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## TABLE OF CONTENTS

|  |    |
|--|----|
| INTRODUCTION .....   | 1  |
| STATEMENT OF FACTS AND OF THE CASE .....   | 2  |
| ARGUMENT .....   | 6  |
| <u>PROPOSITION OF LAW NO. I: The Commission has been granted the authority by the Ohio General Assembly to modify proposed reasonable arrangements and to require a utility to enter into such arrangements.</u> .....   | 6  |
| A. The Court Should Defer to the Commission’s Determination that No Utility Consent is Required for a Reasonable Arrangement .....   | 6  |
| B. Even if the Court Reviews the Commission’s Statutory Interpretation <i>De Novo</i> , the Commission’s Determination That It May Impose a Reasonable Arrangement Upon AEP Ohio Without Its Consent Is Correct. ....  | 9  |
| C. AEP Ohio Would Give Itself a Veto Power Over All Reasonable Arrangements, Thereby Undermining the State’s Policy of Encouraging Approval of Reasonable Arrangements To Foster Economic Development. ....  | 12 |
| D. AEP Ohio Has Waived Its Right To Claim a Veto Power Over Ormet’s Proposed Reasonable Arrangement, Or At the Very Least, Has “Flip-Flopped” in a Conspicuous Way. ....   | 13 |
| <u>PROPOSITION OF LAW NO. II: Even if the Commission’s Order Was In Error, AEP Ohio Has Failed to Demonstrate Harm.</u> .....  | 16 |
| A. The Commission’s Order Ensures Recovery of AEP Ohio Delta Revenues as a Result of the Agreement .....   | 16 |
| B. The Commission’s Finding that AEP Ohio Will Not be Providing POLR Service Under the Reasonable Arrangement Is a Factual Determination, to Which this Court Must Defer .....   | 17 |
| C. AEP is Unharmed Where It is Denied Recovery for a Service That It is Not Providing. ....  | 19 |
| <u>PROPOSITION OF LAW NO. III: If the Commission’s Determination that AEP Ohio is Not Entitled to Keep Delta Revenues is Overturned, the Court Should Remand the Case to the Commission to Determine the Appropriate Adjustments to be Made to the Contract.</u> ..... | 19 |
| CONCLUSION .....   | 20 |
| CERTIFICATE OF SERVICE .....   | 21 |

## TABLE OF AUTHORITIES

### CASES

|  |               |
|--|---------------|
| <i>Consumers' Counsel v. Pub. Util. Comm'n. of Ohio</i> , 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370 (1979).....   | 7             |
| <i>Greer-Burger v. Temesi</i> , 116 Ohio St.3d 324, 330, 879 N.E.2d 174 (Ohio 2007).....   | 15            |
| <i>In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised code, as amended by Amended Substitute Senate Bill No. 221, Case No. 08-777-EL-ORD (issued Feb. 11, 2009) Entry on Rehearing</i> ..... | 8             |
| <i>In the Matter of the Application of Ormet Primary Aluminum Corp. for Approval of a Unique Arrangement with Ohio Power Co. and Columbus S. Power Co.</i> , Case No. 09-119-EL-AEC (issued Jul. 15, 2009) Opinion and Order .....   | <i>passim</i> |
| <i>In the Matter of the Application of Ormet Primary Aluminum Corp. for Approval of a Unique Arrangement with Ohio Power Co. and Columbus S. Power Co.</i> , Case No. 09-119-EL-AEC (issued Sept. 15, 2009) Entry on Rehearing.....  | 8, 18         |
| <i>Industrial Energy Users-Ohio v. Pub. Util. Comm'n. Of Ohio</i> , 117 Ohio St.3d 486, 489, 885 N.E.2d 195 (Ohio 2008).....   | 7, 17         |
| <i>Monongahela Power Co. v. Pub. Util. Comm'n. of Ohio</i> , 104 Ohio St.3d 571, 820 N.E.2d 921 (Ohio 2004).....   | 17            |
| <i>Myers v. Pub. Util. Comm'n of Ohio</i> , 64 Ohio St 3d 299, 302; 595 N.E.2d 873 (Ohio 1992) .....   | 16            |
| <i>Ohio Consumers' Counsel v. Pub. Util. Comm'n. of Ohio</i> , 121 Ohio St.3d 362, 365 904 N.E.2d 853, 857 (Ohio 2009) .....   | 7             |
| <i>Ohio Edison Co. v. Pub. Util. Comm'n</i> , 78 Ohio St. 3d 466, 469 (1997).....  | 6             |
| <i>Payphone Ass'n of Ohio v. Pub. Util. Comm'n. of Ohio</i> , 109 Ohio St.3d 453, 462, 849 N.E.2d 4, 13 (Ohio 2006).....   | 6             |
| <i>Weiss v. Pub. Util. Comm'n. of Ohio</i> , (2000), 90 Ohio St.3d 15, 17 (Ohio 2000).....   | 10            |

### STATE STATUTES AND ADMINISTRATIVE RULES

|  |    |
|--|----|
| Ohio Rev. Code Ann. § 1.42 (2009)..... | 10 |
|--|----|

|   |                  |
|---|------------------|
| Ohio Rev. Code Ann. § 4905.31 (2008)..... | 2, 9, 10, 11, 12 |
| Ohio Adm. Code § 4901:1-38-05(B)(1).....  | 9                |

