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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application for)
Establishment of a Reasonable)
Arrangement between Eramet) Case No. 09-516-EL-AEC
Marietta, Inc. and Columbus Southern)
Power Company.)

**MOTION IN LIMINE AND MEMORANDUM IN SUPPORT
OF ERAMET MARIETTA, INC.**

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August 7, 2009

Attorneys for Eramet Marietta, Inc.

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MOTION IN LIMINE

Pursuant to Rule 4901-1-12, Ohio Administrative Code ("O.A.C."), Eramet Marietta, Inc. ("Eramet") respectfully requests that the Public Utilities Commission of Ohio ("Commission") grant its Motion in Limine to prohibit the Office of the Ohio Consumers' Counsel ("OCC") from recalling Eramet's witnesses for the purposes of additional cross examination on subject matters presented to, and scrutinized by, OCC prior to the discovery responses provided to OCC on August 6, 2009 in compliance with the Attorney Examiner's ruling on OCC's Motion to Compel. The reasons for this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

On June 19, 2009, Eramet filed its Application for approval of a reasonable arrangement. On June 29, 2009, OCC served its first and only formal set of discovery on Eramet. Eramet and OCC spent several days working out a procedure to maintain the confidentiality of the business sensitive, proprietary and otherwise confidential information, which is reflected in a Protective Agreement. Pursuant to the Protective Agreement, Eramet provided responses to OCC's first set of discovery on July 16, 2009, and permitted OCC unlimited availability to view the supporting documentation. After OCC viewed the supporting documentation several times, counsel for Eramet and OCC worked cooperatively to resolve discovery issues. This informal process included OCC informally modifying numerous interrogatories and requests for production of documents and Eramet providing copies of responses and attempting to respond to the new and modified discovery. As part of OCC's discovery, on July 30 and 31, 2009, OCC deposed each of Eramet's witnesses for over eight hours, with the total depositions lasting well over nine hours.

One of OCC's original interrogatories states, "Identify all internal communications (including but not limited to communications involving Eramet consultants) concerning

Eramet's Application." Interrogatory 6. A corresponding request for production of documents states, "Please provide copies of all internal communications (including but not limited to communications involving Eramet consultants) concerning Eramet's Application." Request for Production 8. Eramet objected on three bases:

1. Eramet Marietta objects to and declines to respond to each and every Interrogatory and Request for Production of Documents to the extent that it seeks information that is privileged, proprietary, or constitutes a trade secret by statute or common law, including privileged communications between attorney and client, attorney work product, or trial preparation materials. See Rule 4901-1-19(B), Ohio Administrative Code.

2. Eramet Marietta objects to and declines to respond to each and every discovery request to the extent that it is harassing, unduly burdensome, oppressive or overbroad. Rules 4901-1-16(B) and 4901-1-24(A), Ohio Administrative Code. Detailed and comprehensive statements to broadly drafted Interrogatories are contrary to the purpose and scope of the Commission's Rules of Practice, which are designed to confine discovery and exchange of information to counsel within their professional responsibilities to the general public. See Rules 4901-1-16 and 4901-1-19, Ohio Administrative Code. See also, *Penn Cent. Transp. Co. v. Armco Steel Corp.*, 27 Ohio Misc. 76 at 77 (Montgomery County Ct. C.P. 1971). This is the type of discovery that the Commission will protect against because the requests are unduly burdensome, overly broad, or oppressive. Rule 4901-1-24(A), Ohio Administrative Code.

3. Eramet Marietta objects to and declines to respond to each and every Interrogatory and Request for Production of Documents to the extent the requests are

outside the scope of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Rule 4901-1-16(B), Ohio Administrative Code.

RPD-8.

Eramet also stated that the "request is overly broad and could not be fulfilled by searching selected files. It would literally take a review of thousands of files, compiled over several years. Such broad, undefined searches are the type from which the Commission will protect as unduly burdensome, oppressive, or expensive requests."

