

**FILE**

**PUBLIC – REDACTED VERSION**

**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. )

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**POST HEARING BRIEF OF ERAMET MARIETTA, INC.**

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Lisa G. McAlister (Trial Attorney)  
Thomas L. Froehle  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653

**August 24, 2009**

**Attorneys for Eramet Marietta, Inc.**

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**I. INTRODUCTION**

On June 19, 2009, Eramet Marietta, Inc. ("Eramet") filed an application ("Application") with the Public Utilities Commission of Ohio ("Commission") seeking approval of a reasonable arrangement pursuant to Section 4905.31, Revised Code, as modified by Amended Substitute Senate Bill 221 ("SB 221"), and Rule 4901:1-38-05, Ohio Administrative Code. Eramet Exhibit 1. Through its Application, Eramet is seeking Commission approval of an arrangement that will help Eramet rationalize the capital investments that must be undertaken to secure and sustain the operation of Eramet's plant in Southeast Ohio and to enable it to compete both with other companies in the manganese division under Eramet's parent company umbrella and globally.

Between June 30 and July 9, 2009, the Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Energy Group ("OEG") and Columbus Southern Power Company ("CSP") filed motions to intervene and comments on Eramet's Application. On July 16, 2009, the Attorney Examiners set the matter for hearing and approved the interventions of OCC, OEG and CSP. Pursuant to a modified procedural schedule, the hearing on

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this matter began on August 4, 2009. At the commencement of the hearing, Eramet announced that, after serious negotiations with all of the parties, the Commission Staff ("Staff") and Eramet had reached an agreement in principle.

On August 5, 2009, a Joint Stipulation and Recommendation ("Stipulation") signed by Eramet and Staff was filed and designated Joint Exhibit 1. Eramet's direct case in support of its Application included three witnesses (Messieurs Bjorklund, Flygar and Willoughby).

CSP sponsored one witness (Mr. Baker) who expressed concerns that the Commission may not permit CSP to collect 100% of what CSP considers revenue foregone. CSP Exhibit 1 at 4-8. OCC also sponsored one witness (Dr. Ibrahim) with limited concerns. OCC Exhibit 9 at 2-3. OEG did not sponsor a witness. Mr. Fortney testified on behalf of the Staff and his testimony included specific support for the Stipulation. Staff Exhibits 1 and 2.

Pursuant to the schedule established by the Attorney Examiners, Eramet respectfully submits this Post Hearing Brief for the Commission's consideration.

## **II. BACKGROUND**

Because of the significance of the cost of electricity to the successful operation of the plant,<sup>1</sup> Eramet is seeking a reasonable arrangement to provide predictable prices and costs at a reasonable level over a term that is long enough to help rationalize the capital investments described in the Application and testimony. The reasonable arrangement is an important part of the package that Eramet must present to secure the internal approvals that are required to move into the implementation phase of its

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<sup>1</sup> Electricity is approximately 25% of Eramet's production cost at current electricity prices. Eramet Exhibit 3 at 9.

overarching investment plan. Eramet will not secure the required internal approvals absent a reasonable arrangement that is responsive to its electricity cost and predictability needs.

**A. The Application**

In the Application, Eramet proposes a reasonable arrangement with a 10-year term pursuant to which firm electricity will be supplied by CSP to Eramet to meet its full requirement at a price per kWh that includes all generation, transmission and distribution charges plus any surcharges, riders or other adders. As proposed, the pricing or rate design structure may include a monthly customer charge or minimum bill but shall not include any demand charges. In other words, the proposed pricing establishes a fixed per kWh price for all base level of kWh consumption, which Eramet estimated to be approximately 42,000,000 kWh per calendar month. Eramet Exhibit 1 at 3. As proposed in the Application, for 2009 through 2011, the total or "all in"<sup>2</sup> price is set at \$.04224 per kWh (exclusive of self-assessed kWh tax). Then, beginning in 2012 and for the balance of the term, the Application proposes to escalate the base price of \$.04224 per kWh by 3.5% per year. Eramet Exhibit 1 at 3.

