BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company	**)** **)** **)** **)**	**Case No. 09-119-EL-AEC**

OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO ORMET PRIMARY ALUMINUM CORPORATION'S MOTION TO AMEND AND REQUEST FOR EMERGENCY RELIEF

I. INTRODUCTION

Ormet Primary Aluminum Corporation (Ormet) has an existing unique arrangement with Ohio Power Company (AEP Ohio) that was approved by the Public Utilities Commission of Ohio (Commission). In February 2013, Ormet filed a reorganization bankruptcy petition in before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") to initiate Case No. 13-10334, which remains pending. The purchaser of Ormet's assets in the Bankruptcy Court is Smelter Acquisition LLC, which is an affiliate of Wayzata Investment Partners LLC. Other Wayzata owned or affiliated entities are either pre or post-petition lenders of Ormet. On June 14, 2013, Ormet filed a motion to amend the 2009 unique arrangement and request for emergency relief. Ormet's request for emergency relief is procedurally and substantively defective, as explained below. In addition, under the existing contract as well as bankruptcy law, Ormet cannot amend the contract without AEP Ohio's consent – which it does not have. Moreover, both the Commission and, ultimately, the Supreme Court determined that the contract was airtight, fully binding and ensured that there was "no risk" of Ormet leaving AEP Ohio during the contract term. Consequently, the Commission should deny the request for

emergency relief and establish a comment cycle and/or evidentiary hearing process schedule to consider Ormet's controversial proposals with greater care and scrutiny.

II. ARGUMENT

A. R.C. 4909.16 does not provide a valid legal basis for granting Ormet's request for emergency relief because the requested relief is not temporary in nature and is otherwise inappropriate under R.C. 4909.16 (and R.C. 4905.31), and the statute requires consent by the affected utility (and AEP Ohio does not consent to Ormet's proposed relief).

Ormet's request for emergency relief relies upon R.C. 4909.16, which states in relevant part as follows:

> When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in cases of any emergency to be judged by the commission, it may temporarily alter, amend, or, *with the consent of the public utility concerned*, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state.

(Emphasis added).

The Ohio Supreme Court has construed R.C. 4909.16 as vesting the Commission with broad discretionary powers in determining when an emergency exists and in tailoring an appropriate temporary remedy to meet the emergency. *See Cambridge v. Pub. Util. Comm.* (1953), 159 Ohio St. 88. But the court has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature. *See Cincinnati v. Pub. Util. Comm.* (1948), 149 Ohio St. 570. Thus, in connection with Ormet's motion, the Commission must first address the threshold issue of whether the potential injury alleged by Ormet requires emergency relief to prevent injury to the public. Specifically, when the public injury alleged by Ormet is balanced against several millions of dollars of additional costs that are shifted to AEP Ohio ratepayers as a

direct result of the relief Ormet seeks, the Commission may conclude granting the requested relief will cause – not prevent - "injury to the business or interests of the public." Further, while Ormet claims (Motion at 3) that this entire set of issues needs to be resolved by July 31, 2013 and uses that as the basis for an emergency, the reality is that this is a self-imposed deadline and the proposed new owner can grant multiple 30-day extensions beyond this date under the terms of the "stalking horse" agreement filed with the bankruptcy court.[1]

Even if the Commission determines that the alleged injury requires it to exercise its discretionary emergency power, Ormet will have the burden of proving an emergency exists and that action is necessary to protect the health, safety, and welfare of the public. *See Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347. The Commission has determined that economic hardship in a community does not necessarily equate to the level of an existing emergency requiring action necessary to protect the public. *See In the Matter of the Complaint of the Board of Education of the Cleveland City School District v. The Cleveland Electric Illuminating Company,* Case Nos. 91-2308-EL-CSS and 92-504-EL-CSS, Entry at p. 8 (July 2, 1992) ("The Board's assertion that is has financial problems and that CEI is threatening to charge the schools under its tariffs do not provide sufficient grounds to find that an emergency situation exists to alter or amend CEI's rates.") Further, the Commission has stated that when exercising its discretion under the statute, "the existence of an emergency is a condition precedent to any grant of temporary rate relief . . . . [and] the applicant's supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation" to the public or the subject public utility. *See In the Matter of the Application of Akron Thermal, LP for an*

[1] The purchase agreement is attached as Exhibit A to these comments and Section 4.03(h) is the provision that permits up to six 30-day extensions.

Emergency Increase in its Steam and Hot Water Rates and Charges, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001) (citing *Toledo Edison Co.*, Case No. 84-1286-EL-AEM (Feb. 19, 1985).

If the Commission considers invoking R.C. 4909.16 and examines that statute as a basis for authority, it should recognize that the relief Ormet requests exceeds what the Commission is authorized under the statute to grant. The Commission "may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates." R.C. 4909.16. The authorized relief is interim in nature and only for so long as needed to address the emergency. *See Akron Thermal* at 3 ("Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.") Ormet asks the Commission to act on an emergency basis to shorten the term of its contract by three years and allow it to shop effective January 1, 2014. *See* Motion at 10. These are both very permanent forms of relief, and the Commission – as a creature of statue – is without statutory authority to grant this relief using R.C. 4909.16. Further, even a temporary suspension of rates requires consent of the public utility concerned, and the Company objects and does not consent on a temporary basis, let alone does it consent to the permanent effects of either permitting Ormet to shop or terminate the contract early.

Shortening the term of the contract by three years and allowing Ormet to shop effective January 1, 2014 also impairs AEP Ohio contract rights. Such permanent relief violates constitutional restraints against impairment of the obligations of contract and constitutional guarantees of due process. *See* U.S. Const. Art. I, § 10; U.S. Const. Amend. XIV, § 1; Ohio Const. Art. I. § 16; and Ohio Const. Art. II, § 28. In addition to lacking the authority to provide permanent relief under R.C. 4909.16, the Commission does not have the power to cancel a

contract under R.C. 4905.31 either. When AEP sought to cancel a prior special arrangement with Ormet in the 1970s, Ormet successfully argued that the Commission lacked authority to cancel the special arrangement. The Commission stated, "The Commission must agree on this point. It is axiomatic that this Commission, as a creature of statute, has no powers beyond those conferred by statute. *Akron v. Barberton Belt Rd. v. Pub. Util. Comm.* (1956), 165 Ohio St. 316 (1956). Considering this constraint in conjunction with that maxim of statutory construction, *expressio unius est exclusio alterius*, compels the conclusion that the absence of specific legislative reference to the remedy of cancellation in Section 4905.31 precludes this Commission from authorizing cancellation *in toto*." *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief,* Case No. 75-161-EL-SLF, Opinion and Order at 14-15 (Aug. 4, 1976).

Finally, because Ormet's filing is a request for a unique arrangement request under OAC Chapter 4901:1-38 (see June 27 Entry), there is no opportunity for emergency relief envisioned under those rules – which govern this proceeding. If the Commission had envisioned the potential exercise of R.C. 4909.16 in the context of OAC Chapter 4901:1-38, it would have included some reference or process to accommodate such a request. But it did not and cannot now alter the operation of those governing procedural rules.

In sum, although the Commission has broad discretion when invoking its emergency powers and how it fashions temporary relief to address an emergency, it is unclear whether it is appropriate in this instance. It is clear, however, that the Commission can only provide temporary relief, assuming it finds there is an immediate emergency to address. Ormet's request that the Commission shorten the term of its contract and allow it to shop exceeds the interim relief the Commission is authorized to provide. Moreover, AEP Ohio does not consent to such

relief, thus, it cannot be granted under R.C. 4909.19. Nor can the Commission cancel the contract under R.C. 4905.31. Thus, the permanent relief Ormet seeks can only be obtained thought mutual resolution of the issue, which will require that AEP Ohio's financial concerns be addressed, as further explained below.

B. The Commission should also be aware that, under federal bankruptcy law, Ormet is precluded from seeking to amend an existing contract without AEP Ohio's consent; that issue has been raised by AEP Ohio in the bankruptcy proceeding and any action by the Commission to address the "emergency relief" must take into account that as long as Ormet is in bankruptcy, AEP Ohio must consent to any modification of its contract with AEP, and the bankruptcy court has exclusive jurisdiction to address modification and assumption of contracts that are part of a debtor's estate in bankruptcy.

In Ormet's bankruptcy proceeding, Ormet is seeking to modify and amend the Unique Arrangement so that it can sell substantially all of its' assets to Smelter Acquisition Company ("Purchaser"). The Court has approved the sale of Ormet's assets to the Purchaser, but the sale has not closed.

AEP Ohio has filed an objection in the Bankruptcy Court (the "Objection") to Ormet's attempt to modify and amend the Unique Arrangement, based on applicable bankruptcy statutory and case law that precludes a debtor from amending and modifying a contract so that it can be assumed and assigned to a third party. In addition, AEP Ohio has objected to the proposed assumption and assignment of the Unique Arrangement to Purchaser because the Purchaser has not provided AEP with adequate assurance of performance as required by the United States Bankruptcy Code. Specifically, the Purchaser has not provided AEP Ohio with assurances that the Purchaser will be able to perform its' obligations to AEP Ohio under the Unique Arrangement. The fact that the Purchaser is requiring Ormet to seek substantial modifications to the Unique Arrangement as a condition of the proposed sale raises substantial concerns about the Purchaser's ability to perform its' obligations to AEP Ohio under the Unique Arrangement. (A

true and accurate copy of AEP Ohio's Objection filed with the Bankruptcy Court is attached as Exhibit B.)

C. Both the Commission and the Supreme Court of Ohio have emphatically determined Ormet would not be permitted to shop during the term of the existing contract and it would be unlawful and unreasonable to reverse that determination now after AEP Ohio acted in reliance on that unequivocal assurance by the Commission and the Court.

On February 17, 2009 Ormet filed an application for approval of a unique arrangement with AEP Ohio.[2] AEP Ohio did not join Ormet in filing the application, but did move to intervene on February 27, 2009. Although AEP Ohio's motion to intervene expressed general support for Ormet's initial proposal in this proceeding, it conditioned the support upon full recovery of revenues foregone as a result of the discount from tariff rates. (February 27, 2009 Motion of AEP Ohio to Intervene at 2.) One of the provisions in the arrangement proposed by Ormet (Article 2.01) was for AEP Ohio to be the exclusive supplier to Ormet during the 10-year term of the arrangement. (July 15, 2009 Opinion and Order at 13; Power Agreement at Article 2.03.) AEP Ohio argued against adoption of this provision, as violating the policy of the State of Ohio and the fundamental notion of customer choice embodied in SB 3 and SB 221.

Over AEP Ohio's objections, the Commission held as follows:

> The Commission finds that under the terms of the unique arrangement AEP-Ohio will be the exclusive supplier to Ormet. *Therefore, there is no risk that Ormet will shop* for competitive generation and then return to AEP-Ohio's POLR service.

(Opinion and Order at 13) (emphasis added; internal citations omitted).

AEP Ohio has previously experienced the situation of Ormet shopping for competitive generation service and then returning to AEP Ohio, even after Ormet had promised not to return.

[2] Historically, Ormet received service from the joint service territory of Columbus Southern Power Company and Ohio Power Company and, since the 2011 merger of the two companies, 50% of Ormet's load is billed under CSP rate zone and 50% under Ohio Power rate zone.

The Commission's September 15, 2009 Entry on Rehearing acknowledged this sordid history in referencing "the repeated transfer" of Ormet's facilities among certified service territories. (Entry on Rehearing at 7, 9.) It is undisputed that Ormet has previously obtained special permission to "permanently" leave AEP Ohio's service territory to take advantage of low market prices for electricity[3] only to subsequently seek and obtain permission to return to being served by AEP Ohio when market prices rose.[4] Suffice to say that what was initially thought to be a "no risk" situation of Ormet returning to the AEP Ohio system proved to be something quite different. Based on this prior experience with Ormet, AEP Ohio sought a determination first by the Commission and subsequently by the Supreme Court of Ohio as to whether the exclusive supplier provision was valid and binding under Ohio law.

Specifically, AEP Ohio filed an application for rehearing, requesting that the Commission reconsider its adoption of the compulsory agreement generally and "exclusive supplier" provision specifically – not only to uphold State policy and statutory mandates regarding customer choice but also to enable AEP Ohio to fully recover "revenues foregone" as a

[3] In 1996, based on Ormet's desire to pursue low prices in the wholesale power market, Ohio Power agreed to allow Ormet to permanently leave Ohio Power's service territory and reallocate the service territory of South Central Power Company, such that Ohio Power no longer had any legal obligation to serve the retail load of Ormet. *In the Matter of the Joint Petition of Ohio Power Company and South Central Power Company for Reallocation of Territory*, Case No. 96-1000-EL-PEB ("*South Central"*), September 19, 1996 Joint Petition, Ap. at 248. This unprecedented move was permitted specially for Ormet several years before retail choice was implemented in Ohio. The Commission approved a permanent service territory reallocation to be effective January 1, 2000. *South Central*, November 14, 1996 Finding and Order.

[4] In 2005, Ormet filed a complaint and motion asking the Commission to transfer Ormet back to Ohio Power's certified service territory – based on rising prices in the electricity market. *Ormet Primary Aluminum Company v. Ohio Power Company and South Central Power Company*, Case No. 05-1057-EL-CSS ("*Ormet CSS*"), November 29, 2005 Motion. The Commission ultimately adopted an agreement in 2006 between the parties to allow Ormet to be served by a new combined service territory of Columbus Southern Power and Ohio Power. *Ormet CSS*, November 8, 2006 Supplemental Opinion and Order.

result of the Ormet arrangement. (AEP Ohio August 14, 2009 Application for Rehearing at 13-14.) In its rehearing decision in this case, the Commission confirmed that:

> Under the terms of the unique arrangement as approved by the Commission, AEP Ohio will be the exclusive supplier to Ormet for ten years, commencing January 1, 2009.

(September 15, 2009 Entry on Rehearing at 8) (internal citations omitted)

AEP Ohio then sought a determination by the Supreme Court of Ohio as to whether the exclusive supplier provision was valid and binding under Ohio law. On appeal, AEP Ohio predicted back in 2010 that the circumstance presented by Ormet's current filing could happen and argued that the Court should strike down the exclusive supplier provision as being invalid:

> Ultimately, Ormet may again find – just like it did only ten years ago – that at some point during the contract term market prices for electricity become cheaper than the prices being paid under the involuntary contract imposed upon AEP Ohio.

