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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application for)
Establishment of a Reasonable)
Arrangement Between Eramet Marietta)
Inc. and Columbus Southern Power)
Company.)

Case No. 09-516-EL-AEC **PUCO**

**MEMORANDUM CONTRA ERAMET MARIETTA, INC.
MOTION FOR PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. SYNOPSIS

The Office of the Ohio Consumers' Counsel ("OCC") represents approximately 700,000 residential electric consumers of the Columbus Southern Power Company ("CSP" or "Company"). OCC files this Memorandum Contra¹ Eramet Marietta, Inc.'s ("Eramet") Motion for Protective Order, which Eramet filed after OCC's Attorney sent a public records request to the Public Utilities Commission of Ohio ("Commission" or "PUCO").

Eramet asks the PUCO to block the release of information to OCC that Eramet is required to submit to the PUCO² in order to continue receiving discounted electric rates—discounts that are funded by other customers of CSP, including residential customers. Eramet's information that now is in the possession of the PUCO, apparently addresses whether Eramet is meeting the commitments that are a condition of its receipt of \$40 million in electricity discounts over the next three years that are funded by

¹ See Ohio Admin. Code 4901-1-35(B).

² See Ohio Admin. Code 4901:1-38-06.

Ohioans and addresses the potential impact of the discounts on the customers paying for the discount.

This information that is now in the possession of Ohio state government, at the PUCO, constitutes a public record under Ohio law. And under Ohio law there is no exception that would allow the PUCO to withhold disclosure, since state or federal law does not prohibit disclosure. In this regard, the information is not protected by R.C. 4901.16 (pertaining to confidentiality of PUCO investigations) and is not a trade secret under R.C. 1333.61(D). Nor does the Commission have authority under Ohio's public records law to block disclosure of the information by issuing a protective order under Ohio Admin. Code 4901-1-24. The PUCO should be wary of arguments by Eramet that mix the separate realms of the PUCO's regulatory authority and Ohio's public records law, especially where the result could be non-compliance with the requirements of the public records law.

At a time when Eramet should be engaging in a cooperative approach with the representative (OCC) of many of the customers who are collectively paying millions of dollars for Eramet's discount—a discount that is intended to achieve economic development—Eramet is instead expending funds on mounting legal efforts to keep its justification for the discount secret from the representative of the consumers who are paying for the discount. Eramet's Motion should be denied and the PUCO should release the information to OCC.

II. PROCEDURAL BACKGROUND

On June 15, 2009, Eramet filed an Application before the PUCO seeking approval of a reasonable arrangement with CSP. Eramet is a mercantile customer as defined under

R.C. 4928.01(A)(19).³ On August 5, 2009, Eramet and the PUCO Staff entered into a Joint Stipulation and Recommendation to resolve the issues in the case.⁴ Under the Joint Stipulation, Eramet was to receive discounted electric rates for a ten-year period. OCC and the Ohio Energy Group ("OEG") urged the Commission to modify the agreement to limit the contribution of customer funds so that customers are supporting only those capital investments necessary to sustain Eramet's Ohio operations and thereby retain certain economic development benefits in Ohio.⁵

The PUCO approved the Joint Stipulation with some modifications.⁶ CSP and OCC and OEG filed for rehearing of the Commission's Order, and Rehearing was denied in part and granted in part.⁷ On April 26, 2010, CSP filed a notice of appeal at the Supreme Court of Ohio.⁸

On July 16, 2010, OCC submitted a public records request to the PUCO,⁹ requesting the PUCO to disclose certain information in its possession regarding reasonable arrangements that it had approved between public utilities and customers.

³ *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Application (June 15, 2009).

⁴ *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Joint Stipulation and Recommendation (Aug. 5, 2009).

⁵ *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Post Hearing Brief by the Office of the Ohio Consumers' Counsel and the Ohio Energy Group at 1-4, 10-24.

⁶ *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Opinion and Order (Oct. 15, 2009).

⁷ *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Entry on Rehearing (March 24, 2010).

⁸ *Columbus Southern Power Company v. Pub. Util. Comm.*, Case No. 10-723, Notice of Appeal of Columbus Southern Power Company (Apr. 26, 2010).

⁹ See Attachment 1.

Specifically, OCC sought information submitted by the electric distribution utilities, the information submitted by customers (of which Eramet is one) served under PUCO approved reasonable arrangements, and the records related to the PUCO Staff's 2010 review and audit of approved reasonable arrangements. On July 19, 2010, the PUCO notified Eramet and CSP of OCC's public records request. On July 22, 2010, Eramet filed its Motion for Protection.

On July 26, 2010, the PUCO responded to OCC's public records request.¹⁰ Although the PUCO provided OCC with information related to another customer (Ormet), the PUCO did not provide records related to Eramet. The PUCO in its response noted that it was withholding such materials because Eramet had filed a motion for a protective order and the motion is pending before the PUCO. Unfortunately, the PUCO is mixing its authority over its cases with its responsibilities as part of state government under Ohio's public records law. OCC's filing of this Memorandum Contra in a PUCO case, regarding an issue that has arisen following the resolution of a case but under Ohio's public records law, is not in any way a waiver of rights (nor could it be a waiver of such rights) to seek the recourse and remedies available under Ohio's public records law outside the ambit of the PUCO's jurisdiction over cases.

III. ARGUMENT

A. Eramet's Argument

Eramet argues that OCC's public records request relates to information that is not public records that can be divulged by the PUCO Staff.¹¹ Eramet derives its argument

¹⁰ See Attachment 2.

¹¹ Eramet Motion for Protection at 4-9.

from the exemption from disclosure that is contained in R.C. 149.43(A)(1)(v). There, “records the release of which is prohibited by state or federal law” are excluded from the definition of a public record. Eramet asserts that R.C. 4901.16 is a state law which prohibits the release of the information requested by OCC.

Eramet’s sweeping claim against disclosure of public records applies to the entirety of OCC’s request. The information that is not subject to disclosure, under Eramet’s view, includes the reasonable arrangement reports made by it,¹² the reports of CSP summarizing Eramet’s report¹³, and the records of the PUCO Staff’s 2010 review and audit of Eramet’s reasonable arrangement.

