

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

FILE

MOTION FOR PROTECTIVE ORDER

Now comes Ormet Primary Aluminum Corporation ("Ormet"), seeking authority to keep confidential, and not part of the public portion of the hearing record, certain references to forecasts of future aluminum prices on pages 205 and 215-218 of the transcript and in Ohio Consumers' Counsel ("OCC") Exhibits 3 and 4, and the entirety of Industrial Energy Users – Ohio ("IEU") Exhibit 5. Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code ("O.A.C."), Ormet moves for a protective order to these limited and very specific portions of the hearing record. The reasons underlying this motion and the specific portions of the hearing record are detailed in the attached Memorandum in Support. Consistent with the requirements of the above-cited rule, three unredacted copies of the transcript pages and the referenced exhibits are submitted under seal.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF ORMET'S
MOTION FOR PROTECTIVE ORDER**

Ormet requests that the certain, limited information that was admitted during the hearing in this proceeding be designated as confidential and be protected from public disclosure, namely, (a) select numbers on four pages of the transcript, (b) portions of OCC Exhibits 3 and 4, and (c) the entirety of IEU Exhibit 5. The information in the transcript and OCC Exhibits 3 and 4 for which protected treatment is sought covers forecasts of future aluminum prices. IEU Exhibit 5, which is dated June-July 2013, contains forecasts of future aluminum prices as well, but also contains market intelligence information that has been recently gathered and analyzed. Such information if released to the public would harm Ormet by providing its competitors with its proprietary information, and harm Harbor Aluminum Intelligence Unit ("Harbor") and its clients by providing public access to competitively sensitive proprietary trade secrets.

I. Specific Sections of the Transcript and the Three Exhibits for which Protective Treatment is Sought

Below is a listing of the specific sections of the transcript and the three exhibits for which protective treatment is sought. Also, Ormet has included its supporting explanation in the listing.

TRANSCRIPT SECTIONS AND EXHIBITS	ORMET EXPLANATION
Transcript: <ul style="list-style-type: none">• Page 205, line 15• Page 215, line 24• Page 216, lines 3, 6, 8 and 25• Page 217, lines 4, 7, 8, 18 and 19• Page 218, line 2	On these pages, the prices indicate Harbor's forecasts of future prices of aluminum and differences between the forecasted prices under certain scenarios. Ormet proposes to have redacted and keep confidential the dollar figures on these 12 lines.

TRANSCRIPT SECTIONS AND EXHIBITS (continued)	ORMET EXPLANATION (continued)
OCC Exhibits 3 and 4	On these exhibits, some prices indicate Harbor's forecasts of future prices of aluminum on monthly and yearly bases. ¹ The forecasts of future prices are not publicly available. These forecasts are generated by Harbor for its clients only and are not publicly disseminated. In order to maintain the confidential nature of the forecasted future prices, Ormet proposes to have redacted and keep confidential the future forecasted dollar figures only (August 2013 and forward, for the monthly figures, and 2103 and forward for the yearly figures).
IEU Exhibit 5	This exhibit is an intelligence report prepared by Harbor and is dated June-July 2013. It contains valuable forecasts of future prices, as well as analyses of market intelligence in the current quarter. This report is generated by Harbor for its clients only and is not publicly disseminated. In order to maintain the confidential nature of Harbor's forecasted future prices (August 2013 and forward) and its analyses of market intelligence in the current quarter, Ormet proposes to have redacted and keep confidential the entirety of IEU Exhibit 5.

II. Ohio Law Related to Protective Treatment

Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to include trade secrets. *State ex rel. Besser v. Ohio State* (2000) 89 Ohio St. 3d 396, 399.

¹ Also contained in OCC Exhibits 3 and 4 are monthly forecasted prices between 2009 and July 2013, and the difference between Harbor's forecasts and the actual prices. Ormet is not seeking a protective order regarding the price forecasts for historical time periods.

Rule 4901-1-24(D), Ohio Administrative Code (“O.A.C.”), allows the Commission or certain designated employees to issue an order necessary to protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

The Commission has ruled that, in order to determine whether to issue a protective order, it is necessary:

- To review the materials in question;
- To assess whether the information constitutes a trade secret under Ohio law;
- To decide whether nondisclosure of the materials will be consistent with the purposes of Title 49, Revised Code; and
- To evaluate whether the confidential material can reasonably be redacted.²

III. The Commission will Review the Specific Information and the Confidential Material can be reasonably redacted

The first and fourth points listed above are not at issue. With this motion, the Commission has the necessarily information to review the materials in question (in fact, Attorney Examiner Parrot specifically directed Ormet to propose redactions for her *in camera* review). Additionally, Ormet contends that the confidential material can be reasonably redacted, and with this filing, Ormet specifically proposes the appropriate manner of redaction.

IV. Nondisclosure is Consistent with Title 49 and the Specific Information is a Trade Secret

As to consistency with Title 49 (the third point above), the nondisclosure of the limited information for which Ormet seeks a protective order is entirely consistent with the purposes of Title 49, Revised Code, and will not impair the purposes of Title 49. The Commission and its Staff have

² *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA et al, Order on Remand at 11-12 (October 24, 2007).

full access to the information in order to fulfill their statutory obligations, and all active parties³ have entered into a protective agreement with Ormet and have full access to the information in order to advocate their positions. Additionally, the parties to this proceeding have already had a full opportunity to present witnesses and question witnesses. They will also have a full opportunity to present their arguments to the Commission under the briefing schedule established by the Attorney Examiner.⁴ No purpose of Title 49 would be served by the public disclosure of the information.

As to constituting a trade secret (the second point above), Ormet contends that the limited information for which it seeks a protective order is a trade secret under Ohio law. The need to protect the designated forecasted future prices of aluminum from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. Also, the Intelligence Report contains sensitive analyses of market information in the current quarter and forecasted future prices of aluminum, which are prepared to Harbor clients specifically. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the “public records” statute must also be read in pari materia with Section 1333.31, Revised Code (“trade secrets” statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.⁵

Likewise, the Commission has facilitated the protection of trade secrets in its own rules.⁶

The definition of a “trade secret” is set forth in the Uniform Trade Secrets Act:

“Trade secret” means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans,

³ Not all original parties in this proceeding have participated in this phase of the proceeding. However, all parties who have actively participated in this phase of the proceeding have entered into a protective agreement with Ormet.

⁴ Tr. at 477-478.

⁵ *In re: General Telephone Co.*, Case No. 81-383-TP-AIR, Entry (February 17, 1982).

⁶ *See, e.g.*, Rule 4901-1-24(A)(7), O.A.C.

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

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁷

This definition clearly reflects the state policy favoring the protection of trade secrets, such as the price forecasts that are the subject of this motion.

In 1997, the Ohio Supreme Court adopted a six-factor test to analyze whether information is a trade secret under the statute:

- (1) The extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i.e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.⁸

Applying these factors to the information for which Ormet seeks to protect because they contain confidential information, it is clear that a protective order should be granted.

- **Transcript pages 205 and 215-218** contain Harbor's forecasts of future aluminum prices under different scenarios for the time periods referenced in the questions. These forecasted future prices were generated by Harbor and developed from industry and market intelligence. The forecasted future prices are competitively sensitive information and not publicly available. The forecasted future prices are provided only to Harbor's clients. These future prices are not publicly disclosed, and this information has economic value from not being publicly known. Public disclosure by the Commission is not needed to carry out its duties.
- **OCC Exhibits 3 and 4** contain Harbor's forecasts of future prices of aluminum. As with the prices referenced in the transcript, the forecasted

⁷ Section 1333.61(D), Revised Code.

⁸ *State ex rel The Plain Dealer the Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-525, quoting *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983).

future prices on OCC Exhibits 3 and 4 were generated by Harbor and developed from industry and market intelligence. The forecasted future prices are competitively sensitive information and not publicly available. The forecasted future prices are provided only to Harbor's clients. These future prices are not publicly disclosed, and this information has economic value from not being publicly known.

- **IEU Exhibit 5 contains** valuable sensitive analyses of market information in the current quarter and forecasted future prices of aluminum. This report is prepared for Harbor's clients specifically and is not disseminated to the public. This exhibit contains competitively sensitive information, which has economic value from not being publicly known. Public disclosure by the Commission is not needed to carry out its duties.

V. Conclusion

This Commission has previously carried out its obligations in numerous proceedings to protect trade secrets.⁹ Also, other jurisdictions have held that a public utilities commission has the authority to protect the trade secrets and that the trade secrets statute creates a duty to protect them.¹⁰ For the Commission to do otherwise in this proceeding would negate the protections the Ohio General Assembly has granted to all businesses, not just public utilities.

WHEREFORE, for the above reasons, Ormet requests the Commission grant its motion for a protective order and maintain under seal the specific information on Hearing Transcript pages 205 and 215-218, the specific information in OCC Exhibits 3 and 4, and the entirety of IEU Exhibit 5, as listed in the table on pages two and three above.

⁹ See, e.g., *Elyria Tel. Co.*, Case No. 89-965-TP-AEC (Finding and Order, September 21, 1989); *Ohio Bell Tel. Co.*, Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR (Entry, August 17, 1990).

¹⁰ *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213 (1982).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served upon the persons below via electronic mail this 5th day of September 2013.



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