As proposed in the Application, during the first three years of the reasonable arrangement, Eramet commits to make a capital investment in its current Ohio manufacturing operations of at least \$20 million. Eramet Exhibit 1 at 1, 3. Current projects under consideration for investment within three years after the effective date of the proposed arrangement include improved collection of particulate matter from Furnace 1 by installation of a new baghouse; a rebuild, including a new lining and a

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<sup>2</sup> The "all-in" price for electricity supplied and delivered to Eramet includes all generation, transmission and distribution charges plus any surcharges, riders or other adders as applied to Eramet's usage.

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deeper steel shell, on Furnace 12; and other miscellaneous infrastructure improvements that will cumulatively total approximately \$20 million. *Id.*; Eramet Exhibit 2 at 3-5. Further, as proposed, within six years after the effective date, the entire investment will total approximately \$40 million (including the initial \$20 million), and will also include upgrades to the mixhouse, a new refining operation, and other miscellaneous infrastructure improvements. *Id.*

The capital improvement projects to which Eramet commits in its proposal are not merely for operation and maintenance of the existing furnaces or replacement of existing materials or equipment. Tr. Vol. I at 90–91. In fact, Mr. Bjorklund stated that Eramet spends [REDACTED] on regular maintenance and operations each year and that none of the typical operation and maintenance expenditures made each year are included in the \$40 million capital investments to which Eramet committed in the Application over the first six years of the reasonable arrangement. *Id.*

Eramet recognizes that significant capital investments are critical both to sustain the viability of the Ohio plant and to provide the foundation for securing the approvals required to move forward with an even larger investment to design and build a new manganese alloy furnace. Eramet Exhibit 2 at 4. As Mr. Bjorklund stated, the Ohio operations have reached a point in their economic life cycle that either requires capital investment to sustain the operations or puts the Ohio operations on a disinvestment path. Once the plant is on a disinvestment path, the jobs and other economic benefits will erode over time. *Id.* at 7.

As proposed, during the period 2015 through 2018, Eramet has the right to, without prejudice, propose for the Commission's consideration and potential approval

such modifications to the reasonable arrangement as Eramet may judge are reasonably necessary to secure corporate approvals associated with the design, construction and operation of a new electric submerged arc furnace at Eramet's Ohio facility resulting in an estimated capital expenditure of an additional \$100 million. *Id.* However, as proposed, no modifications or extensions shall be effective without the Commission's prior approval. *Id.* at 2.

Finally, the Application as proposed, contemplates that Eramet and CSP will negotiate in good faith to determine how and to what extent Eramet's customer-sited capabilities might be committed to CSP for integration into its portfolio. *Id.* at 3-4.<sup>3</sup>

**B. The Stipulation**

The Stipulation is a package that addresses several of the issues and concerns related to the Application raised through modifications to that Application. Staff Exhibit 2 at 2. Like the Application, the Stipulation proposes a 10-year reasonable arrangement for Eramet's full electricity requirements. Joint Exhibit 1 at 4. Under the proposed Stipulation, for the period beginning with the effective date through the end of 2011, the price shall be an all-in price of \$.04224 per kWh, exclusive of any charges for Ohio's kWh tax<sup>4</sup> as applied to a base level of usage ("Base Usage"). *Id.* at 5. The proposed Stipulation reflects a reduction in the Base Usage from 42,000,000 kWh per month to

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<sup>3</sup> Among other items that may be identified, these good faith negotiations shall include consideration of the following:

- ♦ Eramet Marietta's potential capability to introduce efficiencies of its electric furnaces;
- ♦ Eramet Marietta's capability to introduce more efficient lighting;
- ♦ Eramet Marietta's opportunity to replace various continuously operating motors with high efficiency motors including applications of variable frequency drives ("VFDs");
- ♦ Eramet Marietta's potential installation of substation capacitor upgrades;
- ♦ Consolidation/relocation of work areas due to restructuring;
- ♦ Such other customer-sited capabilities that may exist or arise during the term of the arrangement.

<sup>4</sup> Eramet is a self-assessor under Ohio's kWh tax provisions.

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not exceeding 38,000,000 kWh per month to exclude electricity used by third parties located on Eramet's premises. *Id.* Also, the Stipulation proposes to permit Eramet's maximum usage to increase in limited circumstances.<sup>5</sup>

The proposed Stipulation also includes a number of provisions that are responsive to concerns raised by the parties with regard to the Application. Specifically, the Stipulation proposes to impose both a minimum bill and maximum demand levels on Eramet. *Id.* at 5-6.<sup>6</sup> For any service rendered in excess of Eramet's Base Usage on or after the effective date through December 31, 2011, the price (exclusive of self-assessed kWh tax) will be computed in accordance with the rate schedule that would otherwise apply to Eramet but for this arrangement and using Eramet's actual demand and energy consumption for each month in which Eramet's usage exceeds the Base Usage. *Id.* at 6.

Beginning with service rendered on or after January 1, 2012, the Stipulation proposes that the price applied to Eramet will be a discount off of the otherwise applicable rate schedule as applied to Eramet's actual monthly demand and usage. The maximum discount in 2012 is 20 percent (20%) off of the otherwise applicable tariff

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<sup>5</sup> Specifically, in the event that Eramet's North Side facility resumes operations other than for temporary purposes and Eramet so notifies CSP in writing, the Base Usage quantity shall be set at 46,000,000 kWh per month. *Id.* In the event Eramet should resume operations of its existing three furnaces other than for temporary purposes and so notifies CSP in writing, the Base Usage quantity shall be set at 48,000,000 kWh per month. *Id.* And, in the event Eramet should resume operations of both the North Side facility and its three existing furnaces for other than temporary purposes and so notifies CSP in writing, the Base Usage quantity shall be set at 56,000,000 kWh per month. *Id.* at 6.

<sup>6</sup> The proposed minimum monthly bill during this period shall be equal to 60 percent (60%) of Eramet's highest monthly kVA usage in the six-month period preceding each monthly bill. *Id.* at 6. The proposed maximum demand, based upon an eighty-five percent (85%) load factor and a ninety-five percent (95%) power factor, unless otherwise modified with the approval of the Commission, may not exceed 65 MVA at a Base Usage of 38,000,000 kWh per month; 78 MVA at a Base Usage of 46,000,000 kWh per month; 81 MVA at a Base Usage of 48,000,000 kWh per month; and, 95 MVA at a Base Usage of 56,000,000 kWh per month. *Id.* at 5-6.



rate and the discount declines over the term of the reasonable arrangement such that Eramet pays the full tariff rate in 2019. *Id.* at 6.<sup>7</sup>

As in the Application, in the Stipulation, Eramet commits to make capital investments totaling \$40 million before December 31, 2014 and may seek to reopen and modify the rates and conditions of the arrangement in conjunction with its commitment to make a total capital investment of approximately \$100 million. *Id.* 7-8. However, the Stipulation includes commitments by Eramet in addition to those set forth in the Application. As proposed in the Stipulation, Eramet commits to maintain a minimum average annual employment of 200 people during the term of its reasonable arrangement. *Id.* at 8. Additionally, under the proposed Stipulation, commencing January 31, 2010, Eramet must provide to the Signatory Parties annual documentation of its compliance with its capital investment and job commitments. *Id.* at 8-9. The Stipulation makes clear that the Commission has and shall have the ability to, at any time and after notice and an opportunity to be heard, consider and make modifications to Eramet's reasonable arrangement in the event that the Commission determines that Eramet has not satisfied its commitments to maintain jobs, made the \$40 million in capital investments or made reasonable progress with regard to the effort to secure corporate approvals to make a total capital investment of approximately \$100 million and that modifications are thereby necessary. *Id.* at 9.

