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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service	))))	Case No. 09-453-HT-AEM

MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT OF THE CITY OF AKRON

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June 3, 2009

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In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service	))))	Case No. 09-453-HT-AEM

MOTION TO INTERVENE OF THE CITY OF AKRON

The City of Akron ("Akron") hereby respectfully moves the Public Utilities Commission of Ohio ("PUCO" or "Commission"), pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code ("O.A.C."), for leave to intervene in the above-captioned matter with the full powers and rights granted by the Commission, specifically by statute or by the provisions of the O.A.C., to intervening parties.

Late on the afternoon of Friday, May 29, 2009, Akron Thermal, Limited Partnership ("ATLP")[1] filed an Application for Emergency Rate Increase ("Application"). ATLP's Application alleges that it is entitled to emergency rate relief in the amount of $4.2 million as a result of it being unable to maintain its service relationship with the University of Akron which was a "special contract" customer. ATLP's Application

[1] It is Akron's understanding from ATLP's assertions in various proceedings that: (1) Akron Thermal Cooling, LLC ("ATC") and ATLP use some of the same facilities, plant and equipment; (2) ATC shares the same general partner as ATLP; (3) ATC produces and distributes chilled water used for air conditioning by various customers located in Akron; (4) both ATC and ATLP are regulated by the Commission; (5) ATLP's leased system includes two adjacent steam generating plants (the Akron Plant and the BFG Plant), two chilled water plants, and 18 miles of distribution piping; (6) ATC uses ATLP's two chilled water plants; and, (7) ATLP provides steam service to ATC at prices and on terms and conditions that may be different than those that apply to tariff or contract customers. The overlapping relationship between ATC and ATLP will require some sorting out by the Commission before it can fairly evaluate ATLP's request for emergency rate relief. As noted in the following memorandum and pursuant to the Modified Second Amended Plan of Reorganization ("Plan") recently confirmed by the bankruptcy court, ATC is obligated to contribute its income and earnings to ATLP with the bankruptcy court concluding that said Plan is viewed as a modified form of substantive consolidation. A copy of the court's confirmation order is attached hereto as Exhibit 1.

contains alternative proposals for modifying its current rates and charges to collect the emergency rate increase which it represents would cause rate increases for its 59 steam and 96 hot water customers ranging between approximately 48 and 72 percent. ATLP's Application states that it operates the steam and hot water system pursuant to a lease with Akron.

As demonstrated further in the Memorandum in Support attached hereto and incorporated herein, Akron has a direct, real, and substantial interest in the issues and matters involved in the above-captioned proceedings, and is so situated as a municipality, regulator, customer and lessor that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect that interest. Akron believes that its participation will not unduly prolong or delay this proceeding and that it will significantly contribute to the full development and equitable resolution of the contested issues of fact or law. The interests of Akron will not be adequately represented by other parties to the proceeding and, as such, Akron is entitled to intervene with the full powers and rights granted by the Commission, specifically by statute and by the provisions of the O.A.C., to intervening parties.

Respectfully submitted,

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THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service	))))	Case No. 09-453-HT-AEM

MEMORANDUM IN SUPPORT

On May 29, 2009, ATLP filed an Application for Emergency Rate Increase ("Application"). The Application alleges that ATLP has been unable to retain a service relationship with its largest customer, the University of Akron, and that the resulting loss in revenue has created conditions that entitle it to be made whole through a very large emergency rate increase.[2]

ATLP's current rates were established pursuant to a settlement jointly submitted to the PUCO by ATLP and the other parties. The settlement included an agreement that the revenue increase allowed by the settlement only applied to tariff (not contract) customers and stated that it would be the responsibility of ATLP to secure the remainder of any needed revenue through negotiation of its contracts with its contract customers. The settlement stated that the "... revenue increase sought from tariff customers plus reasonable increases in revenue from contract customers should provide ... [ATLP] ... with a reasonable opportunity to achieve a fair and reasonable rate of return as recommended by the Staff on p. 14 of the Staff Report." *In the Matter of the Application of Akron Thermal, Limited Partnership for an Increase in its Rates for Steam and Hot Water Service*, Case No. 05-5-HT-AIR, Stipulation and

[2] Application at 3-4.

Recommendation at 4 (August 24, 2005). These provisions of the settlement are identified at page 4 of the PUCO's September 28, 2005 order authorizing ATLP to increase its tariff rates for steam and hot water services. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Increase in its Rates for Steam and Hot Water Service*, Case No. 05-5-HT-AIR, Opinion and Order at 4 (September 28, 2005). Direct testimony that ATLP prefiled in PUCO Case No. 00-2260-HT-AEM on December 27, 2000 in conjunction with a prior ATLP request for an emergency rate increase stated that "... market forces will not allow us to extract more revenues from our special contract customers; thus, we are not seeking an emergency rate increase from our special contract customers." *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, PUCO Case No. 00-2260-HT-AEM, Direct Testimony of Carl Avers at 6 (December 27, 2000).

The Application states that, absent the emergency rate increase, ATLP will not be able to meet its current operating expenses, ATLP will have a negative cash balance by August 2009 and that ATLP will be unable to meet its obligation to provide steam and hot water service to its customers.[3] ATLP's claims are advanced in the context of it recently receiving confirmation of a Second Amended Plan of Reorganization in a pending bankruptcy proceeding[4] and with no indication of any intention (on ATLP's part)

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[3] Application at 4.

[4] In Re Akron Thermal, Limited Partnership, Chapter 11, Case No. 07-51884, In The United States Bankruptcy Court For The Northern District of Ohio, Eastern Division, Chief Judge Marilyn Shea-Stonum. In the bankruptcy court's confirmation order on the modified Second Amended Plan of Reorganization at pages 12 -13, the court stated as follows:

> The Debtor is a public utility that uses facilities leased to it by the City to generate and distribute steam primarily for heating to a variety of customers located in Akron, Ohio. The Debtor provides essential services to customers with critical needs, most significantly, three area hospitals. The physical plant that is central to the provision of

to advise the bankruptcy court, the trustee in bankruptcy and the parties in the bankruptcy proceeding that the viability plan of reorganization now depends on ATLP obtaining authorization for sizeable emergency rate increase from the PUCO.[5]

ATLP's Application seeks authority for an emergency increase in revenue of $4.2 million which will result in rate increases of between 48 and 72 percent depending on whether the increase is spread over all tariff and contract customers or just tariff customers.[6] ATLP's Application further explains that ATLP intends to submit a notice of intent to seek and obtain a permanent rate increase by September 1, 2009 but it does not express ATLP's willingness to agree to refund any emergency rate increase that exceeds the level of rate relief that ATLP may be able to justify in a traditional rate increase proceeding.

> steam and chilled water to the Debtor's customers has evolved over a period of almost eight decades. Within the past three years and in an environment in which energy costs have generally outpaced inflation, the Debtor has succeeded in introducing a fuel source that allows it to operate on a very competitive basis. This is essential because two of its largest customers, the University of Akron ("University") and Akron City Hospital ("City Hospital") have the ability to satisfy their own steam needs. If they could do so at a cost that was predictably lower than what they are charged by the Debtor, that portion of the Debtor's business would likely evaporate.

Thus, the loss of the University of Akron as a customer was foreseeable and the consequences for ATLP were predictable and predicted.

[5] As part of the Second Amended Plan of Reorganization (Section 7.1.5), ATC is required to contribute income and earnings to the reorganized ATLP. Section 14.1 of the Second Amended Plan of Reorganization requires ATLP to file and serve any required reports setting forth the actions taken and progress made toward consummation of the Plan until the case is closed in accordance with the provisions of the Plan. Under Article XV of the Plan, the bankruptcy court retains **exclusive** jurisdiction over the Plan for many purposes, including the enforcement and administration of the provisions, purposes and intent of the Plan. The Plan (Section 15.2) also provides that the Commission shall retain jurisdiction over any rate change to be requested by Debtor, and all other matters otherwise within its jurisdiction.

[6] Application at 8. The revenue distribution alternatives are presented notwithstanding the fact that ATLP has filed for approval of reasonable arrangements in Case No. 09-441-HT-AEC (Children's Hospital) and 09-442-HC-AEC (Canal Place). The Application also indicates that ATLP's other large contract customer, Summa Hospital, has an alternative energy system in place which precludes ATLP from seeking to increase rates and that ATLP has been attempting to maintain revenue under a month-to-month agreement (which may or may not have been filed with the Commission for the Commission's approval). Application at 5.

Akron is a municipality, a regulator of public utilities such as ATLP pursuant to the Ohio Constitution, the lessor of the steam and hot water system operated by ATLP and a customer of ATLP. Akron's rights and obligations as a lessor are defined by the Operating Lease Agreement ("Agreement" attached hereto as Exhibit 2) and its Ordinance No. 670-1996 ("Ordinance" attached as Exhibit A to Exhibit 2).[7] Akron is also a party in the above-mentioned bankruptcy proceeding in which ATLP recently received approval of a plan of reorganization.

Under Rule 4901-1-11(A)(2), O.A.C., an interested party may intervene in a Commission proceeding if the interested party can demonstrate a real and substantial interest in the proceeding and the interested person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.[8] When determining whether a party may intervene under Rule 4901:1-11(A)(2), O.A.C., the Commission considers:[9]

(1) The nature and extent of the prospective intervenor's interest.
(2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case.
(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.
(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.
(5) The extent to which the person's interest is represented by existing parties.

[7] While Section 18.A of the Ordinance requires ATLP to timely provide the City (Akron) with copies of all notices, filings, applications or other documents submitted to the Commission, ATLP has not provided Akron with a copy of the Application. Section 10 of the Ordinance precludes ATLP from increasing Akron's rates and charges unless ATLP has given notice to Akron at least 180 days prior to the start of Akron's fiscal year. By seeking intervention in this proceeding, Akron is not waiving its right to seek a dismissal of the Application as a result of ATLP's failure to first comply with the procedural or other requirements of the Agreement and Ordinance.

[8] 4901-1-11(A)(2), O.A.C.

[9] *See also* Section 4903.221, Revised Code.

Under these criteria, intervention "ought to be liberally allowed so that the positions of all persons with a real and substantial interest" in a proceeding can be considered by the Commission.[10]

Akron respectfully submits that it has a real and substantial interest in this proceeding and meets the Commission's criteria for intervention in Commission proceedings. As a municipality and regulator of public utilities, ATLP's Application indicates that Akron may need to consider if it should establish rates and charges through its ratemaking powers. ATLP's Application indicates that Akron's interest as a lessor may be impaired or impeded as a result of issues that ATLP has asked the Commission to address. And, ATLP's Application indicates that Akron's interests as a customer may be impaired or impeded in this proceeding.

The legal positions advanced by Akron will directly relate to the merits of ATLP's request for relief. Akron's involvement in this proceeding will not unduly prolong or delay the proceeding and Akron will significantly contribute to the full development and equitable resolution of factual and other issues by, in part, applying the experience and knowledge Akron has obtained from its active participation in ATLP's bankruptcy proceeding. Finally, no other person or entity is representing or can represent Akron's interests in this proceeding.

[10] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶20.

For the foregoing reasons, Akron respectfully requests that the Commission grant its Motion to Intervene.

Respectfully submitted,

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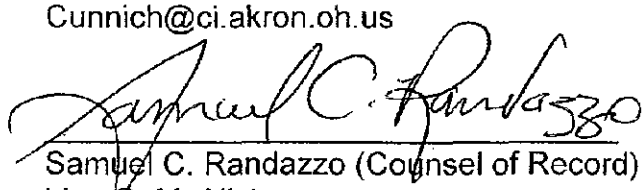

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Intervene and Memorandum in Support of the City of Akron* was served upon the following parties of record this 3rd day of June 2009, via first class mail, postage prepaid.

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Attorney for Akron Thermal, Limited Partnership

EXHIBIT 1

IT IS SO ORDERED.

Dated: 09:16 AM January 26 2009

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	
	)	Chapter 11
AKRON THERMAL, LIMITED PARTNERSHIP,	)	Case No. 07-51884
	)	
Debtor and Debtor-in-Possession.	)	Chief Judge Marilyn Shea-Stonum
	)	OPINION RE: CONFIRMATION OF MODIFIED SECOND AMENDED PLAN OF REORGANIZATION

OVERVIEW*

It is not unusual for a Chapter 11 case to bring to the surface long simmering conflicts.

* Unless otherwise specified, capitalized terms and phrases used herein have the meanings assigned to them in the Plan (defined herein). In addition, any term used in this Confirmation Order that is not defined in the Plan or this Confirmation Order, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable.

As this Court addresses the evidence from the contested Confirmation Hearing in this case, it is useful to list some of the conflicts that predated this bankruptcy case because some or all of the parties, at different times and in various contexts, have suggested or argued such conflicts need to be resolved as a precondition to or part of the confirmation proceedings:

1. Environmental issues dating back to 1995;
2. The condition of the Leased Premises (as defined below) after a fire that occurred in 2000;
3. Repayment of advances made by the City of Akron ("City") to the Debtor in 1999 and 2005;
4. The condition of the Leased Premises as of the commencement of the Lease so as to determine the Debtor's maintenance obligations; and
5. The rights of various customers of the Debtor under contracts of various durations.

Were one to detail each of the separate controversies that have simmered, one could easily identify a dozen or more situations that have or could have been the subject of a separate lawsuit. Notably however, none of these controversies resulted in the filing of lawsuits prior to the commencement of this chapter 11 case. The fact that the Debtor's general partner, and, thus, the management of the Debtor changed as of December 24, 2004 does not simplify the resolution of any of these issues. While the intentions of the Debtor's prior general partner were never clearly developed on the record in this case, one fact is undisputed: It did not cause the Debtor to pay any of the monies that it owed to the City and allowed the Debtor to be grossly delinquent to a number of its major creditors. If these controversies are relevant to confirmation of Debtor's plan, they are addressed in this Opinion as they pertain to confirmation requirements. Some are relevant to the bankruptcy case, though properly addressed in other procedural frames.

After the current general partner assumed management and prior to the filing of this case, the delinquency in payments to major creditors continued, although in the context of significant operational improvements, including the development of a more cost-efficient fuel mix and debt composition proposals that did not win creditor approval.

The Debtor reacted to a notice that the City intended to terminate its Lease by filing this case. In short, the Debtor's relations with the City, as its lessor, and other major creditors were deeply troubled. Throughout this case, the City's stance toward the Debtor has shown no apparent softening. Working to gain the support of the Official Committee of Unsecured Creditors (the "UCC") and other skeptical parties in interest, the Debtor filed a plan of reorganization that assumed continuing opposition from the City. After exploring other possible resolutions of the case with a variety of parties in interest, including the City, the UCC actively supported confirmation of the Debtor's Amended Plan of Reorganization. Because at least one class of creditors failed to accept the Plan and the City's objections to confirmation were not resolved on a consensual basis, the Debtor and the UCC sought to demonstrate that the Plan could be confirmed pursuant to 11 U.S.C. § 1129(b).

I. PROCEDURAL HISTORY OF THE CASE

A. Bankruptcy Filing

On June 18, 2007, Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its properties as a debtor in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

B. The Plan Process

1. Exclusivity

The exclusive period for the Debtor to file a plan was due to expire on October 16, 2007

and the exclusive period to solicit acceptance of such plan was due to expire on December 17, 2007. Upon motions by the Debtor the exclusive period was extended to March 15, 2008. [docket ## 190, 213, 260 and 337]

2. Assumption Motions

On October 15, 2007, Debtor filed a Motion for Approval of Assumption of the Unexpired Operating Lease Agreement with the City (the "Lease Assumption Motion"). [docket # 206] On October 16, 2007, Debtor filed a Motion for Approval of Assumption of Any and All License Agreements with the City and the Franchise Ordinance Ancillary to the Unexpired Operating Lease Agreement (the "License and Franchise Assumption Motion," together with the Lease Assumption Motion, the "Assumption Motions"). [docket # 208] On November, 15 2007, the City filed its Objection to the Assumption Motions. ("City's Assumption Objection")[docket #232]. The Court held evidentiary hearings on the Debtor's Assumption Motions and the City's Assumption Objection on January 14, 15, 31 and February 1, 19, 22, March 5 and 7, 2008 ("Assumption Hearings"). On April 25, 2008, the Court entered a Partial Opinion on the Lease Assumption Motions (the "Partial Opinion"). [docket # 390].

During the Assumption Hearings, the Debtor and the City presented evidence on the issue of Debtor's ability to provide the City adequate assurances, pursuant to 11 U.S.C. §§ 365(b)(1)(A) and (C). The Court did not make a final determination on the adequate assurance issue in the Partial Opinion, instead finding that the feasibility and adequate assurance issues would be handled together in the confirmation process. (*See* Partial Opinion, p. 3). Accordingly, the primary matters left for determination in conjunction with confirmation of the Plan were whether Debtor will have adequate capital to (a) make the monetary cure payments identified in [the Partial Opinion]; (b) perform its future obligations under the Lease; (c) return a dividend to

the unsecured creditors in this case; (d) meet the Debtor's operational expenses; and (e) satisfy other plan obligations under Section 1129 of the Bankruptcy Code. (Partial Opinion p. 3).