In response to Eramet's objection, counsel for OCC requested that Eramet provide a log including a "brief description (involving whom, when, where, topic) and explain the basis for privilege" for all communications. Eramet refused to create such a log on the basis that it would not resolve the other two objections. On July 27, 2009, OCC then modified its request in an attempt to limit the requests to the following:

Int. 6, How about limiting the discovery request to the period of time from approximately June 2008 through present and limit the topics to communications re scope of cap expenditures and funding (and funding sources) for cap ex. associated with the funding projects proposed in the application and the \$150 M plan announced Aug. 30, 2009 and jobs (retention, displacement, creation).

* * *

RFP 8 Limit discovery request to time from June 2008 through present and limit the topics to communications re: funding and funding sources for cap ex associated with funding projects proposed in the application and the \$150 M plan announced Aug 30, including corporate communciations [sic] related to Eramet SA initiatives to postpone or cancel cap exp. projects announced [sic] 4th Q 2008, as it relates to the \$150 million project and the projects proposed in the application.

Eramet maintained its objections. OCC made an oral Motion to Compel at the hearing on August 4, 2009 and attempted to reserve its right to recall Eramet witnesses depending on the information provided. Oral arguments were heard by the Attorney

Examiners. The Motion to Compel was granted and the Attorney Examiners directed Eramet to provide responses, as limited by the July 27, 2009 email.

Additionally, it is worth noting that on August 5, 2009, a Stipulation and Recommendation was filed by Eramet and Staff of the Commission. Parties reserved their rights to recall Eramet's witnesses for the purpose of cross examination on the reasonableness of the Stipulation and Recommendation and Eramet did not object.

Eramet complied with the Attorney Examiner's order compelling discovery and OCC viewed the documentation on August 6, 2009. While there were emails and attachments to the emails that OCC had not viewed prior to August 6, 2009 in the responses provided by Eramet on that date, there was no new substantive information.

Accordingly, while Eramet certainly does not object to OCC recalling Eramet witness Willoughby for the purposes of cross examination on the Stipulation and Recommendation filed on August 5, 2009, Eramet requests that the Commission prohibit OCC from cross examining Mr. Willoughby on subject matters presented to and scrutinized by OCC prior to the discovery responses provided to OCC on August 6, 2009 in compliance with the Attorney Examiner's ruling on OCC's Motion to Compel.


Specifically, Counsel for OCC questioned Mr. Willoughby extensively about a "Vision" plan Eramet announced on August 30, 2008 with an open letter in the Marietta Times during the course of the deposition taken on July 30, 2009. Additionally, Counsel for OCC questioned Mr. Willoughby extensively about campaigns by community action groups against Eramet on deposition. Counsel for OCC failed to explore the same subjects as extensively, or at all, during cross examination of Mr. Willoughby. Because there was not any new information included in the responses to discovery provided to

OCC on these topics, OCC should not be permitted to have a second chance to cross examine Mr. Willoughby on these matters.

Moreover, Eramet does not believe there were any new subject matters provided to OCC in the discovery responses provided on August 6, 2009. Thus, Eramet requests that the Commission require OCC to identify the subject matter upon which it may seek to cross examine Mr. Willoughby to the extent it is beyond the scope of the Stipulation and Recommendation and prohibit OCC from pursuing subjects upon which OCC could have, or already did, cross examine Mr. Willoughby. All of the statutory process requirements were satisfied and OCC had its opportunity to make its evidentiary case.

For these reasons, Eramet respectfully requests that the Commission grant its Motion in Limine and direct OCC to limit its cross examination of Mr. Willoughby to the extent that any cross examination is limited to issues regarding the Stipulation and Recommendation. Pursuant to our agreement, Eramet will make Mr. Willoughby available for such cross examination on Monday, August 10, 2009.

Respectfully submitted,



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August 7, 2009

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion in Limine and Memorandum in Support of Eramet Marietta, Inc.* was served upon the following parties of record this 7th day of August 2009, via hand-delivery, electronic transmission or first class mail, postage prepaid.



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