

FILE

20
RECEIVED-DOCKETING DIV.
2009 SEP -8 PM 5:21
PUCO

**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.)

REPLY BRIEF OF ERAMET MARIETTA, INC.

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

September 8, 2009

Attorneys for Eramet Marietta, Inc.

{C28823:3} This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business
Technician 2 Date Processed SEP 8 2009

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT.....	2
	A. The proposed reasonable arrangement does not result in a subsidy from other customers to Eramet.....	3
	B. OCC/OEG's recommendations are unreasonable and should be rejected.....	4
	1. OCC/OEG's recommendation that the Commission require a "hard cap" on the delta revenue is unreasonable and should be rejected.	5
	2. OCC/OEG's recommendation to require corporate approval prior to receipt of a discount is unclear and unreasonable.....	9
	3. OCC/OEG's request to limit Eramet's ability to invest \$100 million in Ohio until after 2014 is unreasonable.....	11
	C. CSP's assertion that Section 4905.31, Revised Code, prohibits reasonable arrangements unless agreed upon by the EDU is incorrect as a matter of law and should be rejected	12
	D. Eramet's comments on the POLR debate	15
III.	CONCLUSION	16

**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.)	

REPLY BRIEF OF ERAMET MARIETTA, INC.

I. INTRODUCTION

Pursuant to Section 4905.31, Revised Code, and Rule 4901:1-38-05, Ohio Administrative Code ("O.A.C."), Eramet Marietta, Inc. ("Eramet") is seeking approval of a reasonable arrangement that will help it 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. Eramet Exhibit 1. Eramet and the Commission Staff ("Staff") filed a Joint Stipulation and Recommendation ("Stipulation") on August 5, 2009, that modifies the Application. On August 24, 2009, Eramet and Staff each filed briefs supporting and requesting that the Commission approve the Application as modified by the Stipulation.

In accordance with the briefing schedule established by the Attorney Examiners, Eramet respectfully submits this reply brief for the consideration of the Public Utilities Commission of Ohio ("Commission").

II. ARGUMENT

The remaining contested issues in this case are extremely narrow. No party contests the evidence showing that the Stipulation is a product of serious bargaining among capable, knowledgeable parties. Tr. Vol. IV at 574; Tr. Vol. II at 385-386. With one very limited and ironic exception, no party presented evidence showing that the Stipulation violates any important regulatory principle or precedent.¹ Of course, there was evidence presented showing that the Stipulation does not violate any important regulatory principle or precedent. Tr. Vol. IV at 574; Staff Exhibit 2 at 4.

No party contests the fact that the Commission should, in this case, approve some form of a reasonable arrangement or schedule pursuant to Section 4905.31, Revised Code. *See, for example*, Tr. Vol. II at 378. The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Energy Group ("OEG"), [collectively referred to as ("OCC/OEG")] filed a joint brief that recommends that the Commission should make two selective modifications to the package of terms and conditions embodied in the Stipulation. And, based on the testimony of OCC's witness Ibrahim (*Id.* at 575), OCC/OEG appears to recommend that the Commission should then approve a reasonable arrangement or schedule for Eramet.

In fact, the briefs submitted by OCC/OEG and CSP confirm, at least implicitly, the reasonableness of the compromise that is presented, as a package, in the Stipulation

¹ Columbus Southern Power Company's ("CSP") witness Baker testified that based upon his understanding of concerns raised by other parties regarding the exclusivity of the reasonable arrangement, the Stipulation violates regulatory principles or Commission precedent with regard to shopping only. Tr. Vol. III at 325-326. But this testimony is actually connected to CSP's delta revenue collection ambitions which themselves may violate an important principle or precedent. And, the Stipulation does not recommend a resolution of the delta revenue question; it simply defers to the Commission on this question.

with regard to the contested issues for which the Stipulation contains a recommended resolution.

Nonetheless and in this reply brief, Eramet addresses below some of the positions taken or claims made by OCC/OEG and CSP.

A. The proposed reasonable arrangement does not result in a subsidy from other customers to Eramet.

OCC/OEG's advocacy in this case frequently includes a characterization of delta revenue as a subsidy that is received by a customer receiving and paying for service pursuant to a reasonable arrangement approved by the Commission. OCC/OEG Brief at 1, 2, 3, 4, 10, 16 and 22. But the use of the word subsidy² in the present context is not proper and its use by OCC/OEG does not help to advance the Commission's consideration of the differing delta revenue positions.