On July 11, 2008, the City filed a Motion to Modify the Partial Opinion to reflect the U.S. EPA's rejection of Debtor's proposal to resolve the Boiler 32 issue. [docket #458] On July 24, 2008, Debtor filed a brief in opposition to the City's Motion to Modify the Partial Opinion. [docket #471] On August 12, 2008, the City filed a Motion to Modify the Debtor's Motion for Approval of Assumption of the Unexpired Operating Lease Agreement Regarding Fire Damage to the Roof of the RES Steam. [docket #483] On August 25, 2008 the Debtor filed its Objection to the City's Motion to Modify Regarding Roof Issues. [docket #512] The City's Motion to Modify Regarding Roof Issues requested that the Court modify the Partial Opinion to reflect Debtor's failure to repair and maintain the Roof of the RES Steam Plant resulting from fire damage that occurred on October 12, 2000.

3. Debtor's Proposed Disclosure Statement, Chapter 11 Plan of Reorganization, Responses and Objections

On March 20, 2008, i.e., five days after the expiration of its exclusivity period, Debtor filed its initial Plan of Reorganization. [docket # 366] On May 9, 2008, Debtor filed its First Amended Plan of Reorganization for Akron Thermal, Limited Partnership [docket # 405] and initial Disclosure Statement. [docket # 406] On June 30, 2008, the City filed its objections to that initial Disclosure Statement. [docket # 449] The UCC filed its Comments and Limited Objection to the initial Disclosure Statement. [docket #448] On July 11, 2008, the Debtor filed Debtor's Responses to the Objections to Disclosure Statement. [docket #456] Additional objections regarding the Debtor's proposed Disclosure Statement were file on July 17, 2008 [docket #463] and on July 23, 2008 [docket #467].

On July 23, 2008, both Debtor and the UCC responded to the City's First Amended Objection to Debtor's First Amended Disclosure Statement. [docket ## 469 and 468, respectively] The Court approved Debtor's First Amended Disclosure Statement on July 25, 2008 ("Order Approving First Amended Disclosure Statement") [docket #474]

4. Second Amended Plan and Objections

On July 28, 2008, Debtor filed its Second Amended Plan of Reorganization ("Plan") dated July 14, 2008 [docket #472], its First Amended Disclosure Statement for Debtor's Second Amended Plan of Reorganization dated July 14, 2008 [docket #473], and the form of notice that it was using to communicate to parties in interest (1) the approval of Disclosure Statement; (2) hearing date scheduled to address Plan confirmation; (3) the deadline and procedures for filing objections to confirmation of Plan; and (4) the voting deadline for receipt of ballots" [docket # 475]. The Confirmation Hearing was scheduled to commence on Monday, August 25, 2008.

5. Overview of Classification of Claims and Interests and Ballot Results

a. Classes of Claims and Interests in Plan

Article III of the Plan separates claims and interests into four (4) basic classes. (*See* Plan at p. 13-14.) The classes are as follows:

Class 1

Class 1.1	Secured Claim of Summit County for Public Utilities Personal Property Tax
Class 1.2	Secured Claim of The University of Akron
Class 1.3	Secured Claim of Thermal Ventures II, L.P.

Class 1.4 All Other Secured Claims

Class 2

Class 2.1 Allowed Priority Tax Claim of the State of Ohio

Class 2.2 All Other Allowed Priority Unsecured Claims

Class 3

Class 3.1 General Unsecured Claims Up to $5,000.00

Class 3.2 General Unsecured Claims Equal to or Greater Than $5,000.01

Class 3.3 Penalty Claims

Class 4

Class 4 Equity Interests

b. Ballots and Certification

The Debtor timely filed a Certification of Acceptances and Rejections of the Proposed Second Amended Plan of Reorganization [docket # 509] (the "Certification"). The results of the voting (and a brief summary of the treatment of the various classes) are as follows:

Class Name	Class Description	% of Ballots Voting to Accept	% of Amount Voting to Accept	Result	Treatment
1.1	Summit County	100%	100%	Accept	Payment of 100% per payment plan

1.2	University of Akron	0%	0%	Objection Filed	Contract assumed and rights preserved
1.3	Thermal Ventures II, L.P.	100%	100%	Accept	Claim waived except $75,000
1.4	Other Secured Claims	N/A	N/A	N/A; No Creditors in this Class	N/A
2.1	State of Ohio Priority Claims	0%	0%	Agreed to Treatment	Payment of $1,500,000 (roughly 70% of claim)
2.2	Priority Claims (Other than the State of Ohio)	N/A	N/A	N/A; No Creditors in this Class	N/A
3.1	Unsecured Creditors at $5,000 or Below	98.39%	94.61%	Accept	10% dividend 90 days after Effective Date
3.2	Unsecured Creditors Over $5,000	92%	16.07%	Reject	Pro rata share of $2,040,000, plus potential enhancements
3.3	Penalty Claims	0%	0%	Deemed Rejected	No payment
4	Equity Interests	100%	100%	Accept	TVII and Opportunity Parkway retain their interests; other interests extinguished

The Debtor did not receive the minimum percentage of votes from its class 3.2 unsecured creditors required by §§ 1126 and 1129(a)(8). Thus, the Debtor invoked the so-called "cramdown" provisions set forth in § 1129(a).

6. Plan Objections and Responses

The City timely filed an objection to the Plan ("City's Objection"). [docket # 488]. Other timely objections were filed by Ohio Edison Company ("Ohio Edison") [docket #496], the United States, on behalf of the United States Environmental Protection Agency ("U.S. EPA")

(the "U.S. EPA Objection") [docket #497]; the University of Akron's (the "University") Limited Objection (the "University Objection") [docket # 505]; and Summa Health System ("Summa") (the "Summa Objection") [docket # 507].

On August 22, 2008, the UCC filed its responses to the U.S. EPA Objection and to the City's Objection. [docket ## 500 and 508, respectively] On August 24, 2008, Debtor filed a brief in support of confirmation of the Plan. [docket #510] The Debtor filed modifications to the Plan on September 9, 2008 and September 26, 2008 ("Plan Modifications"). [docket ## 523 and 528, respectively]

The U.S. EPA's Objection was resolved by the entry of an Agreed Order between the Debtor, the United States and the UCC (the "U.S. EPA Agreed Order"). [docket #536] The Summa Objection was resolved pursuant to the terms set forth in the Agreed Order (the "Summa Agreed Order"). [docket #537]. On November 3, 2008, the University Objection was resolved pursuant to the terms set out in an Agreed Order (the "University Agreed Order"). [docket #546]

7. Confirmation Hearing

The confirmation hearing was held on August 25, 26, September 5, 8, 9, 12, 15, 18 and October 3, 2008 (the "Confirmation Hearing"). During the Confirmation Hearing, the City filed an amended objection to confirmation [docket #488] and a supplement to its Motion to Modify the Partial Opinion [docket #525] asking the Court to consider the Notice of Violation and Finding of Violation issued on September 17, 2008 by the U.S. EPA to the City (the "September 17 Notice of Violation") as evidence in the Confirmation Hearing.

On December 12, 2008, the City filed a Request For Oral Rulings Rendered January 31, February 22 and July 25, 2008 To Be Set Out In Separate Documents Pursuant To Bankruptcy Rules 5003, 7052, 7054, 9021 and Civil Rules 52, 54, and 59 ("Request For Separate

Documents") [docket #558]. Debtor filed a Memorandum In Opposition to the Request For Separate Documents on December 19, 2008 [docket #559]. The Court discussed the City's Request [docket #558] in a telephonic status conference held January 16, 2009, noting that the Court would enter judgment with respect to those matters in the context of its ruling on the confirmation issues. All parties participating in that status conference agreed that approach was optimal because, should there be appeals of any of those issues, such matters could be raised in a single appeal.

II. DEBTOR'S ORGANIZATIONAL STRUCTURE, FACILITIES AND BUSINESS

Because the feasibility of the Plan depends, *inter alia*, on the Debtor's operation of the facilities that it leases from the City, the following is the Court's summary understanding of the history of the Debtor and its controlling entities, the history of the leased facilities, and a sketch of the Debtor's pre-filing interaction with the City in its capacity as the Debtor's landlord.

A. Debtor's Organizational Structure

Debtor was initially organized in 1995. At that time Debtor's general partner was Thermal Ventures, Inc. ("TVI"). For several years following the Debtor's initial formation, an entity named Thermal Ventures, Limited Partnership ("TVLP") owned an equity stake of over 90% in the form of a limited partner interest in Debtor. During the case, it was averred without contradiction that, as of 2000, Carl Avers controlled both TVI and TVLP. TVI remained the sole general partner (and TVLP owned over 90% of the limited partner interests) of Debtor until December 23, 2004.

TVI also had interests in entities and projects other than Debtor. In 2000, TVI was seeking funding for a number of its projects, one of which was Debtor, and other possible new ventures. In mid 2000, TVI, TVLP, and Yorktown Thermal G.P., Inc. ("Yorktown") (created by

Yorktown Energy Partners IV, L.P., a New York private equity firm) formed Thermal Ventures II, L.P. ("TVII"). To fund TVII, TVI contributed its interests in a number of ventures, and Yorktown contributed cash and certain funding commitments, which were subsequently funded. One of the interests provided to TVII by TVI and TVLP was an option for TVII to acquire TVI's general partner interest and TVLP's limited partner interests in Debtor. As noted above, TVI remained the sole general partner and TVLP remained the primary limited partner of the Debtor until December 23, 2004. TVII did not obtain any partner interests in Debtor until the end of 2004.

In 2003, TVII sought to exercise its option to acquire the interests of TVI and TVLP in the Debtor. Prior to doing so, representatives of TVII and Debtor met with the City and its agents and sought the City's consent and cooperation if new management became involved. Under the Lease, the City's consent to a change in general partner of Debtor was required. When TVII sought to exercise its option, it was generally aware that the Debtor's financial situation was not good. As of December 31, 2003, Debtor reportedly owed TVII over $7 million and owed the City, State of Ohio, and Ohio Edison approximately $5 million, $4 million (including interest and penalties) and $3 million (including interest), respectively, which amounts are still labeled as disputed by the Debtor, although the nature of any such disputes has never been articulated in this case. TVII reportedly shared its hope that, once it exercised its option, the Debtor would be able to propose some form of debt composition to its largest creditors.

In July 2004, the City sent a letter which stated, in part, as follows:

> With this letter we are granting our unconditional consent for Thermal Ventures, Inc. and Thermal Ventures, LP to proceed with the transfer of their general partner and limited partner interests respectively as defined in

the lease agreement and purchase and sale agreement between each party and the City of Akron.

Debtor's Assumption Exhibit 42.

Thereafter, TVII gave notice of its intent to exercise its option to acquire TVI's and TVLP's interests in Debtor. TVI and TVLP, after initially requesting the City's consent, opposed the exercise, which resulted in arbitration. In November 2004, the arbitrator ruled in favor of TVII and directed TVI and TVLP to turn over their interests in Debtor. During 2003 and 51 weeks of 2004, Debtor continued to be managed by TVI and continued to accumulate substantial operating losses. Following the arbitration award, Opportunity Parkway, LLC became the sole general partner and TVII became the 94% limited partner of Debtor effective late December 2004.

B. Debtor's Business

Jeffrey Bees serves as the president of Opportunity Parkway, LLC and Teri Kechler serves as its treasurer. Opportunity Parkway, LLC in turn provides the services of Bees and Kechler, as needed, to the Debtor. Richard Pucak has been the general manager of Debtor since 2000. Debtor employs approximately 43 full-time and 9 part-time employees. Debtor's work force has been stable with low turnover and has demonstrated responsibility and ingenuity.

The Debtor is a public utility that uses facilities leased to it by the City to generate and distribute steam primarily for heating to a variety of customers located in Akron, Ohio. The Debtor provides essential services to customers with critical needs, most significantly, three area hospitals. The physical plant that is central to the provision of steam and chilled water to the Debtor's customers has evolved over a period of almost eight decades. Within the past three years and in an environment in which energy costs have generally outpaced inflation, the Debtor

has succeeded in introducing a fuel source that allows it to operate on a very competitive basis. This is essential because two of its largest customers, the University of Akron ("University") and Akron City Hospital ("City Hospital") have the ability to satisfy their own steam needs. If they could do so at a cost that was predictably lower than what they are charged by the Debtor, that portion of Debtor's business would likely evaporate.

Using some of the same facilities, Akron Thermal Cooling, LLC ("ATC"), an entity that shares the same general partner as Debtor, produces and distributes chilled water which is used for air conditioning by various customers located in Akron. ATC did not file a petition for relief in bankruptcy. Both companies are regulated utilities in Ohio.[1] Debtor's leased system includes two adjacent steam generating plants (the Akron Plant and the BFG Plant), two chilled water plants, and approximately 18 miles of distribution piping that are substantially underground (generally the "Leased Facilities"). ATC uses two chilled water plants. Debtor provides ATC with steam.

Under the Plan, ATC is to contribute its income and earnings to the Reorganized Debtor but is to remain a separate entity to achieve appropriate tax savings. Although not so characterized by any party, the Court views this arrangement as a modified form of substantive consolidation. It is wholly appropriate in this case because of the centrality of the Leased Facilities to the ATC operations and because of past practices. Thus, as discussed below, no value can be attributed to income stream in assessing new value issues.

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[1] The primary reason for organizing two separate entities is that Debtor is subject to gross receipts taxes by the State of Ohio, whereas ATC is not. The two companies are operationally and financially interdependent. In 2007, total revenues for Debtor and ATC were $15.7 million (including $14.4 million and $1.3 million, respectively) and combined EBITDA (excluding certain nonrecurring and bankruptcy related items) was $1.3 million (including $1.1 million and $.02 million respectively). In its Disclosure Statement, Debtor projected combined total revenues and EBITDA (excluding certain nonrecurring and bankruptcy related items) for 2008 to be, respectively, $15.8 million and $1.9 million.

C. Leased Facilities

The following history of the Leased Facilities is summarized from the Disclosure Statement.

Ohio Edison installed the central steam distribution system in 1927, expanded it through the 1940's and operated it until 1978 at which time it was turned over to the City. The original Ohio Edison Beech Street steam generation facility was operated until 1979 at which time the City replaced it with the RES Facility (also known as the Akron Plant). By 1982, the City had added a high-pressure steam distribution and condensate return system to expand the area that could be served by the RES Plant and thus its potential customer base. The RES Facility, which has three boilers, was built as a steam generation plant burning refuse-derived fuel (solid waste). When serious problems developed with the use of refuse-derived fuel, the operators resorted to other fuel sources, including the more costly alternative of natural gas. When the Debtor became the operator, it converted the RES Facility so that it could be fueled primarily by wood chips and waste oil. In 2004 and 2005 Debtor developed the capability to use tire-derived fuel ("TDF"), i.e., utilizing used tires as part of its fuel mix at the Akron Plant.

Debtor also operates a coal and gas fired steam generation plant (known as the BFG Plant) consisting of two boilers and associated equipment was originally built by the B.F. Goodrich Tire Company in the 1950's and 1960's. The BFG Plant was connected to the Akron Plant in 1988 by the City to further expand the system.

The chilled water plants, now operated by ATC, were built in the mid-1980's and 1996, respectively.

The distribution and generating assets have been operated, in whole or in part, by Ohio Edison (through 1978), Teledyne National, Inc. (1979-1982), TriCil, Inc. (1982-1984), WTE

Corp. (1985-1994) and Debtor (1995-present), albeit with a 2004 change in management. In its Lease Assumption Motion, Debtor sought authority to assume the lease of the system which runs through August 15, 2017.

III. DISPUTED ISSUES

A. Compliance with the Requirements of Section 1129 of the Bankruptcy Code

The requirements for confirmation are set forth in § 1129. The plan proponent bears the burden of proving by a preponderance of the evidence that the plan complies with each of the requirements set forth in § 1129(a). If an impaired class votes not to accept the plan, the plan proponent must also prove that the plan meets the additional requirements of § 1129(b), including that the plan does not unfairly discriminate against dissenting classes and the treatment of the dissenting classes is fair and equitable. *In re Exide Technologies, et. al.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003). Debtor, as proponent of the Plan, has met its burden of proving the elements of Section 1129(a) and (b) of the Bankruptcy Code, as further discussed herein below, by a preponderance of the evidence, which is the applicable evidentiary standard.

The Court will address its resolution of disputed factual issues and its conclusions of law[2] as they relate to the requirements of Section 1129(a) and (b). As a threshold matter, the Court notes that it will limit its analysis to the disputed controversies pertaining to feasibility (§§ 1129(a)(11)) and "cramdown" (§ 1129(b)). Matters pertaining to the remaining requirements of

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[2] The parties in interest in this matter have submitted Proposed Findings of Fact and Conclusions ("PFFCL") of law [docket nos. 531, 532-33] which this Court has found helpful in analyzing and organizing the voluminous evidence adduced in this case. For the convenience of readers interested in those resources, throughout this Opinion, the Court makes reference to various PFFCLs of each party.