**MISCELLANEOUS**

|   |    |
|---|----|
| <i>Concise Oxford English Dictionary</i> , Eleventh Edition, Oxford University Press, 2004 .....              | 10 |
| <i>Random House Webster's Unabridged Dictionary</i> , Second Edition, Random House New York, 1998 .....       | 10 |
| <i>American Heritage Dictionary of the English Language</i> , Third Edition, Houghton Mifflin Co., 1996 ..... | 10 |

## INTRODUCTION

AEP Ohio, which seeks to recover costs for a service it will not be providing to its customer under the “reasonable arrangement” at issue, argues that the Public Utilities Commission of Ohio (“Commission”) has no authority to modify a contract under a specific mechanism created by the Ohio General Assembly for just that purpose, and cannot require AEP Ohio to comply with it, despite the Commission’s clear statutory authority to do so. AEP Ohio’s position that a utility may effectively veto the Commission’s approval of any reasonable arrangement, prioritizes the utility’s determination as to what is in its own best interest over the General Assembly and Commission’s determinations of what is in the best interests of the State of Ohio and the State’s policy of fostering economic development. The economic stakes in this case are enormous for economically depressed Southeastern Ohio. If AEP Ohio wins this case, and the reasonable arrangement is invalidated, then it will have the devastating effect of forcing Ormet Primary Aluminum Corporation (“Ormet”) to shut down operations, as Ormet would be in default under its new Term Loan Agreement.<sup>1</sup> This result would deprive the regional economy of up to \$195 million in annual economic benefits generated by the operations of Ormet in order to avoid the possibility that AEP Ohio may not collect an annual \$11.4 million windfall *for a service the Commission has determined that AEP Ohio is not providing*, as Ormet has no ability, contractually, to switch suppliers.

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<sup>1</sup> As Ormet witness James Burns Riley explained at hearing, Ormet’s debt was to come due in February and November of 2010, and has had to be refinanced since the closing of the hearing. See Ex. ORM-7 at 2:16-18, Ormet Supp. at 24. The new Term Loan Agreement is dependent upon the reasonable arrangement remaining in place.

Even if the statute at issue, Ohio Revised Code § 4509.31 (AEP Ohio Ap. at 4<sup>2</sup>), were not clear on its face that a mercantile customer may propose a reasonable arrangement which the Commission may then modify and approve, AEP Ohio's claim is barred by the simple fact that it has not been harmed by the Commission's decision -- it is merely being denied recovery of the unearned windfall of continuing to receive customer revenues for a service that it is plainly not providing. AEP Ohio has also effectively waived its claim that it has a veto right over reasonable arrangements and its argument here contradicts evidence given on the stand by its own witness. Finally, the reasonable arrangement in this case is a very delicate balance of several competing interests and if the Court determines that the Commission exceeded its authority, it should remand the case to the Commission to determine what adjustments to the reasonable arrangement may be necessary.

#### **STATEMENT OF FACTS AND OF THE CASE**

The reasonable arrangement between AEP Ohio and Ormet approved by the Commission in this case is necessary to the continued operations of Ormet at its Hannibal, Ohio smelting facility. Ormet's Hannibal, Ohio facilities provide \$195 million annually in total employee compensation and benefits to the regional economy (Ex. ORM-5 at 1, Ormet Supp. at 11).<sup>3</sup> When at full operations, Ormet's Hannibal facilities directly contribute approximately 1,000 high-paying jobs to an economically depressed area of Ohio, including salaries and wages of over \$56 million, plus additional employee benefits of approximately \$52 million. (Ex. ORM-5

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<sup>2</sup> Hereinafter, AEP Ohio's Appellant Appendix filed Jan. 22, 2010 shall be referred to as "AEP Ohio Ap." AEP Ohio's Appellant Supplement, also filed in this proceeding on Jan. 22, 2010 shall be referred to as "AEP Ohio Supp." Ormet's Intervening Appellee Appendix filed simultaneously with this merits brief shall be referred to as "Ormet Ap." and Ormet's Intervening Appellee Supplement shall be referred to as "Ormet Supp."

<sup>3</sup> Opinion and Order, *In the Matter of the Application of Ormet Primary Aluminum Corp. for Approval of a Unique Arrangement with Ohio Power Co. and Columbus S. Power Co.*, Case No. 09-119-EL-AEC (issued Jul. 15, 2009) at 3 ("Order"), AEP Ohio Ap. at 36.

at 1 and 11, Ormet Supp. at 11 and 21.) And Ormet's Hannibal Facilities also generate over 2,441 further spin-off jobs in the region which are dependent upon the plant's operation. (*Id.* at 1 Ormet Supp. at 11; Hearing Tr. vol. 1, 262:19-263:9, Apr. 30, 2009, Ormet Supp. at 37-38.) The State of Ohio government receives about \$6.8 million annually in individual income, sales, and electricity taxes from Ormet-related activity. (Ex. ORM-5 at 11-12, Ormet Supp. at 21-22.) Similarly, Ormet's industrial operations provide essential economic support for real property values in Southeastern Ohio (particularly in Monroe, Belmont, and Washington counties, where most of its Ohio employees reside). (*Id.* at 1, Ormet Supp. at 11.) The employment opportunities that Ormet offers employees help keep regional unemployment levels down and provide untold socioeconomic benefits as well, such as reduced crime, alcohol/drug abuse, and other societal costs. (*Id.*)

