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**

TRIAL BRIEF FROM
ORMET PRIMARY ALUMINUM CORPORATION

September 9, 2013

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I. INTRODUCTION

This proposal from Ormet Primary Aluminum Corporation ("Ormet") represents the last and least expensive opportunity to save Ormet from liquidation and protect the more than 3,000 jobs and approximately $250 million in annual economic benefits provided by the continued operation of the Hannibal, Ohio aluminum facility. In 2009, the Public Utilities Commission of Ohio ("Commission") approved a special arrangement ("Unique Arrangement") between Ormet and Ohio Power Company ("AEP Ohio") to advance those same economic benefits for the people of the Ohio Valley. Unfortunately, a dramatic increase in AEP Ohio's standard service rates at the very time that aluminum prices and the market cost of electricity prices were falling erased the benefits the Commission authorized in the original Unique Arrangement and necessitated the relief being sought today. The Application filed on June 14 is a carefully crafted balance that provides sufficient economic development monies needed to reactivate four of six pot lines, which have been shut down, provides for a permanent solution to affordable power going forward, and minimizes the amount of economic development assistance requested.

While approving the proposal will increase the economic development assistance paid to Ormet by up to $56.1 million dollars over the next 28 months, that cost is dwarfed by the economic

loss of over $663 million dollars[1] that would be incurred if this request is denied and Ormet is forced into liquidation. More important this cost/benefit arrangement only covers the period of time in which there would be economic development assistance granted to Ormet. The goal of economic development has a longer horizon than just benefits in the grant payment period. If the Application is granted and the Ormet business plan filed in this proceeding is accurate, then the $250 million dollars a year in economic benefit determined by Dr. Coomes will continue for many years beyond 2015. That is in sharp contrast to the maximum of $56.1 million dollars in incremental assistance which will end in 2015.

II. BACKGROUND

On July 15, 2009, the Commission issued an Opinion and Order approving a Unique Arrangement between the two Ohio-licensed electric utility affiliates of the American Electric Power Corporation[2] and Ormet for the provision of electric service to Ormet's Hannibal, Ohio smelter plant. Pursuant to Section 4905.31, Revised Code, the Commission approved both a special arrangement rate and, for the first time, an economic development rider under the authority granted to the Commission by the Ohio General Assembly as part of Senate Bill 221. The revision to the Commission's special arrangement authority now expressly allowed special arrangements to "include a device to recover costs incurred in connection with any economic development and job retention program of the utility within its certificated territory." The July 15, 2009 Opinion and Order was appealed to the Ohio Supreme Court, which affirmed the Commission's Opinion and Order and its ongoing authority to continue to supervise the Unique Arrangement.[3]

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[1] Ormet Exhibit 7 (Direct Prepared Testimony of Henry Fayne) at 11.

[2] The two affiliates are Ohio Power Company and Columbus Southern Power. The two affiliates have since merged, but AEP Ohio maintain two divisions under the same names for rate purposes. Under the special arrangement, Ormet's load is deemed to be 50% in the Columbus Southern division and 50% in the Ohio Power division.

[3] *In re Application of Ormet Primary Aluminum Corp.* (2011), 129 Ohio St. 3d 9, 2011-Ohio-2377.

Since the approval of the Unique Arrangement less than 5 years ago, numerous unforeseen energy policies have been implemented, which have essentially altered the fundamental basis relied upon by Ormet related to the benefits of the economic development and the terms of the original Unique Arrangement. As such, Ormet is requesting modification in order to achieve the original goals.

In addition to the energy policy changes, cyclical worldwide events have resulted in a substantial decrease in aluminum prices on the London Metals Exchange. Despite the significant internal restructuring of legacy liabilities and a dramatic reduction in operating expenses accomplished through a collaborative process during reorganization, Ormet has been impacted by the temporary decrease of approximately 9% in Aluminum prices between calendar year 2010 and calendar year 2013.[4] During the same period, Ormet's power prices increased from a weighted-average price of $39.66 per MWh at the start of 2009 to $62.83[5] per MWh by June of 2013 -- an increase of approximately 58%.[6] Given that power makes up 30-35% of the production cost of aluminum,[7] the combination of high power prices and low metal prices forced Ormet to file for bankruptcy protection under Chapter 11 of the Bankruptcy Code on February 25, 2013.

Ormet has negotiated and executed an asset purchase agreement ("APA") with a buyer that will provide ongoing operational support. The APA requires that Ormet must satisfactorily complete specific reorganization activities before the APA terms become binding on the buyer. The binding contingencies include reductions in pension obligations,[8] ratification of a modified collective bargaining agreement and alteration of the cost of power under the Unique Arrangement

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[4] Industrial Energy Users-Ohio ("IEU") Exhibit 4 – based on Harbor January LME prices of $2,234.838 per metric-ton in January 2010 and $2,037.705 January 2013.

[5] Ormet Ex. 1 (Direct Prepared Testimony of Michael Tanchuk) at 6.

[6] *Id.*

[7] Ormet Ex. 5 (Direct prepared testimony of James Riley) at 2.

[8] The legacy costs will be reduced by roughly $278 million over the next five to seven years. (*Id.* at 7).

to a competitive price level. Through a collaborative process, each of the conditions precedent in the APA have been fulfilled, except for the restructuring of the power costs. In addition, since 2009 Ormet has achieved operating costs reductions of approximately $30 million[9]. The cost of power under a new Unique Arrangement remains the one "gating" issue which will determine whether Ormet exits bankruptcy or whether it slips into liquidation. Upon satisfaction of this last condition precedent, the buyer is prepared to close the purchase in accordance with the APA.[10] In support of this process, the Bankruptcy Court has established that adjusting the price of power that Ormet pays to AEP Ohio is exclusively in the jurisdiction of the Commission.[11] The closing on the APA will bind the buyer to, among other things, assume all outstanding payable obligations to vendors, assume all the employee benefits plans of Ormet and assume the environmental compliance obligations of Ormet. Without the closing, the obligations to vendors and employees will be unpaid, the employees will be without health insurance and supplemental unemployment benefits, the retirees will not have any further contributions to their VEBA, and Ormet will liquidate.

On June 14, 2013, Ormet filed a motion with the Commission to amend its Unique Arrangement with AEP Ohio in order to clear the last contingency and successfully emerge from bankruptcy. As part of its application, Ormet submitted in this docket a multiyear business plan ("Plan").[12] The Plan projects that, if the requested amendments to the Unique Arrangement are approved as filed, Ormet expects to achieve profitable operations by late 2014 or early 2015.[13] As for the long term, the Plan specifically contemplates an onsite generation facility designed to meet

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[9] Ormet Ex. 1 at 6.

[10] See the June 14, 2013 Motion to Amend, at ¶17-18.

[11] *In Re: Ormet Corporation et al.*, pending in the United States Bankruptcy Court for the District of Delaware, jointly administered Case No. 13-10334 (MFW).

[12] Filed in this proceeding on July 15, 2013.

[13] Tr. Vol. 1 at 27.

Ormet's future power needs.[14] The Plan forecasts continued profitability without any additional economic development assistance.

In sum, to achieve the final restructuring condition that allows Ormet to successfully exit bankruptcy as a going concern, the current Unique Arrangement must be superseded to include each of the reasonable and essential modifications set forth in the application filed on June 14th ("Application"). Commission approval of the Application will set the stage for the APA to close and the new Ormet to assume the new Unique Arrangement.

III. PROCEDURAL HISTORY

Following the issuance of the Opinion and Order establishing the Unique Arrangement and the Ohio Supreme Court's affirmation,[15] Ormet moved for expedited approval of a payment deferral for two months, with repayment over a 17-month repayment period, commencing in 2014. The Commission approved the motion and ordered that AEP Ohio be authorized to defer incurred costs not recovered from Ormet's billings for October and November 2012, of approximately $27.2 million of which only $20 million could be treated as delta revenue.

On June 14, 2013, Ormet filed a motion to amend the 2009 Unique Arrangement between AEP Ohio and Ormet, and requested emergency relief. A separate memorandum in support was also filed by Ormet on June 14, 2013. By Entry of June 27, 2013, the Attorney Examiner characterized the June 14, 2013 motion to amend as an "application for a unique arrangement" under Rule 4901:1-38-05(B) of the Ohio Administrative Code, and established a procedural deadline of July 5, 2013, for the filing of motions to intervene and for the filing of comments or objections.

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[14] Tr. Vol. 1 at 33-34.

[15] *In re Application of Ormet Primary Aluminum Corp.*, (2011), 129 Ohio St. 3d 9, 2011-Ohio-2377.

The administrative hearing took place on August 27 and 28, 2013 and the Attorney Examiner directed that initial briefs be filed on September 9, 2013.

IV. ORMET'S APPLICATION FOR A NEW UNIQUE ARRANGEMENT

Ormet's Plan envisions that Ormet will exit bankruptcy successfully and will operate in a sustainable long-term manner which no longer requires any economic development assistance. This plan was designed to reach these goals with a minimum of additional economic development funds charged to AEP Ohio ratepayers and collected through the economic development rider. The Application provides for ten discrete steps to be implemented between now and December 31, 2015. Approval of all ten steps are required in order for Ormet to exit bankruptcy and to operate at its intended level providing maximum economic benefits for the region.[16] Approval of all ten steps will also result in maintaining the employment commitments under the existing Unique Arrangement, as well as position for incremental economic development through the addition of approximately 350 additional full-time employees.

Step One: Advance the termination date of the Unique Arrangement from December 31, 2018 to December 31, 2015.

The first step of the Plan is to shorten the length of the Unique Arrangement so that it ends with calendar year 2015, instead of calendar year 2018. The 2009 Unique Arrangement was executed at a time when there was less than 1% shopping in Columbus Southern Power and no shopping whatsoever in Ohio Power.[17] The ten-year term of the economic development incentives was designed to slowly wean Ormet from a discounted standard service GS-4 rate over a decade. In the original Unique Arrangement, there was no thought to switching the electric

[16] Ormet is willing to consider having AEP Ohio supply power if the pricing would be the "all in" equivalent.
[17] Market Monitoring Report 1st Qrt 2009 Commission Website Ohio Power -0% shopping, Columbus Southern .8% shopping.

supply paradigm for Ormet, nor were there any plans for AEP Ohio to divest its legacy generation facilities out of the utility to an affiliated non-regulated generation company.

Although the original Unique Arrangement was executed only four years ago, there is little question that the Ohio power market has changed dramatically during this four year period and will continue to change over the next few years. For example, today, 58% of AEP Ohio's load and more than 67% of its industrial load is procured by the end users from the competitive market.[18] Further, in accordance with the Commission's order in AEP Ohio's ESP II case,[19] AEP Ohio will be divesting all its legacy generation plants to a non-regulated generation affiliate during calendar year 2014.[20] Additionally, the power for today's default standard service offer ("SSO") customers, which currently includes Ormet, is provided primarily from dedicated generation assets owned by AEP Ohio. In 2015, the power will be provided by the winning bidders in a public auction, instead of being provided from dedicated utility generation assets. In other words, the generation units in 2015 now dedicated to serving Ormet will be owned by a non-utility affiliate of AEP selling power in the open market which certainly was not anticipated when the Commission approved the Unique Arrangement. In sum, since AEP Ohio has elected to switch from dedicated generation units to market procurement, Ormet should have the reciprocal right to elect to go to market. It is only prudent for Ormet to be able to manage these costs directly.

2015 is the year in which Ormet's proposed generation plant is to be completed,[21] and the year AEP Ohio will cease directly providing generation for SSO customers. Given these now foreseeable changes, 2015 rather than 2018 seems to be the logical and appropriate termination

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[18] Market Monitoring Report 2nd Qrt. 2013 Commission Website.

[19] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO et al, Opinion and Order (August 8, 2012).

[20] *Id.*, Opinion and Order at 57, 78.

[21] Tr. Vol. 1 at 32.

date of the new Unique Arrangement. Termination of the Unique Arrangement at the end of calendar year 2015, in lieu of calendar year 2018, will not increase the amount of nominal dollars that will be made available to Ormet under the Unique Arrangement, and it will achieve the goal of ending Ormet's economic development assistance program earlier - by three years. No opposition to step one was articulated at the hearing.

Step Two: Advancement of the payment of the remaining authorized Economic Development Incentives.

Under the existing Unique Agreement, Ormet has approximately $76 million in s available to it for the time period September 2013-December 2017.[22] Specifically, for 2013, the annual cap is $44 million, which was exhausted with the August 2013 invoice.

For calendar year 2014, the annual cap is $34 million. For 2015, the cap is $24 million. A $14 million cap exists for 2016, and the remaining $4 million in economic development incentives can be taken no sooner than calendar year 2017. In 2018, the cap is $0 in the last year of the current Unique Arrangement.[23]

Step Two of the Ormet plan is to advance the remaining $76 million dollars of the authorized discounts over calendar years 2013 and 2014. Mechanically, the economic development incentives will continue to be applied on a monthly basis, consisting of $5,500,000 per month for the remaining four calendar months of 2013, and reducing that down to $4,500,000 per month January through December of 2014. Thus, Ormet's plan of receiving monthly distributions during 2014 addresses the concern related to ongoing viability of operations, as no economic development incentives would be provided if Ormet ceases operations during 2014 or reduces employment below the threshold.

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[22] Tr. Vol. 2 at 360.

[23] Ormet Ex. 5 (Direct Prepared Testimony of James Riley) at 3.

Advancing the payment of the previously authorized economic development incentives to the end of calendar year 2014 (as opposed to calendar year 2017) will not increase the amount of economic development dollars made available to Ormet. However, advancement will greatly assist Ormet, allowing it to secure an economical energy supply cost and repay the 2012 deferrals. The 2013 deferrals will be due five business days after Ormet comes out of Bankruptcy.[24]

Step Three: Amend the rate AEP Ohio charges Ormet for power in calendar year 2013.

Commencing with approval of this application, Ormet proposes that it pay a fixed generation rate per MWh for calendar year 2013 that will result in an average fixed-fee of $45.89/per MWh (the average base generation rate applicable to Ormet for the first quarter of 2013). In addition to the fixed fee of $45.89 per MWh for the entire calendar year 2013, Ormet proposes to pay Riders PIRR, RSR, TURR, TCRR, ESRR, USF, DIR, EE/PDR, EDR, GridSMART, DARR.[25] Essentially, this payment proposal would relieve Ormet from the volatility of the FAC

The purpose of this request is to provide greater certainty about the cost of power and expense to the business during the remainder of calendar year 2013. The ability to forecast cost is essential for Ormet operations. The current process lead to substantial volatility in the FAC. For example, the FAC was increased dramatically in the second quarter of 2013, followed by a subsequent sizable reduction in the third quarter of 2013. In Mr. Roush's testimony, however, he estimated that freezing the Unique Arrangement rate at $45.89 per MWh (given estimated sales of 2.235 GWh) would increase the economic development incentives by $6 million dollars.[26] Since the 2013 fourth quarter costs of the FAC are based on AEP Ohio's costs and were unknown to

[24] July 31, 2013 Entry.
[25] Ormet Ex. 6 (Direct Prepared testimony of Henry Fayne) at 4-5.

Ormet until it was filed with the Commission, Ormet could not attempt to project the nominal dollar increase of the requested adjustments to the 2013 power costs. However, Ormet witness Fayne did secure an estimate from AEP Ohio at the time of the application,[27] and when he took the stand adjusted his cost estimates to match that of AEP witness Roush.[28]

Step Four: Permit Ormet to purchase its power requirements beginning January 2014 through May 2015, during which time Ormet intends to construct a distributive generation facility

Mr. Riley testified, when the Unique Arrangement rate was originally set, part of the reason for the discounted rate was the fact that aluminum smelters are not ordinary electricity customers. An aluminum smelter's consumption of power does not change with the seasons (as occurs with space heating and cooling loads), nor is a smelter tied to normal business hours. Aluminum smelters consume power more or less uniformly 24 hours a day, seven days a week, and 365 days a year. Thus, even industrial tariff rates, such as Ohio Power's GS-4, do not match the load factors of aluminum smelters and do not capture the true cost of service for such high load factor customers.[29]

The high-load factor of the Hannibal, Ohio facility was part of the basis for the Unique Arrangement's rates pursuant to Rule 4901:1-38-05, Ohio Administrative Code. In 2009, the GS-4 Tariff Rate for power to Ormet, including all riders and before the discounts were applied, was $39.66 per MWh.[30] That is above the average smelter price in North America of $27.90 per MWh,[31], but still left Ormet in a competitive position. The $39.66 per MWh price, however, escalated as the result of base rate and rider increases. As a result, the Unique Arrangement rate

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[26] AEP Ex. 1 (Direct Prepared Testimony of David Roush) at DMR-1.
[27] Ormet Ex. 7 (Direct Prepared Testimony of Henry Fayne) at 4; Tr. Vol. 2 at 246.
[28] Tr. Vol. 2, 246-248.
[29] Ormet Ex. 5 (Direct Prepared Testimony of James Riley) at 4.
[30] *Id.* at 5.

per MWh for Ormet leaped to $57.99 per MWh by the first quarter of 2013,[32] and then with the FAC adjustment in the second quarter of 2013, hit $62.64 per MWh. At full operating levels, the substantial increase in the GS-4 rate would cost Ormet approximately $79 million annually for electric service at the Hannibal Facility[34]. That increase far outstrips the remaining authorized annual incentives and leaves Ormet with dramatically higher per-MWh prices for power than it had in 2009 when the Unique Arrangement was established. While the price of power to Ormet under the Unique Arrangement was increasing by millions of dollars, it must be noted that the price of power offered from competitive retail electric suppliers was decreasing.

Wayzata Investment Partners, who owns the proposed buyer of Ormet, owns and operates gas-fired power plants similar in size,[35] prepared a study of the feasibility of an onsite gas-fired power plant, as well as reviewed the availability and price of power from market participants. Mark D. Thompson, operating partner with Wayzata Investment Partners, testified as to the feasibility of developing, operating and maintaining an on-site 540 MW natural gas-fired electric generation facility that would provide Ormet with greater long-term price stability for ongoing operations. Utilizing a specific combined-cycle design, available hedge instruments for mitigating power and fuel supply risk, equipment costing, construction costs, and considering transmission, ancillary service and capacity values, he projected that the "all-in, sustainable" cost to Ormet to be at approximately $41-$43 per MWh for the 2016-2022 time period, a conservative range available from either on-site generation or market purchases.[36]

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[31] Ormet Ex. 1 (Direct Prepared Testimony of Michael Tanchuk) at 3.
[32] Ormet Ex. 5 (Direct Prepared Testimony of James Riley) at 5.
[34] Ormet with a load factor over 98% was particularly affected by the increases in the FAC and other riders which are kWh based.
[35] Ormet Ex. 3 (Direct Prepared testimony of Mark Thompson) at 1-2.
[36] *Id.* at 7-8.

Mr. Thompson opined that Ormet has engaged two highly qualified environmental consulting firms to assist in the development of site and air permits and that the actual construction period for the power plant would be 18 months, with 2 months of commissioning.[37] Mr. Thompson opined that it would take only 18 months to construct the power plant, as he had located specific turbines and generators that are available now.

Mr. Thompson then set about reviewing the availability of competitive retail electric supplier generation for the construction period of 2014 to July 2015. Mr. Thompson received indicative prices for power from three independent suppliers. Since Ormet is still in bankruptcy and does not have Commission authority to shop, it cannot pursue bids or make a firm commitment, thus, indicative pricing is the best information available to Ormet. Mr. Thompson felt comfortable listing the "high case" purchase price (excluding the non bypassable riders) in the $41 to $43 dollar per MWh range.[38] Furthermore, he testified that wholesale prices and variable cost from generation were at times in the $24-36 per MWh range in 2012.

When the Commission authorized AEP Ohio in its ESP II decision to increase the cost of SSO, it explicitly stated that customers who were sensitive to increases in the default power price could shop as an alternative.[39] Ormet has demonstrated that its power cost as a percentage of total operational costs is substantial, thus sustainable and predictable power costs are essential. As the Commission's own published Market Monitoring reports show, when the increases in SSO were implemented, customers transitioned rapidly away from the SSO to the market alternatives. Power cost predictability for mercantile customers such as Ormet are essential to survival. The Commission has recognized the need for Ohio manufacturers to be competitive. For example, the

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[37] "Commissioning" is the period of time needed for testing and adjustments to bring a newly constructed power plant up to commercial operation.
[38] Tr. Vol. 1 at 89.
[39] *In re Columbus Southern Power,* Case No. 11-346-EL-SSO, August 7, 2012 Opinion and Order.

Commission, in the AEP Ohio capacity case,[40] allowed the capacity cost for shopping customers to be set at the RPM price so that Ohio manufacturers would pay the same price for capacity as their competitors in the eight-state PJM region.[41]

Because of the current Unique Arrangement , Ormet is excluded from participating in markets now recognized by Ohio energy policy as being competitive and beneficial. Unless this Commission approves the modifications requested in the Application, Ormet is restricted from directly accessing the market until 2019, despite the fact that as a practical matter, Ormet will be fully subjected to market prices in mid-2015 due to the transition by AEP Ohio to auction process for SSO service. Thus it hardly seems reasonable to require Ormet to continue to purchase power from an SSO, who is in turn acquiring power from the market under an unknown risk management structure that may not be appropriate for the specific operations of a large end user such as Ormet.

In sum, Ormet requests the Commission to permit it to respond to AEP Ohio's prices increases in the same fashion as other industrial customers in the state of Ohio. If they can generate or buy power for less than the utility they should be permitted to do so.

Step Five: Amendment to provide incremental power purchases by Ormet. (New monetary incentive linked to incremental economic development)

As Mr. Tanchuk testified, the Hannibal plant physically and economically operates most efficiently at six pot lines.[42] The purpose of step five is to allow Ormet to reopen pot lines 5 and 6. If Ormet is able to operate all six pot lines, it will increase its employment pledge to 1,000 employees, based on operating pot lines 5 and 6.[43] In addition, Ormet will need 160 MW of capacity in the near term. The incremental load from the added pot lines require lead time and will

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[40] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012) and Entry on Rehearing (October 17, 2012 and December 12, 2012, and January 30, 2013).
[41] *Id.*, Opinion and Order at 23.
[42] Tr. Vol 1 at 30.

follow the return of pot lines 3 and 4. Thus, it is not likely to occur before the middle or end of 2014. If and when Ormet is able to return six pot lines, should that occur prior to June 2015, additional incentives will be necessary to cover the cost of the energy riders and transmission costs. Mr. Fayne has estimated those costs to be $9/MWh or approximately $1.1 million per month for a total amount not to exceed $12.2 million, assuming pot lines 5 and 6 are operating at full capacity for the full period of July 2014 through May 2015. However, it is important to note that this request is specifically linked to the creation of incremental economic development and is only received by Ormet if such economic development of 350 new jobs are created.

Step Six: Extend the monthly economic development incentives during this period.

Ormet requests that during the five month period in 2015 when the existing incentives have been exhausted and the onsite generation plant has not been completed, the Ormet continue to receive the $4.5 million per month discount. This is needed to address the cost of the non bypassable riders which Mr. Fayne has estimated to cost some $6 per MWh.[44] Continuation of the $4.5 million per month economic development incentive would increase the value of the economic development assistance to Ormet by $22.5 million. It is essential though to maintaining the Ormet operation until the new on site power plant can be completed.

Step Seven: Contingency Plan if the Onsite Power Plant is not completed as originally Scheduled.

Although a reasonable forecast for construction of an onsite power plant is 18 months, weather, regulatory or other factors outside the control of Ormet could cause a delay. Thus, in the June 14 application, Ormet requested a contingency to cover a seven-month delay. To bridge the gap between June 1, 2015, and December 31, 2015, Ormet requested a shopping credit equivalent to all the non-bypassable riders except transmission costs (Rider TCRR). Such shopping credit is

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[43] Tr. Vol. 1 at 29, 111; Ormet Ex. 5 (Direct Prepared Testimony of Riley) at 1.

proposed to terminate the earlier of (a) the date when Ormet's new generation plant is placed into full service, or (b) December 31, 2015. In the development of the plan, Ormet diligently identified specific issues that are critical to the immediate and sustainable operations. To that end Ormet has agreed to assume all power cost risk if the proposed on-site power plant is not in operation by the end of 2015 and another long-term energy supply is not secured.

At the hearing, Mr. Thompson was asked whether the power plant project was behind schedule, and he testified that Ormet was already four months behind schedule.[45] This delay though not evident at the time of the filing of the Application, does not alter the portion of the Application by which Ormet has agreed to assume the power cost risk and will implement appropriate mitigations to ensure that the post 2015 cost of power is supportive of sustainable operations. Mr. Fayne, Ormet's rate expert, projected the cost of a seven-month contingency would be $9.9 million for pot lines 1-4 and $5.3 million for pot lines 5 and 6, for a total of $15.2 million.[46] However, it should be specifically noted that Ormet has intentionally linked this incremental incentive to the latter part of 2015 by pot line operations. Thus the incentive is only paid if Ormet sustains operations through such period and only receives the incentive in the amount equal to pot line operations.

Step Eight: Amendment to the 2012 Deferral Repayment Schedule.

Payment of the 2012 deferrals will commence in January of 2014. Throughout 2014 and for the first 5 months of 2015, Ormet is required to pay AEP Ohio approximately $1.6 million per month. Even with the advancement of the economic development incentives requested in step 2, an adjustment to the amortization schedule of the 2012 deferrals is needed because of the size of the deferral repayments and Ormet's costs to shift to self-generation by the end of 2015. Thus,

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[44] Ormet Ex. 7 (Direct Prepared Testimony of Mr. Fayne) at 7.
[45] Tr. Vol. 1 at 91.

Ormet requests that the minimum monthly deferral payment for the 2012 deferral be reduced from $1,602,321.92 to $1,134,978.03 million (with amortization of the remaining $27,239,472.70 over 24 months instead of 17 months). There is no nominal increase in the amount of the economic development incentives made available to Ormet by lengthening the amortization schedule of the 2012 deferral repayment by seven months, but it could provide a higher probability of receiving the full amount by moderately reducing the monthly cash flows.

Step Nine: Reduce the Target Price for the Payment of Premiums by Ormet.

Mr. Riley testified that Ormet had significantly reduced both its operating and non-operating costs. The Hannibal facility reduced its non-energy operating costs by approximately $30 million a year over its historically best performance by improving power consumption, cell life carbon usage and other non-capital improvements. In addition, agreements reached with the United Steelworkers Union and debt holders will reduce future cash costs by approximately $278 million over the next five to seven years. These latter reductions are due to elimination of contributions to the two largest defined benefit pension plans, an 89% reduction in contributions to the VEBA Trust supporting health care costs of Hannibal hourly retirees, and a 53% reduction in long-term debt.[47]

The most important aspect of Ormet's reduction in costs will be its ability to financially survive and prosper in future years. The reduction in costs also provides an important additional benefit of lowering the necessary cost of aluminum required for Ormet to be profitable. As part of the current Unique Arrangement, Ormet agreed that, if aluminum prices on the London Metal Exchange reached a price that made Ormet cash flow neutral, it would share those profits with the ratepayers who had funded the economic development directly. Currently, that trigger price is a

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[46] Ormet Ex. 7 (Direct Prepared Testimony of Fayne) at 8.

[47] Ormet Ex. 5 (Direct Prepared Testimony of James Riley) at 6.

London Metal Exchange posting of $2,805/metric ton.[48] If that trigger point is reached, Ormet will pay a premium of 4% of the applicable GS-4 rate in addition to the rates established in the Unique Arrangement. Further, if the price of aluminum on the London Metal Exchange exceeds the trigger price by $300 a metric ton, then the premium Ormet will pay shall be 8% of the applicable GS-4 rate.[49]

Given the reductions in Ormet's cash costs through restructuring , Ormet proposed to reduce the triggers for paying premiums if the London Metals Exchange posts a cash price of $2,650/metric ton for 2013 or $2,490/metric ton for 2014 and the first five months of 2015.[50] Ormet proposes carrying over the same premium payment terms and conditions that exist in the current Unique Arrangement; the only difference is that the target price is being lowered by approximately $315 per metric ton by 2015. Ormet presented an expert on aluminum prices, Mr. Vazquez, who provided forecasted prices for calendar years 2014 and 2015. The base case estimates from Mr. Vazquez for this period are below the reduced target price, but close to the high range average.

Step Ten: Amendment to permit the assignment of the Unique Arrangement.

As noted in the procedural history section of this brief, the Attorney Examiner decided that Ormet's requested modifications were so extensive that they constituted a new application for a Unique Arrangement. That ruling triggered the discovery, hearings and full Commission review. Ormet did not object or appeal that determination. The outcome of this proceeding will be a new Unique Arrangement. When Ormet exits bankruptcy, its buyer will be a new corporation. As a result, the new Unique Arrangement in this case must be transferred to the new Ormet. The

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[48] Id. at 5, 9.
[49] Ormet Ex. 5 (Direct Prepared Testimony of James Riley) at 5.
[50] Id.

purpose of step ten of the plan is make sure that the Opinion and Order in this Commission can and will be transferred to Ormet's buyer coming out of bankruptcy.

V. WHY RELIEF IS REQUIRED AND NECESSARY

Michael F. Tanchuk, President and Chief Executive Officer of Ormet Corporation, testified that the economic viability of an aluminum smelter is essentially determined by the relationship between the retail market price of aluminum and its operational costs. The primary operational cost is electricity.[51] He explained that electricity is a fundamental raw material in the aluminum industry. When electric rates are excessive, particularly when the retail price of aluminum is low, aluminum reduction facilities, such as the Hannibal Facility in Ohio, simply cannot operate.[52] In cross-examination, Mr. Tanchuk explained that, lower cost interruptible rates or demand response monies are not options for Ormet because it must operate around the clock so that the pot lines remain charged at all times and can keep the metal in a molten state.[53] Thus, when the Unique Arrangement price increased from $39.66 per MWh in 2009 to $62.83 per MWh in June of 2013, not only were all the benefits of the Unique Arrangement lost, but the price of power to Ormet was significantly farther above the market price. With the exception of Ormet all other industrial customers were permitted to leave default service and shop.

The Ormet operation in Hannibal is the economic keystone of Monroe County and the surrounding area. At full operation, six pot lines, which is the level of operation Ormet is seeking to reestablish, the Hannibal facility employs over 1,000 full-time workers with wages totaling approximately $61 million per year. Ormet also covers health costs for workers and family

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[51] Ormet Ex. 1 (Direct Prepared Testimony of Tanchuk) at 2.
[52] *Id.* at 3.
[53] *Id.*

members at a cost of over $16 million annually. Finally , Ormet purchases approximately $15 million to $20 million per year in goods and services in the Ohio Valley.[54]

To evaluate the full impact of the Hannibal facility on the region, Ormet retained Dr. Paul Coomes an economist and professor emeritus at the University of Kentucky. Dr. Coomes measured the economic importance of the Hannibal smelter to the regional economy. He testified that the total net annual impact in the region of the closure of the Ormet plant would be a loss of 3,117 jobs and $238 million in total employee compensation, with state and local governments in Ohio to lose about $9 million annually in tax revenues.[55] Dr. Coomes testified that Ormet was clearly the largest industrial employer in Monroe County, with an average pay of salaried employees being $61,000, and with the average pay of non-salaried employees being $54,000 per year.[56]

Finally, Dr. Coomes explained the significant role an export employer like Ormet has on the local economy. Since Ormet sells aluminum around the world it brings in new monies to southeastern Ohio. This differs from a local barber shop, which is not going to bring in new monies to the local economy; rather, only re-circulates monies that are already in the local economy. Thus, Ormet's according to Dr. Coomes is entitled to a multiplier effect, for purposes of economic development[57]. These supplier chain and spin off jobs and revenues are included in Dr. Coomes study.[58]

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[54] Ormet Ex. 1 (Direct Prepared Testimony of Tanchuk) at 9.
[55] Ormet Ex. 2 (Direct Prepared Testimony of Coomes) at 4-5.
[56] Tr. Vol. 1 at 81.
[57] Ormet Ex. 2 (Direct Prepared Testimony of Coomes) at 3.
[58] Ormet Ex. 2 (Direct Prepared Testimony of Coomes) at 3; Tr. Vol. 1 at 62.

Much of the cross-examination by the Office of the Consumers' Counsel was directed to the domicile of the 1,000 Ormet employees and the 2,100 employees of Ormet's suppliers[59]. Dr. Coomes indicated that 42% of the work force directly employed by Ormet lived in West Virginia.[60] He had not done any studies on the location of the supplier chain, but concluded that there was no reason to believe that the suppliers' locations tracked the domicile of the direct employees. Further, Dr. Coomes was not willing to say that the economic benefits for Ohio should be reduced by 42% to account for the percentage of direct workers domiciled in West Virginia for two reasons: (a) the supplier chain could disproportionally reside in Ohio and (b) the West Virginia employees may shop in Ohio because they are coming to Ohio every business day, which would not occur if they lost their job at Ormet.

Dr. Coomes also indicated that he considered the purchase of electricity, which constitutes 35% of Ormet's expenditures, to be an important factor to consider.[61] If Ormet builds a power plant, not only will the newly hired direct employees of the power plant benefit the area, but the regional economy will have the extra benefit caused by the multiplier effect. Thus, if the power plant is built, Dr. Coomes' testified that the overall estimate of $250 million dollars a year of economic impact from Ormet on the regional economy would probably have to be increased.[62]

While it is important for the Commission to consider the economic statistical impact of Ormet on the region, it is equally important to consider the devastating effect liquidation would have on the people of the Ohio Valley. David R. McCall, Director of United Steelworkers ("USW") District 1, testified on behalf of Ormet. He testified about the importance of the

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[59] This argument was raised by OCC in the July 15, 2009 Opinion and Order in this case. The Commission stated: "All of the jobs which would be retained under the proposed unique arrangement are located in this state irrespective of where the employees reside." *See* July 15, 2009 Opinion and Order at 9.
[60] Tr. Vol. 1 at 61.
[61] Tr. Vol. 1 at 66, 79.
[62] Tr. Vol. 1 at 79.

high-paying Ormet jobs, and concerns for even greater unemployment levels in the region if Ormet is liquidated.[63] Mr. McCall testified that the modified labor agreement was ratified by its members.

No party to the case disputes the importance of Ormet to the economy of Southeastern Ohio. The question the Commission must answer is whether the additional economic relief Ormet requests as part of its nine-step application is worth the economic benefits that Ormet will produce. To assist the Commission in this task, Ormet's witness Mr. Fayne addressed first the incremental cost of the application and then the benefits. Mr. Fayne testified that, under the terms of the current Unique Arrangement, the amount of economic development incentives available to Ormet between 2014 and 2018 is $76 million.[64] Ormet is proposing to advance the approved economic development funds to 2013 and 2014. While advancing the economic development incentives under the existing Unique Arrangement will affect the timing, advancement will not increase the amount of incentive received by Ormet. Thus, the net impact to other customers has not changed.

Mr. Fayne also presented the following calculation of the amount of additional incentives Ormet is seeking in the Application. The maximum additional relief of up to $56.1 million over a 28 month period comprised of the following.

Fixed Generation Rate for 2013	$ 6 million
2015 Incentive for lines 1-4	$22.5 million
Economic Development Credit for lines 5-6	$12.4 million
Latter part of 2015 transition period credit	
Pot lines 1-4	$ 9.9 million
Pot lines 5-6	$ 5.3 million[65]

[63] Ormet Ex. 4 (Direct Prepared Testimony of McCall) at 3.
[64] Tr. Vol. 2 at 360.
[65] Ormet Ex. 7 (Direct Prepared Testimony of Henry Fayne) at 8; Tr. 246.

Mr. Fayne then compared the likely outcome to the public if the pending Application is approved versus the likely outcome if the Application is rejected. If the Commission approves the Application as submitted, Mr. Fayne expects the following outcomes:

1. Ormet would continue to operate, including restarting pot lines 5 and 6 in 2014.
2. Ormet would develop a long-term energy supply plan including the feasibility of the construction and operation of a gas-fired generating plant beginning in 2015, which would provide additional jobs in southeastern Ohio.
3. Other AEP Ohio ratepayers would incur the currently scheduled $76 million in incentives, plus the incremental of up to a maximum of $56.1 million proposed in additional incentives.
4. Ormet would repay both the 2012 and 2013 deferred amounts of approximately $37.5 million.
5. Ormet would pay the PIRR and RSR riders through 2015.
6. Pursuant to current Commission rules, AEP would record deferred capacity costs associated with Ormet's transition to Choice.
7. Fixed costs embedded in the FAC would either be allocated to other customers or absorbed by AEP, depending on the treatment ultimately approved by the Commission.[66]

On the other hand, if the Commission denied the motion to amend, Mr. Fayne would expect these outcomes:

1. Ormet would be forced to shut down, resulting in severe economic consequences in southeastern Ohio and the Ohio Valley.
2. Ormet would be unable to pay the deferred billing amounts, the cost of which would be incurred by AEP and other customers as previously determined by this Commission.
3. The PIRR and RSR charges to other customers would increase.
4. Customers would not be liable for the remaining $76 million in economic development incentives available under the existing Unique Arrangement.

[66] Ormet Ex. 7 (Direct Proposed Testimony of Henry Fayne) at 9.

5. Fixed costs embedded in the FAC would either be allocated to other customers or absorbed by AEP, depending on the treatment ultimately approved by the Commission.[67]

Some of the intervenors to this case may seek to measure the difference between the monies AEP Ohio would collect if the current Unique Arrangement is maintained versus the application. Such an analysis requires the base assumption that Ormet could come out of bankruptcy under the current Unique Arrangement. As Mr. Tanchuk and Mr. Riley testified that is not possible and, therefore, is not an appropriate comparison to make. As detailed above, the single "gating" issue for Ormet to come out of bankruptcy is an economically viable power price. Ormet's only alternative to the APA is liquidation.

Mr. Fayne then compared the costs/benefits of approving the Application versus denial and liquidation of Ormet. If the Application is approved, the costs incurred will be the remaining authorized incentives of $76 million, plus the four new incentives costing up to $56.1 million, for a total of $132.1 million dollars.[68] If the Application is denied, the loss will include no repayment of the 2012 and 2013 deferrals (which are projected to be $37.5[69] million), lost contribution of the non-bypassable riders PIRR, RSR and other non bypassable charges of some $50.6 million, and the economic loss during 2014 and 2015 of $575 million (based on Dr. Coomes study), for a total of $663.10 million dollars.[70] For ease, this cost/benefit comparison is set forth in the table below:

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[67] *Id.* at 9-10.
[68] Ormet Ex. 7 (Direct Prepared Testimony of Henry Fayne) at 10; Tr. Vol. 2 at 246.
[69] Tr. Vol. 2 at 247.
[70] Id., Tr. Vol. 2 at 247-248.

APPROVAL OF MOTION TO AMEND	DENIAL OF MOTION TO AMEND
Existing Economic Development Incentive: $ 76 million	Lost Recovery of Deferred Billing Amounts $37.5 million
Fixed Generation Rate $ 6 million	Loss of Contribution to Non bypassable Riders $50.6 million
2015 Discount lines 1 – 4 $22.5 million	Economic Development loss $575 million
Second half 2015 Transition Period $15.2 million	
Economic Development Incentive for pot lines 5 & 6 $12.4 million	
Total Impact $132.1 million	**Total Impact $663.10 million**

AEP Ohio may be heard to argue that, if the Application is approved, it should be entitled to hundreds of millions of dollars of lost revenue calculated as the delta between Ormet's consumption if sold at the GS-4 price and AEP Ohio's revenue obtained by selling the same amount of power into the wholesale market. Once again, such an analysis is based on the false premise that Ormet could pay the GS-4 price and not be liquidated. Liquidation results in no consumption of electricity. If Ormet goes into liquidation, pursuant to the Opinion and Order in the ESP II case AEP may petition the Commission for the lost revenue associated with the loss of Ormet's load.[71] Bottom line, the delta revenue between the legacy price of GS-4 power and the market is a claim that will exist for AEP Ohio whether Ormet continues in operation under the Application or goes into liquidation. Since AEP Ohio has the right to petition the Commission for funds to be collected from the remaining customers whether Ormet leaves to shop or goes out of business it is not a proper component of a cost/benefit analysis.

[71] See *In re Columbus Southern Power,* Case No. 11-346-EL-SSO, Opinion and Order, August 7, 2012.

VI. THE APPLICATION COMPLIES WITH THE COMMISSION'S RULE ADDRESSING ECONOMIC DEVELOPMENT PROGRAMS

A. Rule 4901:1-38-03

The Commission has a specific administrative rule governing economic development arrangements -- Rule 4901:1-38-03, Ohio Administrative Code. A review of the Application and the supporting testimony in this proceeding clearly demonstrates that Ormet is in compliance with each rule for a new or expanded economic development program. In accordance with Rule 4901:1-38-03(A), Ormet has described the terms in its application and has provided an estimate of the delta revenue the application will generate.[72]

Rule 4901:1-38-03(A) (1) requires a showing that the application advances the goals of the State Energy Policy. The testimony of Mr. Tanchuk and Mr. Riley demonstrated that the proposed economic development plan will enable Ormet to compete in the world wide aluminum market.[73] This fulfills Section 4928.02 (N), Revised Code, which provides that, under the State Energy Policy, the Commission will administer its rules so as to "...facilitate the state's effectiveness in the global economy."

Rule 4901:1-38-03(A) (2) (a) - (g) sets out various limits on plans. As to subsection (a), the affidavit of Mr. Riley filed with the Application described the operation of the Hannibal, Ohio, smelter as a manufacturing operation. Thus all the economic development incentives are for "non-retail" development. The affidavit, as well as the testimony of Mr. Riley, fulfills the required pledge of employment. Ormet has agreed to maintain under the current Unique Arrangement and, if the economic development incentive for pot lines 5 and 6 are implemented the full-time employment will increase to 1,000 workers. That number is clearly in excess of the 25 full-time

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[72] *See*, Direct Prepared Testimony of Mr. Fayne, wherein Mr. Fayne projected the delta revenue to be $132.1 million dollars over the 28-month term of proposed plan. (Ormet Ex. 7 at 11).

[73] Ormet Ex. 1 (Direct Prepared Testimony of Tanchuk) at 8-9; Ormet Ex. 5 (Direct Prepared Testimony of Riley) at 7.

jobs minimum required by Rule 4901:1-38-(A) (2). As for the wages to those workers, the Rule sets a limit of 150% of the federal minimum wage (which is roughly $20,000 per year). The average wage as determined by Dr. Coomes in his testimony was $61,000 a year,[74] which is three times the federal wage minimum.

As to Rule 4901:1-38-09(A) requirements for economic information, Ormet filed a business plan as part of its Application, which addressed the company's projected financial viability assuming the requested economic development incentives are approved. In addition to the business plan, the testimony of Mr. Tanchuk, Mr. Riley Dr. Coomes and Mr. Fayne identified the potential secondary and tertiary economic benefits resulting from the Application. Those benefits include, but not limited to, continued local/state tax dollars and related employment or business opportunities resulting from the location of the Hannibal facility. Finally, another economic fact is that Ormet has agreed to maintain the target employment (650 or 1,000 full time employees) for the term of the unique arrangement.[75]

Since Ormet's Application maintains existing jobs as well as providing for additional jobs, it is well established in the record that, whether operating at 6 pot lines or 2 pot lines, Ormet has a demand in the hundreds of MW;[76] Ormet's demand is well in excess of the 250 kW required by the Rule 4901:1-38-03(B). Thus, the record in this proceeding supports the fact that Ormet is in compliance with the Commission's rule on economic development.

B. The New Unique Arrangement Will Have A Ceiling and a Floor Price

In its July 15, 2009 Opinion and Order at page 9 in the matter at bar, the Commission states that a unique arrangement should have a ceiling. The Application clearly is in compliance

[74] Ormet Ex. 2 (Direct Prefiled Testimony of Coomes) at 2; Tr. Vol. 1 at 80.
[75] *See*, affidavit of Mr. Riley supporting the Application (Ex. B), filed on June 14, 2013.
[76] Id.

with that portion of the Opinion and Order as there is a definitive cap or ceiling on the economic development incentives. Mr. Fayne on cross examination described the monthly economic incentive of $4.5 million per month as a cap (Tr. Vol. 2 at 333-335). This differs from the current Unique Arrangement which was expressed in annual terms. Ormet is concerned that this portion of the transcript not be take out of context. While the monthly incentive is in fact set at $4.5 million, that does not mean that if Ormet does not utilize the full monthly amount in one month that it cannot carry it over and apply the unused balance in a subsequent months. The total amount of economic development incentive though will not exceed the monthly allotment times the number of months Ormet receives the monthly incentives. The Application establishes the maximum length at 28 months (December 2015). The monthly incentives though could end before then if the power plant is completed prior to December 2015. Ormet also believes the Opinion and Order should make clear that the incentives can be used to pay all the amounts that Ormet owes AEP Ohio be that for distribution, transmission, deferrals and power services.

VII. RESPONSE TO AEP OHIO'S CONCERNS

During the course of the two-day hearing, AEP Ohio either through its witness or by cross-examination raised three legal issues concerning the Application and one factual issue. In addition, AEP Ohio presented an alternative to Ormet's proposal to shop for power starting in 2014 and continuing until the onsite power plant is completed. AEP also requested that the Commission erect a special cost barrier to prevent Ormet from building the onsite distributive power unit.

A. The Commission Has the Authority to Modify the Unique Arrangement or Approve a New Unique Arrangement Without AEP Ohio's Consent.

AEP Ohio argued at the hearing that it has the right, pursuant to the current Unique Arrangement's terms, to block any new arrangement or proposed terms that it does not want.

However, it is well settled under Ohio law that the Commission has the final say over the terms of any unique arrangement and has the authority to modify an arrangement (or create a new one) and impose terms on the parties. Quite simply, AEP Ohio lacks a veto power over Commission approved changes.

The Ohio statute granting the Commission the authority to approve reasonable arrangements, Section 4905.31, Revised Code, states explicitly: "Every such schedule or reasonable arrangement shall be under supervision and regulation of the commission, and is subject to change, alteration or modification by the commission." (Emphasis added) Similarly, Rule 4901:1-38-05(B) (4), Ohio Administrative Code, expressly gives the Commission that same power: "The Unique Arrangement shall be subject to change, alteration, or modification by the commission."

The language of the statute and administrative rule is clear -- the use of the term "shall" indicates that unique arrangements remain at all times under the supervision and regulation of the Commission and are subject to change, alteration or modification by the Commission -- whether or not the parties agree to those changes. Nothing in the statutory language or the rule language mandates that the parties must agree to changes, alternations or modifications to reasonable arrangements.

Both the Commission and the Supreme Court of Ohio have recognized the authority to change/alter/modify and expressly have held that AEP Ohio's consent is not necessary to the approval of AEP-Ormet Unique Arrangement. They also have recognized that the Commission retains ongoing supervisory authority over the Unique Arrangement, including the authority to modify its terms over AEP's objection.[77] In rejecting AEP's argument that changes could not be

[77] *In Re Ormet, supra*, at ¶¶33-37, Entry on Rehearing at 17-18 (Sept. 15, 2009).

imposed without AEP's consent, the Supreme Court of Ohio wrote, "although R.C. 4905.31 does not expressly require utility consent, it expressly requires utility compliance."[78] Further, "[r]ather than giving the utilities the right to cancel or consent, the statute requires utilities to conform to the approved arrangement."[79] Finally, the Court noted in no uncertain terms:

> Before recent amendments to R.C. 4905.31, see 2008 Am. Sub.S.B. No. 221, only utilities could file reasonable arrangements for commission approval. This meant that utilities possessed a de facto veto power. If they did not like the terms of the arrangement, they could refuse to file. That the statute was amended to allow non-utilities to file arrangements further suggests that AEP's consent is not required.[80]

In short, AEP has no veto power here. If the Commission believes the proposed new terms are in the public's interest, that is all that matters.

B. The Unique Arrangement Is Not a Contract, Nor Can It Override the Commission's Authority.

AEP Ohio also argued at the hearing that the terms of the Unique Arrangement itself give AEP a contractual right to block any modification of the Unique Arrangement.[81] It is important to note, however, that the Unique Arrangement is not a "contract," which by definition requires the agreement of the parties.[82]

In upholding the terms of the original AEP-Ormet Unique Arrangement over AEP's objection, the Supreme Court of Ohio rejected AEP Ohio's argument that the term "arrangement" in the reasonable arrangement statute denotes a contract to which both parties must assent.[83] In fact, the Court held that the term "arrangement" also could plausibly mean to put a rate schedule in

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[78] *In Re Ormet, supra*, at ¶34.
[79] *Id.*
[80] *In Re Ormet, supra*, at ¶35.
[81] AEP Ohio's Memorandum in Opposition to Ormet Primary Aluminum Corporation's Motion to Amend and Request for Emergency Relief, filed July 5, 2013, at 12-14.
[82] *See, e.g.*, Black's Law Dictionary, Seventh Edition, 1999, contract is defined as "An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."
[83] *In Re Ormet, supra,* at ¶30-31.

a desired order, a definition that contains no element of mutual assent.[84] Most importantly, the Court wrote:

> Finally, the statute affirmatively gives the commission--not utilities--final say over arrangements. The final sentence of R.C. 4905.31 states, "Every * * * reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." Thus, the commission may supervise, regulate, change, alter, and modify arrangements. No comparable power is vested in the utility, ***and the power to modify is not conditioned on the agreement of the utility.***[85]

Taking that factor along with (1) the lack of an express requirement of utility consent in the statute, (2) the express requirement of utility compliance in the statute, and (3) the ability of the customer to propose an arrangement, the Supreme Court held that "we cannot read the word 'arrangement' to impose a utility-consent requirement.[86] Because the AEP-Ormet Unique Arrangement is not a contract in the true sense of that word, AEP does not possess a contractual power to block a new arrangement or new terms with which it disagrees. The Commission has the sole authority to decide what terms can and should be modified or included in a new unique arrangement.

C. The Commission Similarly Is Not Bound By the Unique Arrangement to Require Payment of a Termination Fee by Ormet; Doing So Would Not Be in the Public Interest.

Ormet has proposed that a new Unique Arrangement be approved here without the requirement of any exit or termination fee. AEP Ohio took the position at the hearing that it will only voluntarily accept Ormet's proposal if a contract termination fee is paid to AEP Ohio. [87] For all of the same reasons described above, AEP Ohio's consent is not necessary for the

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[84] Id. at ¶31.
[85] Id. at ¶36 (emphasis added).
[86] *Id.* at ¶33-37.
[87] AEP Ohio Ex.2 (Direct Prepared Testimony of David M. Roush) at 7 -8.

Commission's approval of a new arrangement or new terms to the Unique Arrangement; thus a termination fee is not necessary here. The Commission has the authority to make whatever modifications to the Unique Arrangement it deems just and reasonable. Furthermore, AEP Ohio has not demonstrated that it would be just and reasonable, in the public interest, or even feasible to impose such a contract termination fee on Ormet.

Nor would imposition of a termination or exit fee be in the public's interest. Ormet's proposal seeks the minimum amount of assistance necessary to allow it to continue operating and re-hire and retain its employees. The imposition of a $61 million exit fee -- or any comparable fee -- would imbalance the plan and force Ormet out of business. AEP does not contest that fact. In fact, its witness who sponsored the request for a termination fee admitted that neither he, nor anyone else at AEP Ohio, made any attempt to determine whether Ormet can afford its requested termination fee.[88]

The reality of the current situation is that either a new Unique Arrangement is approved or Ormet faces liquidation. There is no basis for, and no room to impose, the proposed contract termination fee.[89] AEP Ohio claims that its proposal is based upon the amount needed "to protect the Company and its other customers from harm resulting from this latest change in Ormet's plans regarding electric service." However, the "damages" identified by AEP Ohio from which it and its customers supposedly need protection would result equally from a liquidation. Continuing the Unique Arrangement in its current form is not an option, and damages cannot be accurately

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[88] Tr. Vol. 2 at 422.

[89] Ormet notes that Section 3.03 of the Unique Arrangement does provide for a termination payment in the event of Early Termination, as defined under the Unique Arrangement, but only by "netting all amounts then owing to the Party seeking termination against all amounts owing to the other Party under this Power Agreement." AEP Ohio does not base its request for a Termination fee upon Section 3.03 of the Unique Arrangement, rather it states that "An appropriate contract termination fee would be set to protect the Company and its other customers from harm resulting from this latest change in Ormet's plans regarding electric service." This standard for calculating a termination fee is unrelated to the termination fee set forth in Section 3.03 of the Unique Arrangement and does not even reference that section.

measured against that scenario. The only realistic possible outcomes are that Ormet's proposed arrangement is approved or Ormet is liquidated and ceases to exist. AEP Ohio witness David M. Roush, whose calculations provide the support for AEP Ohio's proposed contract termination fee, admitted that $45 million of the $61 million that AEP Ohio seeks as "losses" would be lost by AEP Ohio's other ratepayers whether Ormet's proposal is approved or whether Ormet is liquidated.[90] Therefore, these are not really costs "created" by Ormet's proposal at all; they are costs that will exist under either outcome of this proceeding, and should not be the basis for a contract termination fee.

Furthermore, imposition of an exit fee here would serve only one party's interests: AEP Ohio. It would drive Ormet out of business and impose substantial losses on AEP Ohio's other ratepayers and the State of Ohio generally. AEP Ohio's request for such a fee should be denied.

D. AEP Dramatically Understates The Financial Harm That Would Result From The Liquidation Of Ormet.

AEP Ohio witness David Roush estimates in his direct testimony that the liquidation of Ormet will result in a net financial gain for other ratepayers, who allegedly will save approximately $0.46 million per month because they will no longer be responsible for contributing to Ormet's monthly economic development incentives. For several reasons, Mr. Roush's estimate materially understates the financial harm that would be caused by the liquidation of Ormet.

First, and most critically, Mr. Roush's estimates do not even attempt to account for the approximately $250 million in annual wages, salaries, benefits and tax payments that would be lost if Ormet shuts down.[91] Including those additional harms would dramatically alter Mr. Roush's

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[90] Tr. Vol. 2 at 407-408 and 421.
[91] Tr. Vol. 2 at 404.

calculations, resulting in a net monthly financial loss by the other ratepayers (above the discounts) of approximately $19.5 million.

Moreover, all of Mr. Roush's estimates in this section of his testimony are calculated based on a four-pot line assumption.[92] Ormet has historically made, and pursuant to its proposal will again make, contributions on a six-pot line basis. The fact that Ormet is operating only two pot lines now does not mean that the other ratepayers will not ultimately lose the contributions associated with a six-pot line operation; as Mr. Roush recognized, it just means that the losses flowing from the shutdown of the first four pots have already commenced.[93] Calculating the harms that would flow from the shutdown of all six pot lines, instead of just four of them, demonstrates additional net losses to the rate base of more than $700,000 per month.[94]

Third, as Mr. Roush acknowledged on the stand, AEP Ohio's estimate of losses also omits Ormet's contributions to the fixed generation rate, as well as the $37 million in deferred bill repayments that will be made if Ormet survives.[95] These two items alone add approximately $5.5 million in additional monthly losses, some of which would fall directly upon AEP Ohio (the fixed generation rate contributions) and some of which would fall upon the other ratepayers ($30 of the $37 million in deferred bills).[96]

In short, AEP Ohio's calculations materially understate the monetary harms that would result from an Ormet liquidation. Proper and complete calculations would demonstrate that the liquidation of Ormet would cause significantly more financial harm to AEP Ohio and the other

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[92] Tr. Vol. 2 at 397. This differs from Mr. Roush's calculation of the financial cost of Ormet's proposal, wherein he used six pot lines as the basis for his 2014 calculations. (Tr. Vol. 2 at 410-412) This decision necessarily inflates the latter calculations in comparison to the former ones and results in a fundamentally misleading analysis.
[93] Tr. Vol. 2 at 397-99.
[94] Tr. Vol. 2 at 400-401.
[95] Tr. Vol. 2 at 401-403.
[96] *Id.*

ratepayers. Those losses would exceed the economic development incentives otherwise received by Ormet by approximately $26 million every single month.[97]

E. AEP Ohio's alternative to Ormet's proposal to shop for power in calendar year 2014 and 2015

On page 7 of AEP Ohio's witness David Roush's testimony, it is suggested that, in lieu of Ormet shopping for power during calendar years 2014 and 2015, "... an alternative would be to modify the discount under the current Contract to achieve the equivalent financial outcome as Ormet's proposal." If AEP Ohio is willing to sell power to Ormet at the current market price of $41-$43 including transmission costs[98] before the application of the monthly economic development credits, Ormet would be willing to purchase power in 2014 and 2015 from AEP Ohio. Ormet's concern is that Mr. Roush's Exhibit DMR-3, which is an illustrative calculation based on two assumed FAC/Auction blend prices, does not produce the "equivalent financial" outcome. The prices listed in AEP Ohio Exhibit 1 sheet DMR-3 are significantly over the indicative pricing that Mr. Thompson testified was available and also above what would be required to bring Ormet out bankruptcy. Further, unlike if Ormet was permitted to shop, the AEP Ohio alternative does not provide the certainty of a fixed price. Ormet would suggest that, if a market price is set in lieu of shopping, it be on an "all in" fixed basis as was done earlier this year

[97] Mr. Roush also purports to calculate the "costs" of Ormet's new proposed unique arrangement. However, those calculations are overstated as well because: (1) they assume Ormet will be operating six pot lines for all of 2014 when its plan is clear that it will not be using six lines until July 1, 2014, at the earliest (Tr. Vol. 2 at 410-12), (2) they include as a separate cost item the capacity deferrals that would result from Ormet's proposed shopping, when Ormet is already paying for (and will continue paying for) those costs through contributions to the Retail Stability Rider (Tr. Vol. 2 at 415-16), and (3) they include several alleged costs that would also be incurred if the proposed plan is not approved -- i.e., Ormet liquidates (Tr. Vol. 2 at 406-407 and 421).

[98] Ormet Ex. 3 (Direct Prepared Testimony of Mark D. Thompson) at 7-8; also see Confidential Power Plant Report at 61.

for the unique arrangement between AEP Ohio and Globe Metallurgical, Case No. 13-1170-EL-AEC.[99]

In sum, if having the assured load is a benefit to AEP Ohio, Ormet would be willing to amend its Application so long as the total "all in" cost for power to Ormet is the same as in the Application.

F. AEP Ohio Proposes Special Barrier To Prevent Ormet from building a distributive generation facility.

In the long-term business plan, one of the key features to assure the Commission that Ormet will be financially viable in the long run and that it will not file future requests for economic development assistance for power costs is the construction of a distributive power plant. The Power Plant Report clearly indicates that the proposed generation unit will be an onsite, behind the meter facility. In other words, the proposed generator will not use the AEP Ohio distribution system. On page 9 of Mr. Roush's testimony, he requests that the Commission impose certain AEP Ohio riders on Ormet's distribution generation. In other words, even though Ormet would not be using the AEP Ohio system, AEP Ohio wants to charge "all" of its non-bypassable riders. Presumably, Ormet would also have to grant AEP Ohio an easement to place and service a meter on its self-generator.

Mr. Fayne has estimated that the current cost of all the non-bypassable riders is $6 per MWh[100] or roughly a 15% increase on the projected cost of the self-generation.[101] The Commission's rules on distributive generation[102] require utilities to offer supplemental and

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[99] It should be noted that the price in *Globe* (Case No. 13-1170-EL-AEC) through May 2015 is $42.78 per MWh, which is within the range listed in Mr. Thompson's testimony of $41 to $43 per MWh.

[100] Ormet Ex. 7 (Direct Prepared Testimony of Henry W. Fayne) at 7.

[101] *See* Ormet Ex. 3 (Direct Prepared Testimony of Mark D. Thompson) at 7-8 which presents the estimated cost of the self generation.

[102] Chapter 4901:1-22 of the Ohio Administrative Code.

back-up services for self-generation. Neither the Commission's distributive generation rules nor AEP Ohio's tariff provide for utility charges on distributive power.

The intended effect of this request is to erect a barrier to Ormet's construction of distributive generation. The request should be rejected by the Commission as both contrary to the existing distributive generation rules and the State Energy Policy contained in Section 4928.02 (N), Revised Code, upon which this Application is based.

VIII. RESPONSE TO THE OCC'S AND IEU'S CONCERNS

Neither the Office of the Consumers' Counsel ("OCC") nor IEU presented a witness in the matter at bar. However, based on the cross-examination and the exhibits introduced by these two intervenors, Ormet can identify the concerns that these parties are likely to raise in their trial briefs.

A. The Aluminum Forecasts by Mr. Vazquez are Reliable.

OCC Exhibit 3 and 4 contain charts showing the monthly variation between Mr. Vazquez's aluminum projections over time and the actual London Metal Exchange posted cash price. Ormet assumes that the purpose of these OCC exhibits is to cast doubt on Mr. Vazquez's forecast of projected aluminum prices of $2,294 per metric ton in 2014 and $2,400 per metric ton in 2015. The relevance of these estimates are that they are well within the range identified by Mr. Tanchuk as prices requires for Ormet's economic viability.[103] OCC Exhibits 3 and 4 were prepared as cross-examination tables by counsel. Before these charts can be used to draw any conclusions OCC must establish that the methodology is both mathematically sound and that the results of the methodology are used or accepted in the industry for the intended purpose of grading the quality of metal forecasts.

[103] Tr. Vol 1 at 25.

When OCC Exhibits 3 and 4 were presented to Mr. Vazquez, he indicated that both Exhibit 3 and Exhibit 4 used a method to determine the variance of an aluminum forecast based on monthly data. Mr. Vazquez testified that monthly variance is not used in the industry to assess the error of a forecast. Mr. Vazquez, a noted expert with several decades in the industry and whose publications are read worldwide,[104] testified that the methodology for gauging price forecast accuracy is a comparison between annual forecasts to annual actuals, preferably end-of-the-year to end-of-the-year comparisons.[105] Monthly numbers are used primarily to determine market direction.[106] If OCC seeks to determine what Mr. Vazquez's margin of error in forecasting aluminum prices, it should have applied such an annual-to-annual forecast test. Using the industry-accepted end-of-the-year to end-of-year method, Mr. Vazquez noted his forecast error rate is generally seven percent (7%), one of the best in the industry, and last year his error rate was slightly under 7%.[107]

B. The Economic Development Incentives should not be reduced by the percentage of Hannibal Ohio Employees who live in West Virginia.

As discussed in Section V, although the Ormet smelter is located in Hannibal, Ohio, many of the workers live in West Virginia. OCC in the 2009 proceeding asked that the economic development assistance be reduced since all the workers do not live in Ohio. The Commission responded to the argument by holding:

> "the Commission is not persuaded by the arguments presented by OCC and OEG that the Commission should consider only the Ohio portions of the regional economy. All of the jobs which would be retained under the proposed unique arrangement are located in this state irrespective of where the employees reside." (Case No. 09-119-EL-AEC, Opinion and Order, July 15, 2009 p. 9)

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[104] Ormet Ex. 6.
[105] Tr. Vol. 2, 228-235.
[106] Tr. Vol. 2, 229 and 234.
[107] Tr. Vol. 2, 234-238.

The Commission's decision was correct then, and the logic of its prior decision is even more compelling in 2013. Unlike 2009, today Ormet is in bankruptcy and can only come out of bankruptcy if it gets a sustainable power price. Discounting the incentives by the percentage of workers with West Virginia domiciles would ensure that a sustainable power price cannot be achieved, the consequence of which would be to have Ormet go into liquidation. Such a proposal would truly be a policy that is penny wise and pound foolish.

C. Ormet Will Be Financially Sound When It Comes Out of Bankruptcy

Based on use of IEU Exhibit 1 in cross-examination, it appears that IEU is concerned that for the year to date Ormet, based on its June bankruptcy monthly report,[108] lost some $66 million ($11 million a month on average). Further that this loss occurred at a time period when Ormet was receiving a monthly discount of $5.5 million per month off the GS-4 power rates. If Ormet was not expected to do better when it came out bankruptcy, then IEU would have an argument against giving additional economic development assistance to Ormet. Mr. Riley, Ormet's chief financial officer, dispelled the notion that after Ormet emerged from bankruptcy its performance would equal the monthly loss figures on IEU Exhibit 1. First, the monthly losses in IEU Exhibit 1 included extraordinary costs such as bankruptcy expenses, and amortization of pension investment losses incurred in 2008 which would not be present when Ormet was a going concern with the bankruptcy proceeding behind it.[109] More important, all but $16 to $18 million of the loss is attributable to noncash items. For example, Mr. Riley pointed out that Ormet inventory is marked to market each month so if metal prices go down in that six month period then Ormet must post a non cash loss for purposes of the IEU Exhibit 1 form even though the inventory was not sold. Simply put, IEU Exhibit 1 does not stand for the proposition that Ormet on a monthly basis

[108] IEU Ex. 1.

sold aluminum for 11 million dollars less per month than it cost to produce it. IEU Exhibit 1 does not signify or indicate that Ormet will not be financially successful if the Application is approved and Ormet emerges from bankruptcy. Thus, contrary to flawed assumptions, Ormet is a viable entity going forward. The losses identified over the last year were mostly related to GAAP treatment and were not the direct result of operations. As stated earlier, Ormet has utilized this cyclical period in the market and the restructuring process to substantially reduce operating and legacy costs.

IX. CONCLUSION

We are at the eleventh hour for Ormet. Ormet is at the end of its bankruptcy proceeding, it must now either emerge from bankruptcy under the APA or slip into liquidation. The APA had several conditions precedent. As of this writing the creditors, labor unions and pension plans have come forward and meet the conditions in the APA. The only gating issue for the APA now is the price of power. Ormet has filed with the Commission its long term plan to address the cost of power by building an onsite, distributive power plant. However, to fill the gap between when that plant can be fully operational and the present, Ormet will need the assistance detailed in the ten step plan detailed in the Application. The only other outcome is liquidation.

No one disputes that the people of Ohio in general and the people of the Ohio Valley in particular are better off with a reorganized Ormet rather than the vacant lot that will be left in Hannibal under liquidation. No one wants to see workers and their families without a paycheck or health care benefits, especially in a county with the seventh highest unemployment rate in the state[110]. No party to this case has argued that the dollar amount of the economic assistance Ormet requests is more than what is needed. When one reads the transcript of this proceeding it becomes

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[109] Tr. Vol. 1 at 160-161.

clear that the major question is whether Ormet with the Application will be economically viable through 2015. If the Application will keep Ormet in operation at just the four pot line level of employment then the economic development assistance will produce economic benefits several fold the amount of the assistance[111].

The key question of is whether Ormet will be economically viable. The OCC probed the aluminum price forecasts used in the business plan and presented by world expert Jorge Vazquez. No methodology errors arose from the cross examination and the aluminum forecasts used in the business plan appears to be well supported. Similarly, the IEU looked at the monthly financial data filed by Ormet with the bankruptcy court and questioned whether given its reported monthly losses whether Ormet was viable. Mr. Riley, Ormet's chief financial officer addressed the IEU Exhibit 1 and demonstrated why those reports do not stand for the proposition that Ormet once it emerges from bankruptcy will not be financially viable.

AEP Ohio does not question whether Ormet needs additional economic development assistance to emerge from bankruptcy. AEP Ohio objects instead on legal grounds to the structure of the assistance requested, particularly Ormet's request to go to market in 2014-2015 to cover the gap period between 2014 and construction of the power plant. AEP Ohio stated its willingness to provide Ormet with the "equivalent financial outcome" so long as the current Unique Arrangement structure is used. However, its proposal fails to achieve that outcome.

Given the key role Ormet plays in the economy of the region, the strength of the long term business plan that has been filed and the potential to not only maintain the prior level of employment but increase it to 1,000; the Commission should grant the Application. Since the fear is that the Application may not provide Ormet with enough revenue to be operational, the

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[110] Ormet Ex. 5 at 2.

Commission should avoid seeking to substitute different approaches to bringing Ormet out of bankruptcy. At the eleventh hour it would be a shame if the unintended consequence of a newly introduced wrinkle prevented Ormet from emerging from bankruptcy. There is one exception. Ormet is indifferent as to whether it shops for power in 2014 and 2015, or buys the power from AEP Ohio at the comparable "all in" market price it would receive if it did shop. If that makes the Application more acceptable to AEP Ohio, it is a change that Ormet can accept.

In closing, Ormet would like to thank the Commission for the attention it has given this request, particularly the expedited scheduling of this hearing.

Respectfully submitted,

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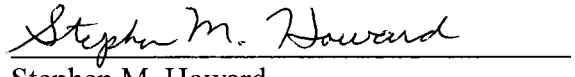
[111] Dr. Coomes estimated that at 4 pot lines the economic impact of Ormet on the region was $218 million per year. Ormet Exhibit 2, p. 5.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served upon the persons below via electronic mail this 9th day of September 2013.



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