§ 1129 are not in dispute and were adequately addressed in the confirmation hearing. The Court finds that those requirements are satisfied and hence will not be discussed in this Opinion.

1. Debtor's Plan is Feasible Because Debtor Can Cure The Prepetition Defaults and Provide Adequate Assurance Of Future Performance and Prompt Cure Of Pre-Petition Defaults (Section 1129(a)(11))

The well-established standard by which feasibility is judged is that confirmation does not demand a guaranty of the plan's success, just a reasonable prospect. *See In re Mallard Pond Ltd.*, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997). Section 1129(a)(11) directs that, in order to obtain confirmation, Debtor must show "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization . . . ." This section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." Collier on Bankruptcy ¶ 1129.03[10](c) at 1129-74 (15th ed. rev. 2007) (quoting *Travelers Ins. Co. v. Pikes Peak Water Co.* 779 F. 2d 1456, 1460 (10th Cir . 1985); *In re Rivers End Apartments, Ltd.*, 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994). However, § 1129(a)(11) does not require a guarantee, it just requires that the plan has "a reasonable prospect of success and is workable." *In re Rivers End Apartments, Ltd.*, 167 B.R. at 476.

Debtor's satisfaction of feasibility under § 1129(a)(11) "does not require proof that meeting the economic projections is certain." *In re Ridgewood Apartments of DeKalb County, Ltd.*, 183 B.R. 784, 789 (Bankr. S.D. Ohio 1995) (citing *In re U.S. Truck Co.*, 47 B.R. 932, 944 (Bankr. E. D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir.1986)). The feasibility requirement exists "to prevent confirmation of visionary schemes." *Id.* (citing *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir.1985). It is the plan proponent's obligation to provide the court and parties in interest with sufficient information to make the determination of feasibility. There are a number of factors typically relevant to determining feasibility, including:

(a) the prospective earnings of the debtor's business;
(b) the soundness and adequacy of the capital structure and working capital for the debtor's post-confirmation business;
(c) the debtor's ability to meet its capital expenditure requirements;
(d) economic conditions;
(e) the ability of management and the likelihood that current management will continue; and
(f) any other material factors that would affect successful implementation of the plan.

See, e.g., In re Mallard Pond Ltd., 217 B.R. at 785.

At the same time, the mere potential for failure, prospects of financial uncertainty, or barriers to consummation of the plan are insufficient to disprove "feasibility." *See In re Union Fin. Servs. Group, Inc.*, 303 B.R. 390 (Bankr. E.D. Mo. 2003); *In re Cajun Elec. Power Co-op, Inc.*, 230 B.R. 715 (Bankr. M.D. La. 1999); *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756 (Bankr. D. Nev. 1998; *In re Montgomery Court Apartments, Ltd.*, 141 B.R. 324, 330 (Bankr. S.D. Ohio, 1992)

Debtor argues that the evidence introduced at the Confirmation Hearing established that it will be able to timely perform all of the obligations described in the Plan and that the Plan is therefore feasible. The City contends that Debtor has failed to demonstrate that its Plan is feasible and that it can cure the defaults and give adequate assurance of future performance under the Lease. Specifically, the City's arguments focused on the following: (1) Cash Sources and Uses at the Effective Date; (2) Funding Cure of Defaults Under the Lease; (3) 2005 Amendatory Agreement; (4) Repair of Fire Damage to the Roof of the RES Facility; (5) Condensate Return Line from Summa to the University; (6) Secured Claim of the University; (7) Continued Undercapitalization of the Debtor; (8) Inaccuracy and Unreliability of Debtor's Financial Projections; (9) Environmental Matters (10) Maintenance Issues; and (11) Rejected City Contracts. *See* City's PFFCL ¶¶ 37-258; 295-96.

For the reasons set forth below, the Court concludes that the Debtor has established by a preponderance of the evidence that it will be able to timely perform all of the obligations described in the Plan and the Plan is therefore feasible.

a. Findings Regarding the Reorganized Debtor's Projected Future Performance

To demonstrate feasibility of the Plan, Debtor presented the testimony of its financial advisor, Jason Fensterstock, the principal of Sasco Hill Advisors. With the assistance of Mr. Fensterstock, Debtor prepared a 2008 monthly set of projections, as well as a five year set of projections, referred to as the "Base Case" projections, which included as Exhibit D to the First Amended Disclosure Statement. All of the projections assume the contribution of the net income of ATC. The projections are derived from an operating model which has been in place for several years. The Base Case projections contain a 2008 monthly income statement, balance sheet and statement of cash flows. The Base Case projections also contain a five year projected income statement, balance sheet, and statement of cash flow. The five year projections also include actual performance from the combined operations of Debtor and ATC in 2005, 2006 and 2007. Upside and downside cases were added as Exhibit G to the First Amended Disclosure Statement dated July 14, 2008. *See* Debtor's PFFCL ¶¶ 52-55

As part of the process, Mr. Fensterstock shared the model with David Wehrle, the UCC's financial advisor. Mr. Wehrle testified that he believed the Base Case projections were reasonable and achievable. Mr. Wehrle also testified that he believed the Reorganized Debtor would be adequately capitalized under the Plan. *See* Debtor's PFFCL ¶ 56. The Court notes that Mr. Wehrle's client had ample incentive to closely scrutinize the Debtor's prospects, as payments to holders of general unsecured claims will not commence until a year and a half following the Effective Date of the Plan.

Debtor's Exhibit 11 summarizes the comparison of projected EBITDA to actual EBITDA performance and shows that for the period January 1, 2008, through July 31, 2008, the actual performance has exceeded the Base Case projections by $271,000. *See* Debtor's PFFCL ¶ 58-66. Evidence was adduced during the Confirmation Hearing documenting Debtor's ability to operate its business and meet its Plan obligations since the Petition Date. *See* Debtor's PFFCL ¶ 60-61.

Based on the Debtor's actual performance and the testimony presented at the Confirmation Hearing the Court finds the Base Case Projections to be reasonable and credible evidence of the Debtor's likely performance. The Base Case projections reflect that Debtor will have sufficient cash flow to meet its operating expenses and future Plan obligations.

b. Findings Regarding Cash Resources and Capitalization.

As noted in the Partial Opinion, the Court has been clear that it will require that the Reorganized Debtor be adequately capitalized. At the time of the Confirmation Hearing, the parties assumed an Effective Date of September 30, 2008. Assuming that Effective Date, Debtor anticipated the following cash sources and uses which is set forth in Debtor's Exhibit 34 at 1 and 2:

Cash Sources and Uses at Plan Effective Date
Assuming September 30 Effective Date

SOURCES:		**USES:**		
Cash:		**Cash:**		
TVII Escrow	$2,000,000	Rent	$987,000	
Cash Deposit (1)	45,000	Franchise Fees	93,000	
Collection Actions (2)	0	Prepaid Steam I	383,000	
City Sewer Overpay	0	Prepaid Steam II	210,000	
Cash	355,000	Pre-Petition Interest	546,000	
Additional Equity (3)	1,000,000	Real Estate Taxes	110,000	
Line of Credit	250,000	PostPet Interest	165,000	
		State Payment	150,000	
		Admin Costs (4)	600,000	
		Convenience Class	20,000	**Excess**

				Cash
Total:	**$3,650,000**	**Total:**	**$3,264,000**	**$386,000**

(1) With Schottenstein, Zox & Dunn Co., L.P.A. ("SZD").
(2) For purposes of this analysis only, assumes no cash received from the collection actions by Effective Date.
(3) Formerly a line of credit.
(4) Assumes payment of all remaining bankruptcy professional costs in September including those paid during month and at closing and includes all prior holdbacks and August and September time, i.e. includes invoices received for full month of September. Excludes $150,000 owed to Sasco Hill Advisors and SZD which are to be paid no later than December, 2008.

See also Debtor's PFFCL ¶ 70.

The City contends that the following items must also be paid at the Effective Date, each of which the debtor disputes:

A.	Additional Cure Amount Pre-Petition Interest on 2005 Amendatory Agreement	$26,922.27
B.	Additional Post-Petition Interest to City of Akron (incl. 2005 Amendatory Agreement)	$20,577.78
C.	Increase in Utility Deposit to First Energy	$50,000
D.	University of Akron Secured Claim	$267,244
E.	Balance of Cure Amount to University of Akron	$475,414
F.	Unrepaired Fire Damage to RES Roof	$380,000

See Debtor's PFFCL ¶ 74.

The Court is more persuaded by the Debtor's calculations of cash sources and uses. With respect to cash uses, the rent, franchise fees, prepaid steam (I and II), pre-petition interest and real estate taxes are all addressed at pages 34 and 35 of the Partial Opinion.[3]

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[3] The Debtor also includes cash expense of $600,000 for administrative costs. This includes all prior holdbacks for professional fees, including over $250,000 under the First, Second, and Third Fee Applications. The Court has not yet approved payment on those holdbacks, so those payments will not be due until sometime after the assumed Effective Date of September 30, 2008, thus providing additional cash cushion at the Effective Date

With respect to items A through C above, the City's claims are flawed for the reasons set forth in Debtor's PFFCL ¶ 76-78. The next two items (Items D and E) claimed by the City are amounts allegedly due the University of Akron as part of the Debtor's assumption of the May 3, 2006 Service Agreement with the University. As more fully described in the University Agreed Order [docket no. 546], there is no amount due the University at the Effective Date. Finally, the City claims that $380,000 is due at the Effective Date in connection with certain roof repairs (Item F). Matters concerning the roof repairs are discussed at Section 5 (a) below. For the reasons noted in that section, the Court finds that the City did not bear its evidentiary burden with respect to this very belatedly identified assertion.

Based on the foregoing, the Court is persuaded by the Debtor's evidence that the amount needed to cure all pre-petition defaults under the Lease, Franchise Ordinance and License Agreements as of the Effective Date is in the range of $2.5 million, plus interest accruing at slightly more than $10,000 per month since the end of the Confirmation Hearing. *See* Debtor's PFFCL ¶ 81.[4] Accordingly, the Court finds that there will be sufficient cash at the Effective Date to satisfy the obligations due on the Effective Date and the costs and expenses of this Chapter 11 case. The Court further finds that with an equity infusion of $3 million, the $250,000 line of credit, and the projections for future performance set forth in the Base Case, Debtor is and should remain adequately capitalized to meet its obligations under the Plan, including payments to creditors under the Plan, and to operate its business through 2017.

c. Findings Regarding Cure and Adequate Assurance of Future Performance

[4] This figure is derived from the chart in Debtor's PFFCL ¶73 ($2,487,054) less the $47,500 in interest on the 2005 Amendatory Agreement. Debtor admits that if the Effective Date is after September 30, 2008, interest on the principal amounts (but not the pre-petition interest) would be approximately $10,000 per month.

Section 365(a) of the Bankruptcy Code provides that the Debtor can, subject to the Court's approval, assume an unexpired lease. 11 U.S.C. § 365(a). Section 365(b)(1) also provides that if there has been a default under the unexpired Lease, then the Debtor must cure or provide adequate assurance of a prompt cure of the items described in subsections (A), (B) and (C). In considering the application of Section 365(b), some courts have viewed it through a lens that might distort in favor of debtors: "the purpose behind chapter 11 is 'to permit successful rehabilitation of debtors' and 'to prevent a debtor from going into liquidation'," (Bankr. W.D. Tenn, 1992); *In re R/P Int'l Techs., Inc.*, 57 B.R. 869, 873 (Bankr. S.D. Ohio 1985) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513). This Court's lens differs from the foregoing. Unexpired leases and executory contracts are potential assets that debtors sometimes can use for the benefit of the bankruptcy estate. Broadly speaking, this Court views § 365(a) as a tool that Congress has made available to debtors and trustees to promote a spirit of equality of return to all creditors, rather than allowing *ipso facto* clauses to operate simply for the benefit of a non-debtor party to the contract, without the possibility of realizing the value of contractual arrangements to the detriment of the remaining creditor body.

i. Burden of Proof on Defaults under the Lease

In determining whether a default exists under a lease or contract, bankruptcy courts "must look to state law." *In re Rachel Indus., Inc.*, 109 B.R. 797, 803-04 (Bankr. W.D. Tenn. 1990) (citing *In re Terrell*, 892 F.2d 469 (6th Cir. 1989). In Ohio, "leases are contracts and are subject to the traditional rules of contract interpretation." *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, 83, 2004-Ohio-411 at ¶ 29.

While the Debtor, as the party moving to assume the Lease, has the ultimate burden of proof, the City "has the initial burden of showing defaults and that those defaults have been properly noticed" to the Debtor. *In re Rachel Indus., Inc.*, 109 B.R. at 802. However, if the

City, as lessor, fails to prove a default then the Debtor is, obviously, not required to prove the elements of Section 365(b)(1). *Id.* The City has the burden of proving the amount of Debtor's default under the Lease in order to establish Debtor's cure obligation. *Id.* If the City has established the defaults by proof, "then the burden shifts back to the debtor to provide satisfactory proof that the defaults . . . will be promptly cured and that there would be adequate assurance of future performance." *Id.* (citing *In re OK Kwi Lynn Candles, Inc.*, 75 B.R. 97, 101 (Bankr. N.D. Ohio 1987)).

In this case, the Court has found above that the total monetary payment needed to cure all pre-petition defaults is approximately $2.5 million as of the Effective Date. Thus, Debtor bears the burden of providing proof of its ability to provide prompt cure of this amount and adequate assurance of future performance.

ii. Standard on Cure and Adequate Assurance of Future Performance.

Regarding the cure of defaults or adequate assurance of a prompt cure of defaults, the Bankruptcy Code does not delineate exactly what is required so reference to case law is necessary. "What is adequate assurance, both for purposes of a prompt cure and for future performance, will depend . . . on individual circumstances." *Motor Truck and Trailer Co. v. Berkshire Chem. Haulers, Inc. (In re Berkshire Chem. Haulers, Inc.)*, 20 B.R. 454, 459 (Bankr. D. Mass. 1982) (cited in *In re DWE Screw Prods., Inc.*, 157 B.R. 326, 331 (Bankr. N.D. Ohio 1993)).

As noted in a Collier treatise on real estate transactions, "[t]he language of section 365(b)(1)(A) of the Code, providing for cure or adequate assurance of prompt cure of outstanding lease defaults as a condition to assumption, clearly contemplates that something less than immediate payment or performance of defaulted obligations will be sufficient." 1-3 Collier Real Estate Trans. & Bankruptcy Code ¶ 3.01[5][a]; *see also, In re Ok Kwi Lynn Candles, Inc.*,

75 B.R. 97, 101 (Bankr. N.D. Ohio 1987) (citing 2 Collier on Bankruptcy ¶ 365.04, at 365-68 (15th ed. 1987)). That may be so, but in this case, the Debtor is to pay all amounts identified for cure of existing defaults promptly and not later than after the judgment entered in accordance with this confirmation decision becomes final and non appealable.

Adequate assurance of future performance is often equated with the financial stability of the debtor, as reorganized in bankruptcy. *See In re Rachel Indus. Inc.*, 109 B.R. at 803 (quoting *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F. 2d 1303, 1310 (5th Cir. 1985)) With respect to future performance under an unexpired lease, the term "adequate assurance" is also not defined within the Bankruptcy Code and reference to case law is necessary. *See In re Rachel Indus., Inc.*, 109 B.R. at 803 (citations omitted). The purpose of the "adequate assurance" of future performance analysis is to determine whether the obligations under a lease, as bargained for prior to bankruptcy, will be met; it is not to improve the position of the landlord. *See In re Embers 86th Street, Inc.*, 184 B.R. 892 (Bankr. S.D.N.Y. 1995); *In re Grayhall Resources, Inc.*, 63 B.R. 382 (Bankr. D. Colo. 1986) (cited in 9C Am. Jur. 2d Bankruptcy § 2364).

Accordingly, in the context of lease assumption, the City may not demand assurance of payment of any obligations beyond those required by the Lease. *See Richmond Leasing Co. v. Capital Bank*, N.A., 762 F.2d 1303 (5th Cir. 1985). Debtor can meet its burden to show adequate assurance of future performance under the Lease by showing that its "performance is likely, i.e., more probable than not." *In re Texas Health Enters., Inc.*, 246 B.R. 832 (Bankr. E.D. Tex. 2000) (cited in 2C Bankr. Service. L. Ed. § 21:478). In the broader context of feasibility, this Debtor has adduced evidence that it will be able to remain current on the obligations that it will incur in the course of its operations. It has done so during the pendency of this chapter 11

case, and that track record is further evidence to this Court that the Debtor has met the adequate assurance requirements of § 365(b).

The Court finds that Debtor has established adequate assurance of future performance and that the pre-petition defaults will be promptly cured.

d. Findings Regarding General Maintenance and the Condensate Return Line

i. Ohio Law on Maintenance Obligations under a Commercial Lease and Interpretation of Section 9 of the Lease

Section 9 of the Lease, entitled "Maintenance of the Leased Property," provides that the Debtor is responsible for and shall pay the cost of all maintenance of the System and the Leased Property. (*See* Debtor's Assumption Ex. 1, Section 9, p. 8-9). Section 9 of the Lease does not impose an obligation upon the Debtor to reconstruct, improve or replace the Leased Property. Section 9 requires the Debtor to maintain the System and the Leased Property. (*See* Debtor's Assumption Ex. 1, Section 9, p. 8-9).

Ohio law on the subject of lease covenants regarding maintenance by a tenant provides that a promise by the tenant to keep the leased property in repair, unless the language of the promise clearly provides otherwise, does not obligate the tenant to make repairs other than those that are the result of ordinary wear and tear on the leased premises. *See Mach v. Accettola*, 112 Ohio App.3d 282, 285; 678 N.E.2d 617 (11th Dist. 1996) (quoting *Restatement of the Law 2d, Property* (1977) 497, Section 13.1, comment c. The court in *Accettola* analyzed a similar maintenance provision in a commercial lease and held that lease language requiring "repairs" or "maintenance" does not "mean replacement of the roof which was completely worn out." *See Id.* at 285-86, 88.

Just a few weeks prior to the Confirmation Hearing and well after the Assumption Hearings, the City raised for the first time the issue of whether the Debtor had adequately

repaired fire damage to a portion of the roof that had occurred in calendar year 2000. Although the Court is seriously tempted to analyze this issue under the rubric of waiver, in light of the pattern of forbearance toward the Debtor that the City exhibited in the first six years of this decade, such an analytical frame would not be the most just approach.

The language of Section 9 of the Lease requires the Debtor only to "be responsible for, and . . . pay the cost of, all maintenance of the System and the Leased Property." (*See* Lease at 8 (§ 9)). The Debtor is not required to reconstruct or improve the System and the Leased Property. Thus, Section 9 of the Lease obligates the Debtor to pay for maintenance and repairs that are required to preserve the original condition of the property as it was when the Lease began in August 1997, subject to normal wear and tear. While no evidence was presented that the roof repairs undertaken in 2001 were not sufficient to allow ordinary operation of the Leased Facilities, the Debtor does plan to do more work on the roof. Its ongoing maintenance plan going into 2009 provides for at least $75,000 to be used for further work on the roof.

ii. The City Has Not Established a Lease Violation Concerning General Maintenance

The City argues that Debtor has not maintained the RES Plan, BFG Annex Steam Plant, and the Leased Property, and that these facilities are in need of major equipment and infrastructure maintenance constituting a default under Section 9 of the Lease. *See* City's PFFCL ¶¶ 252-54; *See* Debtor's PFFCL ¶ 81. The evidence presented by the City on these issues and other maintenance issues did not support these broad assertions. Rather, the Debtor adduced substantial evidence, including on cross-examination of maintenance experts called by the City, that Debtor has properly maintained the System and the Leased Property and that there is no lease violation concerning general maintenance. *See* Debtor's PFFCL ¶¶ 89-111.

iii. The City Has Not Established a Lease Violation Concerning the Condensate Return Line

The City argued that the Debtor should be require to pay $1 million to the City to repair the condensate return line which runs from City Hospital to the University. *See* City's PFFCL ¶ 118; Debtor's PFFCL ¶¶ 85, 129. Based upon the testimony of Richard Pucak and the City's experts, this Court concludes that, throughout the Assumption Hearings and perhaps well into the Confirmation Hearing, the City had not reviewed sufficiently its own records with respect to the state of that system prior to entering into the Lease. It is now clear that, based upon evidence of the condition of the condensate return line in 1992, the Debtor has met and exceeded its obligations to maintain the condensate return line consistent with its obligations under the Lease.

This Court previously concluded in the Partial Opinion that the Debtor's obligation was to return the Leased Property (including the condensate return line) to the City in the condition that it was in at the inception of the Lease. Specifically, this Court directed that if the System included a functioning City Hospital condensate return line at the time the Lease was executed, the Debtor's Plan would have to provide a means for putting that return line back into service within a prompt period of time.

At that point, the record was unclear whether the City Hospital condensate return line was operating in August of 1997 when the Lease was signed. This Court concluded provisionally that the City therefore had not met its burden of proving that the decision in 2007 to modify the System by shutting down that return line constitutes a breach of the Debtor's maintenance obligations. However, the City's evidence that came into the record during the Confirmation Hearing has put the condition of the condensate return line in an entirely different light. Based upon the new evidence that came into the record during the Confirmation Hearing, which will be detailed below, the Debtor's obligation to the City, as landlord, was significantly

less with respect to the condensate return line because of the existing deterioration of the line at the time Debtor took possession of the System in 1997

At the Confirmation Hearing, the City's expert witnesses, Mr. Bacha and Mr. Young, testified that the cathodic protection system which was installed during the construction of the steam system in 1978 was not operating in June 1992. This was established by the Ricwil Report, City Exhibit 1. Mr. Young testified that without cathodic protection, the steam distribution system would begin to corrode. Mr. Young further testified that based upon the Ricwil Report, the useful life of the cathodic protection system installed with this condensate return line was less than the normal useful life of 15 years. *See* Debtor's PFFCL ¶¶ 148-161; City's PFFCL ¶¶ 104-127. The City offered no evidence that it made any effort to repair or replace the cathodic protection system between 1992 and 1997. Thus, this Court can only conclude that the condensate return line was corroded well prior to August 15, 1997.

Further, based upon the testimony presented at the Confirmation Hearing, the Court concludes that the Debtor was working to assure that the condensate return line would be operational at the expiration of the term of the Lease. Richard Pucak testified that the Debtor was "sleeving" a 3 inch pipe into the 5 inch condensate return line, and that upon completion of the sleeving, the condensate return line would be operational. Mr. Pucak also testified that the "sleeving" of the 3 inch line will not affect the integrity of the steam distribution system, and that a 3 inch pipe is sufficient to handle the volume of condensate usually returned by City Hospital, with excess capacity. Mr. Pucak testified that sleeving the 3 inch pipe into the current 5 inch condensate return line will allow the life of the system to be extended by at least ten years, and that even if it fails, the remedy will allow the operator a time and cost efficient remedy to maintain the condensate return line. Finally, Mr. Pucak testified that the Debtor has allocated

sufficient funds to properly repair the condensate return line and to maintain that line through the term of the Lease. *See* Debtor's PFFCL ¶¶ 132-148.

Based on all of the above, the Court finds that the cathodic protection of the condensate return line was failing long before August 15, 1997. Thus, Debtor's obligation is simply to maintain the functionality of the line used to return hot water to the steam plant, not to replace the line. The Court further finds that the continued sleeving of the condensate return line is appropriate maintenance of the line. The Debtor completed the repairs that it was obligated to make. Accordingly, the Court concludes that there is no violation or breach of the Lease related to the condensate return line.

e. Findings Regarding Repair of Fire Damage to Roof at RES Plan

i. The City Has Not Established a Lease Violation Concerning the Roof at the RES Plant

In its Motion to Modify Partial Opinion, the City asserts that $380,000 should be added to the Lease Cure because the Debtor failed to adequately repair the roof at the RES Plant as a result of the 2000 Fire. The City argues that the Debtor failed to make repairs to the roof at the RES Plant consistent with its obligations under the Lease, and, accordingly, the Debtor should be required to pay the City the $380,000 it asserts is required to repair the roof. *See also* City's PFFCL ¶¶ 44-103

As a threshold matter, this Court again notes its frustration with the City's delay in raising this issue. The City claims that it was not aware of the fire damage until the Assumption Hearing in March 2008 when it viewed photographs of what it thought was damage due to a lack of maintenance. This argument is disingenuous.

The fire occurred in 2000. The City admits that it had actual notice of the fire. Under the Lease, the City has the right as the lessor to inspect the property, yet it claims not to have

exercised that right until August, 2008 when Mr. Karlis inspected the roof. Accordingly, with respect to repair of matters dating back to damage incurred in the year 2000, the fact that the issue was not raised in the context of the Assumption Hearing presents a serious timeliness issue to this Court. However, the Debtor has not argued that the City is barred from addressing the fire damage issue in the context of the confirmation proceedings. Thus, the Court will proceed with its analysis of the evidence with respect to the fire damage.

Section 11 of the Lease governs the Debtor's obligation to repair the roof at the RES Plant as a result of the 2000 Fire. Section 11 of the Lease, entitled "Damage and Destruction, provides in its entirety:

> In the event of any damage to or destruction of the Leased Property or any portion thereof during the Term by fire, explosion or other casualty ("Damage or Destruction"), Tenant shall remain in possession of the Leased Property and shall repair or restore the affected portions of the Leased Property. Notwithstanding the foregoing, Tenant shall only be required in the event of Damage or Destruction to provide a ***functional replacement*** for the RES and/or the Annex for purposes of continuing electric, steam, hot water and chilled water services consistent with those currently provided by the System. (Emphasis added)

Section 11 of the Lease does not impose an obligation upon the Debtor to replace as new any part of the Leased Property which has been damaged as a result of a fire. Section 11 merely requires the Debtor to provide a functional replacement of any Leased Property damaged by a fire for purposes of continuing its services. (*See* Debtor's Assumption Ex. 1, Section 11, p. 10). Accordingly, under the Lease, the Debtor was only required to provide a roof which would allow the Debtor to continue to provide steam and hot water services and chilled water services to its customers.

Based upon the testimony at the Confirmation Hearing, the Debtor met its obligations under Section 11 of the Lease. At the hearing, Mr. Pucak testified that after the 2000 Fire, the

Debtor retained the services of Tri-State Restoration to perform repairs to the roof at the RES Plant. Tri-State performed repairs and was paid for the work it performed, which was approximately one-half of the estimated repairs. Mr. Pucak testified that after the repairs were made, the condition of the roof at the RES Plant did not prohibit the Debtor from producing steam and hot water and distributing that steam and hot water to its customers. Mr. Pucak testified that since 2001, the condition of the roof at the RES plant has not prevented the Debtor from functioning in its business. *See* Debtor's PFFCL ¶¶114-18, 124-27

As stated by this Court during the confirmation proceedings, the record is fuzzy as to the application of the $700,000 plus in insurance proceeds that was to be used for plant and property restoration as a result of the 2000 Fire. The Debtor has not been able to provide a clear-cut accounting of those proceeds.[5] That aside, this Court's overall impression of the testimony and evidence with respect to the repair work that the Debtor arranged to have completed is that it resulted in certain improvements to the premises, provided updated replacement parts, and in general, made the plant a better functioning plant for purposes of the evolving way in which steam was being produced.[6] Although not in pristine condition, the roof has stayed on and the RES Plant has continued to operate. Accordingly, the Debtor met its obligation to provide a "functional replacement" of the roof at the RES Plant as set forth in Section 11 of the Lease.

In addition, the City has offered no evidence that it is entitled to the immediate payment of $380,000 as damages based upon the Debtor's failure to repair the roof. First, as previously

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5 The change in the general partner of the Debtor that occurred at the end of 2004 was not amicable. Records from the Debtor's operations were not easily accessed. The City in its role of lessor had the right to such an accounting, though its failure to exercise that right within a reasonable time after the fire causes this Court to view the accounting issue as not timely raised. In reaching this conclusion, the Court notes that it was left with the general impression that insurance proceeds were applied to the functional repair of the Leased Facilities in the year following the 2000 fire.

6 For instance, the conveyor belts that were installed were narrower than the belts that had been there before because the type of fuel being used had changed.

noted, Debtor did repair the roof consistent with its obligations under the Lease. Second, Mr. Karlis, the president and owner of Tri-State admitted that as of September 21, 2001, only $145,268 of his estimated cost required to repair the fire damage to the roof at the RES Plant remained to be performed.[7] *See* Debtor's PFFCL ¶ 119. Third, the testimony of Mr. Conley, the City's own retained maintenance expert, does not support the City's contention that the cost to repair the roof is $380,000. In the Conley Expert Report, Mr. Conley opined that merely $75,000 was required to effectuate roof repairs at the RES Plant. This figure is consistent with the testimony of Richard Pucak, the Debtor's General Manager, who testified that he has received quotes for the repairs of the roof in the range of $75,000 to $125,000. *See* Debtor's PFFCL ¶ 124.

Based on the foregoing, the Court concludes that there is no evidence that the repairs to the roof at the RES Plant will cost $380,000. The Court is persuaded by the testimony of the Mr. Pucak that it has allocated money in its maintenance budget to make repairs to the roof at the RES Plant, and that the amount set forth in the budget is adequate to cover the ongoing costs of repair. Accordingly, the City has not established a default of the Lease as a result of the condition of the roof or the October 2000 fire at the RES Plant and is not entitled to the purported additional cure amount of $380,000. The City is merely entitled to have the roof repaired in accordance with the estimates received by the Debtor in the approximate amount of $75,000, a figure consistent with the expert report offered by the City (*See* Conley Expert Report).

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[7] Mr. Karlis' most recent quote for the roof repairs at the RES Plant was for $800,000. The Court does not view that quote to be credible. Aside from the wide variation between his 2001 estimate for the remaining repairs, Mr. Karlis stated that he is not an expert and that his quote is subject to so many contingencies that he considers it to be merely a guess. *See* Debtor's PFFCL ¶¶ 121-22. The Court appreciated Mr. Karlis' salesman's candor and believes that his testimony was more in the nature of an opening offer in a sales negotiation.

f. Findings Regarding Environmental Matters

i. The City Has Not Established A Default Related to U.S. EPA Matters.

The EPA Agreed Order fully resolves the U.S. EPA's proof of claim and the Debtor's potential liability for the payment of civil penalties. Therefore the City's Objection to Confirmation on this basis is not well taken and overruled.

With respect to any control measures, Debtor's Base Case projections include funds to litigate with the U.S. EPA if it is unable to reach a resolution with the U.S. EPA. If a settlement can be reached, the Base Case projections address the costs of installing air pollution control equipment to address the alleged violations of the Clean Air Act as set forth in the NOVs.

(a) Debtor has not failed to comply with Applicable Legal Requirements.[8]

The Debtor's potential obligation to indemnify the City of Akron, as set forth in Section 38 of the Lease, is contingent upon (a) Debtor's failure to comply with the "terms, covenants, provisions, or conditions of the Lease" or (b) the existence of damages resulting from an "Environmental Condition," as that term is defined in Section 37.2 of the Lease. Neither of these contingencies has occurred. As a result, as more fully explained below, there is no present indemnification obligation that must be addressed under the Plan.

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[8] A chapter 11 plan that proposes an actual reorganization routinely requires the bankruptcy court to deal with various moving targets, some of which can be addressed with finality and others of which are addressed in a necessarily speculative manner because those issues pertain to the feasibility analysis that the bankruptcy court is required to address. Other than on a consensual basis, this Court does not have present jurisdiction to resolve actual or potential controversies between Debtor and U.S.EPA over whether Debtor's post-filing and post-confirmation operations do or do not violate various federal environmental statutes. In the Partial Opinion, this Court examined the process by which U.S.EPA initiates its process: an NOV is simply the start of that process. The Debtor and U.S.EPA have in fact resolved on a consensual basis significant issues since the close of the Lease Assumption Hearing. Unfortunately the bankruptcy process can sometimes result in parties with contigent co-liability presenting evidence of worse case scenarios; the City's evidence on environmental issues illustrates this observation. The NOV that was served upon the City is not to be taken lightly, but the progress that the Debtor has made in working through environmental issues with the U.S.EPA and the incisive analysis of the Debtor's environmental counsel combine to persuade this Court that these matters will be resolved. One can hope that once the City no longer needs to present "worst case" scenario evidence and argument in this chapter 11 case, it will cease to work at cross purposes with the Reorganized Debtor in resolving their respective NOVs.

The City of Akron has previously argued that the Debtor is in default of Section 4.2 of the Lease by virtue of the Boiler 32 NOV. Section 4.2 of the Lease provides that:

> "Tenant . . . shall comply with all laws, rules, regulations, orders, and other requirements applicable to the Leased Property imposed by any Governmental Authority having jurisdiction with respect thereto, including, without limitation, those pertaining to the condition of the environment (collectively, "Applicable Legal Requirements")."

However, as this Court held at page 42 of the Partial Opinion:

> "Unless and until U.S. EPA institutes an enforcement action and Akron Thermal is the subject of a final decision finding a violation of the Clean Air Act, there is no default."

Because the Debtor is not in default of its obligation to comply with the Clean Air Act, it is not obligated to indemnify the City for costs of defense or other claims that might arise at some point in the future with regard to the alleged violations of the Clean Air Act contained in the Boiler 32 NOV.

On September 17, 2008, U.S. EPA issued a Notice of Violation to the City of Akron that, essentially, restates the alleged violations of the Clean Air Act that were set forth in the Notices of Violation issued to the Debtor for Boiler 32 and Boilers 1 and 2 (the "City NOV") (*See* City Exhibit Z). The City has asserted that the City NOV is an additional default under the Operating Lease.

However, as this Court previously held at page 41 of the Partial Opinion, an "NOV does not have the force of a law, rule, regulation, order, or other requirement." Accordingly, unless and until there is an enforcement action against the City ***and*** the City is the subject of a final decision finding a violation of the Clean Air Act, there is no default under the Lease and Debtor is not obligated to indemnify and defend the City, either for its costs incurred as a result of the NOV or any subsequent enforcement action. Moreover, because the Debtor's obligation to

indemnify the City is contingent upon a future finding of default under the Lease, it can not be considered to be a "pay-as-you-go" indemnification obligation. Unless and until there is a final determination by a court that the Debtor has operated Boiler 32 in violation of the Clean Air Act, there is no obligation for the Debtor to pay the City its potential defense costs or any other loss it might possibly incur as a result of that determination.

(b) The NOVs are not an "Environmental Condition".

When the Debtor and the City entered into the Lease, they were aware of certain pre-existing releases of contaminants on the Leased Property and other substances in the area outside of the Annex where Boiler 32 is located. Such releases can result in lawsuits by U.S. EPA and the imposition of cleanup obligations on present owners or operators, even though releases may not have violated any law existing at the time of the release. Prior to November 4, 1995, both Debtor and the City had access to the Leased Property. (*See* Debtor's Assumption Exhibit 3, p. 2) After November 4, 1995, Debtor had the exclusive right to occupy the Leased Property.

In its Motion to Modify, the City asserts that the NOVs issued to it and the Debtor are an Environmental Condition pursuant to Section 37.2 of the Lease. *See also* City's PFFCL ¶¶ 242-46. Section 37.2 of the Lease defined each of the pre-existing and potential future releases of hazardous substances as an "Environmental Condition" and allocated responsibility to the City for (certain) hazardous substance releases on the Leased Property that existed *prior* to November 4, 1995, and to the Debtor for (certain) releases of hazardous substances that occurred on the Leased Property *after* November 4, 1995.

Similarly, Section 38 of the Lease allocates the indemnification obligations of the City and the Debtor for Environmental Conditions, *e.g.*, releases of hazardous substances such as trichloroethane, based on whether they occurred before or after November 4, 1995.

The City's assertion that the NOVs issued to it and the Debtor constitute an Environmental Condition requires this Court to examine the origin of the phrase used in Section 37.2 of the Lease. The words "presence, use, generation, storage, transportation, treatment, recycling, reuse, reclamation, disposition, handling or release of any Contaminant" in the definition of "Environmental Condition" in Section 37.2 of the Lease tracks such language in the federal Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), which statutes address, *inter alia*, liability for the presence, generation, handling, storage, disposal and release of hazardous substances, not the requirements of the Clean Air Act, which uses the term "emission" of air pollutants.[9] Because the NOVs are not an Environmental Condition, they do not trigger the Debtor's obligation to indemnify the City under Section 38(b) of the Lease.[10]

(c) Debtor Is Not Obligated To Indemnify the City Under the Franchise Ordinance.

The City also claims that as a result of the NOVs issued to it and the Debtor, it is entitled to indemnification under Section 8 of the Franchise Ordinance, which provides that:

> Akron Thermal shall, at its sole cost and expense, fully indemnify, defend and hold harmless the City, its officers, boards, commissions, agents and employees from and against any and all losses, damages, expenses, claims, demands, causes of actions [sic] suits, proceedings, liabilities and judgments of every kind and nature whatsoever arising out of Akron Thermal's construction, maintenance or operation of the System or from its exercise of the rights and privileges herein granted, including, without any limitation, any injury or death to any person or damage to any property, real or personal.

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[9] See *e.g.* the federal New Source Performance Standards at 42 U.S.C. §7411.

[10] Since the Boiler 32 NOV is not an Environmental Condition, it also follows that it is not an "Assumed Liability" under Section 3.2(c) of the Lease.

The Franchise Ordinance was enacted by Akron City Council on September 30, 1996 and contemplated that the City and Debtor would subsequently negotiate the current Lease, which was entered into by the parties on August 15, 1997. The Franchise Agreement was incorporated by reference into the Lease as Exhibit A.

The Lease provides at Section 22 that:

> This Lease, together with the Schedules hereto, the Purchase Agreement and other related agreements referred to herein or therein, is the entire contract between the parties relating to the subject matter hereof, and supersedes all prior and contemporaneous negotiations, understandings, and agreements, written or oral, between the parties and, specifically, the interim Agreement is hereby terminated and superseded by this Lease and Purchase Agreement.

The indemnification provision contained in Section 8 of Franchise Ordinance contains general language that is broader than the specific indemnification provisions in Section 38 of the Lease. It is well established under the generally applicable rules governing contract interpretation that specific provisions take precedence over more general provisions. *Smith Barney Inc. v. Sarver*, 108 F.3d 92, 97 (6th Cir. 1997). Accordingly, under the generally applicable rules governing contract interpretation, the more specific indemnification provisions in Section 38 of the Lease take precedence over the broad general language contained in the preceding Franchise Ordinance, and, as discussed above, there has been no event of default to trigger any obligation to indemnify the City.

Even if the indemnification provision contained in Section 8 of the Franchise Ordinance were determined create a binding obligation on Debtor, the issuance of NOVs to the City and Debtor does not require the Debtor to indemnify the City. As this Court noted at page 41 of the Partial Opinion:

> No legal consequences flow from the issuance of [an] NOV because it merely notifies [a company] of their [sic, its] existing obligations under the CAA [Clean Air Act]. It does not impose any new obligations or penalties on [a company], and does not even direct or request that [the company] correct the alleged violations. In order to compel action or impose penalties, EPA would have to pursue further enforcement action, at which time [the company] would have an opportunity to raise [its] defenses.... Absent such action, the findings and conclusions in the NOV have no direct and immediate . . . effect on the day-to-day business of [the company]." *Royster-Clark Agribusiness v. Johnson, Administrator, U.S. EPA*, 391 F. Supp. 2d 21, 2005 U.S. Dist. LEXIS 18918 (D.C. August 29, 2005), at fn 16 (Internal quotes and citations omitted.)

Accordingly, because the NOVs merely give notice of the EPA has defined an issue to be resolved but impose no present liability, they do create a present indemnification obligation from the Debtor to the City under Section 8 of the Franchise Ordinance. The Debtor continues to engage in discussions with the EPA to resolve the characterization of Boiler 32 either through an agreed course of action or, if necessary, through a not-yet-commenced litigation process.

(iv) Debtor's Argument that its Indemnification Obligation to the City is Limited by Section 13.3 of the Lease

Debtor argues that even if at some future time a court might determine that the Debtor has an obligation to indemnify the City for its costs of defense and other claims arising from the potential future enforcement litigation associated with the alleged Clean Air Act violations set forth in the NOVs, this indemnification obligation is limited by the language of Section 13.3 of the Lease. Section 13.3 of the Lease provides that where, as here, the Tenant remains in possession of the Leased Property:

> ". . . Landlord and Tenant hereby acknowledge and agree that in any legal proceeding based upon Tenant's default, except as to any proceeding involving or pertaining to Tenant's obligations with

> respect to Environmental Conditions, Landlord's total recovery against Tenant shall not exceed the Liquidated Damages.[11]

This Court recognizes that, in what the Court views to be the unlikely event that the City's worst case scenarios prove true, Debtor is reserving the right to make this argument. This Court refrains from addressing the matter because, at this stage, it would appear to be nothing more than an advisory opinion.

g. Assumption of the Franchise Ordinance

The limitation in the Franchise Ordinance, prohibiting a transfer of the general partner interest in the Debtor, was a restriction imposed by the City only within the Franchise Ordinance with the Debtor and is not a general limitation applicable to all ordinances of the City. The City granted unconditional consent, in the letter dated July 15, 2004, for the transfer of the general partner interest in Debtor to TVII. This consent must necessarily have included consent for the transfer under the Franchise Ordinance because Debtor's right to operate the entire System is dependent, in part, on its rights under the Franchise Ordinance.

Considering that the Debtor sought the City's consent to the transfer of its general partner interest and that the City gave "unconditional" consent upon which Debtor relied to continue operating the System, the City waived any right now to contest the 2004 assignment of the general partner interest in the Debtor. *See Cleveland v. Cleveland Elec. Illum. Co.*, 440 F.Supp. 193, 205 (N.D. Ohio 1976)

Having given its unconditional consent, the City is now equitably estopped to claim that the Franchise Ordinance, which it has never sought to terminate, is somehow void by virtue of the assignment it previously approved. *See, Pilot Oil Corp. v. Ohio Dep't of Trans.*, 102 Ohio

[11] Section 13.2 of the Lease defines Liquidated Damages to be the sum of $2,000,000 that is to be paid by the Tenant to the Landlord as compensation for any and all defaults if the Lease is terminated.

App.3d 278, 283, 656 N.E.2d 1379 (10th Dist. 1995) (citing *Baxter v. Manchester* (1940), 64 Ohio App 220, 18 Ohio Op. 77, 28 N.E.2d 672; *Cleveland Elec. Illum. Co.*, 440 F.Supp. 193, 205 (N.D. Ohio 1976); *Shapely, Inc. v. Norwood Earnings Tax Bd. of Appeals*, 20 Ohio App.3d 164, 485 N.E.2d 273 (1984)). "The doctrine of estoppel is applicable to municipal corporations where they have the power to act or contract . . . ." *Baxter v. Manchester*, 64 Ohio App. at 225, paragraph 2 of syllabus (holding that, in a situation involving a municipality's contract with an entity for water service, under a franchise ordinance, when the doctrine of estoppel applies to municipal corporations, "they may estop themselves by conduct, silence or acquiescence in the same way as natural persons."); *see also Five Oaks Neighborhood Improvement Ass'n v. Board of Zoning Appeals*, 1984 Ohio App. LEXIS 8841, *4-5 (2nd Dist., Feb. 27, 1984).

In this case, given that Debtor has continued to operate the System since the transfer of its general partner interest in 2004, it was not until after the Assumption Motions were filed that the City raised this issue. Debtor's operation of the System, for which the City contracted, is not interfering with the exercise of governmental functions and the interests of justice guide that the City should be equitably estopped to now claim this purported violation, if any, voids the Franchise Ordinance. Alternatively, because this was a restriction particular to this Franchise Ordinance, and not a restriction of general application to all City ordinances, the City could and did waive the requirement for an ordinance approving the transfer or should now be estopped to claim that Franchise Ordinance is no longer valid.

"It is well settled that a franchise or license agreement is an executory contract within the contemplation of 11 U.S.C. 365." *In re Tirenational Corp.*, 47 B.R. 647, 651 (Bankr. N.D. Ohio 1985) (examining assumability of a franchise agreement). As declared by the Ohio Supreme Court, a public utility franchise is construed to be a contract. *See Parks v. Cleveland Ry. Co.*,

124 Ohio St. 29, 177 N.E. 28 (1931) (citations omitted). Public utility franchises constitute contracts and are "evidenced by the ordinance adopted by the municipality and its acceptance by the utility." *See id.*, syllabus. The Franchise Ordinance in this case is a contract. In this case, there is no general ordinance by the City giving authority for any other entities to operate the System, just the specific Franchise Ordinance authorizing operation only by the Debtor.

The Lease, under both Sections 3.2(a) and 22, incorporates the Franchise Ordinance as part of the "whole, entire" contract between the City and the Debtor concerning the System. (*See* Lease at 3, 17 (§§ 3.2(a), 22).) Accordingly, in this context, the Lease and Franchise Ordinance must be read together because they are part of the same contractual relationship. "Where one instrument incorporates another by reference, both must be read together." *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 528, 2006-Ohio-2957 {¶ 64}, 855 N.E.2d 909 (10th Dist. 2006), appeal not allowed, 2006-Ohio-5625. However, even if the Lease did not specifically incorporate the Franchise Ordinance, "[m]ultiple documents should be construed together if they are part of the same transaction." *Mantua Mfg. Co. v. Commerce Exch. Bank*, 75 Ohio St.3d 1, 5, 661 N.E.2d 161, 165 (1996) (citations omitted). In this respect, the recitals to the Franchise Ordinance expressly state that it was enacted by the City Council in relation to the City and the Debtor "entering into an Operating Lease Agreement in order to permit Akron Thermal to operate the System, pending closing of the transactions described in the Purchase Agreement." (*See* Franchise Ord. at 2-3.)

The Franchise Ordinance contains a specific provision on termination, requiring notice, an opportunity for a hearing and an ordinance to terminate the franchise. Thus, as of the Petition Date, even if the City is not estopped or deemed to have waived its right to require an ordinance to consent to the transfer of the general partner interest in Debtor, the Franchise Ordinance was

not terminated and remains "unexpired." Further, the City's contention that Debtor owes the Franchise Fee and must provide adequate assurance of payment of the Franchise Fee in order to assume the Lease confirms that the City has treated the Franchise Ordinance as being in place and valid, as part of the integrated, "whole, entire" contract.

As an "unexpired" contract, the question is whether the Franchise Ordinance, as part and parcel of the Lease, can be assumed under § 365. Again, if the City is not estopped or deemed to have waived the "material default" of not getting an ordinance approving the transfer of the general partner interest in Debtor, then this constitutes a pre-petition "non-monetary default" under the Franchise Ordinance. Under § 365(b)(1)(A), Debtor does not have to cure "non-monetary defaults" – defaults incapable of being cured – in order to assume the Lease. *In re Yardley*, 77 B.R. 643, 645 (Bankr. M.D. Tenn. 1987).

If the City is not deemed to have waived or to be estopped to assert the technical assignment default under Section 6 of the Franchise Ordinance and a cure of this technical assignment default were required, there would be no way for Debtor to force the City to enact the appropriate ordinance. However, in this circumstance, where Debtor is still the entity with which the City has the Franchise Ordinance, this provision is at best rightly viewed as a non-monetary default that, pursuant to § 365(b)(1)(A), Debtor does not have to cure. In the alternative, under § 365 the Debtor can assume the Franchise Ordinance despite the technical assignment restriction in the Franchise Ordinance.

In this circumstance, the assignment restriction in the Franchise Ordinance, which is specific to the Debtor and not found in an Ohio statute or the City Charter or Code, will not prevent Debtor from assuming the Franchise Ordinance. *See City of Jamestown, Tenn. v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*, 27 F.3d 534 (11th Cir. 1994); *see also*

In re Adelphia Communications Corp. 359 B.R. 65, 71-72 (Bankr. S.D.N.Y. 2007). Based upon the foregoing, Debtor is entitled under § 365 to assume the Franchise Ordinance.

h. Assumption of the License Agreements

The City has not made any arguments regarding termination of the License Agreements, nor of any amounts that need to be cured in order for Debtor to assume the License Agreements. As it appears said License Agreements are necessary to Debtor's operation of the System, and it appearing there are no cure obligations due, the Debtor is hereby authorized under § 365 to assume the License Agreements. [Debtor's Assumption Exhibits 7, 8 and 9].

i. Debtor Is Not Authorized To Reject Specified Supply Contracts.

Among other items, Debtor rejects Hot Water and Chilled Water Supply Contracts listed in Exhibit 8.2 to the Plan as "Schedule of Rejected Contracts." Items 2 and 3 of the Schedule of Rejected Contracts are as follows: Hot Water and Chilled Water Supply Contract dated November 17, 2000 and September 1, 2000 with the City for O'Neil's Parking Garage (the "City's Service Agreement"). Debtor's business judgment is that it can obtain more favorable terms for these contracts. The City contends that the result of Debtor's rejection of the City Service Agreement is that it will put Debtor in violation of Sub-Section 5.1(b) of Section 5 of the Lease and Section 10 of the Franchise Agreement because pursuant to those provisions, the rates charged to the City as Landlord, by the Debtor as tenant ".....shall in no event exceed the most favorable rates charged by Tenant to the class of customers' most similar to Landlord." The City complains that the Debtor does not state in its Plan, "the most favorable rates" charged by the Debtor "to the class of customers most similar to" the City.

Under § 365(d)(2), "at any time before the confirmation of a plan" the Debtor may reject an executory contract. 11 U.S.C. § 365(d)(2). Under § 365(a), the decision to reject a contract rests in the business judgment of the Debtor. 3 Collier on Bankruptcy ¶ 365.03[2] at 365-26 and

27 (15th ed. 2007) (footnotes omitted). Debtor argues that the City offered no evidence to support its arguments on this point, i.e., that there is a class of similar customers receiving a more favorable rate.

Normally the business judgment of a party identified by the Bankruptcy Code as having the right to exercise that judgment is entitled to significant deference from the bankruptcy court. However, in this instance, because the assumption of the Lease is so central to the Plan and because there is an unresolved question about whether authorizing the Debtor at this time to reject the City Service Agreement would be a breach of the Lease, the Court is not prepared to rule on this item now. While the Bankruptcy Code permits assumption or rejection of contracts in the plan context and this Plan does address this issue, there was simply no focus on this aspect of the Plan at the Confirmation Hearing. While approval or disapproval of such actions can occur within a confirmation decision, where the economic result of rejecting a particular executory contract is not central to the feasibility of the Plan, the Court views itself as having discretion to address this issue outside of the Confirmation Opinion. The Court needs to be satisfied that, in the exercise of its business judgment, Debtor has accounted for the possibility of having to address whether it is in immediate breach of the Lease that it is assuming and of the costs that might be incurred in the resolution of that issue. Debtor did timely raise its rejection decision, but is not authorized to reject the City Service Agreement at this time.

j. Conclusions of Law Regarding Feasibility

The Base Case projections for 2008 through 2012 are based upon "realistic and reliable assumptions which are capable of being met." *In re Ridgewood Apartments of DeKalb County, Ltd.*, 183 B.R. at 789. The Base Case projections indicate the Reorganized Debtor should have sufficient cash flow to pay its obligations under the Plan and to fund its operations. At the

Effective Date the equity will be contributed to fund Debtor's cure obligations with repsect to the Lease and to address other immediate payment obligatons under the Plan. Debtor's projected cash is expected to be more than adequate address the operational needs of the Reorganized Debtor and ATC and to service its future plan payments. Factors supporting this conclusion include the anticipated revenues of approximately $15.5 million, a minimal tax burden, debt service structured to match available cash, and expected EBITDA in excess of $2.0 million.

The Debtor is current on all post-petition obligations, including all rent, franchise fees, water and sewer charges and all other charges by the City. Debtor has managed to pay or reserve for the extraordinary professional expenses that have been incurred in its chapter 11 case. The diminution of such fees bodes well for its future prospects.

The Base Case projections demonstrate Reorganized Debtor will be able to perform into the future as well. The Court concludes that based on the entire record of this case, Debtor has established adequate assurance of future performance under the Lease, Franchise Ordinance and License Agreements. In this case, the pre-petition defaults will all be cured at the Effective Date. The Court concludes this is prompt cure of the pre-petition defaults

With regard to the matters presented in connection with the Debtor's Assumption Motions that were not decided in the Partial Opinion, based upon the evidence introduced during the hearings on the Assumption Motions, the post-hearing proposed findings of fact and conclusions of law, and the evidence introduced during the Confirmation Hearing, the Court finds that the Plan is feasible. Based upon evidence of Debtor's financial resources, Debtor has shown adequate assurance of future performance of its obligations under the Lease, Franchise Ordinance and related License Agreements, in accordance with § 365(b)(1)(C). Debtor has met all other applicable requirements under § 365(b). Accordingly, the Court hereby approves

Debtor's assumption of the Lease, Franchise Ordinance and related License Agreements under the requirements set forth in the Partial Opinion, and as discussed below.

During the course of this proceeding, management has shown it has the ability to profitably operate the Reorganized Debtor. Debtor has continuously operated during this Chapter 11 case even though it has paid in excess of $2.25 million in administrative costs. *See* Debtor's Exhibit 12. Based on all of the foregoing, the Court finds that the Plan is feasible and accordingly concludes that the Plan satisfies the requirement of § 1129(a)(11).

2. Debtor's Plan Does Not Violate The Absolute Priority Rule And Is Therefore Fair And Equitable Pursuant To Section 1129(b)(2)(B) Of The Bankruptcy Code

Section 1129(a)(8) requires for confirmation that each class of claims accepts the Plan or is not impaired under the Plan. Because there were impaired classes that did not accept the Plan, Debtor has sought confirmation of its Plan under § 1129(b), which permits confirmation notwithstanding failure to meet the § 1129(a)(8) requirement. "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

Section 1129(b) provides that the Plan can be confirmed even if it has not been accepted by all impaired classes (as otherwise required by § 1129(a)(8)) as long as at least one impaired class of Claims, without the consideration of votes of insiders, has accepted it (§ 1129(a)(10)) and if the Plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims" that is impaired under the Plan and has not accepted the Plan. 11 U.S.C. §§ 1129(a)(10) and 1129(b).

a. Absolute Priority Rule (§ 1129(b)(2)(B)(ii)) and New Value Exception

The City argues that Debtor's Plan violates the absolute priority rule and is therefore not fair and equitable pursuant to § 1129(b)(2)(B)(ii) of the Bankruptcy Code. Specifically, the City

contends (1) that Debtor's partners, TVII and its owners and Opportunity Parkway, LLC, as holders of equity interest junior to the City and the other unsecured creditors, will retain that equity in the Reorganized Debtor and receive property of a value which significantly exceeds the "new value" being contributed. (*See* City's PFFCL ¶¶ 328-37), and (2) that TVII is not paying equivalent value for the retained equity in the Reorganized Debtor (*See* City's PFFCL ¶¶ 338-49).

The absolute priority rule is contained in § 1129(b)(2)(B)(ii) and, as applicable in this case, provides that Debtor's equity holders cannot "receive or retain under the plan" any property "on account of" their old equity interests because the rejecting class of unsecured creditors will not be paid in full under the Plan. 11 U.S.C. § 1129(b)(2)(B)(ii). There is an exception or corollary to the absolute priority rule known as "new value" that has been recognized and approved by the Sixth Circuit Court of Appeals. *Teamsters Nat'l Freight Indus. Negotiating Comm. V. U.S. Truck Co., Inc.*, 800 F. 2d 581 (6th Cir. 1986); *see, Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 203 n.3 (1988); *see also, In re Economy Lodging Sys., Inc.*, 205 B.R. 862, 865 (Bankr. N.D. Ohio 1997); *In re Montgomery Court Apartments of Ingham County, Ltd.*, 141 B.R. 324, 343 (Bankr. S.D. Ohio 1992).

In order for the "new value" exception to apply – for old equity to retain the equity of the Reorganized Debtor – the new value must be "(1) in money or money's worth, (2) that is reasonably equivalent to the value of the new equity interests in the reorganized debtor, and (3) that is necessary for implementation of a feasible reorganization plan." *In re Beaver Office Prods., Inc.*, 185 B.R. 537, 542 (Bankr. N.D. Ohio 1995). If these elements are satisfied, then the absolute priority rule is not violated and the Plan is confirmable under § 1129(b)(2)(B)(ii). *In re Target Graphics, Inc.*, 372 B.R. 866, 872 (Bankr. E.D. Tenn. 2007) (citing *Bank of Am. Nat'l*

Trust and Sav. Ass'n v. 203 North LaSalle St. P'ship, 526 U.S. 434, 442, 119 S.Ct. 1411; *In re U.S. Truck Co.*, 800 F.2d at 588).

With regard to the second and third elements, the analysis "'involves looking at the need for the contribution and whether [the equity holder] paid a fair price for its interest.'" *In re WCI Steel, Inc.*, Ch. 11 Case No. 03-44662 (Bankr. N.D. Ohio Dec. 15, 2004), appeal dismissed, 338 B.R. 1 (N.D. Ohio 2005) (citing *In re U.S. Truck Co.*, 800 F.2d at 588; *In re Economy Lodging Sys., Inc.*, 205 B.R. at 865). There is no clear guideline by which to determine whether a contribution is "reasonably equivalent" and the determination "is factually intense and must be made on a case-by-case basis." *In re Montgomery Court Apartments of Ingham County, Ltd.*, 141 B.R. at 345. The value of the equity contributions must be compared to the value of the interests in the reorganized debtor that old equity is retaining. *See In re Crosscreek Apartments, Ltd.*, 213 B.R. at 548, n.32

The Debtor has the burden of proving that TVII and its partners are not receiving the Reorganized Debtor's equity "on account of " its existing equity interest, but rather, on account of new value in "money or money's worth" equal or equivalent to the value of the Reorganized Debtor.

i. Findings of Fact Regarding Valuation Methodologies

For the purpose of examining the "reasonably equivalent" value of new equity contributions, in general, the discounted cash flow ("DCF") analysis is most relevant because it gives an overall value reduced to present value, roughly as of the effective date of the plan – the date on which the old equity holders will pay for and retain their equity interests in the Reorganized Debtor. The DCF analysis is described as an estimate of:

> the present value of projected future cash flow of the business that is hypothetically available to creditors but not paid to them, and

> then applies a discount rate to projected future cash flows to determine a present value of the company.

In re Am. Homepatient, Inc., 298 B.R. 152, 175-76 (Bankr. M.D. Tenn. 2003).

In some chapter 11 cases, such as those involving publicly traded companies, the use of a market multiple, applied to a comparable company analysis or comparable transaction analysis, may also be helpful. Because the Debtor's estate consists chiefly of the right to operate leased assets through August 14, 2017, use of market multiples and comparable transaction analysis was simply not available in this case. In a case like this where the market was not or cannot be tested, plan confirmation centers on enterprise value derived by analyzing DCF data.

The use of a market multiple depends upon finding adequate comparables. *See Exide Techs.*, 303 B.R. at 61-63. If there are no adequate comparables because of the unique issues facing a closely-held company, then the market approach to valuation is not applicable. *See DCHC Liquidating Trust v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp.)*, 2008 WL 2037592, at *8-11. *In re EBP, Inc.*, 172 B.R. 241, 247 (Bankr. N.D. Ohio 1994); *see also Chartwell Litig. Trust v. Addus Healthcare, Inc. (In re Med Diversified, Inc.)*, 334 B.R. 89 (Bankr. E.D.N.Y. 2005).

Moreover, the Sixth Circuit Court of Appeals has recognized that DCF analysis is "a well-recognized methodology for determining a business's going concern values." *In re Valley-Vulcan Mold Co.*, 2001 WL 224066, No. 99-4129 (6th Cir. Feb. 26, 2001) (cited in *Kool, Mann, Coffee & Co. v. Coffee*, 300 F.3d 340, 362 (3rd Cir. 2002)). Furthermore, in this Court's unreported opinion issued in the *In re WCI Steel, Inc.* case, the Court examined the formulation of a confirmable new value plan and concluded that in order to determine the value of the equity in a reorganized debtor, it must analyze "the enterprise value of the reorganized debtor as of the hypothetical effective date of the Debtors' Plan" and that, in analyzing the "enterprise value,"

"methodologies which rely on cash flow analysis are more persuasive to the Court in light of [the old equity holder's] proposal to retain the Debtors' current equity." *See In re WCI Steel, Inc.*, Ch. 11 Case No. 03-44662, *Id.* at p. 13, ¶ A1.

Based on the unique set of facts and risks facing this Debtor, the Court concludes that use of market multiples is not helpful and the only way to provide a reliable estimate of value of the Reorganized Debtor is by use of the DCF method. Here no credible evidence utilizing the market based approach was presented. In large part this reflects that the Debtor operates the Leased Facilities as a result of a leasehold interest that has a term of less than nine years. It does have a purchase option, but one that cannot be transferred without the consent of the lessor, a consent that cannot be easily assumed. When valuation data based on market transactions cannot be developed because of the absence of comparable transactions, market based methods are not useful, and other valuation methods must be utilized. *See Exide Techs.*, 303 B.R. 48.

ii. Findings of Fact Regarding Enterprise Value

Debtor, the City, and the UCC each offered their own experts to testify about Akron Thermal's enterprise value. Debtor presented the testimony of Mr. Fensterstock. The City called Robert Turner, a Certified Public Accountant ("CPA") and principle of Apple Growth Partners. The UCC called Mark Bober, a CPA and Certified Valuation Analyst and principal of BMF Advisors, LLC ("BMF"), a full service public accounting firm. The testimony and methodologies which relied on a cash flow analysis were more persuasive to the Court in light of TVII's proposal to retain the Debtor's current equity.

(a) Jason Fensterstock

Mr. Fensterstock prepared a discounted cash flow valuation tied to the Base Case Projections.[12] Because the Debtor's Lease with the City expires on August 15, 2017, Mr. Fensterstock concluded that the Reorganized Debtor's value is limited to the discounted present value of its free cash flow during the remaining term of the Lease.[13] *See* Debtor's PFFCL ¶¶ 198-199

Mr. Fensterstock first calculated the projected cash flow through 2017. This is taken from the Base Case projections. Mr. Fensterstock then calculated what he believed to be an appropriate Weighted Average Cost of Capital ("WACC"), which represents the cost of all financing sources in the entity's capital structure. Mr. Fensterstock's experience was that equity investors expect a return of 22 to 25% in such circumstances. Mr. Fensterstock's experience was also that the cost of debt is in the range of 5 to 7%. Mr. Fensterstock testified that he believed a capital structure of one-third equity and two-thirds debt was appropriate. These factors were then blended to derive an appropriate WACC. Based on the foregoing, Mr. Fensterstock concluded that a range of 8 to 12% for the WACC was appropriate. *See* Debtor's PFFCL ¶¶ 199-201.

Mr. Fensterstock's discounted cash flow analysis is attached to the First Amended Disclosure Statement as Exhibit E. Exhibit E provides a range of values for Reorganized Debtor, using discount rates from 8% to 12%. Exhibit E calculates a net present value of the future cash flows in the range of $4,670,000 to $5,622,000 presuming 100% tax payments and $6,295,000 to $7,491,000 presuming only partial tax payments. Obligations under the Plan were then subtracted to arrive at the equity value of the Reorganized Debtor. Those calculations resulted in

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12 Mr. Fensterstock testified that because of the size of Debtor and its unique challenges (customer concentration, historical operating losses, issues with the EPA and limited growth prospects), he did not believe there were any truly comparable companies or transactions and therefore he concluded that the discounted cash flow was the only appropriate method for valuing the Reorganized Debtor.

13 Mr. Fensterstock testified that he considered the purchase option, but concluded it was of very little value.

a range of $96,000 to $1,048,000, presuming 100% payment of Debtor's taxes, and $1,721,000 to $2,917,000, presuming Debtor need only pay part of the taxes due to the contributions of TVII, as the value of the equity in the Reorganized Debtor. *See* Debtor's PFFCL ¶¶ 201-2

(b) Robert Turner

Mr. Turner prepared a report dated August 20, 2008, marked as City Exhibit G. Mr. Turner prepared a second document dated September 5, 2008 marked as City of Akron Exhibit V. Neither of Mr. Turner's reports had merit or probative value. In this case, the City's expert did not use a methodology deemed relevant and reliable by the Court for purposes of examining the reasonably equivalent value of the contribution by TVII. Mr. Turner's September 5, 2008 Report ("Turner Report") has two fundamental flaws.

First, Mr. Turner's Report is not a valuation. Mr. Turner fails to consider the other methods of valuation (discounted cash flow and asset approach). Instead, what he has performed is simply a calculation of some type, limited to a narrow focus on alleged market multiples. The Turner Report attempts to perform calculations based upon the guideline transactions and guideline public company methods. The failure to perform a discounted cash flow analysis renders his Report and testimony of little use to the Court.

Second, Mr. Turner did not testify as to the fair market value of the Reorganized Debtor. Instead, Mr. Turner testified only that TVII was receiving a "potential premium" or "incremental potential value" if the purchase option were exercised and the facilities then sold. Whatever he meant by this analysis, it is not helpful to determine the fair market value of the Reorganized Debtor.

Mr. Turner was unable to place the Turner Report in any category of final valuation presentation techniques recognized by his field. His report lacked any credibility.

(c) Mark Bober

Mr. Bober testified that in assessing the value of Debtor, he considered all three valuation methods: discounted cash flow, asset approach and market approach (which considers guideline public companies and guideline transactions). He first undertook this analysis in providing assistance to the UCC as it evaluated the Plan. Mr. Bober testified that he concluded that the asset approach and market approach were not relevant to his analysis.

Mr. Bober testified that in early September 2008, he was asked to update his work. Mr. Bober prepared a schedule which sets forth his discounted cash flow approach in the form of UCC Exhibits 1 and 2. Based upon the review and input from David Wehrle, Mr. Bober utilized the Debtor's Base Case cash flow projections with certain modifications. *See* Debtor's PFFCL ¶¶ 219-22. Mr. Bober then calculated the appropriate WACC. Mr. Bober examined the WACC on an after-taxation basis because taxes had already been deducted from the projected cash flow. Mr. Bober calculated the WACC assuming a capital structure of 60% debt and 40% equity. *See* Debtor's PFFCL ¶¶ 224-26. Based on this analysis, Mr. Bober applied a 12% discount rate to the projected cash flow through 2017. He assumed a terminal growth rate of 2%. Thus, he applied a 10% discount rate for the terminal period (and assumed the purchase option is exercised in 2017 at a cost of $5 million, which he deducted from the terminal period valuation), resulting in a value of the equity of the Reorganized Debtor of $1,638,095. *See* Debtor's PFFCL ¶¶ 227.

Based on the above-stated factors, the Court finds that the discounted cash flow method is the only reliable method for valuing the Reorganized Debtor. The Court further finds that the testimony of the experts called by Debtor and the UCC are relevant, reliable and credible. Based

upon that testimony, the Court has found that the equity value of the Reorganized Debtor is in the range of $2 million.

c. Findings Regarding TVII's Proposed New Value Equity Contribution

The Court must now examine the value of what is being contributed to determine if it is "reasonably equivalent" to the value of the Reorganized Debtor and necessary for an effective reorganization.

As consideration for their ownership Interests in the Reorganized Debtor, TVII proposes that it will contribute the items to the Debtor:

a. TVII will contribute Three Million Dollars ($3,000,000) to the Reorganized Debtor as an equity infusion.

b. On the Effective Date, TVII will provide an unsecured line of credit to the Reorganized Debtor in the amount of Two Hundred Fifty Thousand Dollars ($250,000). Reorganized Debtor will execute a Note substantially in the form as Exhibit 7.1 to the Plan. See Debtor's Modification to Second Amended Plan of Reorganization for Akron Thermal, Limited Partnership Dated July 14, 2008, filed September 10, 2008 [Docket No. 523].

c. TVII and its partners will (i) contribute operating losses from entities unaffiliated with ATLP to offset cancellation of indebtedness income occasioned by the Plan; and (ii) until the earlier of December 31, 2013 or the date the debt issued under the Plan has been repaid, forego an amount equal to two thirds (2/3) of the tax distribution to which they would otherwise be entitled under the Partnership Agreement. Further, as described in section X(F) of the Plan, TVII has agreed to defer tax distributions if, and to the extent that, fixed charge coverage drops below 1.0.

d. TVII will contribute the income and earnings of Akron Thermal Cooling, LLC to the Reorganized Debtor.

e. TVII will waive its pre-petition claims against ATLP, except for the sum of $75,000 which will remain secured but will be subordinate to the Creditors' Trust Note. TVII asserts claims totaling in excess of $10 million against ATLP.

See Disclosure Statement at ATLP-vii-viii; Plan at 18-19, § 7.1; Modifications to Plan [docket No. 523].

With respect to items (a), (b), and (c) above, the Court is persuaded by the testimony of Mr. Fensterstock as to the value of each of these components. The equity contribution of $3 million and the unsecured line of credit are certain, thus it is appropriate to value those components at more than $3 million. Contrary to Mr. Fensterstock's assertion, the line of credit amount should not be treated as new value in and of itself. Rather, it is the cost saving that the Reorganized Debtor would realize in not having to find such financing from a source that would likely charge fees of a material amount. The Court does not undertake to quantify that cost savings as no testimony was adduced in that regard; the Court simply notes that there is a modicum of new value from the availability of the line of credit.

Mr. Fensterstock testified that the "value" of the tax deferral is at least $1.5 million. This analysis is set forth in Exhibit E to the First Amended Disclosure Statement and Mr. Fensterstock's report (Debtor's Exhibit 10). The agreement to forego full tax distributions was credibly valued at approximately $1.5 million. *See* Debtor's PFFCL ¶¶ 231-33.

With respect to item (d), the City contends that the contribution of the income and earnings of ATC to the Reorganized debtor can be given no value since all of the operating expenses and liabilities of that entity will be borne by the Reorganized Debtor. The Court agrees with the City. The obligations of ATC have been included in all financial statements and projections. The business of ATC and that of the Debtor have been operated as a single entity for all purposes, save legitimate state tax reasons. Most telling, ATC depends upon use of the Leased Facilities. Therefore, the revenue from ATC cannot be credited to TVII as a separate and additional contribution to the reorganization of the Debtor. *See* City's PFFCL ¶¶ 274-75. .

With respect to item (e), Mr. Fensterstock valued the waiver of TVII's secured and unsecured claims of over $1.1 million. *See* Debtor's PFFCL ¶234. The Court agrees with the City's analysis that TVII's waiver of its alleged secured claim does not constitute additional "new value" for equity in the Reorganized Debtor. *See* City's PFFCL ¶¶ 264-274; 338-341.

Based on the foregoing, the sum total of the contributions is in the vicinity of $4.5 million. Given that the equity of the Reorganized Debtor is valued at approximately $2,000,000, the equity contribution of $3,000,000 by itself exceeds the value of the Reorganized Debtor.

d. Findings Regarding Market Test of New Value Equity Contribution

The Supreme Court has held that plans affording junior interest holders with exclusive opportunities free from competition and without the benefit of market valuation fall within the prohibition of § 1129(b)(2)(B(ii). *203 North LaSalle*, 526 U.S. at 458. In this case, the Debtor ceased to have the benefit of exclusivity as of March 16, 2008. The evidence adduced at the Confirmation Hearing established that thereafter, the City did engage in negotiations with the UCC about a possible plan.

This case presents a highly unusual circumstance. The remaining term of the Lease is less than nine years, thus rendering reliable comparables for valuation of the Reorganized Debtor unavailable. Further, the Franchise Ordinance, which is necessary to operate Debtor's business, prohibits assignment without the City's consent, making it difficult, if not impossible, for Debtor to market the equity interests in the Reorganized Debtor without the consent of the City.

As stated, in this case Debtor's exclusive period to file a plan of reorganization expired on March 15, 2008. Despite the fact that the City negotiated with the UCC about the possibility that the City would file a plan, the City did not do so. If any party desired to contribute more than TVII will contribute under the Plan, they have had a full and fair opportunity to make such a

proposal.[14] The fact that no other party has made any such proposal to acquire the equity interests in Debtor is illustrative of the fact that TVII is the only party willing to contribute the capital necessary to fund a reorganization in this case. By allowing exclusivity to expire and thereby giving the City and any other interested party the opportunity to propose a competing plan, this Debtor did what was necessary to permit competition for control of the Reorganized Debtor or some other form of chapter 11 plan.

Accordingly, on the facts and circumstances of this case, any concerns over market testing are resolved by the expiration of the exclusivity period, the absence of any competing plans of reorganization, and the fact that TVII's equity contribution is unmatched, very substantial, and necessary to the success of the reorganization.

e. Conclusions of Law Regarding Absolute Priority and New Value

TVII is contributing equity of $3 million as well as certain other items, which when totaled, have a value of more than $4.5 million. The equity contribution of $3 million proposed by TVII is obviously in "money or money's worth." This will be used to pay the cure obligation of the City (approximately $2.5 million), pay the initial payment to the State of Ohio ($150,000) and pay other obligations under the Plan. Thus, the first element of the new value exception is clearly satisfied. *See In re WCI Steel, Inc.*, Ch. 11 Case No. 03-44662, at p. 23 (holding that "[a] cash contribution clearly is money or money's worth" when it is being distributed to creditors).

The remaining items being contributed are likewise of real benefit to the creditors. The agreement to forego tax distributions enhances future cash flow, thereby allowing more certainty of payment to the State of Ohio and unsecured creditors. The claims being waived likewise

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[14] Noting the provisions of the Lease on the subject of the City's right to approve any new operator, as a practical matter, any other interested party would have had to work with the City to develop a feasible competing plan.

allow for greater recovery to creditors. This entire package is beneficial to the Reorganized Debtor.

The second element of the new value exception is also clearly satisfied in this case. Without the equity infusion by TVII, Debtor will not be able to cure the defaults under the Lease and would not be able to fund distributions to the unsecured creditors, both of which are necessary to this reorganization. With the equity infusion, Debtor will have enough resources to meet these obligations and has demonstrated that it will be able to meet its other expenses going forward.

Based upon the testimony offered by both Debtor's expert and the UCC's expert regarding the discounted cash flow valuation of the Reorganized Debtor, and subtracting the obligations to be paid under the Plan, it is apparent that TVII will be making more than a "reasonably equivalent" contribution of new value in relation to the new equity in the Reorganized Debtor that TVII and Opportunity Parkway will retain under the Plan.

This Court has found that the value of the equity interests to be acquired under the Plan are worth approximately $2 million. Considering that TVII's equity contribution is $3 million, and in excess of $4.5 million when other factors are considered there is no question this contribution meets and exceeds the threshold of being "reasonably equivalent." *See e.g., In re Crosscreek Apartments, Ltd.*, 213 B.R. at 548, n.32 The Debtor has also established that the contributions are necessary for an effective reorganization.

The valuations of the Reorganized Debtor that were presented by both Debtor's expert and the UCC's expert, based on the discounted cash flow method, when coupled with the absence of any competing plans or offers to purchase the equity in the Reorganized Debtor, show that the old equity holders are providing fair value through the new value contribution. Based

upon the foregoing, Debtor has satisfied its burden to show that the Plan complies with the new value exception, corollary or exemption to the absolute priority rule with regard to the Claims in Class 3.2 of the Plan.

3. The Non-Debtor Third Party Releases Are Permitted

In addition to seeking approval of Debtor's waiver of all claims and causes of action against the Directors and Officers of TVII, ATC and Opportunity Parkway, relying upon Bankruptcy Rule 9019, Article XII of the Plan provides for the discharge of Claims or other debts as against the Debtor, TVII, Opportunity Parkway and ATC, and an injunction as to all Claims or other debts, liabilities or terminated Interests as against "the Debtor, Reorganized Debtor, the Creditors' UCC, its members in their capacity as members but not in their individual capacities, and all of their respective partners, officers, employees, agents, counsel, advisors and representatives." (*See* Plan at p. 31-32, §§ 12.2, 12.3 and Supplemental Modifications filed September 26, 2008, Docket No. 528).

Bankruptcy courts have jurisdiction under Section 105(a) to enjoin creditors from pursuing causes of action against the general partner of a debtor limited partnership. *Northlake Bldg. Partners v. Northwestern Nat'l Life. Ins. Co. (In re Northlake Bldg. Partners)*, 41 B.R. 231, 233 (Bankr. N.D. Ill. 1984) (citing *Landmark Air Fund II v. Bancohio Nat'l Bank (In re Landmark Air Fund II)*, 19 B.R. 556, 559 (Bankr. N.D. Ohio 1982). This is especially the case "in the context of a *partnership* bankruptcy," in which "the courts are particularly concerned with reference to the actions which a partnership creditor might commence against individual partners." *Id.* at 234. Courts have held that in order to assist the partnership in reorganizing its affairs, injunctive relief may be proper to prevent creditors "from proceeding against the general partners individually." *Id.* (citing *Old Orchard Inv. v. A.D.I. Distributors (In re Old Orchard Inv. Co.)*, 31 B.R. 599, 602-603 (W. D. Mich.1983)).

A permanent injunction enjoining creditors from pursuing the partners of the Debtor, a limited partnership is especially necessary and compelling when participating partners would have no incentive to make the large contributions necessary to establish feasibility of the Plan if the partners remained liable for claims related to the Debtor's affairs. *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 667 (Bankr. D. Colo. 1992). Such an injunction is also compelling when it is necessary to "provide maximum payout and fair distribution under the plan" and when the injunction is a condition precedent to confirmation of the plan. *Id.* at 667, 689. Further, Bankruptcy Rule 3016(c) expressly contemplates a plan providing "for an injunction against conduct not otherwise enjoined under the Code[.]" Fed. R. Bankr. P. 3016(c).

The Sixth Circuit Court of Appeals, though not in the context of a partnership bankruptcy, has considered and approved the use of a permanent injunction barring both consenting and non-consenting creditors' claims against non-debtor parties. *See Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002) (determining that "enjoining a non-consenting creditor's claim against a non-debtor is 'not inconsistent' with the Code . . ."). In surveying the various factors examined in other circuits, the Sixth Circuit held that "when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor . . . ." *Id.* Those factors are as follows:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect

suits against parties who would have indemnity or contribution claims against the debtor;

(4) The impacted class, or classes, has overwhelmingly voted to accept the plan;

(5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;

(6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and

(7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id. (citing *In re A.H. Robins Co.*, 880 F.2d 694, 701-02 (4th Cir. 1989); *MacArthur v. Johns-Manville Corp.*, 837 F.2d 89, 92-94 (2d Cir. 1988); *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000).

More recently, the Seventh Circuit Court of Appeals has determined that "whether a release is 'appropriate' for the reorganization is fact intensive and depends on the nature of the reorganization." *In re Airadigm Comme'ns, Inc.*, 519 F.3d at 657. When the discharge and injunction provisions proposed relate to unknown potential claims and not to any known claims, there are certain factors, such as four (4), five (5) and six (6) identified in the *Dow Corning Corp.* analysis above that are not applicable. With regard to the remaining *Dow Corning Corp.* factors, the discharge and injunction provisions in the Plan are wholly consistent.

In this case, Debtor is not seeking a release or injunction as to any guarantees of Debtor's indebtedness, nor is Debtor seeking to discharge or enjoin any presently known claims against the released parties. The discharge and injunction provisions exist only to ensure the financial stability of the Debtor and, therefore, such discharge and injunction are in the public interest because they will assist the Debtor to continue to successfully operate and provide utility service

to its customers. *See e.g., In re Litchfield Co. of S.C. Ltd. P'ship*, 135 B.R. 797 (W.D.N.C. 1992). In this circumstance where TVII and its affiliates are making significant financial contributions to fund the Plan, the discharge and injunction as to non-debtor partners and affiliates is justified. *See e.g., In re Karta Corp.*, 342 B.R. 45 (S.D.N.Y. 2006). Without the discharge and injunction provisions, TVII will not contribute the equity infusion, line of credit and other money's worth of value that are necessary for the Plan to work, and to avoid a liquidation in which the creditors will no doubt receive less than under the confirmed Plan.

4. Conditions Precedent

Under Article XIII of the Plan, there are conditions to both confirmation and to the Effective Date.

a. Conditions to Confirmation

As set forth in the Plan Modifications, Debtor has removed the condition to confirmation set forth in sub-part (d) of Section 13.1 of the Plan, regarding satisfaction with respect to the sewer credit litigation. The Court orally ruled on this matter and subsequently entered an Order Re: Motion for Modification of Adequate Assurance Payment [Docket No. 513] on August 26, 2008, whereby the Court determined that it has jurisdiction over the sewer credit matter under Section 366 of the Bankruptcy Code, but for the reasons stated in its oral ruling the Debtor's motion is denied, but Debtor is not barred from revisiting the issue in the future.

The remaining matters set forth in sub-parts (a), (b) and (c) of Section 13.1 of the Plan, concerning approval of the Disclosure Statement, a Confirmation Order in form and substance acceptable to the Debtor, and entry of an Order approving Debtor's assumption of the Lease, Franchise Ordinance and the related License Agreements, will be fully satisfied by the entry of a confirmation order.

b. Conditions to Consummation

The two conditions to the Effective Date of the Plan are set forth in Section 13.2 of the Plan. In short, they are (1) that the Confirmation Order has become a Final Order, and (2) any approvals or consents required by the PUCO have been obtained. Each of the conditions may be satisfied or waived in accordance with Section 13.3 of the Plan, by Debtor's filing a written notice of such waiver with the Court. Both are reasonable and appropriate in this case.

CONCLUSION

For the reasons stated above, the Court confirms the Debtor's Plan. A judgment entry consistent with this Opinion will be entered separately.

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EXHIBIT 2

OPERATING LEASE AGREEMENT

THIS OPERATING LEASE AGREEMENT (this "Lease"), made as of the 15TH day of August, 1997 (the "Lease Closing Date"), by and between the CITY OF AKRON, OHIO, a municipal corporation organized and existing under and by virtue of the constitution and laws of the State of Ohio ("Landlord"), and AKRON THERMAL, LIMITED PARTNERSHIP, a Delaware limited partnership ("Tenant").