There is recent historical evidence of the critical importance of the Hannibal Facilities' operation to the Monroe County economy. When Ormet experienced a shutdown of the Hannibal Facilities in 2005, total wages and salaries paid in Monroe County plunged by 25.8% while the rest of the state averaged 4% growth. (*Id.* at 3-4, Ormet Supp. at 13-14.) Similarly, Monroe County unemployment escalated to 13.1%, compared to the State average 6% unemployment at the time. (*Id.*) Ormet's survival is critical to the economic livelihood of the region, and of Monroe County in particular and the reasonable arrangement approved by the Commission in this case is essential to Ormet's survival.

Unfortunately, Ormet has struggled over the last several years with electricity costs higher than those paid by much of its aluminum industry competition (*see, e.g.*, Ex. ORM-1 at

6:1-5, Ormet Supp. at 6.) and other AEP Ohio industrial ratepayers,<sup>4</sup> and has found it very difficult to maintain its operations. Ormet competes in the highly competitive global aluminum market, and has no ability to set the price of its output. (Ex. ORM-1 at 3:13-15, Ormet Supp. at 3; ORM-7 at 3:10-11, Ormet Supp. at 25.) Ormet is therefore uniquely vulnerable to electricity costs, which historically have accounted for approximately 35% of Ormet's cash costs. (Ex. ORM-1 at 3:6-7, Ormet Supp. at 3.) If electricity costs are high relative to the market price at which Ormet can sell its aluminum, Ormet may be unable to operate the Hannibal Facilities because it simply will not be able to produce aluminum at a cost that is lower than the price at which it can sell the aluminum. (Ex. ORM-7 at 4:15-16, Ormet Supp. at 26.)

The reasonable arrangement documented in a contract signed by AEP Ohio was approved by the Commission and is critical to maintaining the viability of operations at Ormet's Hannibal Facility, because it links partially the price Ormet pays for power to the price at which Ormet can sell its final product. (Ex. ORM-1 at 8:11-18, Ormet Supp. at 8; Ex. ORM-7, at 4:1-10, Ormet Supp. at 26.) The London Metal Exchange ("LME") sets the price of aluminum on the global market and determines the price at which Ormet can sell its final product. (Ex. ORM-7 at 3:10-12, Ormet Supp. at 25.) Under the reasonable arrangement, for 2010 to 2018, Ormet will project its cash costs for a calendar year and, based on the AEP Ohio tariff rate that would otherwise be applicable to Ormet, it determines an LME Target Price.<sup>5</sup> The LME Target Price is the price of aluminum on the LME at which Ormet believes it could afford to pay the full AEP Ohio tariff

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<sup>4</sup> See Stipulation and Recommendation, *In the Matter of the Complaint of Ormet Primary Aluminum Corp. v. S. Cent. Power Co.*, Case No. 05-1057-EL-CSS (filed Oct. 20, 2006) at 7 (Ormet entered into a Stipulation agreeing to pay an above-tariff rate in order to be re-admitted to AEP Ohio's service territory), Ormet Ap. at 7.

<sup>5</sup> Compliance Filing of Ormet Primary Aluminum Corporation, *In the Matter of the Application of Ormet Primary Aluminum Corp. for Approval of a Unique Arrangement with Ohio Power Co. and Columbus S. Power Co.*, Case No. 09-119-EL-AEC (filed Sept. 18, 2009) at § 5.03 ("Power Agreement"), Ormet Supp. at 52.

rate. Once the LME Target Price is set, if the price of aluminum falls below the LME Target Price, Ormet receives a discount that is indexed to the LME price of aluminum (i.e. the further the price of aluminum falls below the LME Target Price, the less Ormet pays for power), subject to a maximum annual discount. (Power Agreement at §§ 5.03-5.07, Ormet Supp. at 65-67.) Conversely, when the price of aluminum rises above the LME Target Price, Ormet will pay a premium above the standard tariff rate. (Power Agreement at §§ 5.03-5.07, Ormet Supp. at 65-67.) Both the discount provided to Ormet and the premium paid by Ormet will be passed through to other AEP Ohio customers as a charge or credit under AEP Ohio's Economic Development Rider. (Order at 10, 12, 14, AEP Ohio Ap. at 43, 45, 47.) AEP Ohio is not required to bear any of the burdens associated with the discount.