Additionally, the Stipulation makes clear that under the proposed arrangement, applicable rules or tariff provisions of CSP apply except to the extent otherwise modified. *Id.* at 3-4. The proposed Stipulation also maintains Eramet's commitment to

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<sup>7</sup> Specifically, in 2013, the discount is 18%; in 2014, the discount is 16%; in 2015, the discount is 14%; in 2016, the discount is 12%; in 2017, the discount is 8%; in 2018, the discount is 4%. *Id.* at 6-7.

negotiate in good faith with CSP to determine how and to what extent Eramet's customer-sited capabilities might be committed to CSP for integration into its portfolio for purposes of complying with Ohio's portfolio requirements. *Id.* at 9-10. Additionally, consistent with AEP's witness' testimony,<sup>8</sup> the Stipulation recommends that, as Eramet has already registered and is committed to participation in PJM's Reliability Pricing Model - Interruptible Load for Reliability ("ILR") Program for PJM's 2009-2010 planning year, the Commission authorize Eramet to continue its participation in PJM demand response programs without penalty for the 2009-2010 planning year. *Id.* at 10. Finally, as proposed, the Stipulation maintains the requirement that no modifications or extensions of the reasonable arrangement shall become effective without the Commission's approval. *Id.* at 9.

### **III. THE COMMISSION SHOULD APPROVE THE PROPOSED REASONABLE ARRANGEMENT**

#### **A. The Standard of Review**

Section 4905.31, Revised Code, permits a mercantile customer of an electric distribution utility ("EDU") to establish a reasonable arrangement with that EDU providing for any of the following:

- (A) The division or distribution of its surplus profits;
- (B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement.
- (C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;

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<sup>8</sup> CSP Exhibit 1 at 12.

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(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;

(E) Any other financial device that may be practicable or advantageous to the parties interested.

Rule 4901:1-38-05(B)(1), Ohio Administrative Code, states that a mercantile customer, or a group of mercantile customers, that files for Commission approval of 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."

Rule 4901:1-38-05(C), Ohio Administrative Code, requires a showing that such arrangement furthers the policy of the State of Ohio embodied in Section 4928.02, Revised Code, which states, in pertinent part, that it is the policy of Ohio to do the following throughout the State:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

\* \* \*

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

\* \* \*

(N) Facilitate the state's effectiveness in the global economy.

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Finally, the Commission and the Ohio Supreme Court apply a three-part test when evaluating the reasonableness of settlements: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public interest; and whether the settlement package violates any important regulatory principles or practices.<sup>9</sup>

The substantial electricity requirements of the Eramet facility and the energy-intensive nature of production of manganese ferroalloys that are essential in the steelmaking process; hardeners used in the aluminum industry; and high purity chromium alloys used in the specialty steel and superalloys industries have previously permitted Eramet to obtain service through a reasonable arrangement submitted to and approved by the Commission pursuant to Section 4905.31, Revised Code.<sup>10</sup> The questions here are not related to disagreements over Eramet's ability to be served pursuant to a reasonable arrangement going forward but about the prices, terms and conditions that Eramet has asked the Commission to approve in this proceeding. In considering an application for a reasonable arrangement pursuant to Section 4905.31, Revised Code, the Commission must balance the costs and benefits, the sometimes competing interests of stakeholders and strive to advance the objectives in Section 4928.02, Revised Code.

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<sup>9</sup> *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 592 N.E.2d 1370. See, also, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 82-83, 765 N.E.2d 862.

<sup>10</sup> See *In the Matter of the Application of Monongahela Power Company for Consent and Approval of a Power Service Agreement with Elkem Metals Company*, Case No. 89-1860-EL-AEC, Finding and Order (February 13, 1990); *In the Matter of the Application of Monongahela Power Company for Approval of an Electric Service Agreement with Elkem Metals Company*, Case No. 97-383-EL-AEC, Finding and Order (July 2, 1997).

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The Commission must make the policy, legal, and factual calls to determine whether reasonable arrangements are appropriate. An extensive hearing was held in this proceeding. Based upon the record evidence in this case, the Commission should approve the Stipulation and direct CSP and Eramet to file an executed contract to implement the reasonable arrangement as proposed by Eramet's Application and modified by the Stipulation.

**B. The proposed reasonable arrangement is just and reasonable.**

For over a half a century, Eramet's Ohio plant has produced manganese and special metal products used by the steel, aluminum, superalloys, and specialty steel industries. Eramet Exhibit 3 at 6. Today, Eramet is one of the largest industrial employers in Washington County with an impact on the State and local economy through active employees, retiree benefits, vendor payments and State and local taxes of at least \$120 million in 2008. Eramet Exhibit 7 at 3-4. Eramet's operations have a significant positive impact on the local economy. No party disputes that Eramet is a vital piece of the local economy. In fact, in response to a question about whether Eramet's operations have an impact on the State and local economies, OCC witness Dr. Ibrahim responded, "Of course. They are an industrial concern and I see that's an important industrial concern." Tr. Vol. IV at 561. It is also worth noting that based upon the letters filed in the docket in this case that there is local support for Eramet's proposed reasonable arrangement. No party contested that it is in the public interest and good for the State of Ohio for Eramet to continue and even increase operations at its Southeast Ohio plant. Tr. Vol. IV at 554-555.

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In exchange for the proposed reasonable arrangement for long-term electricity supply, Eramet has made performance commitments including \$40 million in capital investments over the first six years, commitments to improve environmental performance and energy efficiency, the retention of 200 employees and a 65 MVA load monthly for Ohio. Joint Exhibit 1 at 8; Eramet Exhibit 2 at 4-5; Eramet Exhibit 3 at 11.

The Stipulation also addresses the concerns raised by other parties. Specifically, OCC witness Dr. Ibrahim recommended two modifications to the Stipulation. OCC Exhibit 9B at 2-3. OCC recommended that the Commission impose a specific dollar cap on the delta revenues of the lesser of \$40 million or 100 percent (100%) of the actual capital improvements committed to in the Stipulation, and that the Commission require written notice that Eramet has received all of the necessary corporate approvals from Eramet SA, the parent company, to proceed with the proposed capital expenditures before the Commission applies the discounted rates. *Id.*; Tr. Vol. IV at 547-548. However, as Staff witness Fortney testified, as proposed the reasonable arrangement includes a cap on the level of delta revenues. In response to the question of whether the Stipulation includes a ceiling or cap, Mr. Fortney stated, "Well, there is a ceiling. There's a percent discount from the otherwise applicable tariff rate which, in effect, puts a ceiling, it just does not put an absolute dollar ceiling." Tr. Vol. III at 428. *See also*, Joint Exhibit 1 at 6-7. Moreover, the discount off of the otherwise applicable tariff declines such that Eramet pays the full tariff rates by the end of the agreement. *Id.* This declining discount ensures that the discount does not continue on without Eramet making substantial contributions to its plant and the State and local economy. Additionally, during the period through 2011, when there is an all-in rate, there are

minimum bill requirements and maximum demand limitations. Finally, for the entire term of the proposed reasonable arrangement, the reporting requirements ensure that Eramet will not continue to receive the reasonable arrangement if it is not holding up its end of the bargain. *Id.* at 8-9.

It also cannot be ignored that OCC's recommendation for a specific dollar limit on the delta revenues is based upon the Commission's Order on the reasonable arrangement application of Ormet Primary Aluminum ("Ormet") in Case No. 09-119-EL-AEC, in which OCC, among others, sought rehearing, which is still pending. OCC Exhibit 9B at 3. However, as Dr. Ibrahim admitted, as proposed in Ormet's reasonable arrangement, the electricity price paid by Ormet would have been tied to the London Metal Exchange ("LME") price for aluminum such that Ormet would pay a lower price for electricity when aluminum prices are lower and a higher price for electricity when aluminum prices are higher. Tr. Vol. IV at 549-552. Dr. Ibrahim described the great swings in aluminum market prices that demonstrate the volatility of the aluminum market upon which the Ormet electricity price is based. *Id.* In fact, as proposed by Ormet, it was possible that Ormet could have received free electric service. *Id.* Clearly, the pricing structures proposed by Ormet and Eramet are significantly different and warrant different treatment.

Moreover, OCC's position in the Ormet case was that the Commission should put a hard cap on the delta revenues generated by Ormet's reasonable arrangement equal to \$32.7 million per year, which is the approximate value of Ormet's Ohio payroll. *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power*

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*Company*, Case No. 09-119-EL-AEC, Opinion and Order at 9 (July 15, 2009). As estimated by Mr. Willoughby, the salaries and wages for direct Eramet employees in 2008 were approximately \$23.4 million. Eramet Exhibit 7 at 3. Thus, if OCC's positions were consistent, the delta revenue cap based upon the salaries and wages of the Ohio employees of Eramet would greatly exceed the maximum delta revenues under the proposed reasonable arrangement estimated by Dr. Ibrahim (\$37,495,161 for the first six years of the reasonable arrangement put together). OCC Exhibit 9B at 9.

OCC's recommendation that the Commission require written notice that Eramet has received *all* of the necessary corporate approvals from Eramet SA, the parent company, to proceed with the proposed capital expenditures before the Commission applies the discounted rates is simply unreasonable and unrealistic under real world business conditions.

Eramet made very clear that the reason it requested the reasonable arrangement was that Eramet needs to implement its overarching plan to invest the capital required to sustain operations in Ohio. *See, for example*, Eramet Exhibit 1 at 2 and Eramet Exhibit 2 at 2-7. However, to obtain the necessary capital, Eramet must secure parental approvals and its ability to secure parental approvals is contingent upon its ability to get predictable electric prices at a reasonable level over a period of time that is judged to be sufficient to rationalize the capital investment. *Id.* Admittedly, like most businesses, individual business units like Eramet must submit their capital spending proposals for review and potential approval. Eramet Exhibit 2 at 6. To secure the internal approvals, Eramet must present a package that identifies its need for capital dollars and also shows that its proposed capital spending program deserves being selected relative to



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other capital spending proposals in the Manganese Division. *Id.* Eramet's Chief Executive Officer, Mr. Bjorklund, stated that Eramet [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Nonetheless, some of the projects to which Eramet commits are necessarily in the preliminary stages, are based upon preliminary engineering estimates, and are not scheduled to be completed until up to five years from now. It is simply unrealistic for any parent company to authorize a capital expenditure for a project at this stage. As stated throughout this proceeding, it is also unrealistic for Eramet's parent to authorize the capital expenditure for all projects without a reasonable electricity rate in place. *Tr. Vol. I at 55.*<sup>11</sup>

The proposed reasonable arrangement strikes a just and reasonable balance that is mindful of the interests of other parties while authorizing the price, terms and conditions for electricity that will permit Eramet to help rationalize the capital investment required to sustain the operations in Ohio. The Commission should adopt the Stipulation and approve the Application as modified therein.

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<sup>11</sup> Mr. Bjorklund stated, "The application is related to the lifeblood and the basic to be able to invest in the plant, and that's a reliable long-term power contract, and Eramet will not invest in a plant before we have established a long-term power contract." *Id.*

- C. The proposed reasonable arrangement does not violate any important regulatory principle or practice and furthers the policy of the State.**

The Commission has used its authority under Section 4905.31, Revised Code, for decades to enable reasonable arrangements that have economic development or retention benefits. The Ohio General Assembly recently made, via SB 221, modifications to Section 4905.31, Revised Code, to make it clear that the Commission could continue to use its authority under Section 4905.31, Revised Code, regardless of what may be otherwise required by the law.

Eramet's proposed reasonable arrangement complies with the State policies and public interest objectives set forth in Section 4928.02, Revised Code, and does not violate any important regulatory principle or practice. Staff Exhibit 2 at 4. As stated in Eramet witness Flygar's testimony, if approved, the proposed reasonable arrangement would facilitate the policy of the State by ensuring the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service and ensuring the availability of retail electric service that provides Eramet with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs. Eramet Exhibit 3 at 10. Additionally, because of the commitment to work in good faith with CSP to determine how and to what extent Eramet's customer-sited capabilities might be committed to CSP for integration into its portfolio for purposes of complying with Ohio's portfolio requirements, the reasonable arrangement provides a coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates. *Id.*; Joint Exhibit 1 at 9-10. Finally, as the sole domestic producer of medium and low carbon ferromanganese, there is no

question that ensuring that Eramet can continue to produce these products facilitates the State's effectiveness in the global economy. Eramet Exhibit 3 at 6.