From the platform of R.C. 4909.16, Eramet jumps to other equally non-supportable conclusions that would rewrite Ohio’s public records law. One conclusion it reaches is that since the PUCO Staff and it agreed that information it furnished to the Staff¹⁴ would be protected by R.C. 4901.16, then it must be so.¹⁵ Eramet also leapfrogs to the conclusion that Rule 4901:1-38-06(A) “indicates that the information is covered by Section 4901.16, and thus, is not subject to public records request.”¹⁶ Similarly, Eramet

¹² OCC understands these records correlate to OCC’s public records request for “All records containing information related to PUCO approved reasonable arrangements that were transmitted to the PUCO during 2010 by customers served under reasonable arrangements, to meet the reporting requirements of Ohio Admin. Code 4901:1-38-06.”

¹³ OCC understands these records correlate to OCC’s public records request for “All records, including the annual reports and summaries of annual reports, containing information related to PUCO approved reasonable arrangements that were transmitted to the PUCO by each electric utility during 2010, to meet the reporting requirements of Ohio Admin. Code 4901:1-38-06.”

¹⁴ The joint stipulation and recommendation contains no claim for protection under R.C. 4901.16, for information submitted by CSP, or the information related to the Staff’s 2010 review and audit of the Eramet arrangement. Even if it had, the Joint Stipulation cannot preempt Ohio’s public records law.

¹⁵ See Joint Stipulation and Recommendation at 9 “Information furnished to the Commission’s Staff by Eramet in accordance with this reporting requirement shall be treated as information that the Staff has obtained in its investigatory capacity and subject to the same protections as called for pursuant to Section 4901.16, Revised Code.”

¹⁶ See Eramet Motion at 5.

asserts that Rule 4901-1-24(D) recognizes that information submitted to the Staff is protected by R.C. 4901.16.¹⁷ Eramet also argues that “PUCO precedent”—being one discrete holding of the PUCO¹⁸—prohibits the release of the reasonable arrangement information.

Eramet then alternatively argues that if the Commission determines the reasonable arrangements are not prohibited from release to OCC under R.C. 4901.16, they nonetheless should not be released to OCC because they contain trade secrets that should not be “made public.”¹⁹ Latching onto Ohio Admin. Code 4901-1-24, Eramet asks the PUCO to protect the release of the information to OCC by granting its motion for a protective order.

Eramet characterizes the information as relating to specific projects Eramet has or will make capital investments in and the timing of the investments and projects.²⁰ Additionally Eramet alleges that the reports include its actual kilowatt hour usage and the actual prices it paid for electricity.²¹ Eramet summarily concludes that this information amounts to a trade secret under R.C. 1333.61(D). It does so by merely restating the phraseology of the statute, with little or no explanation other than that “public disclosure would jeopardize Eramet’s business position and its ability to compete.”²²

¹⁷ Id. at 8.

¹⁸ Id. at 6, citing *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry on Rehearing at 5 (July 28, 2004).

¹⁹ Eramet Motion for Protection at 9-12.

²⁰ Id. at 9.

²¹ At this time, OCC can not judge the accuracy of these allegations as OCC has not been provided the information in the case (separate from the public records request).

²² Eramet Motion for Protection at 10.

B. Ohio's Public Records Law Contains Only Limited Exceptions To The General Requirement For Disclosure By A Public Office Such As The PUCO.

The PUCO is subject to records statutes in R.C. Title 49.²³ Under R.C. 4901.12, all proceedings of the public utilities commission and all documents and records in its possession are public records. Additionally, under R.C. 4905.07, "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." These public records statutes that are specifically applicable to the Commission "provide a strong presumption in favor of disclosure."²⁴

R.C. 149.43 is Ohio's Public Records Law. It broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records "whose release is prohibited by state or federal law."²⁵ Thus, the issue that Eramet has placed before the Commission is whether the release of the information to OCC is prohibited by state or federal law. Eramet has identified only two potential laws that apply here: R.C. 4901.16 and R.C. 1333.61(D), Ohio's trade secret law.²⁶

²³ These statutes also recognize that there are few exceptions to the Commission's open records policy: those that are established under another section of the Revised Code, R.C. 149.43, and at the same time, are consistent with the purposes of Title 49.

²⁴ See for example, *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990).

²⁵ R.C. 149.43(A)(1)(v).

²⁶ Because Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of "trade secrets," the PUCO and other public agencies are prohibited from releasing public documents that qualify as a trade secret, per R.C. 149.43.

C. The PUCO's Disclosure Of The Information Requested Is Not Prohibited By R.C. 4901.16 Because That Statute Pertains To Information Related To A Public Utility, Not A Mercantile Customer Of A Public Utility.

Under R.C. 4901.16, unless through a report or testimony, members of the PUCO staff are precluded from divulging information acquired “in respect to the transaction, property, or business of any *public utility*”²⁷ while acting as an agent or employee of the PUCO. Thus, R.C. 4901.16 does not protect information that is not related to the transaction, property, or business of a *private entity*, such as a mercantile customer.

Eramet is a mercantile customer. It is not a public utility. The information Eramet seeks to protect from disclosure is its own information—it is not information that relates to the transaction, property, or business of any public utility, as referred to in R.C.4901.16.

The Supreme Court of Ohio opined on the scope of R.C. 4901.16 in rejecting claims that the statute restricted the PUCO Staff from presenting evidence in a hearing, except through a report or testimony.²⁸ There the Court noted that R.C. 4901.16 is connected to the Commission's regulation of public utilities' systems of accounts, through R.C. 4905.13. R.C. 4901.16 prevents employees or agents of the PUCO who examine the accounts, records, or memoranda kept by public utilities pursuant to R.C. 4905.13, from divulging information regarding the utility's transaction, property, or business, the Court ruled.²⁹

Here there is no utility transaction, property, or business under scrutiny. This is not about how CSP is keeping its accounts and records and whether CSP is complying

²⁷ Emphasis added.

²⁸ See *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.* (2007), 113 Ohio St.3d 180, 192.

²⁹ *Id.*

with the form of accounts prescribed by the Commission under R.C. 4905.13. Rather, the information sought by OCC strictly relates to a single customer and its reasonable arrangement. And the information relates to Eramet's duty to demonstrate that it is complying with the reasonable arrangement, as required under Ohio Admin. Code 4901:1-38-06(B).

Contrary to Eramet's allegations, R.C. 4901.16 does not prohibit the release of the information, because that statute simply is not applicable to the facts. Moreover, the fact that the PUCO Staff and Eramet agreed that the information shall be "subject to the same protections as called for pursuant to Section 4901.16, Revised Code"³⁰ is of no consequence under Ohio's public records law. Here again, the PUCO is mixing its positions for purposes of its cases with its separate responsibilities under Ohio's public records law. The Supreme Court of Ohio has established that a government agency's "promises of confidentiality do not alter the public nature" of documents.³¹ The PUCO itself has acknowledged that public entities cannot make promises of confidentiality with respect to public records.³²

Similarly, Eramet's related arguments--on how the rules in the PUCO's section of the Ohio Administrative Code recognize that the information requested is protected under

³⁰ See Joint Stipulation and Recommendation at 9 (Aug. 5, 2009).