Although the discount given to Ormet under the reasonable arrangement could be substantial when the price of aluminum is low, the benefit to the regional economy of keeping the smelter operating will also be substantial (i.e. up to \$195 million in economic benefits to the region). (*Id.* at 3, AEP Ohio Ap. at 36; Ex. ORM-5 at 1, Ormet Supp. at 11.) In its evaluation of the reasonable arrangement, the Commission determined that while it was in the best interest of Ohio to provide assistance in this form to Ormet, there was also a need to provide greater protections for Ohio ratepayers than existed in the original proposal. To that end, it made a series of modifications to the proposed reasonable arrangement, including: (a) placing a firm and decreasing cap on the amount of the discount Ormet may receive over time; (b) increasing the premium Ormet will pay above the tariff rate when the price of aluminum increases above the LME Target Price; (c) adding a new termination provision providing an opportunity for the Commission to intervene if the aluminum market does not improve in the expected timeframe; and (d) since contractually Ormet's exclusive supplier is AEP Ohio and therefore they will not be providing provider of last resort ("POLR") service to Ormet under the reasonable

arrangement, AEP Ohio should not retain any POLR revenues collected from Ormet; instead it should credit those funds to its Economic Development Rider to offset the impact on other ratepayers. (Order at 9-15, AEP Ohio Ap. at 42-48.) In issuing its Order, the Commission struck a careful balance between the interests of Ormet, AEP Ohio, and AEP Ohio's other customers designed to ensure the best result for the state of Ohio.

## ARGUMENT

**PROPOSITION OF LAW NO. 1: The Commission has been granted the authority by the Ohio General Assembly to modify proposed reasonable arrangements and to require a utility to enter into such arrangements.**

Ohio Revised Code § 4905.31 is clear on its face. AEP Ohio Ap. at 4. The plain meaning of the language in the statute indicates that a mercantile customer may propose a reasonable arrangement, and that the Commission may modify or alter any such reasonable arrangement as it sees fit. There is no requirement in the statute that the relevant utility must agree to all terms of the reasonable arrangement. Further, even if the language of the statute is in any way ambiguous, the Commission reached the correct decision below, and its orders should be upheld.

**A. The Court Should Defer to the Commission's Determination that No Utility Consent is Required for a Reasonable Arrangement.**

While it is true this Court has "complete and independent power of review as to all questions of law" in appeals from the Commission,<sup>6</sup> at the same time "due deference should be given to the statutory interpretations made by an agency [such as the Commission] that has substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Payphone Ass'n of Ohio v. Pub. Util. Comm'n of Ohio*, 109 Ohio St.3d 453, 462, 849 N.E.2d 4, 13 (Ohio 2006). Additionally, "[t]he court has explained that it may rely on

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<sup>6</sup> *Ohio Edison Co. v. Pub. Util. Comm'n*, 78 Ohio St. 3d 466, 469 (Ohio 1997).

the expertise of a state agency in interpreting a law where ‘highly specialized issues’ are involved and ‘where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.’ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 121 Ohio St.3d 362, 365 904 N.E.2d 853, 857 (Ohio 2009) (citing *Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370 (Ohio 1979)); *see also, Industrial Energy Users-Ohio v. Pub. Util. Comm’n Of Ohio*, 117 Ohio St.3d 486, 489, 885 N.E.2d 195 (Ohio 2008). The interpretation of Senate Bill 221 (“SB 221”) is precisely the type of “highly specialized issue” to which the Court should give due deference to the Commission’s interpretation. The Commission is the agency tasked with implementing SB 221 and has a long history of interpreting and enforcing the relevant sections of the Ohio Revised Code, including § 4905.31, both before and after the amendment made by SB 221. Moreover, the Commission has broad regulatory authority over AEP Ohio and its rates, as it does over other electric utilities. As such, it has critical technical and regulatory expertise, and is therefore deserving of deference.

In this case, the Commission had to weigh evidence regarding the economic benefits that Ormet’s Hannibal operations bring to Ohio, the potential impact of the reasonable arrangement on other AEP Ohio ratepayers, the ability of other AEP Ohio ratepayers to pay increased rates in order to foster economic development, and whether the rates, terms and conditions of the proposed reasonable arrangement are just and reasonable. The Commission had to carefully balance the respective interests of Ormet, AEP Ohio, the economic interests of the State and the Southeastern Ohio economy, and the interests of AEP Ohio’s other ratepayers in determining whether or not to approve or modify the reasonable arrangement. These are precisely the types of determinations that the General Assembly has charged the Commission with making and with which the Commission has extensive experience. The Commission’s interpretation of the statute

authorizing it to make these determinations was entirely appropriate and therefore warrants deference by the Court.

The Commission has consistently and clearly articulated its interpretation that a utility's consent to a reasonable arrangement is not necessary under SB 221. In its Entry on Rehearing of the order in which the Commission adopted its regulations implementing SB 221, the Commission denied requests for rehearing on this specific issue. The Commission wrote:

Rule 05, which addresses unique arrangements, allows mercantile customers to apply to the Commission for a unique arrangement with an electric utility. FirstEnergy argues that the Commission should make it clear that such applications require the electric utility's consent before they can be approved by the Commission. We believe FirstEnergy's position is not consistent with Section 4905.31 Revised Code, as modified by SB 221. This section provides that a mercantile customer may apply to the Commission to establish a reasonable arrangement with an electric utility. Although such arrangement requires Commission approval, *there is no requirement that the electric utility must consent to the arrangement before the Commission approves it.*

Entry on Rehearing, *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD (issued Feb. 11, 2009) at 21 (emphasis added), Ormet Ap. at 38. It is interesting to note that while FirstEnergy sought rehearing regarding this issue, AEP Ohio did not. The Commission's subsequent rulings in the proceedings below consistently enforce this interpretation. Entry on Rehearing, *In the Matter of the Application of Ormet Primary Aluminum Corp. for Approval of a Unique Arrangement with Ohio Power Co. and Columbus S. Power Co.*, Case No. 09-119-EL-AEC (issued Sept. 15, 2009) at 17-18 ("Ormet Case Entry on Rehearing"), AEP Ohio Ap. at 93-94.