As CSP's witness Baker agreed, CSP's rates are not based upon the cost of providing service. Tr. Vol. II at 367-368. CSP's rates are something in between cost based and market based because they are established under the hybrid structure created by the electric security plan ("ESP"). *Id.* There is no evidence that the Stipulation's adoption by the Commission will establish a below-cost price. Indeed, Mr. Baker testified that it appears that the proposed Stipulation pricing will provide for recovery of variable costs plus make a contribution to fixed costs. Tr. Vol. II at 350-351.

Moreover, Section 4905.31, Revised Code, allows, and Ohio's public policy encourages, the Commission to enable an alternative reasonable arrangement or schedule when the Commission determines that it is in the public interest to do so.

² Generally the word subsidy is used to describe a situation where the price of a good or service is set below its cost of production.

When the Commission so enables such an arrangement or schedule as the Commission has previously done in the case of Eramet,³ it – not the otherwise applicable standard tariff – governs the service relationship between the utility and the customer or group of customers. Confusing the meaning of the word subsidy (as it is used in ratemaking) with the meaning of the words delta revenue as they are used in the context of discussions about reasonable arrangements does nothing to assist the Commission in resolving the contested issues in this proceeding.

B. OCC/OEG's recommendations are unreasonable and should be rejected.

Rule 4901-1-30, O.A.C., provides that any two or more parties to a proceeding may enter into a stipulation resolving the issues in the proceeding and then present that stipulation to the Commission for approval. It is clear from this rule that stipulations presented to the Commission need not have the blessing or support of all parties. The Commission's settlement criteria require the evaluation of a stipulation as a package and not as isolated components.⁴

The Stipulation filed is a package that resolves most of the issues raised in this proceeding, including many if not all of the concerns raised by OCC/OEG. OCC/OEG's

³ *In the Matter of the Application for Approval of Electrical Service Agreements Between Monongahela Power Company and Elkem Metal Company*, Case No. 97-383-EL-AEC, Finding and Order (August 20, 1997).

⁴ In considering the reasonableness of a stipulation, the Commission has applied the following criteria:

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

Cincinnati Gas & Elec. Co., FirstEnergy Corp. and Columbus & Southern Ohio Elec. Co., Case No. 84-1187-EL-UNC (November 26, 1985), and *Cleveland Elec. Illuminating Co.*, Case No. 82-485-EL-AIR (March 30, 1983). Furthermore, the Ohio Supreme Court has endorsed the Commission's use of these criteria to evaluate the reasonableness of settlements and their effect on the interests of customers and public utilities. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992).

criticism of the Stipulation package is directed at isolated provisions and narrow subjects. OCC/OEG did not consider the entire package and, accordingly, did not examine the Stipulation from the perspective called for by the Commission's rules and precedent. Of course, the Stipulation itself states that the individual provisions in the Stipulation are the product of compromises and that the agreement of the signatory parties is expressly conditioned upon its acceptance in its entirety. Joint Exhibit 1 at 11-12.

Nonetheless, OCC/OEG requests that the Commission selectively modify the Stipulation without looking at the Stipulation as a package. Moreover, based on the record evidence, OCC/OEG's recommended modifications would not provide any additional customer benefits and are otherwise unreasonable.

- 1. OCC/OEG's recommendation that the Commission require a "hard cap" on the delta revenue is unreasonable and should be rejected.**

OCC/OEG recommends that the Commission selectively modify the Stipulation's package so that it includes a specific dollar cap on the delta revenue equal to the lesser of \$40 million or 100 percent (100%) of the actual capital improvements committed to in the Stipulation. OCC/OEG Brief at 14; OCC Exhibit 9B at 2-3. OCC/OEG's recommendation should be rejected.

OCC/OEG's assertion that the delta revenue will be "open to the sky" is, without merit. OCC/OEG Brief at 11. By OCC's own worst-case calculations⁵ presented by Dr. Ibrahim, the delta revenue will not exceed \$40 million in the first six years of the

⁵ While the advocacy of OCC/OEG suggests that the potential increase in the Base Usage level recommended by the Stipulation needs to be considered by the Commission, it has already been factored into Dr. Ibrahim's worst-case calculations. Tr. Vol. IV at 556. And, perhaps more importantly, he agreed that it would be a good thing for Ohio if Eramet's Base Usage did increase. Tr. Vol. IV at 554-555.

reasonable arrangement as recommended by the Stipulation. OCC Exhibit 9B at 9; Tr. Vol. IV at 556-558. Similarly, Staff witness Fortney's evaluation of the potential delta revenue indicates that OCC/OEG's concerns are not warranted. *See, for example*, Tr. Vol. III at 437.

