

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) Case No. 09-119-EL-AEC
Ohio Power Company and Columbus)
Southern Power Company.)

ENTRY

The attorney examiner finds:

- (1) By opinion and order issued on July 15, 2009, the Commission modified and approved the amended application of Ormet Primary Aluminum Corporation (Ormet) for a unique arrangement with Columbus Southern Power Company and Ohio Power Company (jointly, AEP Ohio) for electric service to Ormet's aluminum-producing facility located in Hannibal, Ohio.¹
- (2) On October 12, 2012, Ormet filed a motion for expedited approval of payment deferral, pursuant to Section 4905.31, Revised Code, and Rules 4901-1-12(C) and 4901:1-38-05(B), Ohio Administrative Code (O.A.C). Specifically, Ormet sought approval of a modification to its unique arrangement with AEP Ohio, such that Ormet would be authorized to defer payment of its billed amounts for October and November 2012, which would otherwise be due in November and December 2012, respectively.
- (3) By entry issued on October 17, 2012, the Commission granted Ormet's request for a deferred payment arrangement to the extent set forth in the entry, although the Commission also noted its concern regarding the financial risk being incurred by AEP Ohio's ratepayers and directed that any further relief requested by Ormet should be accompanied by a detailed

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of Columbus Southern Power Company into Ohio Power Company, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

business plan confirming Ormet's long-term ability to exist without ratepayer support.

- (4) On June 14, 2013, Ormet filed a motion to amend its unique arrangement with AEP Ohio and a request for emergency relief, along with a memorandum in support, pursuant to Sections 4905.31 and 4909.16, Revised Code, and Rules 4901-1-12 and 4901:1-38-05, O.A.C. In the motion, Ormet explains its intention to file, within 30 days, a business plan demonstrating sustainable power pricing for the post-2015 period.
- (5) On July 15, 2013, Ormet filed a business plan and power plant report, along with a motion for protective order pursuant to Rule 4901-1-24(D), O.A.C. No memoranda contra Ormet's motion for protective order were filed.
- (6) In support of its motion for protective order, Ormet asserts that the business plan and power plant report contain information that is confidential and proprietary in nature and constitutes a trade secret. Specifically, Ormet states that the business plan contains information that demonstrates a sustainable energy price post-2015 from a future on-site power plant intended to support the ongoing operation of Ormet's facility. Ormet adds that the power plant report includes a description of the power plant, milestones to construction, and pricing information. Ormet notes that business plans are specifically mentioned as constituting a trade secret under Section 1333.61(D), Revised Code. According to Ormet, business plans are rarely released to the public and have never been publicly released by Ormet. Ormet argues that the information contained in its business plan, which Ormet claims has independent economic value, could give Ormet's competitors significant insight into Ormet's operations and a competitive advantage in the aluminum industry. Ormet maintains that its competitors do not have access to the business plan and that Ormet has made reasonable efforts to keep it confidential. Therefore, Ormet requests that the business plan and power plant report be treated as confidential.

- (7) By entry issued on August 6, 2013, the attorney examiner directed Ormet to file its business plan and power plant report as public documents, with only the trade secret information redacted, by August 9, 2013, for review by the Commission or attorney examiner.
- (8) On August 6, 2013, Ormet filed a motion for protective order with respect to an exhibit contained in the testimony of Mark D. Thompson, which was filed on that same date and later designated as Ormet Exhibit 3. In support of its motion, Ormet argues that Ormet Exhibit 3, Exhibit MDT-5 contains confidential trade secret information related to Ormet's business plan and power plant report. No memoranda contra were filed.
- (9) On August 9, 2013, Ormet filed a public version of its business plan and power plant report.
- (10) On August 27, 2013, an evidentiary hearing commenced on Ormet's motion to amend its unique arrangement with AEP Ohio. During the hearing, the attorney examiner directed Ormet to make further redactions to its business plan and power plant report and to file the revised document by August 30, 2013, along with a redacted version of Ormet Exhibit 3, Exhibit MDT-5 (Tr. I at 10-12).
- (11) On August 30, 2013, Ormet filed a newly redacted version of its business plan and power plant report, which releases considerable information into the public record, while maintaining the confidential status of certain figures contained within several financial forecasts, as well as the detailed information explaining Ormet's strategy regarding the proposed power plant. Ormet, however, did not file a redacted version of Ormet Exhibit 3, Exhibit MDT-5.
- (12) On September 5, 2013, Ormet filed a motion for protective order with respect to certain references on pages 205 and 215-218 of the transcript of the evidentiary hearing and certain figures in Ohio Consumers' Counsel (OCC) Exhibits 3 and 4, as well as the entirety of Industrial Energy Users - Ohio (IEU-Ohio) Exhibit 5. Along with the motion for protective order, Ormet filed redacted versions of pages 205 and 215-218 of the

transcript and OCC Exhibits 3 and 4. No memoranda contra were filed.

- (13) In support of its motion for protective order, Ormet explains that pages 205 and 215-218 of the transcript contain references to forecasts of future prices of aluminum and differences between the forecasted prices under certain scenarios, as projected by Harbor Aluminum Intelligence Unit (Harbor). According to Ormet, OCC Exhibits 3 and 4 contain Harbor's forecasts of future prices of aluminum on monthly and yearly bases, which were generated by Harbor for its clients only and are not publicly disseminated. Finally, Ormet explains that IEU-Ohio Exhibit 5 is a Harbor intelligence report dated June-July 2013, which contains valuable forecasts of future prices and analyses of market intelligence in the current quarter. Ormet adds that the report was prepared by Harbor for its clients only and is not publicly disseminated. Ormet argues that nondisclosure of the confidential information is consistent with Title 49 of the Revised Code. Ormet further argues that pages 205 and 215-218 of the transcript, OCC Exhibits 3 and 4, and IEU-Ohio Exhibit 5 contain competitively sensitive trade secret information that has economic value from not being publicly known.
- (14) On September 9, 2013, IEU-Ohio filed a motion for protective order with respect to a redacted portion of its post-hearing brief. No memoranda contra were filed. In support of its motion, IEU-Ohio notes that Ormet has designated the information contained in the redacted portion of IEU-Ohio's brief as confidential and competitively sensitive. IEU-Ohio further notes that Ormet provided the information to IEU-Ohio pursuant to a protective agreement between Ormet and IEU-Ohio.
- (15) 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, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information that, under state or federal law, may not be released. The Ohio Supreme Court

has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373 (2000).

- (16) Similarly, Rule 4901-1-24, O.A.C., allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, “to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.”
- (17) Ohio law defines a trade secret as “information . . . 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.” Section 1333.61(D), Revised Code.
- (18) Rule 4901-1-24(D)(1), O.A.C., provides that all documents submitted pursuant to Rule 4901-1-24(D), O.A.C., should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information.
- (19) The attorney examiner has reviewed the confidential portions of Ormet’s business plan and power plant report, as filed on August 30, 2013. The attorney examiner has also reviewed the confidential portions of pages 205 and 215-218 of the transcript, OCC Exhibits 3 and 4, and IEU-Ohio’s post-hearing brief, as well as the entirety of IEU-Ohio Exhibit 5. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,² the attorney examiner finds that the information constitutes trade secret information. Release of this information is, therefore, prohibited under state law. The

² See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that Ormet's motions for protective order seeking to protect portions of its business plan and power plant report, pages 205 and 215-218 of the transcript, and OCC Exhibits 3 and 4, as well as the entirety of IEU-Ohio Exhibit 5, are reasonable and should be granted. The attorney examiner further finds that IEU-Ohio's motion for protective order seeking to protect a portion of its post-hearing brief is reasonable and should be granted.

- (20) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this entry or until March 25, 2015. Until that date, the docketing division should maintain, under seal, the information filed confidentially.
- (21) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Ormet or IEU-Ohio wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to Ormet and IEU-Ohio.
- (22) As noted above, Ormet did not file, as directed by the attorney examiner during the hearing on August 27, 2013, a redacted version of Ormet Exhibit 3, Exhibit MDT-5. Upon review of Ormet Exhibit 3, Exhibit MDT-5, the attorney examiner finds that it consists of excerpts of Ormet's business plan and power plant report. The attorney examiner directs Ormet to redact Ormet Exhibit 3, Exhibit MDT-5, consistent with the redacted version of Ormet's business plan and power plant report filed by Ormet on August 30, 2013. The redacted version of Ormet Exhibit 3, Exhibit MDT-5 should be filed by September 30, 2013.

It is, therefore,

ORDERED, That the motions for protective order filed by Ormet on July 15, 2013, and September 5, 2013, and the motion for protective order filed by IEU-Ohio on September 9, 2013, be granted, as set forth above. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the confidential versions of Ormet's business plan and power plant report (as filed on August 30, 2013); pages 205 and 215-218 of the transcript, OCC Exhibits 3 and 4, and IEU-Ohio Exhibit 5 (as filed on September 5, 2013); and IEU-Ohio's post-hearing brief (as filed on September 9, 2013), for a period of 18 months, ending on March 25, 2015. It is, further,

ORDERED, That Ormet file a redacted version of Ormet Exhibit 3, Exhibit MDT-5 by September 30, 2013. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

By: Sarah J. Parrot
Attorney Examiner

JRJ/sc

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in

Case No(s). 09-0119-EL-AEC

Summary: Attorney Examiner Entry decides on the motions for protective order and orders a redacted version of Ormet Exhibit 3 and Exhibit MDT-5 to be filed by 09/30/2013. - electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio