

In the Supreme Court of Ohio

Teddy L. Wheeler,
In his Capacity of Pike County Auditor,

Appellee,

v.

Joseph W. Testa,
Tax Commissioner of Ohio,

Appellee,

And

Martin Marietta Energy Systems, Inc.,
a/k/a Lockheed Martin Energy Systems, Inc.

Appellant.

Case No. 14-1362

Appeal from the Ohio
Board of Tax Appeals

BTA Case No. 2012-2043

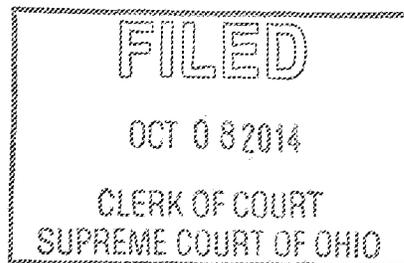
**MOTION OF APPELLANT MARTIN MARIETTA ENERGY
SYSTEMS, INC., a/k/a LOCKHEED MARTIN ENERGY SYSTEMS, INC.
TO STAY RELATED PROCEEDINGS CURRENTLY PENDING
BEFORE THE OHIO DEPARTMENT OF TAXATION**

Robert E. Tait (0020884) - Counsel of Record
Hilary J. Houston (0076846)
Steven L. Smiseck (0061615)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
PH: (614) 464-6341
Fax: (614) 719-4994
retait@vorys.com

Kevin L. Shoemaker (0017094)
Shoemaker Law Office
8226 Inistork Court
Dublin, Ohio 43017
PH: (614) 469-0100
kshoemaker@midohiolaw.com

*Counsel for Appellee, Teddy Wheeler In
his Capacity as Pike County Auditor*

*Legal Counsel for Appellant
Martin Marietta Energy Systems, Inc.,
a/k/a Lockheed Martin Energy Systems, Inc.*



William Posey (0021821)
Keating, Muething & Klekamp, PLL
One East Fourth St., Suite 1400
Cincinnati, Ohio 45202
PH: (513) 579-6535
wposey@kmklaw.com

Sean A. McCarter (0064215)
Law Office of Sean A. McCarter
88 North Fifth St.
Columbus, Ohio 43215
PH: (513) 358-0880
Fax: 614/464-0604
sean@smccarterlaw.com

*Special Counsel to Robert Junk, Pike
County Prosecuting Attorney, for
Appellant Teddy L. Wheeler, In his
capacity as Pike County Auditor.*

Michael DeWine (009181)
Attorney General of Ohio
Daniel W. Fausey (0079928)
Office of the Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
PH: (614) 466-5967
Fax: (614) 466-8226
Daniel.Fausey@ohioattorneygeneral.gov

*Counsel for Appellee, Joseph Testa,
Ohio Tax Commissioner*

Now comes Appellant Martin Marietta Energy Systems, Inc., a/k/a Lockheed Martin Energy Systems, Inc. ("LMES") and pursuant to *S. Ct. Prac. R. 4.01* moves this Court for an Order staying the forty-four (44) related *Petitions for Reassessment* currently pending before the Ohio Department of Taxation. The basis for this Motion is outlined in the attached Memorandum in Support.

Respectfully submitted,



Robert E. Tait (0020884) – Counsel of Record
Hilary J. Houston (0076846)
Steven L. Smiseck (0061615)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
PH: (614) 464-6341
Fax (614) 719-4994
retait@vorys.com

*Legal Counsel for, Martin Marietta Energy
Systems, Inc., a/k/a Lockheed Martin Energy
Systems, Inc.*

MEMORANDUM IN SUPPORT OF MOTION

I. Introduction

On August 8, 2014, Appellant, LMES filed a *Notice of Appeal* to this Court from the *Decision and Order* (“*Decision*”) of the Ohio Board of Tax Appeals (“BTA”) in *Teddy L. Wheeler in his Capacity as Pike County Auditor v. Joseph W. Testa, Tax Commissioner of Ohio*, et al., (Aug. 7, 2014) BTA No. 2012-2043. (An *Amended Notice*, primarily to reflect a change in counsel, was filed on August 25, 2014). The appeal raises sixteen separate “Errors to Be Reviewed”, not the least of which is that LMES is entitled to a finding that the Pike County Auditor (“Wheeler”) acted in bad faith in forcing LMES to contest the tax assessment here at issue, as well as forty-four other frivolous tax assessments. Despite a finding by the BTA that should be dispositive of all these assessments, Wheeler and Pike County continue to pursue the taxes, not only by asking this Court to Dismiss LMES’s appeal so that they can have the case adjudicated by the Court of Appeals for Pike County¹, but by also asking the Department to ratify Pike County’s actions in levying the taxes. For the multiple reasons outlined below, LMES requests that this Court stay the forty-four other related cases until the appeals filed herein are finally decided.

II. Statement of Relevant Facts

A. The Assessments.

In order to properly understand the reasons for this Motion, it is important that the Court be aware of the history of this case. On December 23, 2010, Wheeler, as Pike County Auditor, unilaterally issued a personal property tax assessment – the levy involved in this case -- against LMES based on the his calculation of the value of certain U.S. Government-owned equipment

¹ Following LMES’s appeal herein, Wheeler filed his own appeals in both this Court and in the Court of Appeals for Pike County.

located at the Portsmouth Gaseous Diffusion Plant ("PORTS") during 1992. This assessment was one of *forty-five* separate assessments that Wheeler retroactively issued against the various entities which managed PORTS under contract with the United States Department of Energy ("DOE")² from 1954 to 1999. Not only are these tax assessments -- which total nearly *one and one-half billion dollars* and, in some cases, were not filed until more than a half-century after any tax was allegedly due – contrary to both Ohio and federal law, see, e.g., *U.S. v. Anderson County, Tenn.* (E.D. Tenn. 1983), 575 F. Supp. 574, affirmed (6th Circuit 1985), 761 F.2d 1169, cert. denied (1983), 474 U.S. 919 (1983), but they were issued without the approval or concurrence of the Ohio Tax Commissioner, are in direct opposition to the Opinion of the Ohio Attorney General, and are expressly contrary to the mandate included in *County Bulletin 126*, the only instruction ever issued by the Ohio Department of Taxation on the subject. Finally, and most incredibly, all but two of Wheeler's assessments violated written Payment-in-Lieu-of-Tax ("PILOT") Agreements between Pike County and DOE, under which DOE paid the County more than a half-million dollars in return for the County's promise that it would make no claim for any such taxes.³ As a result of Wheeler's illegal and unprecedented actions, LMES has been required to separately contest each of these unwarranted assessments at a cost that already exceeds one million dollars.

B. The Proceedings Below

Due to the manner in which these taxes were assessed, it was necessary for LMES⁴ to file separate *Petitions for Reassessment* with the Ohio Department of Taxation (the "Department") for each of the involved tax years. Although it was initially agreed that the assessment involved

² Or eventually, the United States Enrichment Corporation ("USEC").

³ The various PILOT Agreements, which were executed and effective for every tax year from 1952 to 1997 are part of the BTA record filed herein on August 27, 2014.

⁴ On behalf of itself and the other involved contractors.

in this appeal (Tax Year 1993) would be adjudicated as a “test case”, due to the passage of time, the Department eventually requested that all pending *Petitions* be adjudicated. Consequently, LMES has also been required to develop an individual record and file a separate memorandum of law for each of the other forty-four tax years. LMES’s challenges to those assessments are currently awaiting determination by the Ohio Tax Commissioner (“Commissioner”). Assuming that there is a resolution of one or more of those matters before the Court decides this case on the merits, LMES will be further required to litigate the cases before the BTA. Under the circumstances, LMES should not be forced to incur those additional costs.

C. The case currently before this Court

With regard to the present case, on May 25, 2012 the Commissioner issued a *Final Determination* cancelling Wheeler's purported assessment for Tax Year 1993. The primary basis for the cancellation was the Commissioner’s finding that, by reason of the PILOT Agreement covering that year, Pike County was contractually precluded from making any claim for personal property taxes against the DOE contractor (LMES). However, the Commissioner made no finding with respect to LMES’s claim that the Auditor had acted in bad faith, nor did he rule on any of the legal or constitutional defenses to the assessment raised by LMES. LMES believes that a ruling on those issues is not only essential to the defense of the forty-four other cases, but also necessary to support LMES’s claim for costs and attorney’s fees herein.