Also, as Staff witness Fortney testified, there is a limit on the delta revenue contained in the package recommended by the Stipulation. In response to the question of whether the Stipulation includes a ceiling or cap on delta revenue, 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. Additionally, the package recommended by the Stipulation includes both a minimum bill and maximum demand levels on Eramet. *Id.* at 5-6.⁶ For the years 2012 through the balance of the Stipulation's recommended reasonable arrangement, the discount is a fixed and declining percentage off of the otherwise applicable tariff rate, which effectively limits and reduces over time the amount of delta revenue. Joint Exhibit 1 at 6. Also, the package recommended by the Stipulation establishes maximum kWh usage levels that are eligible for the reasonable arrangement pricing.⁷ As CSP noted, compared to the reasonable arrangement in the

⁶ 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.

⁷ 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

Ormet case, "The delta revenues are much more predictable for Eramet." CSP Brief at 19.

Given the worst-case estimate of delta revenue presented by the parties who seek to selectively modify the Stipulation, there seems to be little or no good reason to conclude that a hard dollar delta revenue cap will have any significance in the real world. And, the variability in the case-to-case positions of OCC/OEG on whether and how the Commission should go about specifying a dollar limit on delta revenue suggests that their views are yet evolving. As noted in Eramet's Post Hearing Brief, OCC/OEG's position in the Ormet case was that the Commission should put a hard cap on the delta revenue generated by Ormet's reasonable arrangement equal to the approximate value of Ormet's Ohio payroll (approximately \$32.7 million per year). *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, Opinion and Order at 9 (July 15, 2009). In other cases, OCC/OEG did not intervene to urge the Commission to impose a dollar cap on delta revenue. *In the Matter of the Application of the Cleveland Board of Education for the Cleveland Municipal School District to Establish a Reasonable Arrangement with the Cleveland Electric Illuminating Company for Electrical Service*, Case No. 08-1238-EL-AEC.

Given the other measures recommended in the Stipulation that serve to limit the delta revenue level and preserve the Commission's opportunity to monitor and manage problems should they arise, there is no evidence suggesting that a stated dollar limit on

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.

delta revenue will do a better job of protecting the public interest. In the end, OCC/OEG's recommendation to selectively modify the Stipulation to insert an arbitrary hard dollar cap on delta revenue amounts to a recommendation that elevates the form of the protection over the substance of the protective mechanisms embedded extensively in the package recommended by the Stipulation.

It is also important to note that OCC/OEG's recommendation to include a specific dollar cap on the delta revenue equal to the lesser of \$40 million or 100 percent (100%) of the actual capital improvements committed to in the Stipulation significantly undervalues the benefits of the Stipulation as a package. Although Eramet agrees that the primary focus of the proposed reasonable arrangement is to "facilitate the capital investment necessary for Eramet to operate in southeastern Ohio," the benefits of Eramet maintaining operations in Southeastern Ohio are not limited to the value of the initial \$40 million in capital improvements. Eramet described its general status in the community and compiled information reflecting the amounts that were paid to suppliers in Ohio and the local community area that totaled \$133.66 million in 2008. See Eramet Exhibit 3 at 10; Eramet Exhibit 7 at 3-4.⁸ Thus, OCC/OEG's recommendation to selectively modify the Stipulation's package fails to recognize the value of the package presented therein to other customers and the residents of Southeastern Ohio. OCC/OEG Brief at 14.

⁸ Even removing the amount paid for electricity and reducing the total by a third (which Eramet does not agree is an accurate reflection of the amount it will pay to state and local providers in 2009), the total dollar value of the commercial activity related to Eramet's presence in Southeastern Ohio still greatly exceeds \$40 million.

For all of these reasons, the Commission should reject OCC/OEG's recommendation to selectively modify the Stipulation by adding a cap on delta revenue equal to the lesser of \$40 million or the capital investment made by Eramet.