³¹ *State ex rel. Gannett Satellite Information Network, d.b.a. The Cincinnati Enquirer v. Shirey* (1997), 78 Ohio St.3d 400, 403, citing *State ex rel. Sun Newspapers v. Westlake Bd. Of Edn.* (1991), 76 Ohio App.3d 170, 173.

³² See *In the Matter of the Application of United Telephone Company d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry at 14-15 (Aug. 10, 2007)(excluding from a protective agreement language that would limit the lawful exercise of OCC's judgment in response to records request); *In the Matter of the Review of Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at 33-34 (Dec. 6, 2006) (The Commission rejected language proposed by AEP that would have prevented disclosure of trade secret information by a public agency. The Commission noted that "establishment of such a procedure, binding upon another government agency, is beyond its statutory authority.").

R.C. 4901.16--must fail as well. There is no indication that Ohio Admin. Code 4901:1-38-06(A) or 4901-1-24(D) recognizes that the information requested is protected from disclosure under R.C. 4901.16. The wording of the rules cited by Eramet does not support such an argument. Eramet's arguments must fall flat as they are unfounded and lack authority.

Nor is the precedent cited by Eramet, alleging R.C. 4901.16 prohibits release of the information, compelling, much less applicable here. Fundamentally, the single case cited by Eramet, the *CG&E* proceeding³³ is not applicable. That proceeding involved information that pertained specifically to research done by Battelle for CG&E related to CG&E's gas riser leaks. It was information that fell directly under R.C. 4901.16—it pertained to “the transaction, property, or business of any *public utility*.” It was not information related to a mercantile customer's usage and business plans.

There are other distinguishing factors as well that make *CG&E* wholly inapplicable here. The information that was being sought was provided *informally* by CG&E to the PUCO Staff. Here, the information is required to be provided, under Ohio Admin. Code 4901:1-38-06. Revealing the information to OCC in the instant case, thus, would not discourage the sharing of information between the utility and the PUCO Staff because the information is required by Ohio rule. In *CG&E* the Commission considered the sharing disincentive to be an important factor weighing in favor of non-disclosure.

Additionally, in the *CG&E* precedent, the Commission seized upon the continuing nature of the investigation as a convincing factor that triggered R.C. 4901.16. Neither Eramet nor the PUCO Staff has made such a claim here. And the investigation, if any,

³³ *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry on Rehearing at 5 (July 28, 2004).

ended with the fulfilling of the obligation of the rule for the PUCO Staff to prepare a report. R.C. 4901.16 is recognized as having a temporal limitation, meaning its limitation on disclosure has an expiration date.³⁴

D. The Commission Should Not Sacrifice Ohio's Public Records Laws On The Altar Of R.C. 4901.16.

If Eramet's arguments on R.C. 4901.16 are accepted, the Commission will be essentially writing into certain statutes (R.C. 149.43, 4901.12 and 4905.07³⁵) an exception (an act that is the province of the General Assembly and not of the PUCO). That exception could preclude disclosure of virtually all information acquired by the Staff of the PUCO even where it is acquired on a formal basis, but not filed, to carry out duties set forth by statute³⁶ and specific rule.³⁷ Wisely, the Commission has declined in the past to accept sweeping claims that would preclude disclosure under R.C. 4901.16.³⁸ It should continue to reject claims here that would erode the General Assembly's public records law applicable to the PUCO.

³⁴ According to the case law that has evolved under R.C. 4901.16 when the Staff's investigation is completed, the prohibition on disclosure dissolves. See e.g. *In the Matter of the East Ohio Gas Company d/b/a Dominion East Ohio Percentage of Income Payment Plan Rider Audit*, Case No. 10-604-GA-PIP, Entry at ¶10 (May 19, 2010). Eramet has presented no evidence that the PUCO Staff's investigation of its reasonable arrangement is ongoing, despite bearing the burden of proving that R.C. 4901.16 applies and precludes disclosure. In fact, the Staff's investigation appears not to be ongoing. In this regard, the PUCO, in responding to the public records request, released information pertaining to other reasonable arrangements, including the Ormet reasonable arrangement. Hence, it appears that: 1) The PUCO staff itself does not believe that R.C. 4901.16 is an exception to the public records law of Ohio, and thus released Ormet's information; or 2) the investigation the Staff was undertaking on the reasonable arrangements is over, and thus is no longer covered by R.C. 4901.16.

³⁵ R.C. 4901.12 and 4905.07 (and their predecessors, G.C. 499-5, and 1465-46) have been part of Ohio public utility regulation since 1913. See G.C. 499-5; H.B. 582; G.C. 1465-46, H.B. 549).

³⁶ Under R.C. 4905.31(E), the Commission shall supervise and regulate each reasonable arrangement, and the arrangements are subject to change, alteration, or modification by it.

³⁷ See Ohio Admin. Code 4901:1-38-06.

³⁸ See *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry on Rehearing at 10-12 (July 28, 2004).

Creating an exception to the R.C. Title 49 public records statutes for materials subject to R.C. 4901.16 is something the Legislature could have done in 1996, when it amended these Title 49 public records statutes. In 1996, the provisions of R.C. 4901.16 were already in place, having been enacted in some form as early as 1911.³⁹

Instead the Legislature amended the R.C. Title 49 public record statutes to recognize limited exceptions to public records— those that are consistent with the purposes of Title 49 and at the same time recognized under Ohio Public Records law, R.C. 149.43:

Sec. 4901.12 ~~ALL~~ EXCEPT AS PROVIDED IN SECTION 149.43 OF THE REVISED CODE AND AS CONSISTENT WITH THE PURPOSES OF TITLE XLIX OF THE REVISED CODE, ALL proceedings of the public utilities commission and all documents and records in its possession are public records.

Sec. 4905.07. ~~ALL~~ EXCEPT AS PROVIDED IN SECTION 149.43 OF THE REVISED CODE AND AS CONSISTENT WITH THE PURPOSES OF TITLE XLIX OF THE REVISED CODE, ALL facts and information in the possession of the public utilities commission shall be public and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.⁴⁰

That the General Assembly deemed it appropriate to amend the Title 49 public records laws to recognize the 1953 Ohio Public Records law, while not addressing the existing R.C. 4901.16, evinces a clear legislative intent. Had the Legislature wanted to create an exception to the Title 49 public record statutes for R.C. 4901.16, it could have done so when it rewrote the Title 49 public records statutes in 1996. It did not do so and

³⁹ See H.B. 325, G.C. 614-11 (1911). This section was slightly rewritten in 1953.

⁴⁰ See Am Sub. H.B. No. 476 (1996).

the PUCO should not do what the General Assembly chose not to do. Doing so would be contrary to the manifest intent of the General Assembly to provide for only limited exclusions to the Title 49 public record statutes—those recognized under Ohio's public records law that are consistent with the purposes of Title 49.

E. The PUCO's Release Of The Requested Information To OCC Is Not Prohibited Under The Trade Secret Exemption From Ohio's Public Record Statutes.

- 1. Eramet has failed to show how the information has independent economic value, which is required under R.C. 1331.61(D). Neither has Eramet shown how disclosure to OCC under OCC and Eramet's Protective agreement (if disclosure were to occur in this case and if the records actually qualify as trade secrets), amounts to public disclosure that could cause harm to it.**

The Commission has made it clear that a movant who seeks to protect information *from the public* in a case must raise "specific arguments as to how *public disclosure* of the specific items could cause them harm, or how disclosure of the information would permit the companies' *competitors* to use the information to their advantage."⁴¹ Such a standard is in accord with the specific provisions of Ohio's trade secret exemption from public records, R.C. 1331.61(D).

R.C. 1331.61(D) defines a trade secret as:

- D) information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of

⁴¹ *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990). This is consistent with Ohio Adm. Code 4901-1-24(D)(3) that requires movants for confidentiality to file a pleading "setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure ***." See also Ohio Adm. Code 4901-1-27(B)(7)(e) that requires "[t]he party requesting such protection shall have the burden of establishing that such protection is required."

names, addresses, or telephone numbers, that satisfies both of the following:

- 1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Under R.C. 1331.61(D) a trade secret must qualify under Section (D) as one of the forms of information listed and must then satisfy both criterion one and two: the information must have “independent economic value” and must have been kept under circumstances that maintain its secrecy.

This Commission, as well as the Supreme Court of Ohio, has had several occasions to address what constitutes a “trade secret.” The Supreme Court of Ohio has adopted, and this Commission has recognized,⁴² the following factors in analyzing a trade secret claim:

- (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information⁴³

⁴² See *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 8-9 (November 25, 2003) (citations omitted).

⁴³ See *Plain Dealer v. Department of Insurance* (1988), 80 Ohio St.3d 513, 524-524 (citations omitted).

While Eramet addresses factor three in its motion, it seems to have completely disregarded all the other factors. Eramet focuses completely on the “secrecy” factor without first establishing that there is a something of independent economic value to protect.

Although Eramet argues that the information is a trade secret it fails to produce anything but conclusory statements to address the “economic value” issue. Eramet merely alleges that its actual usage and capital investment plans are “competitively sensitive and highly proprietary business financial information” falling within R.C. 1331.61(D). It merely parrots back the statutory phrases with no explanation. Neither does it provide citation to support its allegations that this is the “type of information routinely accorded protected status by the Commission.”⁴⁴

The PUCO has held, in analyzing whether *others* (i.e. competitors) can obtain “economic value” from the disclosure, that economic value is not derived simply by the fact that the information is not generally known by other persons.⁴⁵ This is exactly what Eramet pleads when it alleges that the information is a trade secret because it pertains to confidential information from it that competitors could use.⁴⁶

Even assuming, *arguendo*, that the information sought amounts to a trade secret, and the Commission finds it does not constitute a public record, there is no basis for withholding it from OCC. OCC is not a competitor of Eramet. And, if the disclosure were to occur as part of this case, OCC would receive the information subject to the

⁴⁴ See Motion at 10.

⁴⁵ *In the Matter of the Application of the Ohio Telephone Company for Approval of an Alternative Form of Regulation*, Case No.93-487-TP-ALT, Entry at 10 ((November 25, 2003). There the Commission found that data compiled by SBC Ohio that listed locations where broadband service had been deployed was not a trade secret. *Id.*

⁴⁶ See Motion for Protective Order at 3-4.

terms of its current protective agreement with Eramet. That protective agreement gives Eramet more protections than it currently has regarding the PUCO's possession of the information. That protective agreement is what Eramet itself negotiated and signed with OCC.

2. Commission precedent does not support protecting Eramet's information from disclosure to OCC

Numerous Commission holdings over the years provide guidance as to what documents qualify as trade secrets. Wisely, consistent with the public records laws in Ohio, the Commission has chosen in a number of cases to strictly construe what is a "trade secret."

The PUCO has determined that the details of business arrangements between utilities and third parties do not qualify for protection from disclosure. For instance, contracts between a utility and its customers have been found not to meet the definition of trade secrets.⁴⁷ The Commission has also held that inter-connection agreements containing the rates, terms, and conditions of interconnection between a local exchange company and a competitive local service provider do not amount to a trade secret.⁴⁸

The Commission has also held that financial data, including basic financial arrangements, do not contain proprietary information worthy of trade secret protection.⁴⁹ Additionally, financial statements of an inter-exchange carrier have likewise been found

⁴⁷ *In the Matter of Several Applications of Cincinnati Bell Telephone Company for Approval of a Contract or Other Arrangement between Cincinnati Bell Telephone Company and Various Customers*, Case No. 96-483-TP-AEC, Entry at 4-7 (February 12, 1998).

⁴⁸ *In the Matter of Application of Ameritech Ohio for Approval of an Interconnection Agreement between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 96-604-TP-UNC, Attorney Examiner Entry at 2-3 (July 10, 1996).

⁴⁹ *In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, Entry at 5 (August 11, 2004).

not to be a trade secret.⁵⁰ Even detailed financial information such as balance sheets, plant, accumulated depreciation, and amortization has been found to fail to meet the trade secret definition.⁵¹

Moreover, the Commission has found on occasion that sensitive business information may not be protected from disclosure. For instance, the Commission has declined to interpret as a trade secret the calling data that reveals business information such as traffic volume and revenues from interLATA calls between exchanges.⁵² Interconnection demand letters and timelines for interconnection have been determined not to amount to trade secrets.⁵³ The Commission has also ruled that the fair market value and net book value of assets sought to be transferred need not be protected from disclosure.⁵⁴

These holdings convey a conservative approach to defining trade secrets—an approach that recognizes that the trade secret provisions of R.C. 1333.64 create a very limited and narrow exception to Ohio's public records law.⁵⁵ The PUCO should conclude, based on the information provided by Eramet, that Eramet's usage and its

⁵⁰ *In the Matter of the Application of Rapid Transmit Technology, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Attorney Examiner Entry at 2-3 (October 1, 1999).

⁵¹ *In the Matter of the Filing of Annual Reports by Regulated Public Utilities*, Case No. 89-360-AU-ORD, Entry at 7-11 (August 1, 1989).

⁵² *In the Matter of the Petition of Alvahn L. Mondell, et al. v. The Ohio Bell Telephone Company Relative to a Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, Entry (May 16, 1989).

⁵³ *See In the Matter of the Application of CTC Communications Corp. for a Certificate of Public Convenience and Necessity to Provide Local and Telecommunication services in Ohio*, Case No. 00-2247-TP-ACE, Entry at 3-4 (February 8, 2001).

⁵⁴ *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 3-8 (October 18, 1990).

⁵⁵ *See In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 7 (November 25, 2003)(citations omitted).

capital spending on the project that Eramet wants CSP customers to fund, through electric rate discounts of \$40 million, does not equate to a trade secret.

Moreover, even if the Commission determines that the information amounts to a trade secret, if it ordered disclosure *in this case* under the terms of the Eramet/OCC protective agreement, then Eramet would have the protections of the protective agreement that it negotiated and signed with OCC.

3. The Commission's prior rulings in the Eramet case where the Commission accorded protected status to related information are not controlling.

Although Eramet emphasizes that the Commission has already determined that the information should receive protected status⁵⁶, Eramet's arguments in this regard should be rejected. First, Eramet is again mixing the PUCO's regulatory authority over its cases with the PUCO's responsibilities under Ohio's public records law. As explained above, the PUCO has the obligation to provide the information to OCC according to Ohio's public records law.

Second, when Eramet's motion for protection was granted, it was granted without opposition from any party, including OCC. OCC did not oppose Eramet's motion for protection of portions of its pre-filed testimony (allegedly containing similar information) because OCC was, under the terms of a protective agreement, given access to the information. Furthermore, OCC was able to cross-examine Eramet's witnesses on the substance of the protected testimony. There was no prejudice to OCC from granting protected status to the information.

⁵⁶ Eramet Motion at 11.

Here, though, prejudice abounds and OCC is opposing the motion for protection. There is prejudice to OCC in precluding OCC from reviewing information on the economic development arrangement that is supposed to be the justification for Eramet's receipt of \$40 million of funding from CSP's customers. By seeking to block OCC's access to, and review of, Eramet's justification to Ohio government for receiving funding by other electricity customers, Eramet is seeking to deny the state's utility consumer advocate the opportunity to review whether Eramet is complying with its end of the bargain. Eramet is required to show that it is taking steps toward securing corporate approval of the capital investment—the capital investment is the quid-pro-quo for the discounted rates.

While Eramet could merely provide the information in this case pursuant to the protective agreement in place between it and OCC in this case,⁵⁷ Eramet nonetheless refuses to resolve this issue the easy way. Eramet's Counsel confirmed that the premise of its refusal to release the information is not that the protective agreement is insufficient. Rather Eramet believes that OCC is not entitled to it. Such an approach is unreasonable and unjustified. At a time when Eramet should be engaging in a cooperative approach with the representative (OCC) of many of the customers who are collectively paying millions of dollars for Eramet's discount--a discount that is intended to achieve economic development--Eramet is instead expending funds on mounting legal efforts to keep its justification for the discount secret from the representative of the consumers who are paying for the discount.

⁵⁷ See the Protective Agreement, in Attachment 3.

F. The Commission Cannot Protect Information Requested Under Ohio Admin Code 4901-1-24, As The Statute Relates To Discovery, And Filed Documents, Not Public Records Requests.

Eramet relies upon Ohio Admin. Code 4901-1-24, to seek protection so that the PUCO does not release information to OCC in response to OCC's public records request. Eramet is mistaken in its belief that the Commission has authority under that rule to prevent disclosure of information requested through a public records request. Ohio Admin. Code 4901-1-24 does not provide such authority. Eramet is again inappropriately mixing the PUCO's regulatory authority with the PUCO's responsibility as a state office under Ohio's public records law.

Ohio Admin. Code 4901-24 (A), (B), and (C) relate solely to a motion for protection from *discovery*. Subsection (A) clearly states: "*Upon motion of any party or person from whom discovery is sought* the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Subsections (B) and (C) refer back to subsection (A), and merely explain the requirements of a motion for protection and the Commission's ability to deny the motion in whole or part. OCC's public records request is not discovery. Thus, Ohio Admin. Code 4901-1-24 does not provide protection for Eramet's information.

Neither does subsection (D) of 4901-1-24 apply. Subsection (D) relates to seeking protection against the *filing of a document* with the commission's docketing division *related to a case before the commission*. It reads: "Upon motion of any party or person with regard to the filing of a document with the commission's docketing division relative to a case before the commission, the commission, the legal director, the deputy

legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document.” The documents requested by OCC do not pertain to the filing of a document with the commission.

Neither do the documents necessarily pertain to a case presently before the Commission. CSP has appealed the case. Generally, when the record is transmitted to the Court on appeal, the PUCO relinquishes jurisdiction of such matters to the PUCO.⁵⁸ It is not even clear then that the case is before the Commission at this point, which is a requirement under subsection (D) of 4901-1-24.

That these rules are not applicable to the public records request made by OCC is made clear in particular in the language contained in subsection (G) of Ohio Admin. Code 4901-1-24. There the rule provides that “[t]he requirements of this rule do not apply to information submitted to the commission staff.”

Because Eramet relies solely on Ohio Admin. Code 4901-1-24 to seek to preclude the release of the information requested by OCC, its arguments must fail. This section of the Ohio Administrative Code is not applicable to public records requests. The Commission should not try to fit a square peg in a round hole, as Eramet seems to urge in mixing the PUCO’s regulatory authority with the PUCO’s responsibility under the public records law. Its request for protection under Ohio Admin. Code 4901-1-24 should be rejected.

⁵⁸ *The State, ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97.

G. There Are Policy Reasons To Support Disclosing The Information Requested To OCC, That Outweigh Any Interest Eramet Has In Keeping The Information From OCC.