Other language in the Commission's regulations is also consistent with the Commission's conclusion that a customer need not have utility consent to propose a reasonable arrangement to

the Commission. Ohio Administrative Code § 4901:1-38-05(B)(1) states *inter alia* that “[e]ach customer applying for a unique arrangement bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission *and the electric utility* verifiable information detailing the rationale for the arrangement” (emphasis added). Thus, the burden of proof is placed on the customer applying for a reasonable arrangement to demonstrate that the proposed arrangement is reasonable. Conversely, unreasonable arrangements for which the customer does not meet its burden of proof will not be approved. However, the statute does not establish a further impossible hurdle that a customer having met its burden of proof that its proposed unique arrangement is reasonable, must also win the utility’s consent. That would give the utility a veto right over the reasonable arrangement that the General Assembly did not create.

**B. Even if the Court Reviews the Commission’s Statutory Interpretation *De Novo*, the Commission’s Determination That It May Impose a Reasonable Arrangement Upon AEP Ohio Without Its Consent Is Correct.**

AEP Ohio’s argument that “reasonable arrangement” must mean “mutual agreement” ignores the last sentence of that subsection, which reads “[e]very such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.” Ohio Rev. Code Ann. § 4905.31 (2008), AEP Ohio Ap. at 4. In other words, the Commission is the final arbiter of every reasonable arrangement, in accordance with the statute, and has the power to alter the terms of a proposed and/or previously approved reasonable arrangement. The Commission’s authority is not limited by a requirement that it secure anyone’s agreement with the modifications. It is simply not possible to read this clear language in a manner that comports with AEP Ohio’s insertion of a unilateral veto right into the statute. AEP Ohio cannot hold veto power over any proposed reasonable arrangement, if the Commission also holds the right to approve, deny, modify or alter

the arrangement. To be consistent, § 4905.31 would have to state expressly that the Commission's powers are subject to the utility's right to veto any proposed arrangements or Commission orders. The statute clearly does not so provide.

AEP Ohio seeks comfort in definitions of "arrangement" as commonly used outside of the statutory context. It is true that, as a general rule, the words in a statute must be read in accordance with the common usage of the terms. Ohio Rev. Code Ann. § 1.42 (2009), AEP Ohio Ap. at 1; *Weiss v. Pub. Util. Comm'n of Ohio*, 90 Ohio St.3d 15, 17 (Ohio 2000). AEP Ohio defines "arrangement" as either a "mutual agreement or understanding" or a "preliminary step or measure." Appellant Brief of Columbus S. Power Co. and Ohio Power Co., *Columbus S. power Co. v. Pub. Util. Comm'n of Ohio*, Case No. 09-2060 (filed 22, 2010) at 43 ("AEP Ohio Brief") (citing *Webster's Third New International Dictionary* at 778). However, AEP Ohio's definition is too narrow -- these are not the only common usages of "arrangement". For example, the *Concise Oxford English Dictionary*, defines "arrangement" as follows:

n. 1 the action, process or result of arranging. 2 a plan for a future event. 3 *Music* an arranged composition. 4 *archaic* a settlement of a dispute or claim.

*Concise Oxford English Dictionary*, Eleventh Edition, Oxford University Press, 2004 at p. 72.

Similarly, *Random House Webster's Unabridged Dictionary's* definitions of "arrangement" include "preparatory measures, plans, preparations" and *the American Heritage Dictionary of the English Language's* definition includes "a provision or plan made in preparation for an undertaking." *Random House Webster's Unabridged Dictionary*, Second Edition, Random House New York, 1998 at p. 116; *The American Heritage Dictionary of the English Language*, Third Edition, Houghton Mifflin Co., 1996, at p. 102. Thus, another common usage of the term "arrangement" is "a plan for a future event." The unique arrangement

proposed by Ormet to the Commission falls within this meaning -- it is a plan for the sale of power from AEP Ohio to Ormet over the next ten years. Although AEP Ohio argues that, in the context of the statute, "arrangement" must mean "mutual agreement or understanding" because the definition a "preliminary step or measure" does not make sense, the definition of "a plan for a future event" makes much better sense in the context of the mechanism established under this particular statute. As such, it would read:

. . . do not prohibit a mercantile customer of an electric distribution utility . . . from establishing a reasonable [*plan for future rates*] with that utility or another public utility electric light company. . .

AEP Ohio's overly narrow definition of "reasonable arrangement" is inconsistent with both the language of the statute itself and the plain meaning of the term "arrangement."

Further, AEP Ohio's assertion that the Commission cannot adopt a compulsory agreement and simultaneously deny recovery of revenues foregone under Ohio Revised Code § 4905.31 dramatically overstates the case. (AEP Ohio Brief at 19.) Section 4905.31(E) states that proposed reasonable arrangements *are not prohibited* from containing:

(E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device *may include* a device to recover costs incurred in conjunction with any economic development and job retention program. . .

Ohio Rev. Code Ann. § 4905.31(E) (2008) (emphasis added), AEP Ohio Ap. at 4. This language clearly *permits* a device to recover costs, but does not *require* it, as AEP Ohio would have the Court believe. There is nothing in the statute that requires the Commission to approve recovery of costs incurred in conjunction with an economic development program. In fact, it says that no such arrangement is lawful unless it is approved by the Commission -- clearly, if no arrangement is lawful without the Commission's approval, then the Commission has the authority *not* to

approve an arrangement it finds objectionable. AEP Ohio argues that “[t]he ultimate problem with the Commission’s interpretation is that it leads to the conclusion that the Commission could disallow recovery of all revenues foregone under a contract filed unilaterally by a mercantile customer and imposed on the utility by the Commission.” (AEP Ohio Brief at 18.) The language above imposes no requirement that the Commission approve recovery of revenues foregone, either in whole or in part.

Moreover, AEP Ohio is wrong when it argues that the Commission’s interpretation of the statute results in uncompensated, foregone revenues to AEP Ohio. The Commission disallowed recovery only of revenues related to services it determined that AEP Ohio is not providing to the customer under the reasonable arrangement. That is a relatively easy standard to implement without depriving any utility of recovery of legitimate delta revenues.

In addition, while AEP Ohio is correct that there is no explicit provision instructing the Commission to offset revenues foregone by an amount of expense reductions, the statute authorizes devices “to recover costs incurred in conjunction with any economic development and job retention program.” (Ohio Rev. Code Ann. § 4905.31(E) (2008), AEP Ohio Ap. at 4.) It clearly links the concept of “revenues foregone” with the concept of “costs incurred.” It was reasonable for the Commission to determine that a service **not** being provided to the customer is ineligible for inclusion in the “revenues foregone” to be recovered from other customers.

**C. AEP Ohio Would Give Itself a Veto Power Over All Reasonable Arrangements, Thereby Undermining the State’s Policy of Encouraging Approval of Reasonable Arrangements To Foster Economic Development.**

In SB 221, the General Assembly sought to foster the goals of economic development in Ohio, by allowing mercantile customers to propose reasonable arrangements that would advance those interests. *Id.* If the General Assembly had believed that a utility, on its own initiative, was

adequately advancing these goals, there would have been no need to modify the statute. AEP Ohio's proposed interpretation of the statute would undermine these goals by allowing utilities an effective veto over any reasonable arrangement.

If accepted, AEP Ohio's argument would give AEP Ohio an effective veto power over all reasonable arrangements, no matter how reasonable, and no matter how beneficial to the State's economic development interests and even if such arrangements were approved by the Commission. Such a result would seriously undermine the General Assembly's economic development goal, as expressed in SB 221, and would discourage (rather than encourage) reasonable arrangements in general.

**D. AEP Ohio Has Waived Its Right To Claim a Veto Power Over Ormet's Proposed Reasonable Arrangement, Or At the Very Least, Has "Flip-Flopped" in a Conspicuous Way.**

Throughout this case (until rehearing), AEP Ohio consistently expressed its agreement that it does not possess a veto power over proposed reasonable arrangements, and that the power to approve, deny or modify rate discounts rests solely with the Commission. Columbus S. Power Co.'s and Ohio Power Co.'s Post Hearing Brief, *In the Matter of the Application of Ormet Primary Aluminum Corp. for Approval of a Unique Arrangement with Ohio Power and Columbus S. Power Co.*, Case No. 09-119-EL-AEC (filed Jul. 1, 2009) at 5. When questioned, AEP's witness, J. Craig Baker, stated that AEP Ohio did not believe it was necessary for AEP Ohio to approve, or even negotiate, a key term of the reasonable arrangement because the Commission would ultimately decide whether Ormet's proposed terms were acceptable or not. At trial, Mr. Baker testified as follows:

Q: As part of those discussions [with Ormet] did you discuss the \$38 megawatt-hour rate that is in the middle of paragraph 9 [of the application]?

A: We were told that that was going to be the dollar figure that Ormet was going to request.

Q: Was there any discussion back and forth or negotiation of what that figure would be?

A: No.

Q: And in those discussions -- is it your understanding the \$38 per megawatt-hour is the proposed rate that Ormet would pay?"

A: We understood that that was what Ormet was going to ask the Commission to approve as part of their filing.

Q: Did you have the opportunity to review the numbers, the figures behind that \$38 megawatt-hour rate?

A: No, we did not.

Q: Was that a concern of yours to review that number?

A: The Senate Bill 221, as we understand it, provides the ability for customers to come forward and ask for special arrangements in front of the Commission. *We think that the number that the customer asked for in this case is their decision and it's for the Commission to determine whether that's an appropriate number or not.*

Q: The company doesn't care what that number is; is that correct?