(S.Ct. Case No. 2009-2060, January 22, 2010 AEP Ohio Brief at 40.) Despite AEP Ohio's explicit concerns about the Ormet contract and a companion case involving Eramet Marietta, the Supreme Court firmly upheld the Commission's imposition of the exclusive supplier provision:

> *Even though AEP argues to the contrary, the orders issued by the commission do not allow the manufacturers to shop for electric service for the duration of the arrangement.* * * * We cannot say that the commission erred in finding that there was no risk that the manufacturers would shop. The commission relied on the fact that "AEP-Ohio will be the exclusive supplier" to the manufacturers. *As we have already discussed, that is true—the orders require the customers to take service exclusively from AEP. If they must take service exclusively from AEP, then it follows that they cannot take it from another supplier.*

(*Ohio Power Co. v. Pub. Util. Comm*., 2011-Ohio-2377 at Par. 22, 26) (emphasis added).

In light of the fact that the Commission found that AEP Ohio would be the exclusive supplier for the term of the contract and the Supreme Court of Ohio upheld that provision and similarly found that there was no risk of Ormet shopping during the contract term, it would be

unreasonable and unlawful to allow Ormet to shop now merely so it can obtain a market rate that happens to currently be lower than the SSO rate. AEP Ohio has acted in reliance of these assurances and has planned for and set aside a massive amount of capacity and energy that is required to serve its largest customer, Ormet.

This is not an abstract matter of energy policy or contract law – AEP Ohio will be significantly harmed and it will upset the careful balance achieved in the recent ESP cases between the Company's financial interests and the customers' rate impact concerns. Most notably, the generation revenue to be received under the existing contract would be eliminated. Under the existing contract, AEP Ohio is made whole to the GS-4 generation tariff rates, which includes a margin for AEP Ohio. This revenue stream would be lost if Ormet shops, thereby causing AEP Ohio significant financial harm –some of which may also ultimately be borne by ratepayers directly or indirectly.

Ormet's statement (Motion at 13) that the proposed emergency relief should only result in a "modest $3.5 million" impact on ratepayers is, at best, incomplete. There are other implications of Ormet shopping that affect both AEP Ohio and its customers. For example, Ormet's load will become shopping load that AEP Ohio will support through the provision of capacity in accordance with its obligations as a Fixed Resource Requirement entity. Under the Commission's decision in Case Nos. 10-2929-EL-UNC and 11-346-EL-SSO *et al*., the capacity deferral for the difference between $188.88/MW-Day and the applicable Relibability Pricing Model (RPM) rate will be increased for the period of time that Ormet shops for competitive generation service. In addition, if Ormet shops and bypasses the Fuel Adjustment Clause (FAC), the fixed non-energy costs recovered through the FAC will be spread over a smaller base and will thus increase the cost for other non-shopping customers to bear.

If Ormet does fail and go out of business, that could also cause ratepayers to incur a substantial financial impact. The RSR was established presuming that AEP Ohio would receive base generation revenue from Ormet and the Commission specifically reserved the right for AEP Ohio to re-open the ESP if a substantial reduction in non-shopping load:

> Finally, the Commission notes that our determination regarding the RSR is heavily dependent on the amount of SSO load still served by the Company. Accordingly, in the event that, during the term of the ESP, there is a significant reduction in non-shopping load for reasons beyond the control of the Company, other than for shopping, the Company is authorized to file an application to adjust the RSR to account for such changes.

(ESP II, Opinion and Order at 37-38.) Thus, if Ormet goes out of business, AEP Ohio will likely need to reopen the issue and request a significant increase in the RSR. Further, while this language seems to exclude shopping load, the fact is that Ormet was not expected to shop based on the exclusive supplier provisions in the contract; in that sense, the purpose of this RSR re-opener provision could still be determined to be applicable. If so, the RSR would need to be increased for all customers if Ormet is permitted to shop.

So, the best resolution may be to require Ormet to address AEP Ohio's financial concerns directly (*i.e.*, pay an exit fee to terminate the exclusive supplier provisions) in order to stay in business or for the Commission to resolve those concerns through a combination of Ormet resources and ratepayer obligations. Such a fee would reimburse AEP Ohio for the lost generation revenue associated with the early termination of the contract and for the fixed fuel costs that would otherwise be paid by other customers as a result of Ormet shopping during that period. This is reasonable given that AEP Ohio planned for and set aside the substantial amount of capacity and energy to serve Ormet's needs during this period and is especially appropriate in light of the exclusive supplier provisions in the existing contract. Payment of the fixed fuel costs by Ormet would reduce the tab left to other customers as a result of Ormet leaving SSO service.

In sum, the Commission should reject Ormet's request to break its promise not to shop during the term of the contract and look elsewhere for a solution while keeping Ormet's load as non-shopping SSO load. Alternatively, the Commission should require Ormet/Wayzata to pay an exit/termination fee to AEP Ohio for breaking the contract. Absent such an exit fee, Ormet's proposal to break the contract will harm AEP Ohio as well as ratepayers.

D. Other provisions of the existing contract would be violated if Ormet is permitted to amend the agreement to shop for competitive generation service without AEP Ohio's consent.

Multiple provisions of the existing contract would be violated if Ormet's proposal is adopted over AEP Ohio's objection. Those provisions were specifically designed and contemplate the prospect of a Commission-approved modification. It would be an unlawful retroactive impairment of contract rights to allow Ormet to simply bypass and terminate those provisions through the current request for amendment. *See* U.S. Const. Art. I, § 10; U.S. Const. Amend. XIV, § 1; Ohio Const. Art. I. § 16; and Ohio Const. Art. II, § 28.

Section 2.03 of the existing contract, any modification by the Commission that finds the rates be no longer be just and reasonable (absent early termination for default) "(i) may not be effective earlier than January 1, 2016 unless the cumulative net discount from the AEP Ohio Tariff Rate exceeds 50 percent of the amount Ormet would have been required to pay under the AEP Ohio Tariff Rate and (ii) shall not go into effect between the Parties until the later of the beginning of the next calendar year or 120 days." The cumulative discount Ormet has received is not more than half of the tariff rate to date. In that context, Section 2.03 only permits a change to the rate structure of the agreement to take effect *the later of* 120 days after a Commission order adopting modifications or the beginning of the next calendar year – which would be January 1, 2014 in this case. Even though Ormet is not proposing to shop until January 1, 2014,

the package of amendments (including the modified discount and thus modified rates) under the existing contract would go into effect as soon as possible under the requested emergency relief. Thus, Ormet's current proposal clearly violates Section 2.03.

In addition, Section 3.01(a) permits AEP Ohio to terminate the agreement in the event of a Default under the contract. Pursuant to Section 8.01(c), items of Default include an attempt to assign the contract under Section 13.04 without the assignee assuming all of the obligations under the contract. Section 13.04, in turn, prohibits assignment by Ormet without consent of AEP Ohio and makes it mandatory for the assignee to assume all of the obligations under the existing contract. Ormet requests (Motion at 2, 11) that the Commission in the emergency order affirm the assignment by Ormet of its interest in the Amended Unique Arrangement to Smelter Acquisition LLC under Section 13.04 of the existing contract. Thus, Ormet's proposal here violates the above provisions twofold. First, AEP Ohio is not consenting to the proposed assignment until adequate assurance of performance is given – which has not happened to date. Second, Ormet is proposing to amend, dilute and modify terms of the existing agreement as part of the assignment. Thus, Ormet's proposal also violates Sections 3.01(a), 8.01(c) and 13.04.

Moreover, Section 3.01(c) permits AEP Ohio to terminate the agreement if the Commission requires any modification that is "materially adverse" to AEP Ohio (as determined by AEP Ohio). More specifically, Section 3.01(d) permits AEP Ohio to terminate the agreement "if the Commission, in any order, whether specifically modifying this Power Agreement or otherwise, limits AEP Ohio's recovery of Delta Revenues associated with this Power Agreement in a manner more adverse than the July 15, 2009 Opinion and Order in Case No. 09-119-EL-AEC." Of course, the impact of Ormet's current proposals would result in lower delta revenue

collection by AEP Ohio and would otherwise result in more adverse financial impact on AEP Ohio. Thus, Ormet's current proposal also violates Section 3.01.

Based on these multiple violations and default under the existing agreement, the Commission should reject Ormet's invitation for the Commission to retroactively impair AEP Ohio's contract rights.

E. The proposed amendments are unlawful since they propose to subsidize a competitive retail electric service through nonbypassable "wires charges."

State policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. R.C. 4928.02(H) states that it is the policy of the state to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies from flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates." The Ohio Supreme Court has applied this policy to ensure that such subsidies to not flow. In *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d. 305, the court held that the Commission violated R.C. 4928.02([H]) when it gave FirstEnergy authority to collect deferred increased fuel costs through future distribution rate cases, or to alternatively use excess fuel-cost recovery to reduce deferred distribution-related expenses.

Both during the emergency relief period and the remainder of the contract, the expanded discounts proposed by Ormet exceed its "wires" charges. Specifically, during 2014 and 2015, the $4.5 million monthly discount will significantly exceed Ormet's expected distribution charges and nonbypassable riders. Moreover, Ormet proposes a $6/MWh "shopping credit" for the latter half of 2015. These proposals amount to an explicit and significant unlawful subsidy of a competitive generation service. As further explained below, AEP Ohio questions the legal

basis for an Electric Distribution Utility such as AEP Ohio imposing a nonbypassable charge to explicitly subsidize a CRES provider's competitive generation service.

In addition to creating an unlawful subsidy, the relief Ormet seeks also conflicts with statutory provisions that apply specifically to EDUs. For example, special arrangements under R.C. 4905.31 are only for contracts between EDUs and customers – for the provision of services rendered by the EDU – not a CRES provider. Similarly, nonbypassable charges for economic development under R.C. 4928.143 apply only in the limited context of an EDU's promotion of economic development. Thus, the Commission cannot approve a nonbypassable charge for the benefit of a CRES provider, which is essentially what Ormet requests, and charge the increase in delta revenue to all EDU customers.

F. AEP Ohio objects to other aspects of the proposed amendments

As a threshold matter, all of the effects of Ormet's filing, both relating to the emergency relief and the other proposals, that create additional "foregone revenues" under R.C. 4905.31 (also referred to as "delta revenues") need to be clearly addressed through the provision of full recovery, if AEP Ohio is to consent or agree to Ormet's proposals. This would include being made whole to the base generation tariff rate for the full period of the existing contract. It would also include any additional deferrals created by the proposed fixed rate, which could relate to FAC costs or other riders.

As part of the non-emergency relief, Ormet also proposes (Motion at 11) to extend repayment of the deferred October/November 2012 bill payments totaling approximately $27 million over 24 monthly payments starting in January 2014; whereas, the Commission's October 17, 2012 Entry in this case required repayment over 17 monthly payments starting in January 2014. This additional delay of repayment increases the financial harm to AEP Ohio of Ormet's

nonpayment of its October/November 2012 bills. In fact, given that Ormet is attempting to transfer and assign the contract, it should be required to make full payment prior to being permitted to transfer the contract.

III. CONCLUSION

For the foregoing reasons, the Commission should deny Ormet's request for emergency relief and reject Ormet's request for permission to break the exclusive supplier provisions without payment of a reasonable termination/exit fee to AEP Ohio.

Respectfully submitted,

/s/ Steven T. Nourse
Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608
Fax: (614) 716-2950
Email: stnourse@aep.com

Counsel for Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the counsel for parties of record via electronic mail this 5th day of July, 2013.

/s/ Steven T. Nourse
Steven T. Nourse

Email Service

Thomas.McNamee@puc.state.oh.us
Sarah.Parrot@puc.state.oh.us
jejadwin@aep.com
myurick@taftlaw.com
mwhite@taftlaw.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
grady@occ.state.oh.us
cvince@sonnenschein.com
ehand@sonnenschein.com
dbonner@sonnenschein.com
dbarnowski@sonnenschein.com
sam@mwncmh.com
tiswo@bricker.com
Gregory.price@puc.state.oh.us
mhpetricoff@vorys.com
smhoward@vorys.com
gpetrucci@vorys.com

AEP OHIO COMMENTS

EXHIBIT A PART 1

EXHIBIT A

Asset Purchase Agreement

Execution Version

ASSET PURCHASE AGREEMENT

by and among

SMELTER ACQUISITION LLC

and

ORMET CORPORATION,
ORMET PRIMARY ALUMINUM CORPORATION,
ORMET ALUMINUM MILL PRODUCTS CORPORATION, AND
ORMET RAILROAD CORPORATION

Dated as of February 25, 2013

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ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (together with the Schedules, Exhibits and Annexes hereto, collectively referred to as this "***Agreement***") dated as of February 25, 2013 is made and entered into by and among Smelter Acquisition LLC, a Delaware limited liability company ("***Buyer***"), Ormet Corporation, a Delaware corporation ("***Ormet***"), Ormet Primary Aluminum Corporation, a Delaware corporation ("***OPAC***"), Ormet Aluminum Mill Products Corporation, a Delaware Corporation ("***Ormet Mill***"), and Ormet Railroad Corporation, a Delaware corporation ("***Ormet Railroad***") and collectively with Ormet, OPAC and Ormet Mill, each a "***Seller***" and together, "***Sellers***".

WITNESSETH:

WHEREAS, Sellers are engaged in the business of producing alumina, aluminum and providing related products and services (the "***Business***");

WHEREAS, it is anticipated that shortly after the execution of this Agreement Sellers will file a voluntary petition (collectively, the "***Chapter 11 Cases***") under chapter 11 of title 11 of the United States Code (the "***Bankruptcy Code***") in the United States Bankruptcy Court for the District of Delaware (the "***Bankruptcy Court***") (the date of such filing, the "***Petition Date***");

WHEREAS, it is anticipated that Wells Fargo Capital Finance, LLC, as Agent (the "***Senior DIP Agent***"), will as of the Petition Date provide Sellers with a $60,000,000 principal amount debtor-in-possession credit facility ("***Senior DIP Financing***") pursuant to that certain Super-Priority Senior Secured Debtor-In-Possession Second Amended and Restated Loan and Security Agreement, to be dated as of the Petition Date, by and among Sellers, Specialty Blanks Holding Company ("***Specialty Holding***") the Senior DIP Agent and the lenders party thereto (the "***Senior DIP Financing Agreement***");

WHEREAS, it is anticipated that Wayzata Investment Partners LLC, as Agent (the "***Term DIP Agent***"), will as of the Petition Date provide Sellers with a $30,000,000 principal amount debtor-in-possession credit facility ("***Term DIP Financing***") pursuant to that certain Senior Secured Superpriority Debtor-In-Possession Term Loan and Security Agreement, to be dated as of the Petition Date, by and among Sellers, Specialty Holding, the Term DIP Agent and the lenders party thereto (the "***Term DIP Financing Agreement***");

WHEREAS, in accordance with the Bidding Procedures, and subject to the terms and conditions set forth in this Agreement and the entry of the Transaction Approval Order, Buyer desires to acquire from Sellers, and Sellers desire to sell to Buyer, substantially all of the assets of Sellers (the "***Asset Acquisition***" or sometimes the "***Acquisition***") in a transaction pursuant to sections 105, 363 and 365 of the Bankruptcy Code; and

WHEREAS, the board of directors of each Seller has determined that it is advisable and in the best interests of such Seller and its constituencies to enter into this Agreement and to consummate the transactions provided for herein, and each has approved the same.

NOW, THEREFORE, in consideration of the foregoing and of the representations, warranties, covenants, agreements and conditions contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

ARTICLE I

DEFINITIONS

1.01 Definitions. Capitalized terms used in this Agreement shall have the meanings ascribed to them in Annex A hereto or as may be set forth throughout this Agreement.

ARTICLE II

PURCHASE AND SALE

2.01 Asset Acquisition.

(a) Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, subject to the entry of the Transaction Approval Order and subject to the terms and conditions of this Agreement and on the basis of the representations, warranties, covenants and agreements herein contained, at the Closing, Sellers shall unconditionally sell, transfer, assign, convey and deliver to Buyer and/or one or more of Buyer's Affiliates designated by Buyer (a "***Buyer Designee***") free and clear of any and all Encumbrances (to the maximum extent provided in the Transaction Approval Order), except for Permitted Encumbrances, and Buyer shall purchase, acquire and accept from Sellers, all of Sellers' direct or indirect right, title and interest in, to and under the Business and all of Sellers' assets, rights, claims and properties of every kind and nature, whether real, personal or mixed, tangible or intangible, whether identifiable or contingent, wherever situated or located, whether or not reflected on the books and records of Sellers, other than the Excluded Assets (collectively, the "***Assets***"), which Assets shall include, without limitation, the following:

(i) All real property, together with all the rights, benefits, privileges, easements, rights-of-way, licenses, tenements, hereditaments, and appurtenances thereon or in any way appertaining thereto and all Improvements erected thereon and all rights in respect thereof (the "***Real Property***");

(ii) All fixed assets and other tangible personal property and equipment, including all machinery, tools, molds, equipment, computers, management information systems (including without limitation all software and hardware related thereto), telephone systems, furniture, fixtures, improvements and supplies, wherever located, together with all manufacturers' or other warranties pertaining to the same (collectively, the "***Equipment***");

(iii) All raw materials, inventory, components and other parts, work-in-process, finished goods, all packaging materials and labels, stores and supplies used in the sale of finished goods and/or products and all other inventory whether on hand, on order, in transit or held by others on a consignment basis (collectively, the "***Inventory***");

(iv) The outstanding accounts receivable, notes receivable, purchase orders, negotiable instruments, completed work that has not been billed, chattel paper, notes and other receivables , together with all unpaid financing charges accrued thereon and any payments with respect thereto ("***Accounts Receivable***"), and all claims arising in connection therewith;

(v) All intellectual property, including all (A) copyright rights (registered and unregistered) and software (including source code and object code), in any case, whether domestic or foreign, registered, unregistered and/or common law (including, without limitation, all goodwill associated with any of the foregoing, licenses in respect of any of the foregoing and claims for infringement of or interference with any of the foregoing and the right to recover past damages); (B) trade names, trade name rights, trademarks, trademark applications, trademark rights, service marks, service mark rights, trade dress, domain names, URLs, web pages, in any case, whether domestic or foreign or registered, unregistered and/or common law (including without limitation, all goodwill associated with any of the foregoing, licenses in respect of any of the foregoing, and claims for infringement of or interference with any of the foregoing and the right to recover past damages); (C) invention disclosures, issued design patents, pending U.S. patent applications and corresponding international and foreign counterpart applications and issued patents, including any applications, continuation applications, divisional applications, issued patents, reexaminations and reissues thereof, whether domestic or foreign (including without limitation, all goodwill associated with any of the foregoing, licenses in respect of any of the foregoing, and claims for infringement of or interference with any of the foregoing and the right to recover past damages); and (D) confidential information, trade secrets, designs, specifications, know-how and other proprietary information and technology (collectively, the "***Intellectual Property***");

(vi) All Contracts of Sellers listed on Schedule 2.01(a)(vi) (subject to Bankruptcy Court approval and as may be added or removed pursuant to Sections 2.01(e), 7.09 and 10.13 hereof, the "***Assumed Contracts***");

(vii) All goodwill, customer relationships, other intangible property, and causes of action, actions, claims and rights of any kind as against others (whether by contract or otherwise) relating to any of the Assets (including without limitation, the Intellectual Property), the Assumed Liabilities or the Business, including the Business Related Avoidance Actions;

(viii) All books and records (financial, accounting, personnel files and other), and correspondence, and all customer sales, marketing, advertising, packaging and promotional materials, files, data, software (whether written, recorded or stored on disk, film, tape or other media, and including all computerized data), drawings, engineering and manufacturing data and other technical information and data, and all other business and other records (collectively, "***Books and Records***"), in each case arising under or relating to the Assets, the Assumed Liabilities or the Business (but not the Excluded Assets);

(ix) All rights, but, to the extent permissible by law, not the obligations, under non-disclosure or confidentiality, non-compete, or non-solicitation agreements with employees and agents of Sellers or with third parties (including, without limitation, any non-disclosure or confidentiality, non-compete, or non-solicitation agreements entered into in connection with or in contemplation of the Auction contemplated by the Bidding Procedures);

(x) All permits, licenses, approvals, franchises, notices and authorizations issued by Governmental Entities (collectively the "***Permits***");

(xi) All deposits (including, without limitation, customer deposits and security deposits (whether maintained in escrow or otherwise) for rent, electricity, telephone or otherwise), advances, pre-paid expenses, prepayments, vendor rebates and other refunds, claims, causes of action, rights of recovery, rights under warranties and guaranties, rights of set off and rights of recoupment of every kind and nature (whether or not known or unknown or contingent or non contingent), and the right to receive and retain mail, and other communications of Sellers;

(xii) All rights, remedies and benefits of Sellers arising under or relating to any of the Assets, the Assumed Liabilities or the Business, including, without limitation, rights, remedies and benefits arising out of express or implied warranties, representations and guarantees from manufacturers, suppliers, contractors or installers of the Equipment or the Inventory (or components thereof), the other Assets or products purchased or ordered by Sellers prior to the Closing Date (and in any case, any component thereof), and all claims and causes of action arising or existing therefrom;

(xiii) All cash and cash equivalents, securities, instruments and other investments of Sellers, and all bank accounts;

(xiv) All other property and assets related to, associated with, pertaining to, or presently, historically or prospectively used or useful in, the conduct of the Business or the ownership of any of the Assets, including without limitation, tax attributes, insurance policies (including returns or refunds of premiums paid or other amounts due back) and the proceeds thereof and all other tangible and intangible assets that are not expressly identified as Excluded Assets;

(xv) All rights, privileges, set-offs, indemnification rights, causes of action, claims and demands of whatever nature arising from or in connection with the Business or the Assets;

(xvi) All of the Business as a going concern;

(xvii) The assets set forth on Schedule 2.01(a)(xvii); and

(xviii) All proceeds and products of any and all of the foregoing Assets.

(b) Excluded Assets. Sellers shall not sell, assign, convey or deliver to Buyer, and Buyer shall not purchase from Sellers, and the Assets shall not include, any of the following (collectively, the "***Excluded Assets***"):

(i) Any of the assets set forth on Schedule 2.01(b)(i) hereto;

(ii) The Senior DIP Financing Agreement and the Term DIP Financing Agreement, unless otherwise assumed by Buyer pursuant to Section 3.02(b) or 3.02(c) hereof;

(iii) All Contracts other than Assumed Contracts;

(iv) All shares of capital stock or other equity interests in or issued by any Seller or any securities convertible into, exchangeable or exercisable for shares of capital stock or other equity interests in or issued by any Seller; and

(v) Sellers' corporate minute books, equity transfer records and corporate seal, and all Books and Records to the extent arising under or relating to the Excluded Assets or Excluded Liabilities.

(c) Assumed Liabilities. Subject to the entry of the Transaction Approval Order, subject to the terms and conditions of this Agreement and further subject to Section 10.13, and on the basis of the representations, warranties, covenants and agreements herein contained, at the Closing, Sellers shall assign to Buyer or one or more Buyer Designees and Buyer or one or more Buyer Designees shall assume from Sellers and pay when due, perform and discharge without duplication the following obligations and liabilities of Sellers, and only such obligations and liabilities, in each case other than any such obligations or liabilities that are Excluded Liabilities specifically set forth in Section 2.01(d) (collectively, the "***Assumed Liabilities***"):

(i) The liabilities described on Schedule 2.01(c)(i), to the extent incurred in the ordinary course of business after the Petition Date;

(ii) The obligations and liabilities of Sellers under each of the Assumed Contracts that arise exclusively after the Closing Date, and any Cure Costs applicable to such Assumed Contracts;

(iii) Liabilities of Sellers with respect to Taxes, assessments or other governmental charges set forth on Schedule 2.01(c)(iii), to the extent such Taxes are accrued but not yet due and owed (and not, for the avoidance of doubt, any such Taxes that are due and owed on the Closing Date);

(iv) Liabilities relating to accounts payable (other than those described in clauses 2.01(c)(vi) and (vii) below), as of the Petition Date, of any Seller to any third party (other than to any Seller or any Affiliate of any Seller) vendor or supplier incurred by Sellers in the ordinary course of business, not to exceed $500,000;

(v) Liabilities relating to accounts payable, as of the Closing Date, of any Seller to any third party (other than to any Seller or any Affiliate of any Seller)

vendor or supplier incurred by Sellers after the Petition Date and prior to the Closing in the ordinary course of business (and not in violation of this Agreement) or with the prior written consent of Buyer;

(vi) Any Allowed Claims arising under Section 503(b)(9) of the Bankruptcy Code;

(vii) Any obligations that have not been paid with respect to Critical Vendor Claims; and

(viii) To the extent designated in writing by Buyer after the Petition Date, the Legacy Workers Compensation Claims, together with any letters of credit (and collateral or other assets pledged in connection therewith) issued by Sellers to support payment of such claims.

(d) No Other Liabilities. Except as provided in Section 2.01(c) hereof, Buyer shall not assume nor be deemed to assume and shall have no responsibility or obligation with respect to, any obligations or liabilities of, or claim against, Sellers, the Business or the Assets, of any kind or nature, whether absolute, accrued, contingent or otherwise, whether due or to become due and whether or not asserted, and whether or not known or unknown or currently existing or hereafter arising or matured or unmatured, direct or indirect, and however arising, including without limitation the following (collectively, the "***Excluded Liabilities***"):

(i) Any obligations or liabilities relating to any Contract which is not an Assumed Contract;

(ii) Any obligations or liabilities related to asbestos-related claims;

(iii) Any obligations or liabilities related to hearing loss claims;

(iv) Any obligations or liabilities related to any suit, action or proceeding by any security holders of Sellers or any of their respective Affiliates or any Person acting on behalf of, or claiming rights through, Sellers, including on account of the purchase, sale or rescission in respect of any security of any Seller;

(v) Except for obligations arising under the Transferred Benefit Plans and as otherwise expressly provided elsewhere in this Agreement, including without limitation Section 2.01(c)(i) and Article VIII hereof, any obligations or liabilities relating to employees of Sellers arising from acts or omissions prior to or on the Closing, including without limitation liabilities related to any suit, action or proceeding by any such employee;

(vi) Any obligations or liabilities related to the WARN Act with respect to Employees, or for any action of the Sellers resulting from Employees' separation of employment from Sellers prior to or on the Closing Date;

(vii) Any obligations or liabilities related to Taxes that are not expressly assumed by the Buyer under Section 2.01(c)(iii); or

(viii) Any of the obligations or liabilities described on Schedule 2.01(d)(viii).

(e) Non-Assignment of Assets. Anything contained herein to the contrary notwithstanding, this Agreement shall not constitute an agreement to assign any Asset if, after giving effect to the provisions of sections 363 and 365 of the Bankruptcy Code, an attempted assignment thereof, without obtaining a consent or approval required or necessary for such assignment or transfer, would constitute a breach thereof or in any way negatively affect the rights of Buyer, as the assignee of such Asset. If, after giving effect to the provisions of sections 363 and 365 of the Bankruptcy Code, such consent or approval is required but not obtained, Sellers shall, at Buyer's sole cost and expense, cooperate with Buyer in any reasonable arrangement designed to provide for Buyer the benefits and obligations of or under any such Asset, including enforcement for the benefit of Buyer of any and all rights of Sellers against a third party thereto arising out of the breach or cancellation thereof by such third party. Any assignment to Buyer of any Asset that shall, after giving effect to the provisions of sections 363 and 365 of the Bankruptcy Code, require the consent or approval of any third party for such assignment as aforesaid shall be made subject to such consent or approval being obtained. Any contract that would be an Assumed Contract but is not assigned in accordance with the terms of this Section 2.01(e) shall not be considered an "Assumed Contract" for purposes hereof unless and until such contract is assigned to Buyer following the Closing Date upon receipt of the requisite consents or approvals to assignment and Bankruptcy Court approval.

ARTICLE III

PURCHASE PRICE

3.01 Purchase of Assets. On the terms and subject to the conditions of this Agreement and the Transaction Approval Order, at the Closing, Buyer or one or more Buyer Designees shall (a) purchase the Assets and assume the Assumed Liabilities from Sellers, and (b) satisfy its obligation to pay the Purchase Price as set forth in Section 3.02 hereof.

3.02 Consideration. The aggregate consideration (the "***Purchase Price***") payable in consideration for the sale, transfer, assignment, conveyance and delivery by the Sellers to Buyer or its designated Affiliate of the Assets shall consist of the following:

(a) The assumption at the Closing by Buyer or one or more Buyer Designees of the Assumed Liabilities and payment of all amounts thereof, as and when such payments come due, to the extent required by this Agreement;

(b) Either (i) the payment in full in immediately available funds at the Closing of all outstanding obligations owed by Sellers under the Senior DIP Financing Agreement or (ii) the assumption at the Closing by Buyer of all outstanding obligations owed by Sellers under the Senior DIP Financing Agreement, as may be amended on the Closing Date by Buyer and the Agent thereunder, together with (in the cases of clauses (i) and (ii)) evidence reasonably satisfactory to Sellers of such payment or assumption by Buyer; plus

(c) Either (i) the payment in full in immediately available funds at the Closing of all outstanding obligations owed by Sellers under the Term DIP Financing Agreement (after giving account to subsection (d) below) or (ii) the assumption at the Closing by Buyer of all outstanding obligations owed by Sellers under the Term DIP Financing Agreement (after giving account to subsection (d) below, as may be amended on the Closing Date by Buyer and the Agent thereunder, together with (in the cases of clauses (i) and (ii)) evidence reasonably satisfactory to Sellers of such payment or assumption by Buyer; plus

(d)

(i) Payment by Buyer of $130,000,000, payable in the form of the exercise of credit bid rights under Section 363(k) of the Bankruptcy Code with respect to all or a portion (as determined by Buyer) of the aggregate obligations then outstanding under Pre-Petition Term Loan A, Pre-Petition Term Loan B and the Term DIP Financing Agreement;

(ii) Issuance by Buyer to Sellers of, at Buyer's election (A) long term unsecured indebtedness of Buyer in the principal amount of $1,000,000 or (B) such other debt or equity securities, or securities convertible into equity securities of equivalent value, as determined by Buyer, and, in either case, with terms and conditions materially consistent with those provided by Buyer to Sellers no later than the entry of the Bid Procedures Order (the "***Buyer Securities Consideration***");

(iii) Payment by Buyer of all Bankruptcy Court approved accrued and unpaid professional fees and expenses incurred by Sellers for professionals engaged by Sellers in connection with the administration of the Chapter 11 Case, to the extent such fees and expenses (x) are accrued and unpaid as of the Closing Date, (y) with respect to hourly or monthly professional fees, have been authorized pursuant to the budget prepared in conjunction with the Term DIP Financing Agreement and order approving the Term DIP Financing Agreement, and (z) with respect to any transaction-based fees, have been approved by order of the Bankruptcy Court, which amount shall be deposited into a designated escrow account for such purpose and any amount not so used to satisfy such fees and expenses shall be promptly returned to Buyer; and

(iv) Payment by Buyer of all reasonable costs and expenses of Sellers (including Bankruptcy Court-approved fees and expenses of professionals), not to exceed $625,000, incurred subsequent to the Closing Date in connection with the winding down of Sellers' affairs in accordance with the Wind Down Budget and the conversion of the Chapter 11 Case to a liquidation under Chapter 7 of the Bankruptcy Code, which amount shall be deposited into a designated escrow account for such purpose and any amount not so used to satisfy such costs and expenses shall be promptly returned to Buyer.

3.03 Allocation of Purchase Price. If the transaction contemplated by this Agreement is an "Applicable Asset Acquisition" as defined in Section 1060(c) of the Code, then within sixty (60) days of the Closing, Buyer shall prepare and deliver to Seller a statement allocating the sum of the Purchase Price, the Assumed Liabilities and other relevant items among the Assets in accordance with Section 1060 of the Code and the Treasury regulations promulgated thereunder

(such statement, the "***Allocation Statement***"), and the Allocation Statement shall be finalized upon reasonable consultation with Seller, and with Seller's consent, which consent shall not be unreasonably withheld or delayed. The Parties shall follow the Allocation Statement for purposes of filing IRS Form 8594 (and any supplements to such form) and all other Tax Returns, and shall not voluntarily take any position inconsistent therewith. If the IRS or any other taxation authority proposes a different allocation, Seller or Buyer, as the case may be, shall promptly notify the other party of such proposed allocation. Seller or Buyer, as the case may be, shall provide the other party with such information and shall take such actions (including executing documents and powers of attorney in connection with such proceedings) as may be reasonably requested by such other party to carry out the purposes of this section. Except as otherwise required by applicable law or pursuant to a "determination" under Section 1313(a) of the Code (or any comparable provision of United States state, local, or non-United States law), (i) the transactions contemplated by Article II of this Agreement shall be reported for all Tax purposes in a manner consistent with the terms of this Section 3.03; and (ii) neither party (nor any of their Affiliates) will take any position inconsistent with this Section 3.03 in any Tax Return, in any refund claim, in any litigation or otherwise. Notwithstanding the allocation of the Purchase Price set forth in the Allocation Statement, nothing in the foregoing shall be determinative of values ascribed to the Acquired Assets or the allocation of the value of the Assets in any plan or reorganization or liquidation that may be proposed.

3.04 Assets Held in Trust. Following the Closing, any amounts paid by customers or other third parties (i) to Sellers in connection with the Business or the Assets shall be held in trust by Sellers for the benefit of Buyer and tendered by Sellers to Buyer promptly after the receipt thereof, and (ii) to Buyer in connection with the Excluded Assets shall be held in trust by Buyer for the benefit of Sellers and tendered by Buyer to Sellers promptly after the receipt thereof. Any party charged with the obligation to tender any such payment under this Section 3.04 shall tender such payment in the same form of consideration as such payment was made to such party by any customer or other third party.

3.05 Sale Free and Clear. Sellers acknowledge and agree, and the Transaction Approval Order shall provide that, on the Closing Date and concurrently with the Closing, all then existing or thereafter arising Encumbrances of, against or created by Sellers or their bankruptcy estate, to the fullest extent permitted by Section 363 of the Bankruptcy Code, other than the Permitted Encumbrances, if any, and the Assumed Liabilities, shall be fully released from and with respect to the Assets. On the Closing Date, the Assets shall be transferred to Buyer and/or one or more Buyer Designees, as applicable, free and clear of all Encumbrances, other than the Permitted Encumbrances, if any, and the Assumed Liabilities to the fullest extent permitted by Section 363 of the Bankruptcy Code.

ARTICLE IV

CLOSING AND TERMINATION

4.01 Closing. Subject to the satisfaction of each of the conditions set forth in Article IX hereof (or the waiver thereof by the party entitled to waive that condition), the closing of the purchase and sale of the Assets and the assumption of the Assumed Liabilities, provided for in Article II hereof, as applicable (the "***Closing***"), shall take place at 10:00 a.m., local time, at the offices of Dinsmore & Shohl LLP located at 255 E. 5th Street, Suite 1900, Cincinnati, OH 45202 (or at such other place as the Parties may mutually agree in writing) within five (5) Business Days after the date on which all of the conditions set forth in Article IX hereof have been satisfied or waived by the party entitled to waive that condition (other than conditions which, by their terms, may only be satisfied at the Closing), or on such other date and time as Sellers and Buyer may mutually agree in writing. The date on which the Closing shall be held is referred to in this Agreement as the "***Closing Date***." The Closing shall be deemed effective at 12:01 a.m., local time, on the Closing Date.

4.02 Deliveries at Closing.

(a) Deliveries by Buyer. At the Closing, Buyer shall deliver to Sellers the following:

(i) The Purchase Price, payable in accordance with Section 3.02;

(ii) An Assignment and Assumption Agreement in customary form reasonably acceptable to the Parties (the "***Assignment and Assumption Agreement***"), executed by Buyer;

(iii) A certificate signed by an authorized person of Buyer in accordance with Section 9.01(a) and (b) hereof; and

(iv) Such other documents as Sellers may reasonably request that are customary for a transaction of this nature and necessary to evidence or consummate the transactions contemplated by this Agreement.

(b) Deliveries by Sellers. At the Closing, Sellers shall deliver to Buyer the following:

(i) A certified copy of the Transaction Approval Order which shall be a Final Order;

(ii) A Bill of Sale and Assignment in customary form reasonably acceptable to the Parties (the "***Bill of Sale***"), executed by Sellers;

(iii) The Assignment and Assumption Agreement executed by Sellers;

(iv) One or more certificates signed by the President (or if there is no President, another senior executive officer) of each Seller in accordance with Section 9.02(a) and (b);

(v) A "Certificate of Non-Foreign Status" pursuant to Treasury Regulation Section 1.1445-2(b)(2), executed by Sellers;

(vi) The Deeds, executed by the applicable Sellers;

(vii) Possession of the Assets and the Business;

(viii) such other bills of sale, deeds, endorsements, affidavits, assignments and other good and sufficient instruments of conveyance and transfer, in form reasonably satisfactory to Buyer, as Buyer may reasonably request to vest in Buyer all of Sellers' right, title and interest of Sellers in, to or under any or all of the Assets, including all Owned Real Property; and

(ix) Such other documents as Buyer may reasonably request that are customary for a transaction of this nature and necessary to evidence or consummate the transactions contemplated by this Agreement.

4.03 Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned at any time prior to the Closing Date only as follows:

(a) By mutual written agreement of Sellers and Buyer;

(b) By Buyer upon a breach of, or failure to perform, any representation, warranty, covenant or agreement of Sellers set forth in this Agreement such that the conditions set forth in Section 9.02 would be incapable of being satisfied prior to the then-applicable End Date (or if Sellers shall have delivered a Schedule Update which would give rise to such a breach); provided, however, that the right to terminate this Agreement pursuant to this Section 4.03(b) for breaches of covenants or agreements shall only be available to Buyer after Sellers have received written notice of such breach and a twenty (20) day period to cure such breach (if curable);

(c) By Sellers upon a breach of, or failure to perform, any representation, warranty, covenant or agreement of Buyer set forth in this Agreement such that the conditions set forth in Section 9.01 would be incapable of being satisfied prior to the then-applicable End Date; provided, however, that the right to terminate this Agreement pursuant to this Section 4.03(c) for breaches of covenants or agreements shall only be available to Sellers after Buyer has received written notice of such breach and a twenty (20) day period to cure such breach (if curable);

(d) By Buyer or Sellers, if there shall be any order, writ, injunction or decree of any court or other Governmental Entity binding on Buyer or Sellers which permanently prevents, prohibits or restrains Buyer and/or Sellers from consummating the transactions contemplated hereby and such order, writ, injunction or decree is or shall become final and non-appealable; provided that the right to terminate this Agreement pursuant to this Section 4.03(d) shall not be available to any party whose breach of any provision of this Agreement is the

principal cause of or resulted in the application or imposition of such order, writ, injunction or decree;

(e) By Buyer if (i) the Bankruptcy Court shall not have entered the Bid Procedures Order on or prior to the later of (A) the date that is thirty (30) days following the Petition Date or (B) the date that is fifteen (15) days following the formation of an unsecured creditors committee, or (ii) the Bid Procedures Order shall have been denied, stayed, vacated, modified or supplemented without Buyer's prior written consent.

(f) By Buyer or Sellers if the Auction has not begun by the date that is forty five (45) days following the entry of the Bid Procedures Order.

(g) By Buyer if (i) the Bankruptcy Court shall not have entered the Transaction Approval Order by the date that is ninety (90) days following the Petition Date, (ii) the Transaction Approval Order shall not have become a Final Order on or prior to the date that is fourteen (14) days after the entry of such Order or (iii) the Transaction Approval Order shall have been stayed, vacated, modified or supplemented without Buyer's prior written consent;

(h) By Buyer or Sellers if for any reason the Closing has not occurred by the date that is one (1) month following the entry of the Transaction Approval Order (the "***End Date***"); provided that, if Buyer provides written notice to Seller at least two (2) days prior to the then-applicable End Date, the End Date shall be extended for a period of one (1) month, up to a total of six (6) months following the entry of the Transaction Approval Order; and provided further that, at the time of such termination, the terminating party is not then in material breach (or if any Seller is the terminating party, no Seller is in then in material breach) of its obligations contained in this Agreement;

(i) By Buyer if (i) any Seller seeks to have the Bankruptcy Court enter an order, to be effective prior to the Closing, dismissing a Chapter 11 Case or converting it to a case under Chapter 7 of the Bankruptcy Code, or appointing a trustee in its Chapter 11 Case or appointing a responsible officer or an examiner with enlarged powers relating to the operation of Sellers' businesses (beyond those set forth in Section 1106(a)(3) or (4) of the Bankruptcy Code) under Bankruptcy Code Section 1106(b), or (ii) such an order of dismissal, conversion or appointment is entered for any reason and is not reversed or vacated within fourteen (14) days after the entry thereof;

(j) By Buyer or Sellers if the Transaction Approval Order has been revoked or rescinded or has been modified in any respect that is materially detrimental to the party seeking to terminate and the order revoking, rescinding or so modifying the Transaction Approval Order shall not be reversed or vacated within fourteen (14) days after the entry thereof;

(k) By Buyer if for any reason Buyer is unable, pursuant to Section 363(k) of the Bankruptcy Code, to credit bid in payment of all or any portion of the Purchase Price as set forth in Section 3.02;

(l) By Buyer or Sellers if, at the end of the Auction contemplated by the Bidding Procedures, Buyer is not determined by Sellers to be the Successful Bidder (as defined in the Bidding Procedures);

(m) By Buyer, if any of the conditions set forth in Section 9.02 (g) have not been satisfied by the Action Date or if any of the conditions set forth in Section 9.02(f) are not satisfied prior to the date of the scheduled commencement of the Auction as set forth in the Bidding Procedures (the "***Auction Date***");

(n) By Buyer if (i) the Interim DIP Financing Orders are not entered within five (5) days (or such later date as the Buyer may agree to in writing) following the Petition Date, or (ii) the Final DIP Financing Orders are not entered within thirty (30) days (or such later date as the Buyer may agree to in writing) following the entry of each applicable Interim DIP Financing Order;

(o) By Buyer if, notwithstanding the satisfaction of the conditions set forth in Section 9.02(f)(i) hereof, at any time thereafter prior to Closing, the USW, its officers, representatives, agents or members engage in, cause, authorize, sanction or approve any strike, slow-down, boycott, picketing, sympathy strike, or any other material interruption of the operations of the Business; or

(p) By Sellers if all of the conditions set forth in Section 10.23 hereof are satisfied and the Parties execute the APA Amendment, and thereafter Buyer does not, by the Auction Date, either (i) agree in writing to assume, as of the Closing, the Hannibal CBA, as amended by the Hannibal Restructuring Memorandum of Agreement, and the Burnside CBA (provided such Collective Bargaining Agreements have not been amended, altered or otherwise modified in any respect after the date hereof), or (ii) agree in writing to enter into new Collective Bargaining Agreements, as of the Closing, with the USW containing terms and conditions acceptable to Buyer and the USW.

Each condition set forth in this Section 4.03 pursuant to which this Agreement may be terminated shall be considered separate and distinct from each other such condition. If more than one of the termination conditions set forth in this Section 4.03 are applicable, the applicable Party shall have the right to choose the termination condition pursuant to which this Agreement is to be terminated. The Parties acknowledge and agree that no notice of termination provided pursuant to this Section 4.03 shall become effective until three (3) days after the delivery of such notice to the other Parties, and only if such notice shall not have been withdrawn during such three (3) day period or otherwise become invalid.

4.04 Procedure upon Termination; Limitation on Damages. In the event of the termination of this Agreement, written notice thereof shall forthwith be given by the party or parties so terminating to the other Party or Parties, and this Agreement shall terminate, and the transactions contemplated hereby shall be abandoned, without further action by Sellers or Buyer, except that the provisions of this Section 4.04 and Sections 4.05, 7.02, 10.01, 10.03, 10.04, 10.05, 10.07, 10.08, 10.09, 10.10, 10.11 and 10.15 hereof shall survive any termination of this Agreement and nothing contained in this Agreement shall relieve any party hereto from liability for any breach or inaccuracy of its representations, warranties, covenants or agreements contained in this Agreement prior to such termination.

