

**FILE**

**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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**ERAMET MARIETTA, INC.'S MEMORANDUM CONTRA APPLICATIONS FOR  
REHEARING OF COLUMBUS SOUTHERN POWER COMPANY AND THE OHIO  
CONSUMERS' COUNSEL AND OHIO ENERGY GROUP**

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**I. INTRODUCTION**

Pursuant to Rule 4901-1-35(B), Ohio Administrative Code ("O.A.C."), Eramet Marietta, Inc. ("Eramet") hereby submits this Memorandum Contra the Application for Rehearing filed by Columbus Southern Power Company ("CSP") on November 13, 2009 and the Joint Application for Rehearing filed on November 16, 2009 by the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Energy Group ("OEG") (collectively "OCC/OEG"). Eramet requests that the Public Utilities Commission of Ohio ("Commission") deny the Applications for Rehearing for the reasons discussed below. The failure of Eramet to specifically address every issue raised by CSP and OCC/OEG should not be construed as an endorsement or agreement with that position.

**II. BACKGROUND**

Pursuant to Section 4905.31, Revised Code, and Rule 4901:1-38-05, O.A.C., on June 19, 2009 Eramet filed an Application seeking approval of a reasonable arrangement with CSP to 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. On August 5, 2009, Eramet and the Commission Staff ("Staff") filed a Joint Stipulation and Recommendation ("Stipulation") that modified the Application. On October 15, 2009, the Commission issued an Opinion and Order ("Order") that modified and approved the Stipulation. On October 28, 2009, Eramet filed a contract for electric service that reflects the Order and the Stipulation to implement the reasonable arrangement.

CSP's November 13, 2009 Application for Rehearing raised eight assignments of error that essentially amount to: 1) the Commission erred in its decision that Eramet cannot shop for generation service through the term of the reasonable arrangement; 2) the conclusion that Eramet cannot shop results in the further erroneous decision that, as CSP has no risk of Eramet shopping and returning to CSP's standard service offer ("SSO"), CSP must reduce its recovery of the provider of last resort ("POLR") charge that compensates CSP for shopping risks; and 3) the Commission erred in holding that CSP does not have a veto over customer-proposed and Commission-approved reasonable arrangements.

OCC/OEG raise six assignments of error that essentially amount to: 1) the Commission erred in not specifying the accounting required to ensure that customers receive the benefit of the offset of the POLR charge to the delta revenue; 2) the Commission erred by not setting a hard cap on delta revenue and in not setting forth its reasoning for its decision; 3) the Commission erred in permitting the reasonable arrangement rate to go into effect prior to Eramet obtaining corporate approval for the

capital investments to which Eramet committed; and, 4) the Commission erred in approving a stipulation to which only two parties signed.

Noticeably, six out of CSP's eight assignments of error and two of OCC/OEG's six assignments of error address issues related to whether there should or should not be an offset to any delta revenue produced by the applicable POLR charges. Other than noting that Section 4905.31, Revised Code, grants the Commission the discretion to consider and address the issues related to requests to recover delta revenue that the Commission must make to determine whether the proposed reasonable arrangement appropriately balances the costs and benefits, *Eramet will not specifically address these assignments of error.*

Eramet will address each of the other assignments of error separately. However, it is important to note that neither OCC/OEG nor CSP have raised anything new in any of the remaining assignments of error addressed below. Thus, the requests for rehearing on these issues should be rejected for this reason alone. The requests for rehearing should also be rejected inasmuch as OCC/OEG and CSP have not demonstrated the Commission's Order is unreasonable or unlawful.

### **III. ARGUMENT**

#### **A. The Commission should deny OCC/OEG's request for rehearing on its recommendations regarding a "hard cap."**

OCC/OEG argue that because the Stipulation did not include a "hard cap" it failed to meet two prongs of the Commission's three prong test for evaluating the reasonableness of stipulations: it is not in the public interest and it violates important

regulatory principles.<sup>1</sup> OCC/OEG Application for Rehearing at 8-10. OCC/OEG also claim that the Commission failed to comply with Section 4903.09, Revised Code, by not explaining why it did not impose a "hard cap." *Id.* at 10-11. For the following reasons, the Commission should deny OCC/OEG's request for rehearing on the issue of a "hard cap."