CSP witness Baker acknowledged that Eramet has not proposed in its Application or pre-filed testimony to rely on CSP as its exclusive supplier of generation service for the term of its proposed arrangement with CSP. However, because of Mr. Baker's "understanding that parties may be suggesting that type of provision," CSP seems to be indicating that a reasonable arrangement that purports to be an exclusive supplier agreement goes against the State's policy of encouraging shopping. CSP Exhibit 1 at 4.<sup>12</sup>

Eramet's proposed reasonable arrangement does not violate the State's policy by discouraging shopping. The fact is that there is not a competitive market in place to offer alternatives to customers. In fact, CSP seems to implicitly acknowledge this fact by stating that approving the proposed Application would "serve to stifle the development of a competitive retail electric generation market." CSP Exhibit 1 at 5. The General Assembly recognized this fact by modifying Section 4905.31, Revised Code, to permit customers to propose terms and conditions to satisfy their electricity needs and provide alternatives to the standard service offer that are not currently capable of being met by a competitive generation market. As noted in the Application, there are no competitive retail electric service ("CRES") providers currently offering to serve customers in CSP's territory. Eramet Exhibit 1 at 5. Approving a reasonable arrangement, such as that proposed by Eramet, does not violate any important regulatory practice or principle.

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<sup>12</sup> CSP Exhibit 1 at 5.

**D. The Stipulation meets the Commission's criteria for approval of a stipulation.**

The Stipulation filed in the above-captioned proceedings represents a just and reasonable resolution of most of the issues in these proceedings, meets the above described three-part test established by the Commission, and, therefore, should be adopted by the Commission.

It is clear from the record that all the parties in this proceeding engaged in settlement discussions. *See, for example*, Tr. Vol. IV at 567. All the parties also agreed to the process by which the Stipulation was submitted for the Commission's consideration. *See, for example*, Tr. Vol. I at 6-7. Further, it is clear that all parties were represented by capable, knowledgeable counsel. Staff Exhibit 2 at 3.

Finally, for the reasons already stated, Eramet's commitments and the Application as modified by the Stipulation benefit ratepayers and are in the public interest. In addition to the commitment to retain a minimum of 200 employees and to maintain operations for the term of the agreement, the capital investment projects will have a dramatic positive effect on the environment in the Mid-Ohio Valley and will transform the Eramet of today into a facility that will ensure well-paying jobs, a cleaner community and continued contribution into the area's annual economy. Eramet Exhibit 2 at 7.

**E. Implementation**

For the reasons stated herein, the Commission should approve the proposed Application as modified by the Stipulation expeditiously. As stated by Mr. Fortney, upon Commission approval, the Commission should order CSP to work with Eramet and file within five business days a contract incorporating the terms of the Stipulation. Staff

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Exhibit 2 at 6. It is important that, if the Commission finds that the proposed reasonable arrangement is just and reasonable and adopts the Stipulation, the Commission ensure that the reasonable arrangement may be implemented in a timely manner by prohibiting other parties from delaying the implementation process or effectively vetoing the Commission's order. Accordingly, in addition to requiring Eramet and CSP to file a contract incorporating the terms of the Stipulation within five business days, Eramet respectfully requests that the Commission authorize Eramet to file a schedule incorporating the terms of a Commission-approved reasonable arrangement to implement such arrangement in the event that CSP and Eramet cannot comply with the requirement to file a contract within five business days.

Eramet raises this issue based on concerns that CSP may seek to delay or prevent implementation of a Commission-approved reasonable arrangement due to statements made by CSP in this case and arguments made by AEP in Ormet's case. Specifically, CSP witness Baker indicated that while he could not identify the exact amount of time it would take for Eramet and CSP to translate the Stipulation into a final service agreement, in his experience "it always takes longer than what I expect." Tr. Vol. I at 311. Mr. Baker indicated that because CSP did not develop the Stipulation, it would further complicate the translation into contractual language. *Id.* at 312. However, when asked for examples of provisions that may cause difficulty, Mr. Baker only referenced the minimum billing provision. *Id.* at 312-313.

Similarly, in the Ormet case, AEP argued on rehearing that the Commission does not have the authority to approve a reasonable arrangement proposed by a mercantile customer under Section 4905.31, Revised Code, unless the EDU agrees to be bound

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by the arrangement. *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing at 15 (August 14, 2009).

Eramet does not foresee the same difficulty to which CSP alluded. In fact, Eramet agrees with Staff that if the Commission so orders, the parties could present a contract incorporating the terms of an approved reasonable arrangement within the timeframe proposed by Staff. Nonetheless, in the unlikely case that it should prove impossible for the parties to comply with such an order, the Commission should approve a reasonable arrangement or schedule using the full range of options provided by Ohio law. CSP should not be permitted an absolute veto over the authority delegated to the Commission by Section 4905.31, Revised Code, to enable a reasonable arrangement or schedule that is filed by a mercantile customer.

In other words, the Commission should enforce its decision pursuant to the powers granted it by the General Assembly through Sections 4905.31, 4905.22 and 4909.17, Revised Code, which prohibits public utilities from charging or demanding any unjust or unreasonable charge or a charge in excess of the charge authorized by the Commission. Additionally, Section 4905.30, Revised Code, prevents a public utility from billing and collecting charges for the services it provides prior to having the required regulatory approvals to impose such rates and charges and it must publish the rates and charges in a schedule that is on file with the Commission. Only the Ohio

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Supreme Court has the power to review, suspend or delay any order made by the Commission (not CSP) pursuant to Section 4903.12, Revised Code.

**IV. CONCLUSION**

For reasons stated herein, Eramet urges the Commission to adopt the terms and conditions contained in the Joint Stipulation and Recommendation filed in this proceeding on August 5, 2009 and, based on the terms and conditions stated therein, approve the Application Eramet filed on June 19, 2009.

Respectfully submitted,



Lisa G. McAlister (Trial Attorney)  
Thomas L. Froehle  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653  
[lmcalister@mwncmh.com](mailto:lmcalister@mwncmh.com)  
[tfroehle@mwncmh.com](mailto:tfroehle@mwncmh.com)

**August 24, 2009**

**Attorneys for Eramet Marietta, Inc.**

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Post Hearing Brief of Eramet Marietta, Inc.* was served upon the following parties of record this 24<sup>th</sup> day of August 2009, *via* hand-delivery, electronic transmission or first class mail, postage prepaid.

  
Lisa G. McAlister

Marvin I. Resnik, Counsel of Record  
Steven T. Nourse  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215

**ON BEHALF OF AMERICAN ELECTRIC POWER**

Janine Migden-Ostrander  
Consumers' Counsel  
Gregory J. Poulos  
Maureen Grady  
*Office of the Ohio Consumers' Counsel*  
10 West Broad Street, 18<sup>th</sup> Floor  
Columbus, OH 43215

**ON BEHALF OF THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

David F. Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202

**ON BEHALF OF THE OHIO ENERGY GROUP**

Robert Fortney  
Utilities Department  
Public Utilities Commission of Ohio  
180 East Broad Street, 3<sup>rd</sup> Floor  
Columbus, OH 43215

Thomas McNamee  
Werner Margard  
Attorney General's  
Public Utilities Commission of Ohio  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, OH 43215

**ON BEHALF OF THE STAFF OF THE PUBLIC  
UTILITIES COMMISSION OF OHIO**

Greg Price  
Rebecca Hussey  
Attorney Examiners  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215

**ATTORNEY EXAMINERS**