4.05 Payments Upon Termination.

(a) If this Agreement is terminated pursuant to Section 4.03(b), (h), (i), (j), (l), (m) or (o) hereof, Sellers shall, subject to approval by the Bankruptcy Court in the Transaction Approval Order or otherwise, reimburse Buyer for its reasonable and documented out-of-pocket costs and expenses (including legal, accounting, and other similar fees and expenses) incurred in connection with the Acquisition and the other transactions contemplated by this Agreement in an amount up to $1,000,000 (the "***Expense Reimbursement***").

(b) The Expense Reimbursement, to the extent payable pursuant to Section 4.05(a) hereof, shall be paid by Sellers to Buyer immediately upon the termination of this Agreement by wire transfer of immediately available funds to an account designated by Buyer to Sellers.

ARTICLE V

REPRESENTATIONS AND WARRANTIES OF SELLERS

Except as set forth in the corresponding sections or subsections of the Disclosure Schedule, Sellers hereby jointly and severally represent and warrant to Buyer as follows:

5.01 Organization and Qualification; Due Authorization.

(a) Each Seller is a corporation or limited liability company duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization and has all requisite corporate power and authority to own, lease and operate its properties and to carry on its business as it is now being conducted, subject to the limitations, if any, imposed by applicable bankruptcy law. Each Seller is duly qualified to do business and is in good standing in all jurisdictions in which the failure to so qualify would not constitute a Material Adverse Effect. The jurisdictions in which each Seller is so qualified are listed on Schedule 5.01(a) hereto.

(b) Each Seller has full corporate power and authority to execute and deliver this Agreement and the Other Agreements to which it is a party, and, subject to Bankruptcy Court approval, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Other Agreements to which any Seller is a party and the performance and consummation of the transactions contemplated hereby and thereby by such Seller have been duly authorized by all necessary corporate action on the part of such Seller.

(c) This Agreement and the Other Agreements to which any Seller is a party have been (or to the extent to be entered into on or prior to the Closing, will be) duly executed and delivered by such Seller and, subject to Bankruptcy Court approval and the due authorization, execution and delivery of such agreements by the other parties thereto (other than other Sellers), this Agreement and the Other Agreements constitute (or to the extent to be entered into on or prior to the Closing, will constitute) valid and binding obligations of such Seller, enforceable against such Seller in accordance with their terms.

(d) Except as set forth on Schedule 5.01(d)(i), Sellers do not own, directly or indirectly, any interest or investment (whether equity or debt) in any Person (other than other Sellers). The Persons listed on Schedule 5.01(d)(i) are the "***Inactive Subsidiaries***." The Inactive Subsidiaries have no rights in respect of or in any way related to or currently or historically used in the Business and have no properties, claims, assets, operations, contracts, business or receivables. Except as set forth on Schedule 5.01(d) hereto, no Person other than Sellers owns or holds any assets or properties used or held for use in the operation of the Business.

5.02 Violation; Consents and Approvals.

(a) Except as set forth in Schedule 9.02(d), neither the execution and delivery by any Seller of this Agreement or the Other Agreements to which it is (or will be) a party nor, after giving effect to the Transaction Approval Order, the consummation of the transactions contemplated hereby or thereby nor, after giving effect to the Transaction Approval Order, compliance by it with any of the provisions hereof or thereof will (i) conflict with or result in a violation of (A) any provision of the certificate of incorporation or bylaws (or other organizational or governing documents) of such Seller or (B) any judgment, order, writ, injunction, decree, statute, law, ordinance, rule or regulation binding upon such Seller or by which the Business or any Assets are subject or bound, (ii) violate, conflict with, or result in a breach of any of the terms of, or constitute a default under, or give rise to any right of termination, modification, cancellation or acceleration under (A) any Material Contract, or (B) any license, permit, authorization, consent, order or approval of, or registration, declaration or filings with, any Governmental Entity, or (iii) result in the creation of any Encumbrance upon the properties or assets of such Seller being sold or transferred hereunder.

(b) Other than the Bid Procedures Order and the Transaction Approval Order, and except as set forth in Schedule 9.02(d), no consent, waiver, approval, order, Permit or authorization of or from, or declaration or filing with, or notification to, any Person or Governmental Entity is required on the part of Sellers in connection with the execution and delivery of this Agreement or the Other Agreements, or the compliance by Sellers with any of the provisions hereof or thereof.

5.03 Financial Statements. Sellers have delivered to Buyer the following financial statements: (a) audited consolidated balance sheet as of December 31, 2011, and the related statements of operations, stockholders' equity and cash flows (together with the auditors' report thereon) for the year ended December 31, 2011, together with notes to such financial statements (the "***Year End Financial Statements***"), and (b) unaudited consolidated balance sheet as of September 30, 2012, and the related statements of operations, stockholders' equity and cash flows for the nine-month period ended September 30, 2012 (the "***Interim Financial Statements***"). The Year End Financial Statements and Interim Financial Statements are herein collectively referred to as the "***Financial Statements***." The Financial Statements have been prepared in accordance with generally accepted accounting principles ("***GAAP***") consistently applied throughout the periods covered thereby, present fairly in all material respects, as of their respective dates, the financial condition and results of operations of Sellers (subject, in the case of Interim Financial Statements, to the disclosures contained in any notes thereto and normal, recurring year-end adjustments that may be required upon audit and the omission of footnote disclosures) and are consistent with the books and records of Sellers.

5.04 Absence of Undisclosed Liabilities. Except as and to the extent specifically disclosed in the Interim Financial Statements or as set forth on Schedule 5.04 hereof, Sellers do not have any material liabilities other than liabilities and obligations incurred during the period between September 30, 2012 and the date hereof related to the restructuring of Sellers and those incurred since September 30, 2012 in accordance with the Business Plan or in the ordinary course of business and consistent with past practice.

5.05 Indebtedness. Except as set forth on Schedule 5.05 hereof, Sellers do not have any Indebtedness.

5.06 Absence of Certain Changes or Events. Except as set forth on Schedule 5.06 hereto or as expressly contemplated by this Agreement or the Business Plan, since September 30, 2012 Sellers have not:

(a) Except for executory contracts and unexpired leases rejected by Sellers by Order of the Bankruptcy Court with the prior written consent of Buyer, terminated, modified or amended any Assumed Contract or taken any action which violates, conflicts with or resulted in a breach of any provision of, or constitutes a default under, any Assumed Contract;

(b) (i) purchased or otherwise acquired any material properties or assets (tangible or intangible) or sold, leased, transferred or otherwise disposed of any Assets, except for purchases of materials and sales of finished inventory in the ordinary course of business consistent with past practice, (ii) permitted, allowed or suffered any of the Assets to be subjected to any Encumbrance (other than Permitted Encumbrances), or (iii) removed any Equipment or other material assets (other than finished inventory) from the Real Property other than in the ordinary course of business consistent with past practice;

(c) Waived or released any claim or rights included in or related to the Assets or the Business with a value individually or in the aggregate in excess of $250,000 or revalued any of the Assets, except for adjustments to the value of inventory in the ordinary course of business consistent with past practice;

(d) Entered into any contractual relationship with any third party related to the Assets or the Business, other than purchase or supply orders in the ordinary course of business;

(e) Made any material commitments for capital expenditures;

(f) Other than in the ordinary course of business consistent with past practice increased the benefits of or compensation (whether in the form of salary, bonus or otherwise) payable to any employee, contractor or consultant of Sellers, or granted any bonus, benefit, payment (contingent or otherwise) or other direct or indirect compensation to any employee, contractor or consultant of Sellers;

(g) Except as required by Law, adopted, amended or terminated any Company Benefit Plan;

(h) Introduced any material change with respect to the operations of the Business;

(i) Suffered any material damage or destruction to or loss of any material assets or properties whether or not covered by insurance;

(j) Changed in any way Sellers' accounting methods, principles or practices other than required by changes in GAAP;

(k) Entered into any commitment or transaction or series of commitments or transactions in respect of Indebtedness or paid, discharged or satisfied any claims, liabilities or obligations (absolute, accrued, asserted or unasserted, contingent or otherwise), other than the payment, discharge or satisfaction in the ordinary course of business of liabilities incurred in the ordinary course of business consistent with past practice; or

(l) Agreed or committed to do any of the foregoing.

5.07 Title to Assets. Sellers (i) have good and valid title to all the Assets (ii) free and clear of all Encumbrances (except for those set forth on Schedule 5.07 hereto and those that will be released upon Closing and Permitted Encumbrances), and at the Closing will convey good and valid title to all of such Assets to Buyer, free and clear of all Encumbrances except for the Assumed Liabilities and Permitted Encumbrances. Except as set forth on Schedule 5.07 hereto, the Assets constitute all of the assets and properties which are used in or reasonably required to carry on the Business as currently conducted. Except as set forth on Schedule 5.07 hereto, the tangible Assets are in good operating condition and repair, ordinary wear and tear excepted.

5.08 Customers and Suppliers.

(a) Schedule 5.08(a) hereto sets forth a list of the ten (10) largest suppliers of the Business for the twelve (12) months ended September 30, 2012 (the "***Material Suppliers***").

(b) Except as set forth on Schedule 5.08(b) hereto and in the Business Plan, since September 30, 2012, (i) no Material Supplier has ceased or materially reduced its sales or provision of services to, or materially and adversely modified its relationship with, Sellers, other than, with respect to Material Suppliers, such cessations, reductions or modifications which would not, individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect, and (ii) no Seller has received notice of termination or an intention to terminate any relationship with any Material Supplier, other than any termination of a relationship which would not, individually or in the aggregate reasonably be expected to result in a Material Adverse Effect.

(c) Schedule 5.08(c) hereto sets forth a list of the ten (10) largest customers of the Business for the twelve (12) months ended September 30, 2012 (the "***Material Customers***").

(d) Except as set forth on Schedule 5.08(d) hereto and in the Business Plan, since September 30, 2012, (i) no Material Customer has ceased or materially reduced its purchases from, or materially and adversely modified its relationship with, Sellers, other than, with respect to Material Customers, such cessations, reductions or modifications which would not, individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect, and (ii) no Seller has received notice of termination or an intention to terminate any relationship with any Material Customer other than any termination of a relationship which

would not, individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect.

5.09 Intellectual Property.

(a) Schedule 5.09(a) hereto sets forth all material Intellectual Property owned by or licensed to Sellers that is used in the operation of the Business as currently conducted.

(b) Except as set forth on Schedule 5.09(b) hereto, Sellers solely own or are licensed or otherwise have the right to use (to the extent required to operate the Business in the ordinary course) and to transfer to Buyer hereunder, free from any Encumbrances (other than Permitted Encumbrances), and without payment to any other party, the Intellectual Property; none of the Intellectual Property is subject to any Order; and the consummation of the transactions contemplated hereby will not alter or impair such rights (other than that all such rights will be assigned to Buyer). No claims have been asserted against Sellers by any Person with respect to the ownership, validity, enforceability or use of any of the Intellectual Property, or challenging or questioning the validity or effectiveness of any of the Intellectual Property in any jurisdiction, nor, in either case, to the knowledge of Sellers, is there any valid basis for any such claim. To the knowledge of Sellers, (i) no Person is infringing upon the rights in the Intellectual Property of Sellers, and (ii) the operation of the Business and the use of the Intellectual Property in the operation of the Business has not infringed and does not infringe upon or misappropriate the rights of any Person. Except as set forth on Schedule 5.09(b) hereto, Sellers are not party to any contract or agreement pursuant to which they have agreed to indemnify any Person for or against any interference, infringement, misappropriation, or other conflict with respect to any of the Intellectual Property.

5.10 Litigation. Except as set forth on Schedule 5.10 hereto, there are no material claims, charges, actions, suits or proceedings pending, or to the knowledge of Sellers, threatened against or affecting Sellers, including but not limited to any claims, charges, grievances, actions, suits or proceedings relating to the Assets, the Assumed Liabilities, the Business, Sellers' current or former employees, consultants or contractors, or the transactions contemplated by this Agreement, at law, in equity or otherwise, in, before, or by any Governmental Entity, arbitrator or mediator. No Seller is in default under any judgment, order or decree of any Governmental Entity.

5.11 Taxes.

(a) Except as set forth on Schedule 5.11(a), all federal, state, foreign, county, local and other Tax Returns required to be filed by or on behalf of Sellers have been timely filed, or extensions of the time to file have been obtained, and when filed were true and correct in all material respects, and the taxes due and owing were paid or adequately accrued, except to the extent contested in good faith by proper proceedings. True and complete copies of all Tax Returns filed by Sellers for each of its three (3) most recent fiscal years have been delivered to Buyer. Sellers have duly withheld and paid all Taxes required to have been withheld and paid relating to any employee, independent contractor, creditor, stockholder, or other third party, and all Forms W-2 and 1099 required with respect thereto have been properly completed and timely filed and distributed.

(b) Except as set forth on Schedule 5.11(b), the provision made for taxes on the Interim Financial Statements is sufficient for the payment of all material Taxes, whether or not disputed, at the date of such Interim Financial Statements and for all years and periods prior thereto. Since September 30, 2012, Sellers have not incurred any material Taxes other than Taxes incurred in the ordinary course of business consistent in type and amount with past practices.

(c) The federal and state income Tax Returns of Seller have been audited by the IRS and appropriate state taxing authorities for the periods, and to the extent set forth in Schedule 5.11(c) hereto, and Sellers have not received from the Internal Revenue Service or from the tax authorities of any state, county, local or other jurisdiction any notice of underpayment of Taxes or other deficiency which has not been paid nor any objection to any return or report filed by any Seller. There is no material dispute or claim concerning any Tax liability of any Seller either (i) claimed or raised by any authority in writing or (ii) as to which any Seller has knowledge based upon personal contact with any agent of such authority.

(d) Except to the extent set forth in Schedule 5.11(d) hereto, there are no outstanding agreements or waivers extending the statutory period of limitations applicable to any Tax Return or report of any Seller or the period of time within which any Tax Return of any Seller must be filed.

(e) No Seller is a party to any agreement, contract, arrangement, or plan that has resulted or would result, separately or in the aggregate, in the payment of any "excess parachute payment" within the meaning of Section 280G of the Code (or any corresponding provision of state, local, or foreign Tax law). No Seller has been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in 897(c)(1)(A)(ii) of the Code. No Seller is a party to or bound by any tax allocation or sharing agreement. No Seller (A) has been a member of an affiliated group filing a consolidated federal income Tax Return (other than a group the common parent of which was one of Sellers) or (B) has any liability for the Taxes of any Person (other than any other Seller) under Treas. Reg. §1.1502-6 (or any similar provision of state, local, or foreign law), as a transferee or successor, by contract, or otherwise.

