

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Globe Metallurgical Inc. for Approval of a)
Reasonable Arrangement for its Beverly, Ohio) **Case No. 16-0737-EL-AEC**
Plant)

**MEMORANDUM CONTRA BY GLOBE METALLURGICAL INC.
TO THE APPLICATION FOR REHEARING
OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. Introduction

The Office of the Ohio Consumers' Counsel ("OCC"), through its application for rehearing, seeks access to the confidential annual reports that Globe Metallurgical Inc. ("Globe") will submit to Staff during the term of the unique arrangement. OCC does so even though as recently as October 2015, the Commission rejected the same request by OCC in regards to Eramet's unique arrangement application.¹

As it did in 2015, the Commission should deny OCC access to Globe's annual reports. OCC does not dispute the Commission's detailed findings in its Opinion and Order and does not deny that "Globe is making a significant commitment to jobs and capital investment in Ohio" and "the arrangement allows Globe ... to remain competitive in the marketplace which assists Ohio's effectiveness in the global economy."² OCC instead seeks a change in the law "so that the OCC can review" Globe's annual reports to monitor Globe's compliance with its commitments.³ But OCC simply does not have, and has not identified or articulate, any right or need to review Globe's future annual reports.

¹ *In re Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-0516-EL-AEC, Opinion and Order (Oct. 14, 2015) at 7-8.

² Opinion and Order (Oct. 26, 2016) [hereafter "Opinion and Order"] at 8 ¶ 19.

³ Application for Rehearing (Nov. 25, 2016) at 1 [hereafter, "App. for Reh'g"].

Therefore, and because the Opinion and Order is well-reasoned and supported by undisputed record evidence, the Commission should deny OCC's application for rehearing.

II. Background

On April 11, 2016, Globe filed an application for a unique arrangement ("Application") in this case.⁴ The Ohio Power Company ("AEP Ohio"), OCC and the Ohio Manufacturers Association – Energy Group ("OMAEG") all intervened. After "lengthy discussions with all the various parties over a several month period,"⁵ a Stipulation and Recommendation ("Stipulation") was signed by Globe, Staff and AEP Ohio.⁶ OMAEG signed as a non-opposing party. OCC did not sign.

A hearing was held on October 19, 2016. During that hearing, Globe's evidence included both public and confidential copies of expert economic testimony as well as company testimony sponsoring and supporting the Application as modified by the Stipulation.⁷ As well, an unopposed motion for a protective order was granted so that Globe's employment and capital investment data in the Stipulation would remain confidential.⁸ OCC introduced its own written testimony in evidence and the matter was submitted for decision.⁹

On October 26, 2016, the Commission issued its Opinion and Order finding that the Stipulation was "reasonable and should be adopted."¹⁰ The Commission fully considered the record and pointed to evidence supporting its findings that the Stipulation (1) is the product of

⁴ Globe Exs. 2 & 2C. Exhibits numbered "C" were filed, submitted and admitted under seal because they contain Globe's confidential business information. Tr. (Oct. 19, 2016) at 7:11-20, 9:5-10:7, 16:25-17:11 [hereafter, "Tr."].

⁵ Tr. at 14:22-15:1.

⁶ Joint Exs. 1 & 1C.

⁷ Tr. at 6:14-17:11; Globe Exs. 1, 1C, 2, 2C, 3 & 3C; Joint Exs. 1 & 1C.

⁸ Tr. at 6:8-10; Motion for Protective Order (Oct. 19, 2016) at 4 & 6.

⁹ Tr. at 17:17-20:14; OCC Ex. 1.

¹⁰ Opinion and Order (Oct. 26, 2016) at 9 ¶ 21 [hereafter, "Opinion and Order"].

serious bargaining among capable, knowledgeable parties; (2) does not violate any important regulatory principle or practice; and, (3) is in the public interest.¹¹

III. Argument

A. The Commission properly approved the Stipulation without creating a new right for OCC to review Globe's future confidential annual reports.

There is no support for OCC's first argument that the Commission was required by precedent to grant OCC a right to review Globe's future annual reports.¹² Indeed, it is OCC's application that seeks to break from precedent and change existing law and practice.

Under the Stipulation, "Globe is making a significant commitment to jobs and capital investment in Ohio."¹³ Under existing rules equally applicable to all reasonable arrangement customers, Globe must comply with its commitments and demonstrate its compliance by submitting an annual report to Staff.¹⁴ Globe's filings expressly acknowledge this requirement and even provide penalties for any shortfall.¹⁵ Under existing rules and under the unique arrangement, Staff has the right to receive and review Globe's annual reports.

1. OCC has no right to review Globe's future annual reports.

In contrast, OCC has no right to review Globe's future annual reports. OCC's claim that it has such a right under case precedent significantly overstates a single 2011 entry in *Eramet* (hereafter, the "2011 *Eramet* entry") cited by OCC.¹⁶ In the 2011 *Eramet* entry, the attorney examiner made a fact-specific finding that certain existing annual reports were not protected

¹¹ Opinion and Order at 3 ¶ 10 – 9 ¶ 21.

¹² App. for Reh'g at 4-6.

¹³ Opinion and Order at 8 ¶ 19.

¹⁴ See O.A.C. 4901:1-38-06(A) & (B). Globe's unique arrangement also remains under "the supervision and regulation of the commission...." R.C. 4905.31(E).

¹⁵ Application (Apr. 11, 2016) at ¶ 37; Stipulation (Oct. 19, 2016) at ¶ 11.

¹⁶ App. for Reh'g at 5-6 & n.3 (citing *In re Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-0516-EL-AEC, Entry (Mar. 3, 2011)).

from a single public records request.¹⁷ But OCC’s application in this case does not involve a public records request and does not involve existing reports and does involve employment and investment figures and plans that have been ruled confidential in this and other cases.¹⁸ Whereas the 2011 *Eramet* entry involved a one-time application of public records law to a limited set of documents, OCC’s request here proposes a change in law applicable to reasonable arrangements based on pure conjecture – that documents that don’t even yet exist should be disclosed as a matter of course to OCC as a self-appointed super-monitor of the Commission and Staff. The 2011 *Eramet* entry is simply not applicable here.

Indeed, OCC’s request is contrary to a more recent and relevant order in the same *Eramet* case where the Commission rejected the very claim OCC makes here. In 2015, Eramet and Staff filed a stipulation to amend Eramet’s unique arrangement.¹⁹ Opposing the stipulation, OCC asked for the right to receive Eramet’s future annual reports and asked that Eramet publically confirm compliance with its unique arrangement commitments.²⁰ The Commission rejected OCC’s proposals because they “are not required by Ohio law or pursuant to any regulatory requirement or practice.”²¹ It is notable that that OCC does not even cite the 2015 *Eramet* order.

¹⁷ 2011 *Eramet* entry at 7-8 ¶ 16-17 (finding that alleged trade secret information in existing documents had otherwise been publically disclosed and ordering their production in response to OCC’s public records request).

¹⁸ Tr. at 6:8-10 (granting Globe’s Motion for Protective Order (Oct. 19, 2016), which OCC did not oppose). See also O.A.C. 4901:1-38-05(E) (providing that customer information provided to a utility for a unique arrangement shall be treated as confidential); O.A.C. 4901-1-24(G) (providing that requirements for seeking a protective order “do not apply to information submitted to the commission staff”); *In re Application of TimkenSteel Corp. for Approval of a Unique Arrangement*, Case No. 15-1587-EL-AEC, Opinion and Order (Dec. 16, 2015) at 2 & 6-7 (granting protective orders for, among other things, employment and investment commitments); *In re Application of Warren Steel Holdings LLC for Approval of a Reasonable Arrangement*, Case No. 14-1009-EL-AEC, Hearing Tr. (July 3, 2014) at 6 (granting protection of a business plan showing anticipated future capital expenditures and projected employment levels).

¹⁹ *Eramet*, 09-516-EL-AEC, Opinion and Order (Oct. 14, 2015) at 2 [hereafter, the “2015 *Eramet* order”].

²⁰ 2015 *Eramet* order at 7-8.

²¹ 2015 *Eramet* order at 8.

In fact, although “the Commission has approved numerous unique arrangements,”²² OCC does not cite a single decision where approval of a reasonable arrangement gave OCC a right to review future annual reports.

It is OCC’s application, not the Commission’s Opinion and Order, that runs afoul of precedent. The Commission should reject OCC’s application because, as OCC concedes, the Commission should not deviate from precedent “unless the need is clear and it is shown that prior decisions are in error.”²³

2. OCC has no need to review Globe’s future annual reports.

Not only does OCC have no right to review Globe’s future annual reports, it has no need for them. OCC’s testimony says only that “it is appropriate for it to be known that companies receiving funding ... regarding unique arrangements are fulfilling their commitments to Ohioans for economic development.”²⁴ But Staff already reviews annual reports to determine compliance with criteria in reasonable arrangements.²⁵ OCC has made no showing that Staff cannot ensure Globe’s compliance. Nor has OCC made any showing why it should have a right to review Globe’s annual report – especially since doing so would result in Globe’s confidential annual reports being treated differently from confidential annual reports of all other unique arrangement customers that are not subject to OCC review and could compromise Globe’s confidential business information. Therefore, OCC’s first assignment of error should be denied.

B. The Commission’s Opinion and Order is properly supported under R.C. 4903.09.

There is no merit to OCC’s second assignment of error alleging that the Opinion and Order are deficient under R.C. 4903.09 because the Commission did consider and reject OCC’s

²² Opinion and Order at 9 ¶ 20.

²³ App. for Reh’g at 6 (citing *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St. 3d 49, 50 (1984)).

²⁴ OCC Ex. 1, Attachment 1 at 13:3-5.

²⁵ See O.A.C. 4901:1-38-06(A) – (B).

testimony and fully supported its decision with citations to the record and reason.

“The purpose of R.C. 4903.09 is to inform interested parties of the reasons for the commission's action and to provide [the Ohio Supreme Court] with an adequate record in order to determine whether the decision is lawful and reasonable.” *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St. 3d 451, 455 (2004). “All that is required is that the commission set forth ‘some factual basis and reasoning based thereon in reaching its conclusion.’” *Id.* at 455.

The Commission more than met the requirements of R.C. 4903.09. The Commission specifically acknowledged OCC’s testimony that a new unique arrangement was not appropriate and that Globe’s annual reports should be provided to OCC.²⁶ The Commission rejected OCC witness Willis’ testimony as having “no merit,”²⁷ explaining that “the Stipulation, as a package, is in the public interest” because, among other things, “Globe is making a significant commitment to jobs and capital investment in Ohio” and “the arrangement allows Globe ... to remain competitive in the marketplace which assists Ohio’s effectiveness in the global economy.”²⁸

The record supports the Commission’s decision to approve the Stipulation rather than rejecting and/or modifying it as requested by OCC witness Willis. As indicated in Globe’s application, which was admitted into the record with no objection by OCC, Staff will monitor Globe’s compliance with its commitments under established rules by reviewing Globe’s annual reports.²⁹ Importantly, those annual reports will contain Globe’s confidential employment and capital investment information and plans.³⁰ The fact that Staff (as required by Commission

²⁶ Opinion and Order at 7-8 ¶ 17.

²⁷ Opinion and Order at 8 ¶ 19.

²⁸ Opinion and Order at 8-9 ¶ 19.

²⁹ See Globe Ex. 2 at ¶37.

³⁰ *Id.* at ¶ 37 and see Tr. at 6:8-10.

rules) will monitor Globe's compliance with its commitments under the unique arrangement is sufficient record evidence to support the Commission's decision.

The Commission properly rejected OCC's request for a new right to review Globe's annual reports and, in its Opinion and Order, acknowledged and pointed to abundant record evidence supporting the decision to not modify the Stipulation to provide OCC with access to Globe's annual reports.³¹ OCC's second assignment of error lacks merit and should be rejected.

IV. Conclusion

OCC does not dispute the Commission's factual findings supporting its Opinion and Order approving the Stipulation for a unique arrangement for Globe. Neither does OCC identify or articulate any right or legitimate need to review Globe's annual reports. Under existing rules and under the unique arrangement, Staff will review Globe's annual reports to determine its compliance with the criteria in the unique arrangement. For these reasons, as explained more fully above, Globe requests that the Commission deny the OCC's Application for Rehearing.

Respectfully submitted,

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³¹ See, e.g., *Migden-Ostrander*, 102 Ohio St. 3d at 455 (holding the Commission's decision was supported with adequate facts and reasoning); *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312 (1987) (finding that the Commission's decision was clearly reasoned and supported by the totality of the record); *In re Application of Ormet Primary Aluminum Corporation*, Case No. 09-119-EL-AEC, Entry on Rehearing at ¶ 7-8 (Nov. 13, 2013) (denying application for rehearing based on OCC's allegation that an opinion and order did not address certain recommendations).

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below via electronic mail this 5th day of December, 2016.

/s/ William A. Sieck

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Summary: Memorandum MEMORANDUM CONTRA BY GLOBE METALLURGICAL INC. TO THE APPLICATION FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL electronically filed by Mr. William A Sieck on behalf of Globe Metallurgical Inc.