First, although OCC/OEG assert that the Commission's "recent finding in the *Ormet* case established a definitive regulatory precedent that unique arrangements must contain a ceiling that establishes a maximum amount of delta revenue which ratepayers should be expected to pay" and that in this case the Commission "failed to comply with the regulatory principle," OCC/OEG do not explain how this "regulatory principle" was violated.

Contrary to OCC/OEG's assertions, the Commission first correctly described each of the mechanisms in the Stipulation that serve as limits on delta revenue that are otherwise ignored by OCC/OEG including: the fixed rate for 2009 through 2011; the minimum bills; the maximum demand levels on Eramet; the maximum kWh usage levels that are eligible for the reasonable arrangement pricing; and, the fixed, declining percent discount from the otherwise applicable tariff rate, which effectively limits and reduces over time the amount of delta revenue. Order at 3-4. Next, the Commission identified the fact that its review must evaluate the reasonableness of settlements as a package – not as isolated provisions. *Id.* at 10. The Commission then identified that, while OCC/OEG recommended that the Commission impose a specific dollar cap on the

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<sup>1</sup> It is important to note that OCC/OEG never asserted that the lack of a "hard cap" violates important regulatory principles until this Application for Rehearing. In the Initial and Reply briefs filed by OCC/OEG, they only alleged that the lack of a "hard cap" was not in the public interest.

delta revenue of the lesser of \$40 million or 100 percent of the actual capital improvements to which Eramet committed in the Stipulation, OCC/OEG's request was countered with the facts in evidence that "Staff witness Fortney testified, however, that the structure of the Stipulation...effectively imposes a ceiling or cap on delta revenues."

*/d.* The Commission further explained how, in spite of not accepting OCC/OEG's unfounded and isolated recommendation that the Commission selectively modify an isolated provision of the Stipulation to impose a "hard cap" that, based on the record evidence would not provide any additional customer benefits, the Stipulation as a package advances the public interest. Specifically, the Commission held that the Stipulation:

addresses the concerns of OCC, OEG, and CSP, and provides significant benefits to ratepayers, including ensuring job retention and, potentially encouraging new employment through potential for growth. The Stipulation also contributes to the regional economy through significant local and state tax dollars and employment and other business opportunities resulting from the viable operation of the facility.

Order at 12.

Not only have OCC/OEG failed to demonstrate that the Stipulation is not in the public benefit or violates any important regulatory principle by not including a "hard cap," OCC/OEG have never demonstrated that a "hard cap" would actually provide any benefit or protection to customers. Specifically, as noted by Eramet in its Reply Brief, by OCC's own worst-case calculations presented by Dr. Ibrahim, the delta revenue will not exceed \$40 million in the first six years of the reasonable arrangement as recommended by the Stipulation. OCC Exhibit 9B at 9; Tr. Vol. IV at 556-558. 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, Dr. Ibrahim agreed that it would be a good thing for Ohio if Eramet's Base Usage did increase. Tr. Vol. IV at 554-555. 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.

Because OCC/OEG have failed to demonstrate that the Commission's approval of the Stipulation without imposing a "hard cap" is unreasonable or unlawful, the Commission should deny OCC/OEG's request for rehearing on this issue.

**B. The Commission should deny OCC/OEG's request for rehearing regarding its unclear and unreasonable recommendation to require corporate approvals prior to the implementation of the reasonable arrangement.**

OCC/OEG assert that the Commission's failure 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 is not in the public interest and does not benefit the public. OCC/OEG Application for Rehearing at 11. OCC/OEG's request for rehearing should be denied.

Despite Eramet pointing out that the form of the requirement that OCC/OEG urges upon the Commission is so unclear that it is incapable of being implemented, OCC/OEG do not provide any additional clarity to their request. Nonetheless, the Commission correctly noted that "Eramet's ability to secure the parental approvals required to obtain capital to implement its investment plan depends on Eramet's ability to get predictable electricity prices at a reasonable level over a period of time that is judged to be sufficient to rationalize the capital investment." Order at 11. The Commission also held that the Stipulation as a package benefits ratepayers and is in

the public interest in part, because Eramet “has also committed to make significant capital investments in its Marietta facility.”

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. For this reason and because OCC/OEG failed to demonstrate that the Commission’s Order is unreasonable or unlawful, the Commission should deny OCC/OEG’s request for rehearing on this issue.

**C. The Commission should deny OCC/OEG’s request for rehearing that the Commission erred in approving a stipulation that does not “reflect any diverse interests.”**

OCC/OEG note that the “Commission concluded, based upon Mr. Fortney’s [uncontested] testimony, that the Stipulation appears to be the product of serious bargaining among capable, knowledgeable parties.” OCC/OEG Application for Rehearing at 12. The Commission also held that the “record also reflects that the Stipulation, as a package, advances the public interest, in that it addresses the concerns of OCC, OEG, and CSP...” Order at 12. Nonetheless, OCC/OEG argue that when an entire class of customers does not sign a stipulation ... the stipulation should be considered deficient and incurable under the Supreme Court precedent. OCC/OEG Application for Rehearing at 13. The Ohio Supreme Court cases OCC/OEG cite in support of its argument are mischaracterized and irrelevant.

In both the *Time Warner* and *Constellation* cases, the issue was whether stipulations arose from settlement talks from which an entire customer class was



intentionally excluded.<sup>2</sup> That is not the case here. All parties were invited to and participated in extensive settlement negotiations. In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328 (2006), the Court overturned the Commission's order because it violated the requirement of Section 4928.14(B), Revised Code, which states that the Commission may dispense with a competitive-bidding process "if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed." The Court's decision was unrelated to customer support or lack thereof for the stipulation in the case, but was rather based on its determination that the rate stabilization plan adopted by the Commission failed to provide for customer participation as required by Section 4928.14(B), Revised Code. *Id.* at 334-335. The Court has never ruled that stipulations approved by the Commission must be supported by all parties or all customer classes. In fact, there is no requirement that a representative of any specific customer class (or a subset of any customer class, for that matter) support (or decline to oppose) a stipulation in order for this part of the test to be met. Establishing such a requirement would empower any individual intervenor to a Commission proceeding who is the sole representative of a customer class to hold an otherwise reasonable stipulation hostage to its demands. This cannot be the result intended by the Commission when it established this criterion as a part of its standard for evaluating the reasonableness of partial stipulations. In fact, the three-part test is specifically designed to provide a

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<sup>2</sup> *Time Warner AXs v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 223 at footnote 2 (2006); *Constellation New Energy v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 535-536 (2004).

standard for assessing the reasonableness of stipulations which are not supported by all parties to a proceeding.<sup>3</sup>

As the evidence of record reflects, the Stipulation meets this criterion and the Commission should deny OCC/OEG's request for rehearing.

**D. The Commission should deny CSP's request for rehearing urging the Commission to prohibit reasonable arrangements unless agreed upon by CSP.**

For at least the third time, CSP repeats, nearly verbatim, the argument first included in its Application for Rehearing in an unrelated reasonable arrangement case<sup>4</sup> and then again in its Post Hearing Brief at pages 19-26, that the Commission must conclude that no reasonable arrangement or schedule can be enabled without the electric distribution utility's consent and acceptance. CSP Application for Rehearing at 18-25. Unfortunately, regardless of how many times an argument is repeated, it does not become correct as a matter of law or otherwise.

The Commission correctly noted that if "the General Assembly had intended on retaining the requirement that an electric utility agree to a proposed reasonable arrangement, there would have been no need for the General Assembly to amend Section 4905.31, Revised Code, to authorize the filing of an application by a mercantile customer." Order at 11.

The Commission should deny CSP's request that the Commission find that Section 4905.31, Revised Code, prohibits the establishment of a reasonable

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<sup>3</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 592 N.E.2d 1370, 1373, 64 Ohio St.3d 123, 126 (1992).

<sup>4</sup> *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 (August 14, 2009). CSP and Ohio Power Company have also appealed this issue, amongst others, in Ohio Supreme Court Case No. 09-2060.

arrangement or schedule unless and until CSP consents to the Commission's determination as CSP has failed to demonstrate that the Commission's decision is unreasonable or unlawful.

### **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. For the reasons stated herein, Eramet respectfully requests that the Commission deny the requests for rehearing identified herein.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Eramet Marietta, Inc.'s Memorandum Contra Applications for Rehearing of Columbus Southern Power Company and the Ohio Consumers' Counsel and Ohio Energy Group* was served upon the following parties of record this 23rd day of November 2009, *via* hand-delivery, electronic transmission or first class mail, postage prepaid.

  
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