(f) Except as set forth in Schedule 5.11(f) hereto, during the last two (2) years, no Seller has (i) applied for any tax ruling with respect to non-income Taxes, (ii) entered into a closing agreement with any taxing authority with respect to non-income Taxes, or (iii) been a party to any Tax allocation or Tax sharing agreement (other than with any other Seller).

(g) No Seller will be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of any:

(i) Change in method of accounting for a taxable period ending on or prior to the Closing Date;

(ii) "Closing agreement" as described in Section 7121 of the Code (or any corresponding or similar provision of state, local or foreign income Tax Law) executed on or prior to the Closing Date;

(iii) Intercompany transactions or any excess loss account described in Treasury Regulations under Section 1502 of the Code (or any corresponding or similar provision of state, local or foreign income Tax law);

(iv) Installment sale or open transaction disposition made on or prior to the Closing Date; or

(v) Prepaid amount received on or prior to the Closing Date.

(h) No Seller has distributed stock of another Person, or has had its stock distributed by another Person, in a transaction that was purported or intended to be governed in whole or in part by Section 355 or 361 of the Code.

(i) Except as set forth in Schedule 5.11(i) hereto, no Seller has engaged in a "reportable transaction", within the meaning of Treasury Regulation §1.6011.4.

5.12 Contracts.

(a) Schedule 5.12(a)(i) hereto sets forth each agreement, contract, arrangement, lease, license, understanding, commitment or instrument (each a "***Contract***") to which any Seller is a party or is bound. Schedule 5.12(a)(ii) hereto sets forth each Contract to which any Seller is a party or is bound (A) involving aggregate expenses or payments of $500,000 or more during any 12-month period (other than purchase orders in the ordinary course of business of Sellers and other than Contracts that by their terms may be terminated by Sellers in the ordinary course of business upon 60 days' or less notice without penalty or premium), (B) which is a Government Contract or (C) the breach or termination of which could reasonably be expected to have a Material Adverse Effect on Sellers (the "***Material Contracts***").

(b) Each of the Material Contracts is valid, binding and in full force and effect, enforceable by the Seller party thereto in accordance with its terms, subject to the limitations, if any, imposed by applicable bankruptcy laws, and there has not been any cancellation or, to the knowledge of Sellers, threatened cancellation of any such Material Contract, nor any pending or, to the knowledge of Sellers, threatened disputes thereunder. No Seller is (with or without the lapse of time or the giving of notice, or both) in material breach or default under any Material Contract except for breaches or defaults (i) that would be remedied solely by the payment of Cure Costs, (ii) caused solely by the filing of Sellers' Chapter 11 Case or (iii) as set forth on Schedule 5.12(b) hereto, and to the knowledge of Sellers, no other party to any of the Material Contracts is (with or without the lapse of time or the giving of notice, or both) in material breach or default thereunder. Except as set forth on Schedule 5.12(b) hereto, after giving effect to the Transaction Approval Order, no consents or approvals of any Person other than Sellers is necessary to sell, assign, convey, transfer and deliver to Buyer, on the terms of this Agreement and the Other Agreements, any and all rights and interests of Sellers in the Material Contracts. Sellers have provided Buyer with true and complete copies of each written Material Contract (including all amendments thereto).

5.13 Compliance with Laws, Permits, Licenses, Etc.

(a) Except as set forth on Schedule 5.13(a) hereto, Sellers are and have been at all times within the applicable statute of limitations in compliance in all material respects with all applicable Laws and Permits. Except as set forth on Schedule 5.13(a) hereto, no communication, whether from a Governmental Entity, citizens group, employee or otherwise, has been received by Sellers and no investigation or review is pending or, to the knowledge of Sellers, threatened by any Governmental Entity with respect to (i) any alleged violations by Sellers thereof of any Law or Permit or (ii) any alleged failure to have all Permits required in connection with the operation of the Business or the ownership of the Assets.

(b) Sellers hold all material Permits necessary or required to operate the Business as currently conducted. Set forth on Schedule 5.13(b) hereto is a list of all such Permits (and the status thereof), all of which are valid, effective and in good standing. Except as set forth on Schedule 5.13(b) hereto, each of such Permits is freely transferable to Buyer and none of the transactions contemplated herein will cause, or result in, a termination, limitation or suspension of any such Permit.

5.14 Inventory. Except as set forth on Schedule 5.14 hereto or in the Business Plan, (i) all Inventory of Sellers, whether or not reflected on the Financial Statements, consists of items of a quality useable or saleable in the ordinary course of business; (ii) Sellers do not hold any Inventory on consignment; (iii) all Inventory is merchantable and fit for the purpose for which it was procured or manufactured and, except as has been written down on the face of the Interim Financial Statements, or, with respect to inventory acquired since the date of such Interim Financial Statements, other than in the ordinary course of business, none of such Inventory is slow-moving or obsolete, damaged or defective; (iv) any Inventory that has been written down has either been written off or written down to its net realizable value; (v) there has been no change in inventory valuation standards, other than in the ordinary course of business consistent with past practice, or methods with respect to the Inventory in the current or prior one (1) fiscal years; (vi) the quantities of any kind of Inventory are sufficient for the ordinary course operation of the Business; and (vii) since September 30, 2012, Sellers have continued to replenish their respective inventories in a manner consistent with past practices.

5.15 Environmental Matters.

(a) Except as set forth on Schedule 5.15(a) hereto, (i) the operations of Sellers are in material compliance with all Environmental Laws; (ii) there has been no Release at any of the properties owned or operated by Sellers, or any predecessor in interest thereof, or at any disposal or treatment facility which received Hazardous Substances generated by Sellers or any predecessor in interest thereof which could have a Material Adverse Effect; (iii) no Environmental Claim has been asserted against Sellers or any predecessor in interest thereof nor does any Seller have knowledge or notice of any threatened or pending Environmental Claim against Sellers or any predecessor in interest thereof which could have a Material Adverse Effect; (iv) no Environmental Claims have been asserted against any facilities that may have received Hazardous Substances generated by Sellers or any predecessor in interest thereof which could have a Material Adverse Effect; (v) no property now or formerly owned or operated by Sellers has been used as a treatment or disposal site for any Hazardous Substance; (vi) no Seller has

failed to report to the proper Governmental Entity any Release which is required to be so reported by any Environmental Laws which could have a Material Adverse Effect; (vii) each Seller holds all licenses, permits and approvals required under any Environmental Laws in connection with the operation of the business carried on by it, except for such licenses, permits and approvals as to which Sellers' failure to maintain or comply with could not have a Material Adverse Effect; and (viii) no Seller has received any notification pursuant to any Environmental Laws that (A) any work, repairs, construction or capital expenditures are required to be made as a condition of continued compliance with any Environmental Laws, or any license, permit or approval issued pursuant thereto or (B) any license, permit or approval referred to above is about to be reviewed, made subject to limitations or conditions, revoked, withdrawn or terminated, in each case, except as could not have a Material Adverse Effect.

(b) Except as set forth on Schedule 5.15(b) hereto, (i) Sellers are in material compliance with all Environmental Laws; (ii) no Seller has released, spilled or discharged any Hazardous Substance on, in or under, nor to the knowledge of any Seller, is any Hazardous Substance migrating from or onto the Real Property that could reasonably be expected to give rise to any reporting, investigation, remediation, or other liabilities or obligations under any Environmental Laws; (iii) no release, spill or discharge of any Hazardous Substance caused by Sellers, or arising during the ownership or operations of Sellers or the Business, has occurred on, in, under or is migrating from or onto any Real Property formerly owned, leased, operated or otherwise used in connection with the Business, that could reasonably be expected to give rise to any reporting, investigation, remediation, or other liabilities or obligations for Sellers or the Business under any Environmental Laws; (iv) Sellers have received no notice of any litigation, demand, claim, hearing or notice of violation or alleged violation pending or threatened against any Seller relating in any way to the Environmental Laws; (v) Sellers have not treated, stored, disposed of, arranged for or permitted the disposal of, any substance, including any Hazardous Substance, so as to give rise to any current or future liabilities under any Environmental Laws; (vi) to the knowledge of Sellers, there are no events, conditions, circumstances, activities, practices, incidents, actions, omissions or plans which reasonably could be expected to interfere with or prevent compliance or continued compliance with the Environmental Laws as the Business is currently operated, or otherwise form the basis of any litigation, hearing, notice of violation, study or investigation, based on or related to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling, or the emission, discharge, release or threatened release into the environment, of any Hazardous Substance; and (vii) Sellers have not undertaken or assumed any liability or obligation for corrective or remedial action, or of any other Person relating to Environmental Laws.

(c) Except as described in Schedule 5.15(c) hereto, to the knowledge of Sellers, the Real Property does not contain any: (i) under- or above-ground storage tanks, (ii) underground injection wells, (iii) septic tanks in which process wastewater or any Hazardous Substances have been disposed, (iv) asbestos, (v) equipment using PCBs or (vi) drums buried in the ground, or other landfills, surface impoundments, or disposal areas.

(d) Schedule 5.15(d) hereto identifies all environmental, health and/or safety, including process safety management, loss and prevention, investigations, assessments, audits, studies, tests, reviews, reports or sampling results (including but not limited to Phase I or Phase

II environmental assessments or environmental audits) relating to the Real Property obtained by Sellers and true and complete copies of such reports have been provided to Buyer.

(e) Schedule 5.15(e) hereto identifies all material Environmental Permits, approvals or authorizations issued by any federal, state or local Government Entity to any Seller in connection with the Business or the Real Property, each such Environmental Permit is valid and enforceable and in full force and effect, and Sellers are in compliance, in all material respects, with the terms and conditions of all such Environmental Permits, approvals or authorizations and no other Environmental Permits, approvals or authorizations are necessary for operating the Business as currently conducted.

5.16 Employees and Employee Benefit Plans and Arrangements; Labor Matters.

(a) Except as set forth in Schedule 5.16(a) hereto, Sellers do not sponsor, maintain or contribute to or have any obligation to maintain or contribute to, or have any direct or indirect liability, whether contingent or otherwise, with respect to any plan, program, arrangement or agreement that is a pension, profit-sharing, savings, retirement, employment, consulting, severance pay, termination, executive compensation, incentive compensation, deferred compensation, bonus, stock purchase, stock option, phantom stock or other equity-based compensation, change in control, salary continuation, retention, vacation, sick leave, disability, death benefit, group insurance, hospitalization, medical, dental, life (including all individual life insurance policies to which a Seller is the owner, the beneficiary or both), Code Section 125 "cafeteria" or "flexible" benefit, employee loan, educational assistance or fringe benefit plan, program, practice, arrangement, policy or agreement, whether written or oral, including, without limitation, any (i) "employee benefit plan" within the meaning of Section 3(3) of ERISA or (ii) other employee benefit plans, agreements, programs, policies, arrangement or payroll practices, whether or not subject to ERISA (including any funding mechanism therefor now in effect or required in the future as a result of the transaction contemplated by this Agreement or otherwise) under which any Employees of Sellers as of the date hereof ("***Employees***") or former Employees, current or former officers, directors, leased employees, consultants or agents (or their respective beneficiaries) of any Seller has any present or future right to benefits (individually, a "***Company Benefit Plan***" and collectively the "***Company Benefit Plans***"). All references to "Sellers" in this Section 5.16 shall refer to (i) any of Sellers and (ii) their subsidiaries and any employer that would be considered a single employer with any of Sellers under Sections 414(b), (c), (m) or (o) of the Code ("***ERISA Affiliate***").

(b) Except as set forth on Schedule 5.16(b) hereto, none of Sellers or any ERISA Affiliate maintains, contributes or has any liability, whether contingent or otherwise, with respect to, and has never maintained, contributed or had any liability, whether contingent or otherwise, with respect to any Company Benefit Plan (including, for such purpose, any "employee benefit plan," within the meaning of Section 3(3) of ERISA, which any of Sellers previously maintained or contributed), that is, or has been, (i) subject to Title IV of ERISA or Section 412 of the Code, (ii) maintained by more than one employer within the meaning of Section 413(c) of the Code, (iii) subject to Sections 4063 or 4064 of ERISA, (iv) a "multiemployer plan," within the meaning of Section 4001(a)(3) of ERISA ("***Multiemployer Plan***"), (v) a "multiple employer welfare arrangement" as defined in Section 3(40) of ERISA, (vi) a plan that is a "welfare benefit fund" as defined in Section 419(e) of the Code, or an

organization described in Sections 501(c)(9) or 501(c)(20) of the Code, or (vii) an "employee pension benefit plan" within the meaning of Section 3(2) of ERISA and that is not intended to be qualified under Section 401(a) of the Code.

(c) Except as set forth on Schedule 5.16(c), (i) each Company Benefit Plan has been established and administered in all material respects in accordance with its terms and in compliance with the applicable provisions of ERISA, the Code and all other applicable Laws; (ii) with respect to each Company Benefit Plan, all reports, returns, notices and other documentation that are required to have been filed with or furnished to the Internal Revenue Service ("***IRS***"), the United States Department of Labor ("***DOL***") or any other Governmental Entity, or to the participants or beneficiaries of such Company Benefit Plan have been filed or furnished on a timely basis; (iii) each Company Benefit Plan that is intended to be qualified within the meaning of Section 401(a) of the Code is so qualified and is the subject of a currently effective favorable determination letter from the IRS, or as the case may be, an IRS advisory, notification or opinion letter to the effect that such Company Benefit Plan satisfies the requirements of Section 401(a) of the Code and that its related trust is exempt from taxation under Section 501(a) of the Code and, to the knowledge of Sellers, there are no facts or circumstances that could reasonably be expected to cause the loss of such qualification or the imposition of any liability, penalty or tax under ERISA, the Code or any other applicable Laws; (iv) other than routine claims for benefits, no liens, lawsuits or complaints to or by any person or Governmental Entity have been filed against any Company Benefit Plan or Sellers or, to the knowledge of Sellers, against any other person or party and, to the knowledge of Sellers, no such liens, lawsuits or complaints are contemplated or threatened with respect to any Company Benefit Plan; (v) no individual who has performed services for Sellers has been improperly excluded from participation in any Company Benefit Plan; and (vi) there are no audits or proceedings initiated pursuant to the IRS Employee Plans Compliance Resolution System (currently set forth in Revenue Procedure 2006-27) or similar proceedings pending with the IRS or the DOL with respect to any Company Benefit Plan.

(d) Neither of Sellers nor any other "party in interest" or "disqualified person with respect to any Company Benefit Plan has engaged in a non-exempt "prohibited transaction" within the meaning of Section 406 of ERISA or Section 4975 of the Code involving such Company Benefit Plan that, individually or in the aggregate, could reasonably be expected to subject any of Sellers or such other person, whether natural or otherwise, to a tax or penalty imposed by Section 4975 of the Code or Sections 501, 502 or 510 of ERISA. No fiduciary has any liability for any breach of fiduciary duty or any other failure to act or comply with the requirements of ERISA, the Code or any other applicable laws in connection with the administration or investment of the assets of any Company Benefit Plan.

(e) Except as set forth on Schedule 5.16(e), (i) all liabilities or expenses of Sellers in respect of any Company Benefit Plan (including workers' compensation) that have not been paid, have been properly accrued on Sellers' most recent financial statements in compliance with GAAP; and (ii) all contributions (including all employer contributions and employee salary reduction contributions) or premium payments required to have been made under the terms of any Company Benefit Plan, or in accordance with applicable law, as of the date hereof have been timely made or reflected on Sellers' financial statements in accordance with GAAP.

(f) Except as set forth on Schedule 5.16(f), (i) none of Sellers has any obligation to provide or make available post-employment benefits under any Company Benefit Plan for any current or former officer, director, employee, leased employee, consultant or agent (or their respective beneficiaries) of such Seller, except as may be required under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("***COBRA***"); and (ii) there are no reserves, assets, surpluses or prepaid premiums with respect to any Company Benefit Plan that is a "welfare plan" (as defined in Section 3(1) of ERISA) ("***Welfare Plan***").

(g) Except as set forth on Schedule 5.16(g), neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby will (either alone or in combination with another event) (i) result in any payment becoming due, or increase the amount of any compensation due, to any current or former officer, director, employee, leased employee, consultant or agent (or their respective beneficiaries) of any of Sellers; (ii) increase any benefits otherwise payable under any Company Benefit Plan; (iii) result in the acceleration of the time of payment or vesting of any such compensation or benefits; (iv) result in a non-exempt "prohibited transaction" within the meaning of Section 406 of ERISA or Section 4975 of the Code; or (v) result in the payment of any amount that could, individually or in combination with any other such payment, constitute an "excess parachute payment," as defined in Section 280G(b)(1) of the Code or Treasury Regulations promulgated under Section 280G of the Code. No current or former officer, director, employee, leased employee, consultant or agent (or their respective beneficiaries) has or will obtain a right to receive a gross-up payment from Sellers with respect to any excise taxes that may be imposed upon such individual pursuant to Section 409A of the Code, Section 4999 of the Code or otherwise.

(h) Sellers have made available to Buyer with respect to each Company Benefit Plan, a true, correct and complete copy (or, to the extent no such copy exists or the Company Benefit Plan is not in writing, an accurate written description) thereof and, to the extent applicable: (i) the most recent documents constituting the Company Benefit Plan and all amendments thereto, (ii) any related trust agreement or other funding instrument and all other material contracts currently in effect with respect to such Company Benefit Plan (including, without limitation, all administrative agreements, group insurance contracts and group annuity contracts); (iii) the most recent IRS determination, advisory, notification or opinion letter; (iv) the most recent summary plan description, summary of material modifications and any other written communication (or a written description of any oral communications) by such Sellers to its employees concerning the extent of the benefits provided under a Company Benefit Plan; (v) the three most recent (A) Forms 5500 and attached schedules, and (B) audited financial statements; (vi) for the last three years, all correspondence with the IRS, the DOL and any other Governmental Entity regarding the operation or the administration of any Company Benefit Plan; (vii) all discrimination tests for the most recent plan year; and (ix) any other documents in respect of any Company Benefit Plan reasonably requested by Buyer.

(i) Except as set forth on Schedule 5.16(i), (i) none of Sellers has any plan, contract or commitment, whether legally binding or not, to create any additional employee benefit or compensation plans, policies or arrangements or, except as may be required by Law, to modify any Company Benefit Plan; and (ii) Sellers may amend or terminate any Company Benefit Plan (other than an employment agreement or any similar agreement that cannot be terminated without the consent of the other party) at any time without incurring liability

thereunder, other than in respect of accrued and vested obligations and medical or welfare claims incurred prior to such amendment or termination.

(j) Except as set forth on Schedule 5.16(j), no Company Benefit Plan covers any current or former officers, directors, employees, leased employees, consultants or agents (or their respective beneficiaries) of Sellers outside of the United States and no Company Benefit Plan is subject to foreign Law.

(k) No Seller has any material direct or indirect liability, whether absolute or contingent, with respect to any misclassification of any person as an independent contractor, volunteer, consultant, leased employee or "temp" rather than as an employee of Seller, or with respect to any employee leased from another employer. No individual classified by Sellers as an independent contractor, leased employee, "temp," volunteer or consultant is entitled to benefits, and or compensation of any kind, under any Company Benefit Plan.

(l) Except as set forth on Schedule 5.16(l), (i) within the past six (6) years, each employee classified as "exempt" from overtime under the Fair Labor Standards Act ("***FLSA***") and any state laws governing wages, hours, and overtime pay has been properly classified as such, and the Companies have not incurred any liabilities under the FLSA or any state wage and hour laws; (ii) within the past six (6) years, each employee not subject to FLSA has been properly categorized according to applicable Law, and has been paid overtime wages consistent with applicable law; (iii) for the last three (3) years, Sellers are and have been in compliance in all material respects with all Laws relating to the employment of labor, including, without limitation, all Laws relating to wages, hours, overtime pay, meal and rest periods, collective bargaining, employee organizing, employment practices; the hiring, promotion, assignment, and termination of employees; discrimination; equal employment opportunities; disability; labor relations, civil rights, disability, data privacy and data protection, unemployment insurance, safety and health, employee benefits, reductions in force, plant closings, mass layoffs, the Worker Adjustment and Retraining Notification ("***WARN***") Act or any state or local similar Laws, workers' compensation, pay equity, immigration, family and medical leave, working conditions, worker training and rehabilitation and the collection and payment of withholding and/or social security taxes.

(m) Except as disclosed in Schedule 5.16(m) (i) No unfair labor practice charges or complaints, jurisdictional disputes, union recognition claims or other matters within the jurisdiction of the National Labor Relations Board, against Sellers and involving the Assets or the Business has occurred, is pending, or to the knowledge of Sellers, is threatened before the National Labor Relations Board or other Governmental Entity and there are no facts or circumstance known to Sellers that could reasonably be expected to give rise to such complaint, dispute, claim or matter; (ii) no employee is represented by a union or labor organization, no union organizational campaign presently exists or has within the three years preceding the Closing Date existed with respect to any employees of Sellers and no request or petition for union representation has been filed or made; (iii) no union or labor organization has been recognized as the collective bargaining representative of any group or unit of any Seller's employees and no union or labor organization has been certified by the National Labor Relations Board or any other Governmental Entity as the collective bargaining representative of any of Seller's employees; and (iv) within the past three years, no work stoppage, work slowdown,

walk-out, boycott, corporate campaign, "work to rule" campaign, hand-billing, sit-in, strike, lock-out, picket, labor dispute, disruption, demonstration, protest or other concerted labor activity has occurred or to the knowledge of Sellers is threatened by or with respect to any of Sellers' employees.

(n) Except as disclosed in Schedule 5.16(n) hereto, (i) no Seller is a party to or subject to any collective bargaining agreement, labor contract works council agreements, trade union agreements, and other agreements (each a "***Collective Bargaining Agreement***") with any union, works council, or labor organization (each a "***Union***" and collectively "***Unions***"); (ii) there are no pending or, to the Seller's knowledge, threatened, lawsuits, grievances, unfair labor practice charges, arbitrations, charges, investigations, hearings, actions, claims, or proceedings (including without limitation any administrative investigations, charges, claims, actions, or proceedings), against the Seller brought by or on behalf of any applicant for employment, any current or former employee, representative, agents, consultant, independent contractor, subcontractor, or leased employee, volunteer, or "temp" of the Seller, or any group or class of the foregoing, or any Governmental Entity, in each case in connection with his or her affiliation with, or the performance of his or her duties to, the Seller, any person alleging to be a current or former employee, any group or class of the foregoing, or any Governmental Entity, or alleging violation of any labor or employment Laws, breach of any Collective Bargaining Agreement, breach of any express or implied contract of employment, wrongful termination of employment, or any other discriminatory, wrongful, or tortious conduct in connection with the employment relationship.

(o) Schedule 5.16(o) hereto sets forth a complete list of current foreign national Business Employees on whose behalf Sellers have submitted applications and petitions to the U.S. Department of Labor, U.S. Immigration and Naturalization Service, and U.S. Department of State for immigration employment and visa benefits; and Sellers have provided Buyer with copies of all such applications and petitions and all government notices regarding adjudications of such applications and petitions. There are no pending or, to the knowledge of Sellers, threatened actions against Sellers for violations under the Immigration Reform and Control Act of 1986 respecting the employees of Sellers.

(p) Sellers are not obligated, whether by law or otherwise, to cause any temporary or leased employees to be eligible for any Company Benefit Plan, nor are such individuals participants or beneficiaries of any Company Benefit Plan.

5.17 Real Property.

(a) The Real Property constitutes all of the real property, real property leases, subleases, occupancy and use agreements, operating agreements, easements, licenses and other real property interests (collectively, the "***Leases***") used in, or held by Sellers for, for the operation of the Business as currently conducted. Except as set forth on Schedule 5.17(a) hereto, Sellers are in exclusive possession of the Real Property and the Improvements thereon. No public warehouse facilities are utilized in the operation of the Business as currently conducted other than as described on Schedule 5.17(a) hereto.

(b) The only Leases as of the date hereof are those listed on Schedule 5.17(b) hereto and made a part hereof (the "***Schedule of Leases***"), true and complete copies of which have been exhibited to Buyer. The rents and other charges set forth on the Schedule of Leases are the actual rents billed by the respective landlords under the Leases for the calendar month immediately preceding the date hereof.

(c) Except as otherwise set forth in the Schedule of Leases: (i) the Leases are in force and effect and none of the Leases have been modified, amended, terminated, renewed or extended; (ii) no renewal or extension options have been granted to Sellers; (iii) Sellers do not have an option to purchase any of the Real Property or any portion thereof; (iv) the rents set forth in the Schedule of Leases are being paid on a current basis and there are no arrearages; (v) none of the parties to a Lease is in default of any of its obligations thereunder and no event has occurred that, with the giving of notice or passage of time, or both, would constitute a default thereunder. Sellers have not sent written notice to any landlord under any Lease claiming that such landlord is in default, which default remains uncured. Sellers have not received any written notice from any landlord under any Lease claiming that Sellers (or any of them) is in default, which default remains uncured; (vi) Sellers are in possession of the respective premises under the Leases; (vii) Sellers have not paid any rent, fees, or other charges for more than one month in advance; (viii) Sellers are presently not contesting any tax, utility, operating cost or other escalation payments or occupancy charges, or any other amounts payable under any Lease; (ix) all material work, repairs, alterations and improvements required to be performed by any party to any of the Leases has been completed and fully paid for, and all material obligations of the landlord under the Leases have been performed; (x) there are no actions or proceedings pending or, to the knowledge of Sellers, threatened by any landlord under any Lease; (xi) true and complete copies of all assignments of Leases and subleases and consents thereto by landlords under the Leases, including all amendments, guarantees, side letters, subordination and non-disturbance agreements and other documents relating thereto, have been delivered to Buyer and are described in the Schedule of Leases; (xii) there are no security deposits other than those set forth in the Schedule of Leases, such security deposits are held by the landlords under the Leases and have not, as of the date hereof, been applied to existing arrears in rents or otherwise in accordance with the terms of the Leases. Accrued interest on such security deposits has been paid to Sellers annually; and (xiii) the Leases do not prohibit the execution, delivery and performance of this Agreement and the transactions contemplated hereby.

(d) All public utilities (including, without limitation, gas, electric, water, storm and sanitary sewerage and telephone utilities) required to operate the Business are installed at and available to the Real Property, and, Sellers have no knowledge of any proposed, planned or actual curtailment of service of any utility supplied to any portion of the Real Property.

(e) (i) no eminent domain, condemnation or similar proceedings are pending or, to the knowledge of Sellers, threatened with respect to the Real Property, (ii) no proceeding is pending or, to the knowledge of Sellers, threatened which would terminate the current access from the Real Property to any presently existing highways and roads adjoining or situated on the Real Property, (iii) no structure on the Real Property is located within a flood hazard zone as defined by the Federal Insurance Administration, (iv) no special assessments or tax abatements affect the Real Property, (v) there are no pending or, to the knowledge of Sellers, threatened zoning changes or zoning ordinance amendments which would affect the Real Property, and

(vi) the Real Property, including, without limitation, each Improvement thereon, is in good condition, normal wear and tear excepted, for the purpose for which used in the Business, has sufficient rights of access and egress for the purposes for which it is used and complies, in all material respects, with all municipal, state and federal statutes, ordinances, rules and regulations applicable thereto, and no material improvements or repairs are necessary or currently contemplated with respect thereto.

(f) Schedule 5.17(f) hereto lists the street address, the current owner and the current use of each parcel of Real Property in which any of the Sellers has fee title (or equivalent) interest and which is related to, used, useful or held for use in the conduct of the Business (the "***Owned Real Property***"). Except as described in Schedule 5.17(f) hereto, each Seller listed in Schedule 5.17(f) as the owner of a parcel of Owned Real Property has good and valid title in and fee simple to such parcel.

5.18 Insurance. Schedule 5.18 hereto sets forth a summary of each insurance policy carried by Sellers (including any self-insurance programs). All such insurance policies are valid and binding and in full force and effect, all premiums due thereunder have been paid in full and Sellers have not received any notice of cancellation or termination in respect of any such policy nor are Sellers in default thereunder.

5.19 Affiliate Interests. All leases, contracts or agreements between any Seller and any Affiliate of any Seller are listed on Schedule 5.19 hereto. To the knowledge of Sellers, no Affiliate of any Seller has any direct or indirect interest in, or controls or is a director, officer, employee or partner of, or consultant to, or lender to or borrower from or has the right to participate in the profits of, (i) any Person which does business with any Seller or is competitive with the Business, or (ii) any property, asset or right which is used by any Seller. All Indebtedness of any Affiliate to Seller, and all Indebtedness of Seller to any Affiliate of Seller, is listed on Schedule 5.19 hereto.

5.20 Brokers. Except as set forth on Schedule 5.20 hereto, neither Sellers nor any Affiliates thereof are parties to any agreement, arrangement or understanding with any Person which will result in the obligation of Buyer, Sellers or any Affiliates thereof to pay any finder's fee, brokerage commission or similar payment in connection with the transactions contemplated by this Agreement.

5.21 Accounts Receivable. Each Account Receivable is a true and correct statement of the account for goods delivered to or services actually performed for and accepted by, such account debtor in the ordinary course of business materially consistent with past practice. Except as set forth in Schedule 5.21, the debtors to which the receivables relate are not in or subject to a bankruptcy or insolvency proceeding, and none of the receivables has been made subject to an assignment for the benefit of creditors. Except as set forth in Schedule 5.21, all receivables that are reflected on the Financial Statements (net of any reserves shown thereon) (i) are valid and existing, (ii) represent monies due for goods sold and delivered or services rendered in the ordinary course of business materially consistent with past practice, and (iii) are not subject to any refunds or adjustments or any defenses, rights of set-off, assignment, restrictions, security interests or other Encumbrances. Except as set forth in Schedule 5.21, all such receivables are (x) current, and there are no disputes regarding the collectability of any such

receivables and (y) adequately reserved for cancellations and bad debt. Sellers have not factored any of the receivables.

5.22 Bank Accounts. Schedule 5.22 hereto sets forth a complete list of all bank accounts (including any deposit accounts, securities accounts and any sub-accounts) of Sellers.

5.23 Foreign Corrupt Practices Act Compliance. No Seller or any Person or other entity acting on behalf of a Seller, has directly or indirectly, on behalf of or with respect to the Business or the Assets in violation of the FCPA: (a) made or offered to make any contributions, payments or gifts of its property to or for the private use of any governmental official, employee or agent; (b) either established or maintained any unrecorded fund or asset for any purpose, or made any intentionally false or artificial entries on its books or records for any reason; (c) made any payments to any Person with the intention or understanding that any part of such payment was to be used for any purpose other than that described in the documents supporting the payment; (d) either made any contribution, or reimbursed any political gift or contribution made by any other Person, to candidates for public office; (e) engaged in any material transaction or made or received any material payment which was not properly recorded on the books of the Sellers; (f) created or used any "off-book" bank or cash account or "slush fund;" or (g) engaged in any other conduct constituting a violation in any material respect of the FCPA.

5.24 Accuracy of Information Furnished. No representation or statement contained in this Agreement (including the Exhibits and Schedules) or any Contract executed pursuant hereto contains or will contain any untrue statement of a material fact or omits or will omit any material fact necessary to make such representation or statement, in light of the circumstances under which it was made, not misleading. Sellers have provided Buyer with correct and complete copies of all documents listed or described in the Schedules.

ARTICLE VI

REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer hereby represents and warrants to Sellers as follows:

6.01 Organization and Due Authorization. Buyer is a limited liability company duly organized, validly existing and in good standing under the laws of the state of Delaware. Buyer has full limited liability company power and authority to execute and deliver this Agreement and the Other Agreements to which it is (or to the extent to be entered into on or prior to the Closing, will be) a party and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Other Agreements to which Buyer is a party and the performance and consummation of the transactions contemplated hereby and thereby by Buyer have been duly authorized by all necessary action on the part of Buyer. This Agreement and the Other Agreements to which Buyer is a party have been (or to the extent to be entered into on or prior to the Closing, will be) duly executed and delivered by Buyer and, subject to the due authorization, execution and delivery of such agreements by the other parties thereto, this Agreement and the Other Agreements constitute (or to the extent to be entered into on or prior to the Closing, will constitute) the valid and binding obligations of Buyer, enforceable against Buyer in accordance with their terms.

6.02 No Violation; Consents and Approvals. Except as set forth in Schedule 9.01(d), neither the execution and delivery by Buyer of this Agreement or the Other Agreements to which it is a party nor the consummation of the transactions contemplated hereby or thereby nor compliance by it with any of the provisions hereof or thereof (a) conflict with or result in a violation of (i) any provision of the organizational documents of Buyer or (ii) any judgment, order, writ, injunction, decree, statute, law, ordinance, rule or regulation in any material respect binding upon Buyer or (b) violate, conflict with, or result in a breach of any of the terms of, or constitute a default under, or give rise to any right of termination, modification, cancellation or acceleration under, (A) any note, bond, mortgage, indenture, deed of trust, contract, commitment, arrangement, license, agreement, lease or other instrument or obligation to which Buyer is a party or by which Buyer may be bound or to which any of Buyer's assets may be subject or affected in any material respect and that, in each case, is material to the business of Buyer, or (B) any material license, permit, authorization, consent, order or approval of, or registration, declaration or filings with, any Governmental Entity.

6.03 Litigation. There is no claim, action, lawsuit, or proceeding, or to the knowledge of Buyer, any pending inquiry or investigation or any threatened claim, action, lawsuit, proceeding, inquiry or investigation, in each case, by or against or affecting Buyer which has had or can be reasonably expected to have a material adverse effect on the ability of Buyer to consummate the transactions contemplated hereby.

6.04 Brokers. Except as provided for in any adequate protection order approved by the Bankruptcy Court to which Buyer has not objected, in connection with the transactions contemplated hereby and by the Other Agreements, neither Buyer nor any Affiliate thereof is a party to any agreement, arrangement or understanding with any Person which will result in the obligation of Buyer, Sellers or any Affiliate thereof to pay any finder's fee, brokerage commission or similar payment.

6.05 Financing. Buyer shall have on the Closing Date sufficient unrestricted funds or committed lines of credit on hand to pay the portion of the Purchase Price payable in cash at the Closing. Buyer has provided to Sellers true and correct redacted copies of documentation evidencing Buyer's empowerment as of the Closing Date to deliver the credit bid pursuant to Section 3.02(d)(i).

6.06 Foreign Ownership of Buyer. Buyer is not controlled by a foreign entity or other investor for the purposes of Section 721 of the Defense Production Act of 1950, as amended, and the regulations promulgated thereunder.

ARTICLE VII

COVENANTS OF THE PARTIES

7.01 Cooperation and Efforts.

(a) From the date hereof until the Closing, Sellers and Buyer agree (i) to cooperate with each other in determining whether any filings are required to be made or consents are required to be obtained in any jurisdiction or from any third party in connection with the

consummation of the transactions contemplated hereby and in making or causing to be made any such filings promptly and in seeking to obtain in a timely manner any such consent; and (ii) to use commercially reasonable efforts to take, or cause to be taken, all actions, to do, or cause to be done, all things to obtain as promptly as practicable the satisfaction of the conditions to the Closing of the transactions contemplated herein and to fulfill their respective obligations hereunder. Sellers and Buyer shall furnish to each other all such information as may be reasonably required in order to effectuate the foregoing. Sellers shall make available their personnel and facilities, and such documents as may exist related thereto, to assist Buyer in making the employment decisions.

(b) Upon request of Buyer, Sellers will cooperate with Buyer to consider and pursue any alternative transaction structure to achieve Buyer's tax structuring and business goals, including by amendment of this Agreement and/or through a plan of reorganization.

7.02 Public Announcements. Except as required by applicable law or the rules of any applicable stock exchange or in filings required to be made with the Bankruptcy Court (which Sellers shall provide to Buyer in a reasonable number of days, but, in any event, at least two (2) Business Days, in advance of filing with the Bankruptcy Court), neither Buyer nor Sellers shall, nor shall they permit any of their respective Affiliates to, make any public announcement in respect of this Agreement or the transactions contemplated hereby without the prior written consent of the other parties hereto (which consent shall not be unreasonably withheld or delayed). Notwithstanding anything herein to the contrary, any party to this Agreement may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure.

7.03 Cooperation With Respect to Tax Matters.

(a) Solely to the extent not exempt in accordance with Section 1146 of the Bankruptcy Code, Buyer shall pay and shall be responsible for all Transfer Taxes (and related costs, fees, and expenses) imposed on or payable in connection with the Asset Acquisition contemplated by this Agreement, which obligation shall be in addition to the Purchase Price. Sellers shall be responsible for preparing and filing all Tax Returns of Sellers (and promptly providing a copy of such Tax Returns to Buyer) for all taxable periods, and Buyer shall be responsible for preparing and filing all Tax Returns of Buyer.

(b) Without the prior written consent of Buyer, no Seller shall make or change any election, change an annual accounting period, adopt or change any accounting method, file any amended Tax Return, enter into any closing agreement, settle any Tax claim or assessment relating to any Seller, surrender any right to claim a refund of Taxes, consent to any extension or waiver of the limitation period applicable to any Tax claim or assessment relating to any Seller, or take any other similar action relating to the filing of any Tax Return or the payment of any Tax, if such election, adoption, change, amendment, agreement, settlement, surrender, consent or other action would have the effect of increasing the Tax liability of any Seller for any period ending after the Closing Date or decreasing any Tax attribute of any Seller existing on the Closing Date.

(c) As of the Closing, Sellers agree to join in any election made by Buyer regarding the procedure to be utilized with respect to wage reporting under Revenue Procedure 2004-53.

(d) Sellers and Buyer shall cooperate with each other and provide each other with such assistance as reasonably may be requested by either of them in connection with the preparation of any Tax Return or any audit or other examination by any taxing authority, or any judicial or administrative proceedings relating to any liability for Taxes under this Agreement. If Buyer requests assistance hereunder Buyer shall reimburse Sellers for all reasonable third-party out-of-pocket expenses incurred in providing such assistance. Nothing in this Section 7.03 shall require Buyer to be liable for any of the income tax liability of Sellers.

7.04 Conduct of the Business Pending the Closing. Except as expressly contemplated by this Agreement or the Term DIP Financing Agreement or with the prior written consent of Buyer, Sellers covenant and agree that, between the date hereof and the Closing Date, Sellers shall operate the Business in the ordinary course in a manner consistent with past practice, and shall confer with Buyer and its representatives, as reasonably requested, to report on operational matters and the general status of ongoing operations. Sellers shall, between the date hereof and the Closing Date, except as expressly contemplated by this Agreement, the Term DIP Financing Agreement or in the ordinary course of business consistent with past practice, or with the prior written consent of Buyer, (i) conduct the Business in compliance with all applicable Laws, rules and regulations, (ii) use commercially reasonable efforts to preserve the relationships with the current customers, distributors, suppliers, vendors and others having business dealings with Sellers, (iii) maintain their physical assets, properties and facilities in their current working order, condition and repair as of the date hereof, ordinary wear and tear excepted, (iv) not take any action, or omit to take any action, the intent of which is to cause the termination of their current officers, (v) perform all obligations required to be performed by Sellers under the Assumed Contracts, (vi) maintain their books and records on a basis consistent with prior practice, (vii) bill for products sold or services rendered and pay accounts payable in a manner consistent with past practice, (viii) maintain all insurance policies required to be set forth on Schedule 5.18 hereto, or suitable replacements therefor, in full force and effect through the close of business on the Closing Date, (ix) provide Buyer with updated monthly financial information concerning Sellers, including, without limitation, the value of the accounts receivable, (x) not encumber nor enter into any material new leases, licenses or other use or occupancy agreements for the Real Property or any part thereof, (xi) not take any action that would cause the representations and warranties contained in Section 5.06 hereof to be inaccurate in any material respect, (xii) with the prior consent of Sellers, such consent not to be unreasonably withheld, grant Buyer reasonable access to their customers, distributors, suppliers and vendors and cooperate with Buyer in communicating with such Persons, provided that Sellers shall have the opportunity to have a representative of Sellers present (in person or by telephone, as applicable); (xiii) timely pay any and all required fees and taxes with respect to patents (if any), patent applications (if any), any trademark applications and any registered trademarks comprising the Intellectual Property, (xiv) take any and all other commercially reasonable actions as may be necessary to avoid abandonment, cancellation, or expiration of any of the Intellectual Property, and (xv) take any further actions as may be necessary to avoid limiting the scope of any claims that may issue with respect to patent applications (if any) comprising the Intellectual Property.

7.05 Access to Information; Notification of Certain Matters.

(a) From the date hereof until the Closing, Sellers shall (i) permit Buyer and its representatives to have reasonable access upon reasonable prior notice, during normal business hours, to the Business, the Assets, the Real Property, the employees of Sellers and to such records, contracts and documents relating to Sellers, the Business and the Assets as Buyer or its representatives shall request in connection with the transactions contemplated hereby; (ii) furnish to Buyer such financial and operating data and other information relating to the Sellers, the Business and the Assets as may be reasonably requested; and (iii) instruct the executive officers and senior business managers, employees, counsel, auditors and financial advisors of Sellers to cooperate with Buyer and its representatives regarding the same.

(b) After the Closing Date, Buyer shall permit Sellers and their representatives to have reasonable access, during normal business hours, following reasonable advance notice and at Sellers' sole expense, to the Books and Records as is reasonably necessary for the preparation and filing of Tax Returns and other reports and documents required to be filed by Sellers pursuant to applicable Law or regulation and to employee and Company Benefit Plan records so as to effectuate the assumption of certain Company Benefit Plan liabilities, provided, however, that these exceptions shall not limit any rights to discovery Sellers or any of their Affiliates may have in connection with any cause of action or litigation. Any request by Sellers and their representatives for access that, in Buyer's reasonable discretion, would unreasonably interfere with the ordinary course operation of the Business after the Closing would not be reasonable for the purposes of this paragraph.

(c) Sellers shall give written notice to Buyer promptly after becoming aware of (i) the occurrence of any event, which would be reasonably likely to cause any condition set forth in Article IX to be unsatisfied at any time from the date hereof to the End Date or (ii) any notice or other communication from (x) any Person alleging that the consent of such Person is or may be required in connection with any of the transactions contemplated by this Agreement or (y) any Governmental Entity in connection with any of the transactions contemplated by this Agreement; provided, however, that the delivery of any notice pursuant to this Section 7.05(c) shall not limit or otherwise affect the remedies available hereunder to Buyer.

7.06 Transition of Business. Sellers shall assist Buyer in accomplishing a smooth transition of the Business from Sellers to Buyer or one or more Buyer Designees, including holding discussions with respect to personnel policies and procedures, and other operational matters relating to the Business.

7.07 Disclosure Schedule and Supplements. Until the Closing Date, Sellers shall as promptly as practicable deliver any schedules not previously delivered or supplement or amend the Disclosure Schedule with respect to any matter that, if existing, occurring or known at the date of this Agreement, would have been required to be set forth or described in the Disclosure Schedule (a "***Schedule Update***"). Any such supplement or amendment shall be deemed to modify the Disclosure Schedules for purposes of this Agreement. Notwithstanding anything in this Section 7.07 to the contrary, in no event will Sellers be permitted to supplement or amend any Disclosure Schedules other than Disclosure Schedules required under and with respect to Article V without the prior written consent of Buyer in its sole discretion and any such

Summary: Memorandum in Opposition (Part 1 of 3) electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company