This Commission has emphasized the importance of the public records laws and has noted that "Ohio public records law is intended to be liberally construed to 'ensure that governmental records be open and made available to the public...subject to only a very few limited exceptions.'"⁵⁹ Furthermore, this Commission has established a policy that confidential treatment is to be given only under extraordinary circumstances.⁶⁰

Often the Commission has used a balancing approach to resolve issues of disclosure. For instance, the PUCO has noted "it is necessary to strike a balance between competing interests. On the one hand, there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision."⁶¹

Here, the "public scrutiny" recognized by the PUCO as part of the public process of regulation should include review by the advocate for the 700,000 consumers who are

⁵⁹ See for example, *In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, Attorney Examiner Entry at 3, citing the Commission's Order *In the Matter of the Application of IB The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry (November 23, 2003)(relying on *State ex rel Williams v. Cleveland*, 64 Ohio St. 3d 544 (1992)).

⁶⁰ See *In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement With American Steel & Wire Corp.*, Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing at 3 (September 6, 1995).

⁶¹ *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2-3 (October 1, 1999); see also *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Entry at 7 (October 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.").

paying part of \$40 million in electricity discounts to Eramet in exchange for promised economic development benefits. Under the Commission Order Eramet has been receiving discounted electric rates, since the arrangement was approved.⁶² The information contained in the reports sought will enable customers who are paying for the discount to determine if Eramet has made any progress in securing the necessary corporate commitments from Eramet S.A. to go forward with the \$40 million capital expenditure. These commitments are the quid pro quo for the discounted rates.

Indeed the PUCO noted, in approving the reasonable arrangement, that it retains the ability to consider and make modifications to the arrangement in the event that it determines that Eramet has not satisfied its commitments or that reasonable progress has not been made to secure corporate approvals for capital investment, *or for good cause shown*.⁶³ It is noteworthy that under the Commission's words, others including the Commission itself, CSP, OCC, and OEG, may raise concerns about whether the terms of the reasonable arrangement are being fulfilled. This PUCO ruling cannot be reduced to mere empty words by those who would prevent access to the information that is needed to participate in the ongoing process that the PUCO contemplated.

On the other hand, Eramet's only policy argument to speak of is its allegation that releasing the report *to OCC* (not the public) will have a chilling effect on mercantile

⁶² OCC and OEG recommended that the discounted electric rates should not begin until Eramet notifies the Commission that it has received final corporate approvals to go forward with the investment. This was a condition of approval for the V&M Star reasonable arrangement. *See In the Matter of the Application for Establishment of a Reasonable Arrangement between the Ohio Edison Company and V & M Star*, Case No. 09-80-EL-AEC, Entry on Rehearing at 2-3 (April 29, 2009). The Commission declined to adopt such an approach for the Eramet reasonable arrangement.

⁶³ *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Opinion and Order at 12 (Oct. 15, 2009).

customers coming forward with reasonable arrangements.⁶⁴ Interestingly enough, sharing of information with OCC, through protective agreements reached between OCC and V&M, Eramet, and Ormet, has never before been described as having a chilling effect on reasonable arrangements.

In fact, many applications for reasonable arrangements have been filed that contain allegedly sensitive information which has been provided to the PUCO and OCC under controlled circumstances such as a protective agreement. Sharing of allegedly sensitive information with regulators and interested parties in order to obtain discounted rates is merely part of the process to obtain preferred treatment.

In this case, the public's interest in disclosure is great because Ohio customers are parrying \$40 million in electricity discounts to Eramet. Ohioans are expecting that in return for the funding Eramet will be delivering the quid pro quo of promised economic development. The PUCO should deny Eramet's motion for protection.

IV. CONCLUSION

For the reasons stated herein, the Commission should find that R.C. 4901.16 does not prohibit the PUCO from releasing the information requested by OCC in its public records request. As discussed this information does not amount to public utility information—rather it is strictly information about a mercantile customer's usage and business plans. Hence, there is nothing in R.C. 4901.16 that prevents the Staff from disclosing the information.

Further, the PUCO should deny Eramet's Motion for Protection. If the release of the information occurs in this case, then the release of the information requested would

⁶⁴ Eramet Motion at 12.

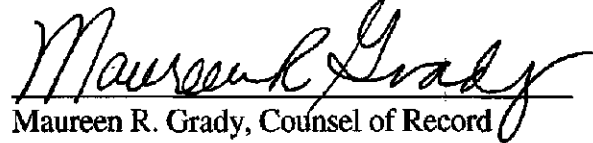
be to OCC under the terms of the current protective agreement that exists between OCC and Eramet. This is not the sort of public disclosure that triggers claims of injury that could result from disclosing trade secret information into the hands of Eramet's competitors. Rather it is information that OCC seeks to review to determine if Eramet is meeting its end of the bargain, where the costs of its significant electricity discounts are paid by Ohio customers in exchange for promised economic development to benefit Ohioans.

Eramet's efforts to shield this information from OCC are unjustified. There is no legitimate basis under the Ohio public records law for blocking OCC's access to the information. There is no legitimate basis in this case under the PUCO's regulatory authority for blocking OCC's access to the information. At a time when Eramet should be engaging in a cooperative approach with the representative (OCC) of many of the customers who are collectively paying millions of dollars for Eramet's discount--a discount that is intended to achieve economic development--Eramet is instead expending funds on mounting legal efforts to keep its justification for the discount secret from the representative of the consumers who are paying for the discount.

The PUCO should release the information to OCC either in this case or in response to the public records request, with all due speed.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

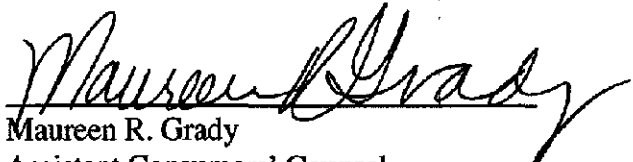
A handwritten signature in cursive script, reading "Maureen R. Grady", written over a horizontal line.

Maureen R. Grady, Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
(614) 466-9475 (Facsimile)
grady@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra Eramet's Motion for Protection was served by regular U.S. Mail Service, postage prepaid, to the following parties of record, this 9th day of August, 2010.


Maureen R. Grady
Assistant Consumers' Counsel

SERVICE LIST

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Office of the Ohio Consumers' Counsel

Your Residential Utility Consumer Advocate

Janine L. Migden-Ostrander
Consumers' Counsel

July 16, 2010

Via Hand Delivery and E-mail
(jodi.bair@puc.state.oh.us)

Jodi J. Bair
Deputy Director, Utilities Department
Public Utilities Commission of Ohio
180 East Broad Street, 3rd Fl.
Columbus, Ohio 43215

Re: Request for Records

Dear Ms. Bair:

I write to request that the Public Utilities Commission of Ohio ("PUCO" or "Commission") provide to me all of the following records:

All records, including the annual reports and summaries of annual reports, containing information related to PUCO approved reasonable arrangements that were transmitted to the PUCO by each electric utility during 2010, to meet the reporting requirements of Ohio Admin. Code 4901:1-38-06. This should include but not be limited to the Eramet, Ormet, and V&M reasonable arrangements.

All records containing information related to PUCO approved reasonable arrangements that were transmitted to the PUCO during 2010 by customers served under reasonable arrangements, to meet the reporting requirements of Ohio Admin. Code 4901:1-38-06. This should include but not be limited to the Eramet, Ormet, and V&M reasonable arrangements.

All records containing information relating to the Staff's 2010 review and audit of PUCO approved reasonable arrangements required under Ohio Admin. Code 4901:1-38-06. This should include but not be limited to the Eramet, Ormet, and V&M reasonable arrangements.

This request is made under the Ohio Public Records Act, and includes but is not limited to the definitions of records under R.C. 149.011(G). I also make this request pursuant to R.C. 4911.16.

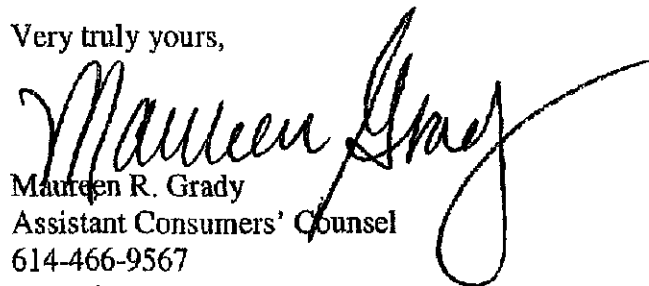
I request these records in an electronic format if such electronic versions are available; otherwise, the records should be provided in the format available. Please contact me by phone or email in advance of copying records, if the copying charges to OCC will exceed \$225.00.

Jodi Bair
July 16, 2010
Page Two

Please contact me to advise when the records are ready to be picked up at the PUCO. Please provide these records by July 22, 2010.

Thank you Jodi.

Very truly yours,

A handwritten signature in black ink, appearing to read "Maureen Grady", with a long, sweeping horizontal stroke extending to the right.

Maureen R. Grady
Assistant Consumers' Counsel
614-466-9567
grady@occ.state.oh.us



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

July 23, 2010

Via Hand Delivery

Maureen R. Grady
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, Ohio 43215-3485

Dear Ms. Grady,

As legal counsel to the Public Utilities Commission of Ohio, I am responding to your public records request, which was dated July 16, 2010. Enclosed is a compact disc containing the records identified by the staff of the Commission as responsive to your request.

Please be aware that Eramet Marietta, Inc. filed a motion for a protective order on July 22, 2010 in Case No. 09-516-EL-AEC in response to your public records request. The company, citing R.C. 4901.16 and 1333.61, seeks to protect certain records from release. As this motion is pending before the Commission, these records have not been included on the enclosed disc.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Sarah J. Parrot".

Sarah J. Parrot
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
Phone: (614) 466-4396
Fax: (614) 644-8764

Enclosure

cc: Jodi Bair
Sandra Coffey

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between Eramet Marietta Inc., ("Eramet") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, the "Parties"). This Agreement is designed to facilitate and expedite the exchange with OCC of all information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between Eramet and OCC as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials or any resolution of Eramet's obligation to produce (including the manner of production) any requested information or material.

1. The purpose of this Agreement is to permit access to and review of such Protected Materials in a controlled manner that will allow their use solely for the purposes of this Proceeding while protecting such data from disclosure without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. "Proceeding" as used throughout this document shall mean the above-captioned case, including any appeals.

3. "Protected Materials" shall mean documents and information furnished subject to the terms of this Agreement and so designated by Eramet by conspicuously marking each document or written response as confidential, or by counsel for Eramet orally notifying OCC's counsel, on the deposition record, prior to a response to a question posed at a deposition, that the response is considered "Protected Materials". Protected Materials shall not include any information or documents contained in the public files of any state or federal administrative agency or court and shall not include documents or information which at, or prior to, commencement of this Proceeding is or was otherwise in the public domain, or which enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement shall not be deemed to have caused such Protected Materials to have entered the public domain.

To the extent that documents or information are stored or recorded in the form of electronic or magnetic media (including information, files, databases, or programs stored on any digital or analog machine-readable device, computers, discs, networks or tapes) ("Computerized Material"), Eramet, at its discretion may produce Computerized Material in such form. To the extent that OCC reduces Computerized Material to hard-copy form, OCC shall conspicuously mark such hard-copy as confidential, but Eramet shall conspicuously mark such Computerized Material as confidential.

To the extent that OCC creates, develops, or otherwise establishes on any digital or analog machine-readable device, recording media, computer, disc, network, tape, file, database, or program documents or information designated by Eramet as Protected Materials, OCC shall take all necessary steps to ensure that access to Protected

Materials is properly restricted to Authorized Representatives, as such term is defined in paragraph 8 below.

4. Portions of deposition testimony and deposition exhibits shall be designated as Protected Materials by making a statement to such effect on the record during the course of the deposition by counsel for Eramet. Each deposition transcript (including copies) and deposition exhibit (including copies) that constitutes or contains Protected Materials shall be marked conspicuously as confidential. If portions of a videotaped deposition are designated as Protected Materials, the videocassette or other media containing the video shall be marked conspicuously as confidential.

5. Protected Materials provided in the context of this Proceeding shall be provided to OCC, and at Eramet's discretion, may be provided for "viewing only" at Eramet's offices or the offices of its legal counsel, for use by OCC solely in conjunction with this Proceeding. Protected Materials shall not be used by any person, other than Eramet, for any purpose (whether public, private, business, personal, competitive, or otherwise) other than for purposes of this Proceeding. Eramet agrees that OCC's Authorized Representatives will be granted unlimited occasions on which to review the information that has been provided for "viewing only." Additionally, OCC's Authorized Representatives may need to make writings and/or obtain copies of the Protected Materials provided initially for viewing only, for the purposes of preparing for and conducting this proceeding. OCC will promptly notify Eramet of the need to make writings or obtain copies of documents and Eramet may either agree to such or must request, no later than 1 business day after notice from OCC, a prompt oral argument and ruling on the matter from the Attorney Examiner. Nothing in this Agreement

precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement shall not be deemed to have caused such Protected Materials to have entered the public domain.