2. OCC/OEG's recommendation to require corporate approval prior to receipt of a discount is unclear and unreasonable.

OCC/OEG urges the Commission to selectively modify the package recommended by the Stipulation by inserting a requirement that Eramet obtain "corporate approval of the capital investment" prior to effectiveness of the reasonable arrangement. OCC/OEG Brief at 21-22.

The form of the requirement that OCC/OEG urges upon the Commission renders it incapable of having any practical application based on the record evidence. Indeed, the form of the capital spending approval requirement that OCC/OEG urges upon the Commission begs the question of what amount of capital spending needs to be approved and when it needs to be approved to satisfy the proposed requirement.⁹

The \$40 million investment that Eramet has committed to make as part of the package contained in the Stipulation involves numerous capital projects that will require separate corporate approval prior to commencement. *See, for example*, Eramet Exhibit 1 at 1, 3; Eramet Exhibit 2 at 3-5. Regardless of the questions raised regarding the form of the capital spending approval requirement urged upon the Commission by OCC/OEG, the recommendation is otherwise without merit and unnecessary given the other provisions of the Stipulation.

⁹ If adopted, would the requirement urged upon the Commission by OCC/OEG mean that Eramet has to secure corporate approval to spend the estimated cost of the Furnace 12 revitalization; the estimated cost of the bag house project; a total of \$20 million; \$40 million; \$100 million; or some other amount?

The record evidence demonstrates that Eramet is in the process of obtaining the necessary corporate approvals for the capital projects that make up the \$40 million that Eramet has committed to invest over time and prior to 2012 as part of the package contained in the Stipulation. Tr. Vol. I at 28-29, 39.¹⁰ The Stipulation contains provisions that require Eramet to provide status reports. Joint Exhibit 1 at 8-9. If the information furnished by Eramet indicates that the investment is not coming forward as expected, the Stipulation makes clear that the Commission has the right and the authority to take action. Joint Exhibit 1 at 8-9.

Finally, OCC/OEG's recommendation that the Commission selectively modify the package contained in the Stipulation to insert a capital investment approval condition on the front end of the reasonable arrangement would, if adopted by the Commission, put Eramet into a tail-chasing spin. The record evidence demonstrates that parental approvals are required to obtain the necessary capital, and that such parental approvals are contingent upon Eramet's 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. *See, for example*, Eramet Exhibit 1 at 2 and Eramet Exhibit 2 at 2-7. In other words, Eramet cannot secure corporate approvals to make capital investments

¹⁰ Specifically, regarding the approval process for the Furnace 12 revitalization, the following exchange took place:

- Q. And isn't it true that your proposal to include the Furnace 12 revitalization capital investment project has not been approved by the parent company, Eramet SA?
- A. Well, the project has not been formally approved by the parent company.
- Q. A request has not been made to approve it to the parent company.
- A. We are in the process. We have been in the process of getting this project approved for quite some time.

Tr. Vol. I at 28-29. Similarly, regarding the bag house, Mr. Bjorklund stated, "I don't have the approval, but the approval process in Eramet as a group is a working in progress process, so as I said before, it is my strong belief that we are able to do this investment." *Id.* at 39.

required to sustain its viability in Southeastern Ohio in the absence of a long-term power supply arrangement containing reasonable and predictable prices. Accordingly, Eramet filed an Application to obtain approval of a reasonable arrangement and the Stipulation reflects a reasonable compromise regarding the composition of that reasonable arrangement. OCC/OEG's recommendation that the Commission selectively modify the balance struck in the Stipulation will, if adopted and as a practical matter, result in a reasonable arrangement that is incapable of being used for its intended purpose.

3. OCC/OEG's request to limit Eramet's ability to invest \$100 million in Ohio until after 2014 is unreasonable.

At pages 3 and 10 of their Brief, OCC/OEG urges the Commission to selectively modify the Stipulation by including a requirement that appears to mean that Eramet would be unable to bring the \$100 million capital investment opportunity before the Commission until after 2014. This very odd OCC/OEG recommendation is without merit, not supported by the record evidence¹¹ and appears to be in direct conflict with their claimed support for Ohio's effort to retain and expand its manufacturing sector.¹²

The Stipulation recommends that the Commission permit Eramet to seek to modify the reasonable arrangement in conjunction with its effort to secure corporate approvals of an incremental capital investment of \$100 million. If or when Eramet applies to modify the reasonable arrangement for this purpose, the Commission will be free to reexamine all of the terms and conditions and make any changes that the

¹¹ OCC's witness did not testify on this issue.

¹² If this is an example of OCC/OEG's "balanced solutions that promote economic development and job retention" (OCC/OEG Brief at 1), it is unlikely that they can be counted on to make a positive contribution to Ohio's economic development and retention efforts.

Commission determines are warranted based on the facts and circumstances that then exist.

The Stipulation provides Eramet with nothing more than the opportunity to ask for changes needed to obtain the necessary corporate approvals and leaves the Commission to determine the outcome. OCC/OEG's recommendation that the package contained in the Stipulation be modified to insert a requirement that will preclude Eramet (prior to 2015) from even asking the Commission to approve modifications it needs to secure corporate approvals to make an incremental capital investment in Southeastern Ohio of \$100 million is, bluntly stated, ridiculous.¹³

C. CSP's assertion that Section 4905.31, Revised Code, prohibits reasonable arrangements unless agreed upon by the EDU is incorrect as a matter of law and should be rejected.

CSP uses a good portion of its brief to copy, nearly verbatim, an argument included in its Application for Rehearing in Ormet's reasonable arrangement case referenced above. Specifically, CSP argues that the Commission must conclude that no reasonable arrangement or schedule can be enabled without the electric distribution

¹³ OCC/OEG states that there is "no explanation on the record as to why these new one-sided provisions found their way into the Joint Stipulation. Nor is there any explanation offered by either Staff or Eramet as to the purported need for such latitude." OCC/OEG Brief at 10. Contrary to this assertion, Staff witness Fortney testified in response to questions from OCC's counsel that expanding the timeframe within which Eramet could seek to modify the reasonable arrangement as necessary to obtain corporate approvals for the \$100 million investment probably "because they [Eramet] hope they get the approval to make those expansions and that the global economy is recovered such that they will need a new furnace before 2015." Tr. Vol. III at 463. Additionally, Mr. Fortney stated:

I believe that they would certainly like to make the hundred-million dollar investment prior to 2015. That would be a, certainly be a sign that Eramet Marietta is a viable corporation.

* * *

In the staff's view not only the investment, hundred-million dollar investment prior to 2015, but also the actions that would cause them to raise the base level of usage would be -- are good things, signals that Eramet is becoming a successful operation.

Id. at 466-467.

utility's ("EDU") consent and acceptance. CSP Brief at 19-26. In reply, Eramet adopts and incorporates by reference the response to CSP's legal argument that is contained in the Memorandum Contra AEP's Application for Rehearing (pages 3 to 6) filed by Industrial Energy Users-Ohio ("IEU-Ohio") in the above-mentioned Ormet proceeding.¹⁴

Specifically, Section 4905.31, Revised Code, does not give CSP or any other EDU 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 or group of such customers. SB 221 explicitly expanded the persons eligible to submit such an arrangement or schedule for the Commission's consideration and approval to include a mercantile customer or group of mercantile customers. However, the General Assembly did not modify the statutory requirement that upon Commission approval of such a reasonable arrangement, "[e]very such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs." Section 4905.31(E), Revised Code. Thus, there is nothing in SB 221 that requires an EDU's consent as a predicate for effectuating a reasonable arrangement or schedule approved by the Commission pursuant to Section 4905.31, Revised Code.

¹⁴ *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, Industrial Energy Users-Ohio's Memorandum Contra Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing at 3-7 (August 24, 2009). For what it may be worth, Eramet is a member of IEU-Ohio and was actively involved (through IEU-Ohio) in the legislative process that resulted in the passage of Amended Substitute Senate Bill 221 ("SB 221") including the legislative provisions that modified Section 4905.31, Revised Code.

In addition, and as noted in Eramet's Post Hearing Brief, there are other sections of Ohio law that prohibit public utilities from charging or demanding any unjust or unreasonable charge or a charge in excess of the charge authorized by the Commission. See Sections 4905.22 and 4909.17, Revised Code. Additionally, before a public utility can bill and collect charges for the services it provides, it must have 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. Section 4905.30, Revised Code. Finally, only the Ohio Supreme Court has the power to review, suspend or delay any order made by the Commission. Section 4903.12, Revised Code. Thus, CSP's argument that the Commission should rewrite Section 4905.31, Revised Code, to equip CSP with an absolute veto over the Commission's authority to determine, in accordance with the law, the rates and charges that a utility must use for billing purposes is also in direct conflict with the clear and plain requirements of other Sections of the Revised Code.

Moreover, the Commission has already rejected this exact argument. FirstEnergy raised the same argument in the Commission's case to develop and adopt rules to implement SB 221's modifications to Section 4905.31, Revised Code, and the Commission rejected FirstEnergy's argument and held that FirstEnergy's argument is inconsistent with Section 4905.31, Revised Code, as modified by SB 221.¹⁵ The Commission specifically stated, "Although such arrangement requires Commission

¹⁵ *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 of the Revised Code, as Amended by Amended Substitute Senate Bill No. 221, Case No. 08-777-EL-ORD, Application for Rehearing of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company at 17 (October 17, 2008); and Entry on Rehearing at 21 (February 11, 2009).*

approval, there is no requirement that the electric utility must consent to the arrangement before the Commission approves it." *Id.*

Eramet urges the Commission to reject CSP's request that the Commission find that Section 4905.31, Revised Code, prohibits the establishment of a reasonable arrangement or schedule unless and until CSP consents to the Commission's determination.

D. Eramet's comments on the POLR debate.

As noted in Eramet's Application and Post Hearing Brief, discussions regarding reasonable arrangements subject to approval pursuant to Section 4905.31, Revised Code, include questions regarding the appropriate treatment of the costs and benefits of such arrangements. Both OCC/OEG and CSP spend a significant portion of their briefs arguing about the balance of costs and benefits in the context of whether there should or should not be an offset to any delta revenue equal to the revenue that might otherwise be produced by the applicable provider of last resort ("POLR") charges.¹⁶

Section 4905.31, Revised Code, grants the Commission discretion to consider and address issues related to requests to recover delta revenue. Specifically, Section 4905.31(E), Revised Code, states that a schedule or arrangement concerning a public utility "*may* include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue forgone as a result of any such program." Section 4905.31(E), Revised Code; Tr. Vol. II at 371-372.

¹⁶ As of now, no one knows what the POLR charge will be or if there will be any such charge beginning January 1, 2012 or after the end of CSP's current ESP.

The Commission must make the policy, legal, and factual calls to determine whether the proposed reasonable arrangement appropriately balances the costs and benefits, including CSP's recovery of revenue foregone. Eramet continues to urge the Commission to address this subject and the treatment of delta revenue.

III. CONCLUSION

The package contained in the Stipulation 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 obtain approvals required to begin investing the capital that must be invested to sustain its operations in Ohio. Both OCC/OEG and CSP specifically state that they are committed to economic development.¹⁷ For reasons stated herein, in Eramet's Post Hearing Brief and in the Initial Brief filed by the Staff, Eramet urges the Commission to approve the Stipulation as filed by Eramet and the Staff and direct Eramet and CSP to either file an agreement incorporating the terms of the Stipulation within five business days, or, in the alternative, authorize Eramet to file a schedule that complies with the Stipulation.

¹⁷ CSP Brief at 6; OCC/OEG Brief at 1. Despite these statements, the testimony and actions of the parties regarding their commitment to the communities they serve reveal a more complete picture. For example, CSP has taken actions to encourage members of the General Assembly to not support Eramet's Application in this proceeding. Tr. Vol. II at 384-385. To date, OCC has not supported a single reasonable arrangement application filed since the passage of SB 221 regardless of whether it was for economic retention, expansion, or bringing new business to the State. Tr. Vol. II at 299-301. In fact, OCC actively opposed each reasonable arrangement with the exception of the application filed by the Cleveland Municipal School District, from which OCC remained conspicuously absent. *Id.*

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lisa G. McAlister", written in dark ink.

Lisa G. McAlister (Trial Attorney)

Thomas L. Froehle

MCNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

lmcAlister@mwncmh.com

tfroehle@mwncmh.com

Attorneys for Eramet Marietta, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Eramet Marietta, Inc.* was served upon the following parties of record this 8th day of September 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, 18th 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, 3rd Floor
Columbus, OH 43215

Thomas McNamee
Werner Margard
Attorney General's
Public Utilities Commission of Ohio
180 East Broad Street, 9th 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