Both parties appealed the Commissioner’s *Final Determination* to the BTA. After a full evidentiary hearing, the BTA affirmed the cancellation of the assessment primarily on the same grounds as found by the Commissioner -- again side-stepping most of the legal issues involved. Moreover, and despite its conclusion that Pike County had specifically bargained away – *in return for hundreds of thousands of dollars* – the very claim that Wheeler has pursued against

LMES, the BTA failed to find that Wheeler had acted in bad faith, or that Pike County's actions in seeking to collect these additional taxes were frivolous in nature. The BTA's inaction on this issue is all the more troubling since it additionally held, as a matter of "fact", that LMES could not be considered a taxpayer under Ohio law because it 1) neither owned, nor stood "in the stead of an owner by virtue of having a 'beneficial interest' in the subject property, pursuant to R.C. 5711.01(B)", and 2) could "not properly (be) assessed as a manufacturer" under R.C. 5711.16 since DOE exercised "ultimate control and supervision over PORTS". Thus, not only were Wheeler's assessments precluded by the PILOT Agreements, federal law, years of Ohio precedent, and the express opinions of both the Ohio Tax Commissioner and the Ohio Attorney General – all of which prohibited the County from taxing government-owned personal property, but LMES was never a party subject to taxation in any event. Each of these findings should be equally applicable to the other pending matters.

D. The Historical Operation of PORTS

As established by testimony presented by LMES to the BTA, PORTS was commissioned by the United States government in the early 1950's as part of our national defense program. Because the science of uranium enrichment was in its infancy, and since the government needed the technical expertise and management skills that could only be found in the private sector, the government created the Management and Operation ("M&O") contract.⁵ Much like if one were to hire a cook to prepare your meals at home – albeit on a much grander scale – the Atomic Energy Commission (now DOE) contracted with various companies and institutions to supply the personnel to manage and operate its nuclear facilities.⁶ However, all property utilized in the operation, from the processing equipment to the paperclips, was owned by the government, and

⁵ See deposition of Harry R. Nesteruk ("Nesteruk Dep.") at 8-10.

⁶ Id. at 11.

the contractor was explicitly forbidden to utilize any of that property for its own purposes.⁷ To assure compliance, all appropriate items were specifically "tagged" as property owned by the federal government, and there were criminal penalties for the unauthorized use of any such equipment.⁸ Finally, all of the enriched uranium produced at PORTS was owned and controlled by the government, and the PORTS contractor was permitted to perform no activities that were not specifically on behalf of the U.S. government.⁹ All of this was long known by Auditor Wheeler before any of the assessments were issued and, in fact, *stipulated* to the BTA.¹⁰

E. Payment-in-Lieu-of-Tax Agreements

Because M&O contractors such as LMES owned no property and conducted no business other than providing personnel services to the federal government, those contractors were generally not subject to state or local taxation. Recognizing that fact, Congress included within the *Atomic Energy Act of 1946 (42 U.S.C.2208)* a provision authorizing DOE to make payments to local governments *in-lieu-of-taxes*. Relevant to this matter, DOE made payments to Pike County for every year from 1952 to 1997 to compensate the County for the loss of PORTS tax revenue. In return for those payments, however, DOE insisted that the County forever *waive* any and all claims to such taxes against DOE or its contractors.¹¹ The agreements also included the express acknowledgement that "Counsel for the County" agreed that any government-owned equipment located at PORTS was not subject to taxation under Ohio law. Incredibly, in light of his future actions, Wheeler not only admitted that he was well-aware of these waivers, but that he, himself, negotiated and signed many of these PILOT agreements on behalf of the County.

⁷ Id. at 18-19; Deposition of Ralph G. Donnelly ("Donnelly Dep.") at 11; Deposition of Peter Dayton ("Dayton Dep.") at 11.

⁸ Donnelly Dep., at 16, 18; Nesteruk Dep. at 20-21, 24.

⁹ Dayton Dep. at 12.

¹⁰ See *Joint Stipulations of Fact* at ¶ 6.

¹¹ Id. at ¶¶ 6-7.

The agreement covering the Tax Year here at issue – which was also negotiated by Wheeler and contains language nearly identical to the agreements covering forty-two of the other tax years -- provides, *inter alia*:

NOW THEREFORE, the parties hereto agree as follows:

1. For purposes of rendering financial assistance to the County, DOE will pay the County, as payment in lieu of property taxes for County government purposes, the sum of \$175,546.83 for tax years 1992 through 1997 * * *.
2. Such payment shall constitute *full satisfaction of any and all claims the County may have for taxes for tax years 1992 through 1997 against DOE and DOE's contractors, of any nature whatsoever, on, with respect to, or measured by the value or use of Government-owned real or personal property* which is utilized in carrying on activities of DOE * * *.
3. As a further consideration for such payment, the *County agrees to and does waive and release, as to each and all of said companies and organizations, any and all claims for said taxes for tax years 1992 through 1997* and agrees further that, if requested by DOE, *the County will join in friendly litigation* before a court having jurisdiction of the parties and subject matter *and in the entry of a consent judgment in keeping with the spirit and intent of this agreement. * * ** (Emphasis added.)

Not only have Wheeler and Pike County refused to honor their additional promise to “join in friendly litigation” to enforce these agreements, they have continued to pursue their billion dollar claim against LMES and the other PORTS contractors for the very taxes that they waived.

F. The Auditor's Actions

Moreover, Wheeler's actions in issuing his multiple assessments against the PORTS contractors, even if they did not directly violate the express promises made in the various PILOT agreements, would still be unprecedented. For good reason, those assessments – the first of which, incidentally, came a full five years after the tax itself was *repealed* -- represent the only time in the history of Ohio that a county has attempted to tax federally-owned personal property.

Wheeler conceded at the BTA hearing in this case that, despite the fact that Ohio has historically housed numerous federal installations, his personal property tax assessments were the first and only ones ever issued against the contractors who operated those facilities.¹² Ohio law has never supported such claims and, as noted above, both the Tax Commissioner and the Ohio Attorney General explicitly determined that Ohio's personal property tax was "not applicable" to property "titled in the United States."¹³

Wheeler's actions were and are unprecedented, illegal, and in direct violation of the express covenants made in the PILOT agreements. They are all the more egregious when one considers that none of the assessments -- which each claim millions of dollars in back taxes, interest and penalties, in some cases more than a half-century after they were due -- were issued until more than a decade after LMES left the site. In this case alone, LMES has been forced to spend hundreds of thousands of dollars to establish a factual record and otherwise defend against the Auditor's improper and vexatious actions. LMES should not be forced to incur the additional and unnecessary expenses involved with continuing to litigate these forty-four companion assessments, when this Court's decision will be dispositive of all of those cases.

III. Argument

A. It is appropriate for this Court to stay any further proceedings by the Ohio Department of Taxation until this appeal has been resolved.

First, there is no question that this Court has jurisdiction over this matter. Appeals from the BTA are governed by *R.C. 5717.04*. That statute provides, in relevant part:

The proceeding to obtain a reversal, vacation, or *modification of a decision of the board of tax appeals* shall be by appeal to the Supreme Court or the Court of Appeals for the county in which the property taxed is situated or in which the taxpayer resides. * * * *

¹² H.R. 96-97.

¹³ See *1958 Ohio Atty. Gen. Ops. No.2471* and *County Bulletin No. 126*.

The Court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

(Emphasis added.) This Court has held that “an appellate Court acquires jurisdiction in a case as soon as a timely notice of appeal is filed.” *Village of Waterville v. Lucas Cty. Budget Comm.*, 37 Ohio St.2d 79 (1974), citing *State, ex rel. Curran v. Brookes*, 142 Ohio St. 107 (1943). Moreover, “[an] appeal is perfected insofar as jurisdiction attaching to the Court when a notice of appeal containing the information prescribed by R. C. 5717.04 has been filed both with the Board of Tax Appeals and in this Court.” *Turner v. Lindley*, 1977 WL 200627 (Ohio App. 10 Dist., Dec. 6, 1977), Case No. 77AP-408.

LMES perfected its appeal to this Court on August 8, 2014. Wheeler filed his own appeal – as well as an identical appeal to the Fourth District Court of Appeals -- some 28 days *thereafter*. Since LMES’s appeal was first in time, under the express language of *R.C. 5717.04*, this Court has exclusive jurisdiction over this case.

Likewise, the Court has, in appropriate circumstances and where justice requires, stayed related proceedings until a potentially dispositive issue has been resolved. *C.f. State ex rel. Mahoning County Commissioners v. Mahoney*, 100 Ohio St.3d 248, (2003) (where this Court *sua sponte* stayed a related budget hearing “pending announcement of this court's opinion in case Nos. 2003-0171 and 2003-0172, disposing of the issues presented.”)

Although the operative facts and legal issues are identical, the pendency of forty-four additional Petitions for Reassessment before the Department raises the possibility of inconsistent and incomplete results, all of which will need to eventually be resolved by this Court. Conversely, Pike County will be in no way prejudiced by the requested stay and, in fact should welcome it since they, too will be forced to incur additional costs in litigating these other cases.

LMES thus submits that in name of judicial efficiency, as well as do justice to the parties, its Motion for Stay should be granted.

B. Wheeler’s pending Motion to Dismiss should not affect that stay.

Even though LMES raised – without any objection from Wheeler -- essentially the same issues in its appeal to the BTA that it has raised before this Court, Wheeler has filed a Motion to Dismiss this appeal asserting, for the first time, that LMES lacks standing to appeal.¹⁴ Citing *Newman v. Levin*, 116 Ohio St.3d 1205, 2007 Ohio 5507, he contends that since “the Decision cancelled the assessment,” (as did the Commissioner’s *Final Determination* that LMES appealed to the BTA), “it is impossible to conclude that LMES was aggrieved by the Decision.”¹⁵ Wheeler is wrong, and his Motion – which is nothing more than a thinly-veiled attempt to transfer this appeal to what he and the County perceive to be a “friendlier” court -- is all the more reason why this Court should issue the requested stay.

While it is true that the BTA *Decision* affirmed the cancellation of the assessment for Tax Year 1993 -- essentially on the same limited basis as that adopted by the Commissioner – it is completely silent with regard to the majority of the legal issues raised by LMES, issues which need decision for LMES to be made whole. The promises in the PILOT agreement aside, Wheeler’s unprecedented actions not only ignored Ohio and federal law, but were directly contrary to the express instructions issued to county auditors by the Ohio Tax Commissioner. LMES needs this Court to so find, not only to dispose of the other forty-four pending assessments, but also to support LMES’s claim for costs and attorney’s fees.

¹⁴ LMES’s *Memorandum in Opposition to the Motion to Dismiss* was rejected by the Clerk’s office as not being timely filed.

¹⁵ Wheeler’s Motion at 4.

Second, even though the BTA found, as had the Commissioner before it, that Pike County accepted hundreds of thousands of dollars in return for waiving the very claims that the County now seeks to enforce against LMES, the BTA abused its discretion by refusing to find that Wheeler and the County acted in bad faith, or that Wheeler's actions in pursuing the assessment – ignoring the clear contractual and legal prohibitions of which he was patently aware – were frivolous in nature.

Finally, neither the Commissioner nor the BTA ruled on the fundamental question underling this, and the other forty-four pending assessments: *does Ohio law permit the taxation of federally-owned personal property?* A definitive ruling on this question is not only necessary to finally settle the issues in this case, but would presumably be dispositive of all of Wheeler's claims against the PORTS contractors.

In the case *sub judice* – as is those involving each of the other forty-four pending assessments -- Wheeler, as Pike County Auditor, not only directly violated the very covenants that the County made in the PILOT agreements, but he patently disregarded all of the Ohio precedent barring such assessments, including the specific refusal of two separate Tax Commissioners to take any such action.¹⁶ Instead, believing that historically Pike County had not been treated equitably by DOE,¹⁷ Wheeler's solution was to simply ignore both the County's contractual obligations and the applicable law, and try to coerce additional funds from DOE and its contractors. Stated plainly, such actions constitute harassment, not enforcement. LMES should have the right, not only to challenge those actions on appeal, but to have the related matters stayed until these issues are finally resolved.

¹⁶ See H.R. 104-107.

¹⁷ See H.R. at 27-29.

The PILOT Agreement, County Bulletin No. 126, the Attorney General's opinion, and the manner that the involved government-owned property at PORTS was treated for over five decades make it clear to any casual observer that Pike County and its Auditor – in a thinly-veiled attempt to extort more money -- deliberately and repeatedly chose to violate the covenants made in their formal agreements with DOE, and ignore both those promises and their duties imposed under Ohio law. LMES should not be required to incur even more costs until this appeal has been finally resolved.

C. This Court not only has jurisdiction to consider LMES's appeal but, given the circumstances of this case and the other pending cases, it is the appropriate forum to rule on the legal issues so presented.

Despite the fact that the subject assessment is merely one of *forty-five* such assessments directed against personal property owned by the United States government, neither the Commissioner nor the BTA ruled on the fundamental question underlying all of these cases: *is federally-owned property taxable under Ohio law?* In its *Notice of Appeal*, LMES outlined ten separate reasons why such taxation is prohibited. Those reasons include, but are not limited to:

- The assessment violates both federal and state law, particularly *U.S. Const., Art. VI, Cl. 2*; *42 U.S.C. § 2208*; *DOE Order 2100.12A*; *R.C. 5715.45* and *5715.46*.
- The Assessment is void because the Auditor lacks the authority to issue assessments for property not listed in returns under *R.C. 5711.24*.
- The assessment is contrary to the Commissioner's interpretation of Ohio law and his binding instructions regarding the taxability of Government property for purposes of Ohio personal property tax.
- The assessment is contrary to the binding opinion of the Ohio Attorney General regarding the taxability of Government property for purposes of Ohio personal property tax. See *1958 Ohio Atty. Gen. Ops. 2471*.
- The assessment is contrary the binding decision of the U.S. 6th Circuit Court of Appeals, finding that statutes similar to Ohio's imposed an ad valorem tax rather than a privilege tax, precluding a government contractor's liability for tangible personal property tax based upon its use of federally-owned property. See *U.S. v. Anderson County, Tenn.*, 761.F.2d 1169, (6th Cir., 1985), *cert. denied* 474 U.S. 919 (1985)

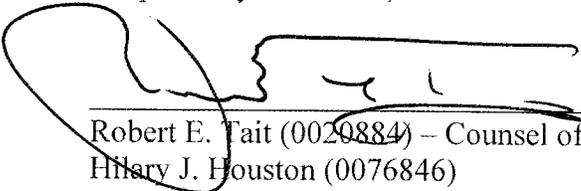
- The assessment is contrary to the manifest intent of the Ohio General Assembly to not tax Government-owned tangible personal property under any circumstance.

Even though the BTA affirmed the cancellation of Wheeler's assessment for Tax Year 1993, the BTA's failure to address any of these underlying legal issues has left LMES in the position of having to defend forty-four other assessments. Thus, not only does LMES have "a present interest in the subject matter of the litigation which has been prejudiced by the judgment appealed from," – at a minimum the BTA's refusal to find that Wheeler acted in bad faith, *Willoughby Hills v. C.C. Bar's Sahara, Inc., supra*, -- but it has an overriding interest in having this Court finally determine the "taxability" issue, so that the remaining assessments can be disposed of once and for all.

IV. Conclusion

For the reasons outlined above, LMES requests that this Court issue an Order staying the forty-four related Petitions for Reassessment currently pending before the Ohio Department of Taxation until the Court has issued a decision on the merits of this appeal.

Respectfully submitted,

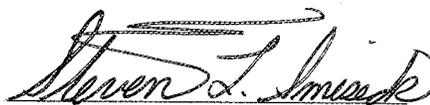


Robert E. Tait (0020884) – Counsel of Record
Hillary J. Houston (0076846)
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Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
PH: (614) 464-6341
Fax (614) 719-4994
retait@vorys.com

*Legal Counsel for, Martin Marietta Energy
Systems, Inc., a/k/a Lockheed Martin Energy
Systems, Inc.*

CERTIFICATE OF SERVICE

This is to certify that on this 8th day of October, 2014 a true copy of the foregoing Memorandum In Opposition was sent by regular U.S. mail, postage prepaid, to the Honorable Mike DeWine, Attorney General of Ohio and Daniel W. Fausey, Assistant Attorney General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428; to Kevin L. Shoemaker, Shoemaker Law Office, 8226 Inistork Court, Dublin, Ohio 43017; to William Posey, Keating, Muething & Klekamp, PLL, One East Fourth St., Suite 1400, Cincinnati, Ohio 45202; and to Sean A. McCarter, Law Office of Sean A. McCarter, 88 North Fifth St., Columbus, Ohio 43215.


Steven L. Smiseck (0061615)

*Legal Counsel for Appellant
Martin Marietta Energy Systems, Inc.,
a/k/a Lockheed Martin Energy Systems, Inc.*