6. All Protected Materials filed with an administrative agency or court shall be filed in compliance with the rules of the administrative agency or court for filing under seal. Eramet can seek a result that no person, other than OCC's Authorized Representatives and attorneys of record in this Proceeding or authorized personnel from the administrative agency or court, shall have access to any sealed document, item, or information from the files of the administrative agency or court without an order of the administrative agency or court, subject to OCC's rights under paragraph 12 below.

7. The rules and procedures governing use of Protected Materials at hearings in this Proceeding shall be determined at a future date.

8. As used in this Agreement, the term "Authorized Representative" shall include OCC's counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

9. Access to Protected Materials is solely permitted to OCC's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC shall treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom (including, without limitation, Protected Materials

comprised of portions of transcripts) as proprietary and confidential, and shall safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent disclosure to any persons other than OCC's Authorized Representatives or from use other than for preparing or conducting this Proceeding.

10. In the event that any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person shall be terminated immediately and such person shall promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there shall be no such Authorized Representative, such person shall treat such Protected Materials in the manner set forth in paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has agreed to the attached Non Disclosure Certificate shall continue to be bound by the provisions of this Agreement even if no longer so engaged.

11. In this Proceeding, OCC may disclose Protected Materials or OCC writings regarding their contents to any individual or entity that is already in possession of said Protected Materials, but only if that person or entity is bound by a protective order or a similar protective agreement with Eramet with respect to the Protected Materials that may be disclosed by OCC and disclosure is consistent with the terms and conditions of that protective order or similar protective agreement. OCC may disclose Protected Materials to employees of the Public Utilities Commission of Ohio.

12. If OCC receives a public records request for the Protected Materials, or if OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require or may reasonably be

expected to lead to disclosure of such material, OCC shall first give notice to Eramet (as provided in Paragraph 13), specifically identifying each of the Protected Materials that could be disclosed in the public domain or to third persons not subject to a protective order or protective agreement with Eramet. After service of OCC's notice, Eramet shall have five (5) business days within which to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials, including, if applicable, the reasons the Protected Materials should not be produced in response to a public records request. The affidavits for the motion shall set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If Eramet files such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If Eramet does not file such a motion within five (5) business days of OCC's service of the notice, then OCC may treat the materials as non-confidential, not a trade secret and not subject to this Agreement, provided that such treatment is deemed by OCC to be in accordance with Ohio law. Alternatively, Eramet may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such proceedings

should be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present.

Any portions of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected shall be filed under seal. OCC may file Protected Materials under seal or use Protected Materials *in camera* in this Proceeding regardless of whether OCC seeks a ruling that the Protected Materials should be in the public domain. All Protected Materials shall remain confidential pending a ruling by such administrative agency or court.

13. All notices referenced here must be served on Eramet, to the attention of one of Eramet's counsel in this case by: (1) hand-delivering the notice to the counsel's offices, or (2) hand-delivering the notice to Eramet's counsel in person at any location.

14. It is expressly understood that upon a filing made in accordance with paragraphs 12 and 13 of this Agreement, the burden shall be upon Eramet to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

15. The inadvertent production of any Protected Materials and/or other information subject to the attorney-client privilege shall be without prejudice to any claim that such information constitutes Protected Materials or is privileged provided that Eramet advises OCC of such inadvertent production or disclosure promptly upon discovery. Upon discovering that information provided by Eramet appears to contain privileged information and has been inadvertently produced, OCC shall notify Eramet and return one copy of the information upon request. OCC may challenge Eramet's

assertions, including the assertion of privilege.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC shall return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain (in a manner not inconsistent with the terms of this Agreement, protective order, or a similar protective agreement with Eramet) or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross examination, transcripts, briefs and work product pertaining to such information and shall maintain that copy under secure conditions as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute Eramet's determination regarding any material identified as "Protected Materials" by Eramet, and to dispute the manner in which the Protected Materials are provided to OCC (including Eramet's determination that documents are to be provided for "viewing only") and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel with regard to any issue involving the "Protected Materials," including that OCC is not precluded from filing a motion with regard to the manner in which Eramet provides "Protected Materials" to OCC.

18. By entering into this Protective Agreement, Eramet does not waive any right it may have to object to the discovery of confidential material on other grounds and to pursue those remedies that may be available to Eramet before the administrative agency of competent jurisdiction or court of competent jurisdiction. Nor shall this Agreement be construed as a waiver by Eramet of any legally cognizable privilege to withhold any Protected Materials on any basis other than that it has been designated as such, and the inadvertent production of privileged material also shall not be deemed a waiver of the privilege.

19. This Protective Agreement shall not be relied upon or cited as precedent in any future proceeding for or against any party, except to enforce this Agreement.

20. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement shall be valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

21. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

22. Upon the final resolution of this Proceeding, this Agreement shall remain in effect and continue to be binding, unless expressly modified, superseded, or terminated by written agreement of Eramet and OCC or by order by the administrative agency of competent jurisdiction or court of competent jurisdiction, which shall retain jurisdiction over this Proceeding for enforcement of this Agreement following final

resolution of this Proceeding.

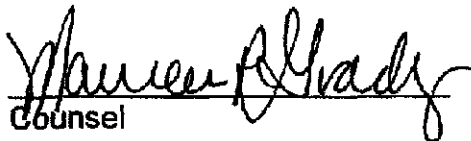
23. Nothing in this Agreement shall prevent either party from applying to the administrative agency of competent jurisdiction or court of competent jurisdiction for modifications to this Agreement, after making good faith attempts to resolve issues that arise under implementation of this Agreement.

Eramet Marietta Inc.
BY:


Counsel

7/23/09
Date

Office of the Ohio Consumers' Counsel
BY:


Counsel

7/23/09
Date

BEFORE THE

PUBLIC UTILITIES COMMISSION OF OHIO

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

NON-DISCLOSURE CERTIFICATE

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed July 23, 2009, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from Protected Materials shall not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and shall be used only for the purposes of this "Proceeding" as defined in paragraph two of the Protective Agreement.

Name:

Company:

Address:

Telephone: