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**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application	)	
Of Ormet Primary Aluminum Corporation	)	Supreme Court Case No. 09-2060
For Approval of a Unique Arrangement	)	
with Ohio Power Company and Columbus	)	
Southern Power Company.	)	
	)	
	)	
<i>(Columbus Southern Power Company And</i>	)	Appeal from the Public Utilities
<i>Ohio Power Company</i>	)	Commission of Ohio
v.	)	Case No. 09-119-EL-AEC
<i>The Public Utilities Commission of Ohio)</i>	)	

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**MOTION TO STRIKE  
PORTIONS OF APPELLANTS' BRIEF  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND THE OHIO ENERGY GROUP**

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On January 22, 2010, Appellants, the Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively "AEP Ohio" or "Companies"), filed their merit brief—a brief that contains certain claims and information that are not properly before the Court. OCC and OEG thus move to strike those portions of Appellants' brief.

In their merit brief, the Companies make several arguments including the following two: (1) The Court should find unreasonable the Public Utilities Commission of Ohio's ("PUCO" or "Commission") "revised approach on rehearing" of considering only the first three years of the 10-year contract to evaluate shopping risk (AEP Ohio Brief at 34, 37-40) and (2) The PUCO's decision conflicts with the language of the Ormet contract, which provides "an additional and independent basis" for the Court to reverse. (AEP Ohio Brief at 17).

The Companies did not set forth these alleged errors in their application for rehearing filed with the PUCO. Additionally, only one of these errors was contained in their notice of appeal, filed on November 12, 2009. The Companies, thus, failed to comply with the requirements of R.C. 4903.10 and 4903.13, which are mandatory and jurisdictional. Therefore, the Companies cannot urge or rely upon either of these errors in their merit brief as a ground for reversing the PUCO. Neither can the Court hear these issues.

Additionally, the Companies throughout their merit brief refer to information that was not part of the record in the PUCO proceeding being appealed. That information includes the allegation that serving Ormet's power requirements is the equivalent of supplying power to more than 400,000 households in Ohio. (AEP Ohio Brief at 2, 28). In presenting this allegation, the Companies cite to the PUCO website conveying typical Ohio household consumption. (AEP Ohio Brief at 31). The Companies also reference census data showing the number of residential households in Franklin County and Hamilton County. (AEP Ohio Brief at 31).

Other information referred to in the brief that is outside the record includes a statement made that "less than two weeks after the Commission's Opinion and Order in this case was issued, the future operation of Ormet has been cast in uncertainty." (AEP Ohio Brief at 35). This statement directly references the PUCO's discussion of the Worker Adjustment and Retraining Notification ("WARN") notices and press releases regarding Ormet. None of the WARN notices and press releases were admitted into the evidentiary record in the proceeding, and no witnesses testified regarding the nature or the implications of these notices. In fact the Commission explicitly ruled that such information could not be considered by it on rehearing. (AEP Ohio Appx. 80). Finally, AEP conveys to the Court other extra-record information

when it claims that it was named in the top-ten list of utilities in economic development by Site Selection magazine. (AEP Ohio Brief at 3).

Because all of this information was never part of the record in the proceeding on appeal, this Court should not consider it. This Court has repeatedly recognized that it may consider only that which was considered by the trial court and nothing more.<sup>1</sup> Allowing the Companies to bootstrap into the appeal information that was not part of the record below is also contrary to the provisions of the Revised Code that clearly restrict the scope of the record. Moreover, Appellees who have not been able to challenge the information will be prejudiced if Appellants can use this information on brief to support their arguments. It should be struck from the Appellants' merit brief.

The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Energy Group ("OEG"), Intervening Appellees, request that the Court, in the interest of justice, expeditiously issue an order striking portions of the brief (and the notice of appeal) that refer to the matters the Companies failed to raise in their application for rehearing. Additionally, OCC and OEG seek an order striking the portions of the brief that convey non-record information to the Court. A memorandum in support of this motion is attached. OCC and OEG request that this Court issue its ruling to permit Appellees to focus their merit brief, due February 22, 2010, and oral argument upon issues that are appropriately before the Court and subject to the Court's jurisdiction.

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<sup>1</sup> *State of Ohio v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, syllabus ¶1.

Respectfully submitted,

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**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application	)	
Of Ormet Primary Aluminum Corporation	)	Supreme Court Case No. 09-2060
For Approval of a Unique Arrangement	)	
with Ohio Power Company and Columbus	)	
Southern Power Company.	)	
	)	
	)	
(Columbus Southern Power Company And	)	Appeal from the Public Utilities
Ohio Power Company	)	Commission of Ohio
v.	)	Case Nos. 09-119-EL-AEC
The Public Utilities Commission of Ohio)	)	

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**MEMORANDUM IN SUPPORT**

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- A. The Companies failed to apply for rehearing on issues contained in their merit brief and thus, the Court has no jurisdiction to entertain such argument. Those portions of the merit brief (and the notice of appeal) should be struck.**

Under R.C. 4903.10 “[n]o party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application [for rehearing].” R.C. 4903.10 also provides that no cause of action arising out of an order of the Public Utilities Commission of Ohio (“PUCO” or “Commission”) shall accrue unless a proper application for rehearing has been made to the PUCO. Another provision of the Revised Code, R.C. 4903.13, sets forth the right of appeal and the obligations of parties seeking an appeal from a decision of the PUCO. Under R.C. 4903.13, a party to a Commission proceeding may appeal but must set forth “the order appealed from and the errors complained of.” These statutes together authorize a mandatory process for appealing PUCO orders and prescribe the conditions and procedure under which appeals may be sought.

This Court has ruled that if an appellant fails to raise specific grounds for rehearing before the PUCO or claim specific errors in the notice of appeal, the Court lacks jurisdiction to consider those arguments.<sup>2</sup> Therefore, under R.C. 4903.10 and 4903.13, appellants have to initially raise the arguments they discuss in their merit brief in both their application for rehearing and in their notice of appeal. Otherwise, appellants fail to preserve the issue on appeal, and the Court has refused to hear arguments on those issues.<sup>3</sup> This process assures that parties do not engage in unfair tactics by making belated claims of error--claims that could have been corrected earlier by the Commission.<sup>4</sup> The very purpose of an application for rehearing would thus, be destroyed and would constitute an entirely meaningless step if parties could raise issues for the first time before the Court.<sup>5</sup> The Appellants in this case failed to adhere to these statutes, and their belated claims of error should not be heard.

In their merit brief the Companies introduce two new claimed errors – errors that they failed to apply for rehearing on. These claimed errors are: 1) The Court should find unreasonable the Commission’s “revised approach on rehearing” of considering only the first

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<sup>2</sup> *Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340,349, 2007-Ohio-4276, 872 N.E.2d 269, ¶40 (citing *Consumers’ Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 247, 638 N.E.2d 550); *Travis v. Pub. Util. Comm.* (1931), 123 Ohio St. 355, 9 Ohio Law Abs. 443, 175 N.E. 586, ¶6 of the syllabus.

<sup>3</sup> See for example *Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.2d at 349, 872 N.E.2d at ¶40; *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, ¶16.

<sup>4</sup> See *City of Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353, 376-377, 39 O.O. 188, 86 N.E.2d 10 (characterizing Section 614-46a, General Code, the predecessor to R.C. 4903.10, as the General Assembly recognizing that it should guard against such unfair tactics).

<sup>5</sup> *Id.* Jurisdictional issues, however, are an exception to this rule. See *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 233, 661 N.E.2d 1097, reconsideration denied (1996), 75 Ohio St.3d 1453, 663 N.E.2d 333, citing to *Gates Mills Investment Co. v. Parks* (1971), 25 Ohio St.2d 16, 20, 54 O.O.2d 157, 266 N.E.2d 552. None of the issues subject to this motion qualify as jurisdictional issues, however.

three years of the 10-year contract to evaluate shopping risk (AEP Ohio Brief at 34, 37-40) and 2) The PUCO's decision conflicts with the language of the Ormet contract, which provides "an additional and independent basis" for the Court to reverse. (AEP Ohio Brief at 17).

A quick reference to the Companies' application for rehearing, filed August 14, 2009, reveals that the Companies have not complied with the statutes governing appeals. (AEP Ohio Appx. 51-76). The closest the Appellants come to raising these issues is the first assignment of error, which provides as follows: "The Commission's conclusion that *during the ten-year term* of this unique arrangement there is no risk Ormet will be permitted to shop for competitive generation and then return to AEP Ohio is unreasonable and conflicts with the Commission's orders in AEP Ohio's ESP Cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO (ESP Cases)." (AEP Ohio Appx. 52) (emphasis added).

While this first ground for rehearing refers to the Commission's original Opinion and Order concluding that during the *ten year term* of the arrangement there is no risk of Ormet shopping,<sup>6</sup> it clearly does not pertain to the Commission's "revised approach on rehearing." In its Entry on Rehearing, the PUCO "clarified" its original Opinion and Order on this very issue. There it addressed AEP Ohio's rehearing claim challenging its finding that no risk exists of Ormet shopping during the ten year term of the arrangement. The Commission granted rehearing, and ruled that the relevant period when Ormet cannot shop is the duration of AEP Ohio's current approved security plan. That term of that plan is three years. (AEP Ohio

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<sup>6</sup> (AEP Ohio Appx. 46-47) (where the Commission concluded "there is no risk that Ormet will shop for competitive generation and then return to AEP-Ohio's POLR service" and ordered for the ten year term of the unique arrangement that AEP Ohio credit AEP Ohio customers for the POLR charges paid by Ormet).

Appx. 84). Thus, discussion of shopping risk for *the first three years of the contract*<sup>7</sup> is germane only to the Entry on Rehearing, which the Companies did not appeal. They should have done so, if they intended to raise this issue on appeal and discuss it in their merit brief. They did not. Because the Companies failed to comply with R.C. 4903.10, the Court should strike those arguments from the brief.<sup>8</sup>

The Companies' subsequent incorporation of the PUCO's "revised approach on rehearing" into its notice of appeal as Error 2 does not cure its initial error. (See AEP Ohio Appx. 328). In fact, that portion of the notice of appeal should be struck as well as the related arguments in the merit brief. This is because the Companies cannot appeal actions of the PUCO which they have not sought rehearing on under R.C. 4903.10. The words of R.C. 4903.10 are clear in this regard: "No cause of action arising out of any order of the commission, other than in support of the order, shall accrue to any person, firm, or corporation unless such person, firm or corporation has made a proper application to the commission for a rehearing."

The Companies also failed to apply for rehearing on the other error urged in the brief -- that the Commission's decision conflicts with the language of the Ormet contract. While the

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<sup>7</sup> Accordingly, in limiting its ruling assessing shopping risk to the first three years of the ESP term, the Commission only approved a POLR credit for that time period as well.

<sup>8</sup> See *Office of Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d at 248 (OCC's failure to raise an issue in its application for rehearing was ruled fatal to its claim of error.); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶40 (finding that OCC waived its right to raise an issue by not setting it forth in the application for rehearing); *Forest Hills Utility Co. v. Pub. Util. Comm.* (1972), 31 Ohio St.2d 46, 52, 60 O.O.2d 32, 285 N.E.2d 702, 707 (Court would not consider issue that was not raised in the application for rehearing, but must adhere to R.C. 4903.10 and the decisions of the court, citing *Agin v. Pub. Util. Comm.* (1967), 12 Ohio St.2d 97, 98, 41 O.O.2d 406, 232 N.E.2d 828, 829).

Companies did seek rehearing of the Commission's order on grounds that it conflicted with the Commission's *Orders* in the ESP case, (Assignment of Error 1), they did not claim that the order conflicts with the *Ormet contract*. Moreover, neither did the Companies incorporate this claim into the notice of appeal. Thus, in failing to raise the issue in its application for rehearing and its notice of appeal, the Companies did not comply with R.C. 4903.10 or R.C. 4903.13.<sup>9</sup> They simply cannot argue the issue in their merit brief. The Court has no jurisdiction to hear such arguments<sup>10</sup> and should thus strike them from the Companies' merit brief.

The Appellees ask the Court to strike the Appellants' arguments at this time so as to relieve Appellees from the unnecessary task of responding to issues which are not properly before the Court and relieve the Court from having to read arguments that should not be heard due to a lack of jurisdiction. A ruling striking these matters will also ensure that oral argument is limited in scope to only those matters that are properly before the Court, saving the resources of the Court and the parties. As a matter of appellate efficiency and consistent with long-standing principles of appellate procedure, OCC and OEG request that this motion be granted.

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<sup>9</sup> *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶21 (Court is precluded from considering an issue not raised in appellant's notice of appeal to the Court); *City of Akron et al. v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155, 161-162, 9 O.O.3d 122, 378 N.E.2d 480, 485 (where appellants did not assert a proposition in their application for rehearing and also did not assert it in the notice of appeal, the issue is not properly before the court).

<sup>10</sup> *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d at 402, 616 N.E.2d at ¶21.

**B. The Companies should be prohibited from introducing information in their merit brief that is not part of the record in this proceeding.**

R.C. 4903.21 defines the “transcript” that the Commission must transmit to the Court, under S.Ct.Prac.R. 5.5, when served with a notice of appeal. The transcript is limited to the “journal entries, the original papers or transcripts thereof, and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of\*\*\*.” The transcript submitted to the Clerk of the Supreme Court becomes the “record” of the PUCO proceeding, which the Court then utilizes in reviewing the appeal from the PUCO.

The information that the Companies seek to now introduce on appeal was not part of the evidence adduced at the hearing. It is non-record information that the Companies have introduced for the first time ever, ostensibly in an attempt to strengthen their appeal. The Appellees never had the chance to challenge such information in the PUCO proceeding.

This Court has held that a reviewing court cannot add matter to the record before it which was not part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.<sup>11</sup> In *State of Ohio v. Ishmail*<sup>12</sup> this Court was faced with reviewing a court of appeals decision that considered transcripts that were not taken into account at the trial court level. The Court drew upon several reported cases to reach its decision, including a court of appeals case from Montgomery County, *Bennet v. Dayton Mem. Park & Cemetery Assn.*<sup>13</sup> The Court cited to the conclusion of *Bennet* limiting the reviewing court to materials

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<sup>11</sup> *State of Ohio v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, syllabus ¶1. Accord *State v. Coleman* (1999), 85 Ohio St.2d 129, 133, 707 N.E.2d 476, 483 (Court would not consider materials that were not evidence before the trial court and not in the record on appeal, finding that a reviewing court cannot add matter to the record before it that was not part of the trial court’s proceedings).

<sup>12</sup> *State of Ohio v. Ishmail*, 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500.

<sup>13</sup> *Bennet v. Dayton Mem. Park & Cemetery Assn.* (1950), 88 Ohio App. 98.

considered by the trial court: “[i]t is axiomatic that in an appeal on questions of law the reviewing court may consider only that which was considered by the trial court and nothing more.”<sup>14</sup> The role of a reviewing court is to assess errors of the trial court and such a review “should be limited to what transpired in the trial court, as reflected by the record made in the proceedings”<sup>15</sup> this Court opined. The transcripts were not properly involved in the record of the trial court proceeding transmitted to the court of appeals. Thus, it was prejudicial error for the reviewing court to add the transcripts to the record before it and to render its decision based on those transcripts.<sup>16</sup>

The Court’s reasoning in *State of Ohio v. Ishmail* is equally applicable here. Like the transcripts that were not part of the trial court’s review, the information in the Appellants’ merit brief was not part of the PUCO’s review. The Court’s review of the PUCO proceeding must be limited to that which transpired below, like this Court found in *State of Ohio v. Ishmail*. Indeed much of the information referred to was information that the PUCO specifically noted was lacking in the record. And on the basis of an inadequate record, the PUCO declined to rule in favor of the Appellants’ claims.

For instance, the PUCO ruled that despite AEP Ohio’s claim that the exclusive Ormet contract would adversely affect competition in the state, there was no evidence in the record to support the allegation. (AEP Ohio Appx. 363). And yet, in their merit brief, the Companies seek to cure the inadequacies of their case by bringing in information alleging the impact of

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<sup>14</sup> Id. (citation omitted).

<sup>15</sup> *State of Ohio v. Ishmail*, 54 Ohio St.2d at 406, 377 N.E.2d at 501.

<sup>16</sup> See *Swetland Co. v. Evatt* (1941), 139 Ohio St. 6, 16, 21 O.O. 511, 37 N.E.2d 601, 606, finding that “[i]t should need no citation of authority to convince that this court will not go outside of the record in consideration of facts in appealed causes.”

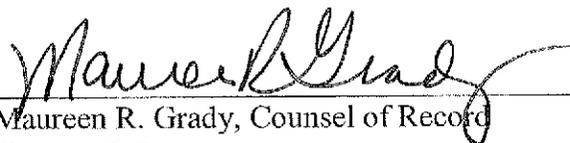
the Ormet contract equates to serving over 400,000 households. The Companies allege that this information shows that “[p]rohibiting shopping for such an enormous electric load is unquestionably a major constraint on the competitive generation market in Ohio for the next ten years.” (AEP Ohio Brief at 31).

Information supplied by the Companies on the uncertainty of future operations of Ormet, i.e. the WARN notice, too, was information that the PUCO explicitly ruled was not part of the record. (AEP Ohio Appx. 354). Yet the Companies seek to use this information to bolster their argument that there is a risk that Ormet’s contract will be changed or terminated, thus translating to a risk of Ormet shopping for generation service, and imposing POLR risk for the Companies. (AEP Ohio Brief at 34-35).

To allow the Companies to introduce such information in their merit brief is not only inconsistent with the precedent of the Court as described in *State v. Ishmail*, but it is also inconsistent with the definition of the “record” on appeal. Under S.Ct.Prac.R. 5.5, the record on appeal relates back to the “transcript” defined under R.C. 4903.21. The transcript is confined to the evidence adduced at the PUCO hearing. Here the information sought to be used by the Companies was not part of the evidence adduced at the hearing. It was not relied upon by the PUCO in reaching the decision the Companies are appealing. Additionally, permitting such information to infiltrate the record on appeal is contrary to notions of fairness and is prejudicial to the Appellees. Such information should be struck from the Appellants’ merit brief.

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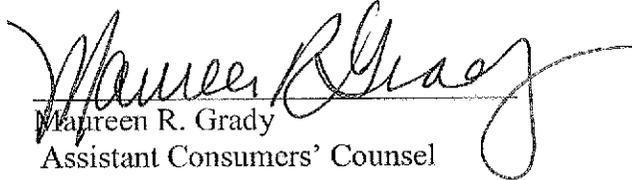
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion to Strike Portions of Appellants' Brief by Office of the Ohio Consumers' Counsel and the Ohio Energy Group* has been served upon the below-named counsel via First Class mail, postage prepaid this 5th day of February, 2010.

  
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