

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application for)
Approval of an Amendment to a Contract) Case No. 09-516-EL-AEC
for Electric Service between Ohio Power)
Company and Eramet Marietta, Inc.)

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in this matter and the stipulation and recommendation submitted by the signatory parties, and being otherwise fully advised, hereby issues its Opinion and Order.

APPEARANCES:

McNees, Wallace & Nurick, LLC, by Scott E. Elisar and Samuel C. Randazzo, 21 East State Street, Columbus, Ohio 43215, on behalf of Eramet Marietta, Inc.

Mike DeWine, Ohio Attorney General, by Werner L. Margard and Thomas McNamee, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Steven T. Nourse, American Electric Power Service Corporation, 1 Riverside Plaza, Columbus, Ohio 43215, Porter Wright Morris & Arthur, LLP, by Christine M. Blend, 41 South High Street, Columbus, Ohio 43215, on behalf of Ohio Power Company.

Bruce J. Weston, Ohio Consumers' Counsel, by Maureen R. Grady, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485, Bricker & Ecker, LLP, by Dane Stinson, 100 South Third Street, Columbus, Ohio 43215, on behalf of the residential customers of Ohio Power Company.

Boehm, Kurtz, & Lowry, by David F. Boehm, Michael L. Kurtz, and Jody Kyler Cohn, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

OPINION:I. History of the Proceeding

On June 19, 2009, Eramet Marietta, Inc. (Eramet) filed an application with the Commission pursuant to R.C. 4905.31 to establish a reasonable arrangement with Columbus Southern Power Company (AEP Ohio) for electric service to its manganese alloy-producing facility in Marietta, Ohio. In its application, Eramet requested that the Commission establish a reasonable arrangement for electric service with AEP Ohio that would allow Eramet to secure a reliable supply of electricity at a reasonable, predictable price over a term that would allow the investment of approximately \$40 million capital investments to upgrade the Marietta facility.

AEP Ohio, the Ohio Energy Group (OEG), and the Ohio Consumers' Counsel (OCC), each filed motions to intervene in this proceeding, which were granted by the attorney examiner on July 16, 2009. Thereafter, a hearing was held in this matter and, during the course of the hearing, a joint stipulation and recommendation signed by the parties was filed. On October 15, 2009, the Commission found that the joint stipulation and recommendation was reasonable and should be approved.

On January 22, 2015, Eramet filed an application in this case to amend its existing reasonable arrangement with AEP Ohio (2015 Application). OEG and OCC filed comments on Eramet's application. Reply comments were filed by AEP Ohio on February 26, 2015. Thereafter, on September 21, 2015, Staff and Eramet filed a stipulation and recommendation (Stipulation) regarding the amendment to Eramet's existing reasonable arrangement. However, OCC, OEG, and AEP Ohio were not signatory parties to the Stipulation. A hearing was held in this matter on September 25, 2015. At the hearing, Eramet presented one witness in support of the Stipulation, while OCC presented one witness in opposition to the Stipulation.

II. Discussion

A. Summary of the Application

In its application, Eramet proposed to modify its existing reasonable arrangement to extend the term of the reasonable arrangement by one year and end on December 31, 2020. Further, Eramet proposed that its delivered price outcomes should be accomplished using generation supply from a competitive retail electric service (CRES) provider. Eramet also proposed to modify its capital investment and employment commitments, such that it would use its best efforts to secure investment to the level necessary to comply with pending United States Environmental Protection Agency (EPA) regulations and maintain the facility's operations. It would also use its

best efforts to maintain an average of 175 full-time equivalent employees over the six-year period of the modified reasonable arrangement.

B. Summary of the Stipulation

The Stipulation was filed on September 21, 2015. The Stipulation was intended by the signatory parties to resolve all of the outstanding issues in this proceeding (Eramet Ex. 1 at 1). The Stipulation contains the following terms, among others, as summarized by the Commission, and not intended to supersede or amend the terms of the Stipulation:

- (1) Eramet be permitted to purchase its energy, capacity, market-based service components and other competitive retail electric services (collectively referred to as competitive services) from a certificated CRES provider;
- (2) The currently-approved declining discount be maintained but applied to Eramet's total bill regardless of whether Eramet obtains competitive services as a standard service offer (SSO) customer or a customer obtaining competitive services from a certified CRES provider;
- (3) The reduced difference between Eramet's bill computed at the otherwise applicable shopping rate and the electric bill (i.e., transmission and distribution charges) Eramet would pay shall be deemed delta revenue. The delta revenue continues the same basic computation method in the currently-approved reasonable arrangement, but operates to reduce the potential amount of delta revenue, because the otherwise applicable shopping bill payable by Eramet will be less than the otherwise applicable rate that would apply if Eramet was assumed to be an SSO customer;
- (4) AEP Ohio's current authority to recover delta revenue remains in place subject to the computation adjustments necessary as a result of Eramet obtaining competitive services from a CRES provider;
- (5) Eramet will use its best efforts to maintain an average of 175 full-time equivalent direct employees at the Marietta facility over the term of the currently-approved reasonable arrangement;

- (6) Eramet has fully satisfied all existing commitments in its current reasonable arrangement and the Stipulation contains any going forward commitments that may apply during the balance of the term of the current reasonable arrangement;
- (7) Eramet will continue to submit to the Commission annual reports regarding the performance of the Marietta facility and the impact of the modified reasonable arrangement on the Marietta facility; and
- (8) The Commission will retain continuing jurisdiction over the modified reasonable arrangement and Eramet retains the right to request further modifications of its reasonable arrangement.

(Eramet Ex. 1 at 4-8).

Further, the stipulating parties agree that the Stipulation satisfies the three-part test traditionally used by the Commission to consider stipulations. Specifically, the stipulating parties agree that:

- (1) The Stipulation is a product of lengthy, serious, arms-length bargaining among capable, knowledgeable parties representing diverse interests;
- (2) The Stipulation does not violate any important regulatory principle or practice; and
- (3) The Stipulation, as a whole, benefits customers and the public interest, and represents a just and reasonable resolution of all of the issues in this proceeding.

(Eramet Ex. 1 at 8-9.)

C. Consideration of the Stipulation

Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR (Apr. 14, 1994); *W. Reserve Tel. Co.*, Case No. 93-230-TP-ALT (Mar. 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993); *Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR (Jan. 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

The signatory parties agree that the Stipulation is a just and reasonable resolution of the issues raised in this proceeding and is the product of lengthy, serious bargaining among knowledgeable and capable parties, representing a wide range of interests (Eramet Ex. 1 at 8). The Stipulation asserts that the parties are each capable, knowledgeable parties, and that intervenors in this proceeding were invited to discuss and negotiate the stipulation. Eramet witness Kevin Murray testified that the Stipulation is the product of negotiations that have been ongoing for nearly a year, and that there have been considerable back and forth negotiations (Tr. at 12). Additionally, he testified that the Stipulation will result in reduced delta revenues and the benefit of that will flow to all customer classes, including residential customer classes (Tr. at 17-18).

OCC witness Michael Haugh testified that the settlement lacks a diversity of interests, meaning customers who would pay the discount subsidy are not signatories to the Stipulation (OCC Ex. 1 at 5).

Commission Conclusion

The Commission finds that the Stipulation is the product of serious bargaining among capable, knowledgeable parties. The record demonstrates that all of the parties were included in settlement discussions and were provided opportunities to represent their interests in the Stipulation. Further, the parties in this case routinely participate in matters before the Commission, are capable and knowledgeable with respect to regulatory matters, and are represented by experienced counsel. Additionally, the signatory parties represent a wide variety of diverse interests. Although OCC did not ultimately sign the Stipulation, the record indicates that the Stipulation benefits residential customers (Tr. at 17-18).

Additionally, the Commission notes that we have repeatedly determined that we will not require any party, including OCC, to agree to a stipulation, in order to meet the first part of the three-part test. *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opinion and Order (Feb. 19, 2014) at 10; *In re FirstEnergy*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 26, citing *Dominion Retail, Inc. v. The Dayton Power and Light Co.*, Case No. 03-2405-EL-CSS, et al., Opinion and Order (Feb. 2, 2005) at 18, Entry on Rehearing (Mar. 23, 2005) at 7-8; *In re The Dayton Power and Light Co.*, Case No. 12-3062-EL-RDR, et al., Opinion and Order (Dec. 17, 2014) at 9. Further, there is no evidence in the record that any class of customers was excluded from the settlement negotiations. See *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996). Therefore, upon review of the record, the Commission finds that the Stipulation meets the first prong of the Commission's three-part test for reasonableness.

2. Does the settlement, as a package, benefit ratepayers and the public interest?

The signatory parties submit that, as a package, the Stipulation benefits ratepayers and is in the public interest (Eramet Ex. 1 at 8). Eramet witness Murray argues that the Stipulation benefits ratepayers and serves the public interest because it will allow Eramet to lower its overall price of electricity that would be associated with the reasonable arrangement (Tr. at 12-13). The signatory parties agree that the Stipulation will facilitate Eramet's ability to compete in the global economy and is necessary for Eramet to obtain needed approval for capital investment necessary to comply with environmental regulations promulgated by the United States EPA (Eramet Ex. 1 at 6).

OCC argues that the Stipulation does not meet the Commission's three-part test for the reasonableness of a stipulation, and that the Commission should modify the terms of the Stipulation (Tr. at 20-21). OCC witness Haugh testified that to move the settlement closer to benefitting ratepayers and the public interest, the Commission should require Eramet to engage in an auction or request for proposal (RFP) process to choose a CRES provider. Additionally, OCC witness Haugh argued that the Commission should require that an annual report on the reasonable arrangement be made available to parties to ensure that Eramet is fulfilling its commitments to the state of Ohio for economic development.

Commission Conclusion

Upon consideration of the parties' arguments, the Commission finds that the evidence of record demonstrates that, as a package, the Stipulation benefits ratepayers and the public interest. We find that the Stipulation is likely to result in a decrease in the delta revenue, while maintaining vital jobs in the state of Ohio. We find that the Stipulation will promote Eramet's ability to compete in the global economy, which benefits both ratepayers and the public interest. Additionally, the Commission notes that it is already in Eramet's best interest to seek out the best available offer for competitive services, so modifying the Stipulation to include an auction or RFP process is unnecessary.

3. Does the settlement package violate any important regulatory principle or practice?

Finally, the signatory parties assert that the Stipulation does not violates any important regulatory principle or practice (Eramet Ex. 1 at 8). Additionally, Eramet witness Murray testified that the Stipulation does not violate any important regulatory principle or practice (Tr. at 13). Further, Mr. Murray noted that there is not a cap on delta revenue in the existing reasonable arrangement. He testified that applying a cap on the delta revenue would add another degree of uncertainty to the list of variables that Eramet must consider when deciding whether to make the capital investment necessary for its facility to remain in operation (Tr. at 16).

However, OCC argues that the Stipulation violates regulatory principle and practice because it does not include a cap on what customers will be asked to pay in delta revenue. OCC witness Haugh testified that the Stipulation does not provide for a cap on the total delta revenue that AEP Ohio can collect from customers. Additionally, OCC witness Haugh testified that Eramet should publicly confirm that it has fulfilled its past commitments for economic development and that future filings should publicly confirm that Eramet has fulfilled its commitments for economic development. OCC

witness Haugh asserts that these requirements are not unique to Eramet, but are appropriate generally for these types of cases. (OCC Ex. 1 at 5).

Commission Conclusion

The Commission finds that the Stipulation does not violate any important regulatory principle or practice. The Commission notes that the third part of the three-part test is whether an important regulatory principle or practice has been violated, not whether the Stipulation could include additional regulatory requirements. In this instance, the Stipulation does not violate any important regulatory principle or practice. The additional provisions proposed by OCC are not required by Ohio law or pursuant to any regulatory requirement or practice.

Therefore, because the Stipulation satisfies the Commission's three-part test for evaluating the reasonableness of a stipulation, we find that the Stipulation should be adopted and approved. Accordingly, Eramet's reasonable arrangement with AEP Ohio should be modified consistent with the terms of the Stipulation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On January 22, 2015, Eramet filed an application pursuant to R.C. 4905.31 to modify its existing reasonable arrangement with AEP Ohio for electric service to its manganese alloy-producing facility in Marietta, Ohio.
- (2) AEP Ohio is a public utility as defined in R.C. 4905.02 and an electric utility as defined in R.C. 4928.01(A)(11), and, as such, is subject to the jurisdiction of this Commission.
- (3) On September 21, 2015, a Stipulation was filed by Eramet and Staff, which was intended to resolve all of the issues in this case. OCC, OEG, and AEP Ohio were not signatory parties to the Stipulation.
- (4) A hearing was held in this matter on September 25, 2015.
- (5) The Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

ORDER:

It is, therefore,

ORDERED, That the stipulation of the signatory parties is reasonable, and should be adopted and approved. It is, further,

ORDERED, That AEP Ohio take all necessary steps to carry out the terms of the stipulation and this Opinion and Order. It is, further,

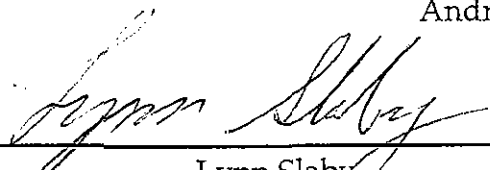
ORDERED, That Eramet and AEP Ohio file an executed or revised power agreement in this docket that conforms to the provisions ordered by the Commission within 14 days of the effective date of this Order. It is, further,

ORDERED, That the approved reasonable arrangement be effective for services rendered following the filing in this docket of an executed or revised power contract. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO




Andre T. Porter, Chairman

Lynn Slaby_____
M. Beth Trombold

Asim Z. Haque_____
Thomas W. Johnson

BAM/sc

Entered in the Journal **OCT 14 2015**

Barcy F. McNeal
Secretary