A: I don't know that I would use the term "the company doesn't care." *We don't think we have a lot of say in this. We think it's a decision that the Commission will make based on an application by Ormet.*

(Hr'g Tr. 15-16 (emphasis added), Ormet Supp. at 33-34)

Thus, at the time of trial, AEP Ohio was clearly of the belief that (a) it had no role in this application, or choosing the terms of the application; (b) it did not believe it had a particular "say" or influence upon the reasonableness of any terms; and (c) the power to make that decision rests solely in the hands of the Commission. Much later, AEP Ohio changed its position when it realized that there was a possibility that the Commission might deny recovery of POLR charges associated with the reasonable arrangement. But that flip-flop occurred only after the Commission issued its decision.

AEP Ohio further seeks to reverse the decision on POLR charges based on its assertion that the Commission has imposed an exclusive electricity contract on the parties, in contravention of important Ohio public policies. AEP Ohio fails to explain, however, that it has SUPPORTED the exclusive supplier provisions in this case, until it became concerned with their effect on POLR charges. Thus, in its intervention in the case, AEP Ohio wrote: “AEP-Ohio believes that the proposed contract is lawful and reasonable and based on Ormet’s representations should be approved by the Commission.” Motion of Columbus S. Power Co. and Ohio Power Co. to Intervene, *In the Matter of the Application of Ormet Primary Aluminum Corp. for Approval of a Unique Arrangement with Ohio Power and Columbus S. Power Co.*, Case No. 09-119-EL-AEC (filed Feb. 27, 2009) at 2, AEP Ohio Ap. at 97. By supporting the exclusivity provisions until post-hearing briefs,<sup>7</sup> AEP Ohio waived its ability to oppose those provisions, or at least, conspicuously flip-flopped on the issue. By raising the argument for the first time in its post-hearing brief, AEP Ohio denied other parties the opportunity to respond to its arguments or to enter any relevant evidence into the record, thus AEP Ohio should be precluded from pursuing this argument on appeal.<sup>8</sup>

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<sup>7</sup> At the Commission hearing on the reasonable arrangement, AEP Ohio’s witness confirmed that it was his understanding that while the contract is in place, AEP Ohio would be the exclusive supplier of Ormet, but did not express any concern regarding that provision. Hr’g Tr. 37:4-38:4.

<sup>8</sup> The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 330, 879 N.E.2d 174 (Ohio 2007). Courts apply judicial estoppel in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment. *Id.* The same principles of fairness and consistency should be applied in this case. AEP Ohio should not be permitted to game the Commission’s proceedings by supporting a provision that would make it Ormet’s exclusive supplier (a clear benefit to AEP Ohio) until it became apparent there was risk that it would be denied revenues because of it.

**PROPOSITION OF LAW NO. II: Even if the Commission's Order Was In Error, AEP Ohio Has Failed to Demonstrate Harm.**

The Court must affirm the Commission's decision where the appealing party is unable to demonstrate that it has incurred harm as a result of the order. *Myers v. Pub. Util. Comm'n of Ohio*, 64 Ohio St 3d 299, 302; 595 N.E.2d 873 (Ohio 1992) ("We consider these allegations under the established principle that this court will not reverse an order of the commission absent a showing of prejudice by the party seeking reversal.") In this case, AEP Ohio has failed to demonstrate that it will suffer harm as a result of this order, therefore, even if the Court determines that the Commission's order was in error, it should find that the error was harmless and allow the order to stand.

**A. The Commission's Order Ensures Recovery of AEP Ohio Delta Revenues as a Result of the Agreement**

The Commission's Orders provide AEP Ohio with delta revenue recovery for all of the services that AEP Ohio is actually providing to Ormet. While the Commission granted a discount to Ormet of up to \$60 million for 2010 and 2011 (and decreasing thereafter), it found that the maximum amount other ratepayers in the state could afford to pay would be \$54 million. In order to bridge the gap and assure that AEP Ohio would be able to recover the \$6 million difference between its delta revenues and what it may collect through the economic development rider, the Commission allowed AEP Ohio to defer the differential with carrying costs equal to AEP Ohio's long-term cost of debt, and if unrecovered through the payment of above-tariff rates by Ormet over the term of the contract, to recover it through the economic development rider. (Order at 10, AEP Ohio Ap. at 43.)

The only amounts AEP Ohio is not permitted to recover under the reasonable arrangement are the POLR charges. The Commission found that under the reasonable

arrangement, AEP Ohio will be the exclusive supplier to Ormet, and there will be no risk that Ormet would shop for competitive power generation and then return to AEP Ohio's POLR service. *Id.* at 13, AEP Ohio Ap. at 46. The Commission found that "[i]f AEP-Ohio were to retain these charges, AEP-Ohio would be compensated for a service it would not be providing." *Id.*

Therefore, under the Commission's order, AEP Ohio is being compensated for all services that it is providing under the reasonable arrangement.

**B. The Commission's Finding that AEP Ohio Will Not be Providing POLR Service Under the Reasonable Arrangement Is a Factual Determination, to Which this Court Must Defer**

The Court cannot reverse or modify a Commission decision as to questions of fact when the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Industrial Energy Users-Ohio v. Pub. Util. Comm'n of Ohio*, 117 Ohio St.3d 486, 489, 885 N.E.2d 195 (Ohio 2008) (citing *Monongahela Power Co. v. Pub. Util. Comm'n. of Ohio*, 104 Ohio St.3d 571, 820 N.E.2d 921 (Ohio 2004)). The Commission made a factual determination that AEP Ohio would not be providing POLR service to Ormet under the reasonable arrangement; it therefore should not be permitted to retain revenues related to that service. (Order at 13-14, AEP Ohio Ap. at 46-47.) AEP Ohio offered no evidence as to the delta revenues resulting from the reasonable arrangement, and offered no evidence in support of applying POLR charges to Ormet. AEP Ohio did not raise the points it raised on pages 7 to 8 and pages 20 to 22 of its brief before the Commission below. Therefore there is absolutely no evidence in the record that contradicts the

Commission's decision to require AEP Ohio to credit the POLR charges to its other customers. There is no record evidence requiring that the Commission's decision be overturned.

AEP Ohio argues that the history of its relationship with Ormet speaks to the risk that Ormet will leave. (AEP Ohio Brief at 36-37.) The Commission rejected AEP Ohio's argument and determined that because AEP Ohio has been made whole in the prior proceedings regarding Ormet's departure from and return to the AEP Ohio system, there was no reason to believe that if one of the possible contingent calamities in AEP Ohio's list of horrors did come to pass, AEP Ohio would not be made whole again in a similar manner. (Ormet Case Entry on Rehearing at 9, AEP Ohio Ap. at 85.) Thus, the Commission concluded that although there is a remote possibility that Ormet would shop at some point over the term of the reasonable arrangement (though the reasonable arrangement itself prohibits it), there was no need to include POLR charges in delta revenues, because the Commission would have ample opportunity to make AEP Ohio whole if and when such occasion should arise. No one can predict the future with certainty, and there is always a chance that any party to a contract may be in breach -- it is for this reason that many contracts include provisions specifying what happens if either party breaches the contract, and a large body of contract law deals with this subject. The presence of termination and default provisions in a contract are commonplace and cannot be utilized as evidence that a contract will not remain in place. AEP Ohio's assumption that the collection of POLR revenues is the only possible means of protecting AEP Ohio's interests against a potential breach or termination of the contract is unpersuasive, self-serving, and reflects a lack of understanding of the protections against just such an occurrence that are built into the agreement.

**C. AEP is Unharmed Where It is Denied Recovery for a Service That It is Not Providing.**

AEP Ohio should not be permitted to retain windfall profits. If a utility is not providing a service, it should not be allowed to keep revenues as though that service were actually being provided. There is an important distinction between delta revenues (which are foregone revenues recovered by a utility from other ratepayers) and collecting revenues for a service that AEP Ohio is not providing. The concept of delta revenues is meant to keep a utility whole when it provides a discount to a customer in order to foster economic development. This concept is very different than allowing the utility to collect revenues for a service it is not providing. For example, if a utility's tariff rates would have a customer pay \$100 for 10 kW of power and a reasonable arrangement would have the same customer pay \$90 for the same 10 kW of power, then the delta revenues should be the \$10 difference for all of the power used. However, if the reasonable arrangement would have the customer pay \$90 for 9 kW of power, it would not make sense to charge other customers \$10 in delta revenues -- the utility would be being paid \$10 for 1 kW of power that it was not providing and it would reap a windfall. To say that the utility would have sold the extra kW to the customer "but for" the contract would be a transparent grab for more money than the utility deserves.

**PROPOSITION OF LAW NO. III: If the Commission's Determination that AEP Ohio is Not Entitled to Keep Delta Revenues is Overturned, the Court Should Remand the Case to the Commission to Determine the Appropriate Adjustments to be Made to the Contract.**

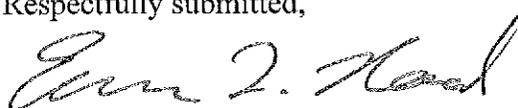
AEP Ohio argues that rather than denying it POLR revenues, the Commission should have protected ratepayers by reducing the discount given to Ormet. These are not the only two options, however, as the Commission recognized in balancing the respective economic interests of the parties and meeting the economic development goals of the statute. If the Court determines that AEP Ohio is entitled to keep the POLR revenues, this proceeding should be

remanded back to the Commission so that the Commission may consider and evaluate all options for modification of the reasonable arrangement. The Commission has already dramatically reduced the discount to Ormet from the original proposal, and further reductions of the discount to Ormet could jeopardize the viability of the entire contract. The Commission determined in its order that the record conclusively demonstrated the economic benefit that Ormet brings to the region, (Order at 3, AEP Ohio Ap. at 36) and hasty adjustments made to the reasonable arrangement could very well cause those to evaporate. Other options for modification of the reasonable arrangement to ease the burden on ratepayers, such as the use of deferrals, should also be evaluated, and the Commission is the proper venue for such an evaluation due to its expertise in reviewing and approving energy contracts.

### CONCLUSION

WHEREFORE, Ormet respectfully requests that the Court deny AEP Ohio's petition for review of the Commission's orders and affirm the orders as issued by the Commission.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that the Brief of Intervening Appellee Ormet Primary Aluminum Corporation was served by First-Class U.S. Mail upon counsel for all parties of record identified below this 4<sup>th</sup> day of March, 2010.



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