RECITALS

WHEREAS, Landlord owns and operates the district heating and cooling system that supplies to approximately 200 customers steam, hot water and chilled water for the heating and cooling of businesses and residences located in the Central Business District of the City of Akron, County of Summit, State of Ohio (the "EDS"), including, without limitation, a certain steam power plant formerly owned by BF Goodrich Company (the "Annex"), a certain solid waste to energy incinerator facility (the "RES", and together with the Annex, the EDS, and the steam and water main distribution system located throughout the Seller's municipal area and associated underground piping, manholes, and related facilities, the "System") in Akron, Ohio;

WHEREAS, Landlord and Tenant have entered into that certain Interim License and Operating Agreement (the "RES Interim Agreement"), dated as of August 4, 1995, pursuant to which, among other things, (i) Landlord granted to Tenant a non-exclusive license to enter into, upon, and across, and to use and have access to the Annex, and (ii) Tenant agreed to furnish all labor and related services pertaining to the operation and maintenance of the Annex;

WHEREAS, Landlord and Tenant have entered into that certain Addendum to Interim License and Operating Agreement (the "Addendum", and together with the RES Interim Agreement, the "Interim Agreement"), dated as of November 4, 1995, pursuant to which, among other things, (i) Landlord granted to Tenant a non-exclusive license to enter into, upon, and across, and to use and have access to the RES, and (ii) Tenant agreed to furnish all labor and related services pertaining to the operation and maintenance of the RES;

WHEREAS, Landlord and Tenant are parties to that certain Asset Purchase Agreement, dated as of the date hereof (the "Purchase Agreement"), pursuant to which Tenant may elect to purchase and Landlord may elect to sell the System and substantially all of the assets and properties of Landlord associated with the System;

WHEREAS, the Purchase Agreement and the Interim Agreement contemplate the lease of the System to Tenant pursuant to this Lease in order to permit Tenant to operate the System, pending the closing of the transactions described in the Purchase Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

Section 1. Premises. For the term set forth in Section 2 and otherwise upon the terms and conditions hereinafter set forth, Landlord does hereby lease to Tenant, and Tenant does hereby lease and take from Landlord, the System and all of the land, buildings, structures, systems, fixtures, improvements, equipment, manholes, and underground piping of any kind whatsoever and wherever located and all appurtenant rights, privileges, and easements in favor of Landlord relating to the System and the orderly operation thereof including, without limitation, all of the assets and properties contemplated by Section 2.1 of the Purchase Agreement (all of the foregoing sometimes hereinafter referred to collectively as the "Leased Property"). The Leased Property shall not include the land outside of the Annex; however, Landlord hereby grants to Tenant a non-exclusive license for and during the term of this Lease for purposes of ingress and egress to and from the Annex and the public right of way. Notwithstanding the foregoing, Landlord hereby reserves at all times during the Term the right to install or cause to be installed on the roof of the RES a radio and/or cellular communications tower, and to place any and all required transmission equipment inside of Building A. Such installation and placement shall be at no cost or expense to Tenant. Any and all revenues generated by such installation and placement, net of Landlord's costs and expenses (including without limitation, Landlord's attorney fees), shall be divided equally between Landlord and Tenant. Landlord agrees that any such tower and equipment shall not result in any damage to the roof or structure of the RES, and Landlord covenants to assume all responsibility for any such damage.

Section 2. Term. The term (the "Term") of this Lease shall commence on the date of this Agreement (the "Lease Closing Date"). The initial term of this Lease shall be for ten (10) years commencing on the Lease Closing Date and Tenant shall have the right to renew and extend the initial term for one additional period of ten (10) years. The Term shall end on the earlier to occur of (a) the Purchase Closing Date or (b) the tenth anniversary of the Lease Closing Date or in the event that the Tenant has elected to extend the term for an additional ten (10) years, on the twentieth anniversary of the Lease Closing Date, unless earlier terminated pursuant to the provisions of this Lease.

Section 3. Lease Payments.

3.1 For each year of the Term, Tenant shall pay to Landlord an annual rent equal to $90,000 per year. Tenant shall pay such rent by paying monthly installments pursuant to the "Standard Schedule of Payments" set forth on Schedule 3.1 hereto. Such payments shall be made on the last day of each and every calendar month during the Term. In the event this Lease commences other than on the first day of a calendar year or is terminated other than on the last day of a calendar year, the lease payment for such year during which this Lease commences or is terminated shall be paid pursuant to the Standard Schedule of Payments, and the obligation to pay such rent shall survive the Lease termination.

3.2 Tenant shall pay to Landlord and/or assume all liability for, as the case may be, as additional rent during the Term all of the following:

(a) an annual sum equal to the franchise fee identified in that certain Franchise Ordinance passed by Akron City Council on September 30, 1996, a copy of which is attached hereto as Exhibit A and made a part hereof; Tenant shall make this payment within 30 days after the close of each calendar year;

(b) all property taxes and assessments attributable to the Leased Property during the Term; Landlord shall give notice of receipt of any tax assessments to Tenant within 10 days of Landlord's receipt of such assessment; Tenant shall not pay or be obligated with respect to taxes or other assessments payable with respect to the income of Landlord; Tenant may, at Tenant's expense and with written notice to Landlord, contest the validity or amount of any taxes or other assessments with respect to the Leased Property by appropriate proceedings duly instituted and diligently prosecuted, and in such event, Landlord will provide Tenant access to any books and records of the Landlord that may relate to such taxes or assessments; Landlord shall cooperate fully with Tenant, provided Landlord shall not incur any cost or expense in doing so, in connection with any such contest, and shall permit any such contest to be prosecuted in Landlord's name if the same shall be required for the proper resolution of the disputed matter; Despite any such contest pending, Tenant shall comply with the disputed assessment to the extent required by applicable law, and the Landlord will not be subjected to civil or criminal sanctions, penalties or fees, and that the Leased Property will not be subjected to imminent loss or forfeiture, as a result thereof; During the Term of this Lease the Tenant shall be

responsible for all governmental filings with respect to property taxes related to the Leased Property; and

(c) all of the following liabilities of Landlord (the "Assumed Liabilities") which are hereby expressly assumed and shall be satisfied and discharged by Tenant: (i) all obligations of Landlord to be performed on or after November 4, 1995 under all of the Acquired Contracts (as defined in the Asset Purchase Agreement of even date herewith); and (ii) any liability or obligation relating to or arising from any Environmental Condition as provided in Section 37 below, except to the extent limited by the terms of Section 37.

3.3 Tenant shall deliver to Landlord within 90 days after the end of each fiscal year throughout the Term of this Lease complete financial statements of Tenant, certified by the President of Tenant and an independent auditor reasonably acceptable to the City as being true and accurate in all respects. Landlord shall have the right, subject to Section 14 below, to audit the books and records of Tenant at any time during the Term of this Lease upon 15 days advance written notice to Tenant.

Section 4. Use of Premises; Compliance with Laws.

4.1 The System and all of the Leased Property shall be used and operated on a continuous basis and without interruption by Tenant for the purpose of generating steam, hot water and chilled water to provide heating and cooling services. Notwithstanding any provision of this Lease to the contrary, Tenant shall not be in default under this Lease for any temporary interruption of operations by Tenant, provided (i) in the event such interruption exceeds twelve (12) hours Tenant immediately delivers written notice to Landlord setting forth the date operations temporarily ceased and the cause of such temporary interruption, and (ii) Tenant resumes operations within ninety (90) days after the date operations temporarily ceased. In the event Tenant desires to discontinue its operation of the Leased Property, Tenant shall first make written request to Landlord stating with specificity the reasons for such desired discontinuance, which request shall be delivered to Landlord not later than two (2) years prior to the desired date of such discontinuance. Nothing in this Lease shall be deemed to require Landlord to consent to any discontinuance of Tenant's operations, and such consent shall be given or withheld at the sole and absolute discretion of Landlord; provided, however, that such discontinuance shall be subject at all times to the statutes, rules and regulations applicable to the Public Utilities Commission of Ohio (the "PUCO").

4.2 Tenant shall not commit or permit any waste to the Leased Property, and shall comply with all laws, rules, regulations, orders, and

other requirements applicable to the Leased Property imposed by any Governmental Authority having jurisdiction with respect thereto, including, without limitation, those pertaining to the condition of the environment (collectively, "Applicable Legal Requirements"). Notwithstanding any provision of this Lease to the contrary, Tenant may, but shall not be obligated to, contest any Applicable Legal Requirements by appropriate proceedings duly instituted and diligently prosecuted at Tenant's expense, and Tenant shall notify Landlord prior to the commencement of any such contest. So long as any such contest is pending, Tenant shall comply with the disputed Applicable Legal Requirement to the extent required by applicable law. The responsibility for any alterations, additions, improvements, repairs or replacements to the Lease Property required by Applicable Legal Requirements shall be as set forth in Sections 9 and 10.

Section 5. Operation of System; Authority.

5.1 Subject to Section 4.1 above, Tenant shall operate and manage the System on a continuous basis and without interruption during the Term and shall be entitled to any and all revenues and profits from the operation of the System. Tenant shall have full authority for the operation and management of the System and the Leased Property during the Term including, without limitation, full power and authority with respect to:

(a) all matters with respect to the operation of the System and the generation of steam, hot water and chilled water and the delivery of steam and chilled water to the present and future customers of the System;

(b) setting and modifying the billing rates for the provision of steam, hot water and chilled water to the System's customers (subject to any required Governmental Authority approvals) and preparing and presenting all information and data required by any Governmental Authority in connection with rate increases or modifications; provided, however, Tenant shall hold all steam, hot water and chilled water prices at current levels for all existing customers and end users of the System as of November 4, 1995 (but subject to imposition of any gross receipts tax or other tax on such prices imposed by the PUCO or other tax authority), and shall charge the Landlord at Landlord's current rate or less (subject to any of the aforementioned taxes), for a period of at least three years from November 4, 1995; Tenant shall not increase the rates charged to Landlord for or during the period from November 5, 1998 to December 31, 1998 unless Tenant shall have given at least ninety (90) days notice of such an increase to Landlord. Thereafter, Tenant shall

not increase the rates charged to Landlord unless Tenant shall have given notice to Landlord at least 180 days prior to the beginning of Landlord's fiscal year; provided, however, that in no event shall the rates charged to Landlord at any time exceed the most favorable rates charged by Tenant to the class of customers most similar to Landlord;

(c) employing personnel required for the operation and management of the System and planning and administering all matters pertaining to labor relations, salaries, wages, working conditions, hours of work, termination of employment, employee benefits, employee staffing, safety, and related matters pertaining to such employees;

(d) engaging and supervising such independent contractors as it may deem necessary;

(e) purchasing materials, supplies, fuel, light, power, transportation, and services necessary or desirable for the operation of the System;

(f) making or directing all maintenance and repairs to the System and the Leased Property;

(g) billing to and collecting from customers all charges in connection with the operation of the System and the delivery of steam and chilled water;

(h) making all disbursements in connection with the operation and management of the System;

(i) securing and maintaining adequate and reasonable insurance, as set forth in Section 10, with respect to the operation of the System and Tenant's possession of the Leased Property, including insurance covering the risk of personal injury to, or death of, the Tenant's personnel or others, the risk of fire, and other damage to the Leased Property;

(j) securing and maintaining all permits, certificates, licenses, approvals, evidences of authority, easements, and rights-of-way necessary or desirable for the operation of the System and filing all reports and notices and disbursing funds for all payments required in connection therewith; and

(k) maintaining books of account, including all ledgers and journals, and generally performing all accounting and disbursing services with respect to the operation of the System.

Section 6. Assignment of Contracts and Authorizations; License of Intellectual Property.

6.1 Except as provided in Section 6.2 hereof, all contracts and authorizations listed on Schedule 6.1 hereto which would constitute an Acquired Contract or Acquired Authorization are assigned by Landlord to Tenant as of November 4, 1995, by execution of this Lease (the "Assigned Contracts and Authorizations") and Landlord shall, at Tenant's request, execute and deliver any and all agreements, certificates, and other documents reasonably requested by Tenant and in form acceptable to Landlord, which are necessary or desirable to effect the assignment of such Assigned Contracts and Authorizations to Tenant. Tenant hereby assumes and agrees to perform the obligations of Landlord under the Assigned Contracts and Authorizations except for those obligations which (a) are the result of Landlord's breach of an Assigned Contract or Authorization, (b) should have been performed by Landlord prior to November 4, 1995, under the terms of such Assigned Contract or Authorization, or (c) constitute an inaccuracy in or breach of Landlord's representations and warranties in this Lease or the Purchase Agreement. Except as provided in Section 6.3, and subject to the limitations set forth in this Lease, Tenant shall have the right to renegotiate, replace, modify, amend, or terminate such Assigned Contracts and Authorizations as it shall, in its sole discretion, determine.

6.2 All Acquired Contracts and Acquired Authorizations which cannot, by their terms or because consent is not granted by a customer, be assigned to Tenant ("Retained Contracts and Authorizations") shall be retained by Landlord until such time as such Retained Contracts and Authorizations can be assigned to Tenant; provided, however, that all monetary obligations thereunder shall be reimbursed by Tenant to Landlord and that all benefits of such Retained Contracts and Authorizations shall inure to Tenant. Until such time, Tenant shall serve as agent for Landlord under such Retained Contracts and Authorizations with respect to all matters covered thereby, and, except as provided in Section 6.3, and subject to the limitations set forth in this Lease, Tenant shall have the authority, as agent for Landlord, to renegotiate, replace, modify, amend, or terminate any such Retained Contract and Authorization. Landlord shall cooperate with Tenant, at no cost or expense to Landlord, in obtaining any consent required to assign the Retained Contracts and Authorizations to Tenant or provide to Tenant the benefits of such Contract or Authorization as promptly as possible after the Lease Closing Date.

6.3 Tenant shall maintain and perform during the Term all heating and cooling contracts listed on Schedule 6.3 attached hereto (the "Heating/Cooling Contracts") in their current form and shall not renegotiate, replace, modify, amend, or terminate such Heating/Cooling Contracts without the prior written consent of Landlord, which consent shall not be unreasonably withheld. Landlord agrees not to take any action to cause any Heating/Cooling Contract to be terminated and Landlord shall not force the Tenant to terminate any Heating/Cooling Contract. Tenant hereby indemnifies and agrees to defend and hold harmless Landlord from and against any and all losses, costs, claims, liabilities, damages and expenses (including, without limitation, reasonably attorneys' and expert fees and expenses), fines, penalties, charges, remedial actions, and requirements, imposed upon, suffered, or incurred by Landlord by reason of claims arising from or related to acts or omissions of Tenant occurring on or after November 4, 1995, with respect to the Heating/Cooling Contracts.

6.4 Landlord hereby grants Tenant an exclusive, royalty free license to use the patents, trademarks, trade names, copyrights, licenses, inventions, processes, trade secrets, discoveries, and other intellectual property described on Schedule 6.4 hereto. The term of the license granted by Landlord to Tenant shall be equal to the Term of this Lease.

Section 7. Management; Employees. Tenant shall be responsible for providing the management, accounting, engineering, administrative, and general personnel required for the operation off the System during the Term, and for all matters relating to the employment and dismissal of such personnel. In order to obtain such personnel, Tenant may hire its own employees or contract for personnel with others.

Section 8. Expansion or Modification of Premises. Tenant shall be entitled to make such modifications, additions, and improvements, including capital improvements (collectively, "Improvements") to the Leased Property as Tenant deems necessary or desirable; provided, however, that Tenant shall only make material Improvements (i.e. those costing $50,000 or more) to the Leased Property with the prior approval of the Director of Public Service of the City of Akron or her/his predetermined designee, such approval not to be unreasonably withheld; and, provided further, that Tenant shall not be entitled to make any Improvement if such Improvement would materially adversely impair the value of the System or the Leased Property for its current use.

Section 9. Maintenance of the Leased Property. Tenant shall be responsible for, and shall pay the cost of, all maintenance of the System and the Leased Property. Tenant shall not make any major repairs to the Leased Property without the prior consent of the Director of Public Service of the Landlord or his

authorized designee, which consent shall not be unreasonably withheld. Tenant shall be responsible for maintaining the exterior landscaping around the RES in a commercially reasonable manner and at an appearance level substantially equivalent to past practices.

Section 10. Insurance.

10.1 Tenant shall at all times during the Term, at its own expense, maintain in full force and effect a comprehensive commercial general liability insurance policy, including products liability insurance, with a company or companies approved by the Landlord, which approval shall not be unreasonably withheld, having a combined single limit of at least $5,000,000 per occurrence, with respect to bodily injury and property damage. All such policies shall name the Landlord as an additional insured and shall specify that the insurance evidenced thereby will not be cancelled unless the insurer has given the Landlord at least 30 days prior written notice. In no event shall Tenant do or omit to do any act which results or may result in cancellation of such insurance.

10.2 Tenant shall keep the RES and the Annex and all additions, alterations, modifications and improvements thereto, including all boilers and machinery, insured, with a company or companies approved by Landlord, which approval shall not be unreasonably withheld, against loss by fire and all other risks and hazards covered under a standard form All-Risk fire and extended coverage insurance policy and such policy shall insure the RES at a replacement value of $5,150,000 and the Annex at a replacement value of $4,120,000. Tenant covenants and agrees to promptly add such improvements and/or modifications to the foregoing policy or policies of insurance. Tenant hereby waives any and all claims for loss, damage, destruction, or theft to any personal property which it places or causes to be placed in, on or within the RES or the Annex, whether or not such personal property is owned by Tenant, and regardless of whether Tenant has maintained adequate insurance pertaining to such personal property. All such policies shall name Landlord as an additional insured. Tenant and Landlord agree that, except for loss or damage resulting from Tenant's negligent acts or omissions or those of its officers, employees and agents, Tenant shall not be responsible for the property stored by Landlord in Buildings A and D pursuant to Section 33 below and that Landlord shall bear the risk of loss with respect to such property. Landlord shall not recover any proceeds of Tenant's insurance policies to cover losses related to such property. Additionally with respect to Landlord's use of Buildings A and D, Landlord shall carry a comprehensive commercial general liability insurance policy having a combined single limit of at least $1,000,000 per occurrence, with respect to bodily injury and property damage, or Landlord may self-insure the foregoing risks. All such policies shall name Tenant as an additional insured and shall specify that the insurance evidenced thereby will not be cancelled unless the insurer has given

the Tenant at least 30 days prior written notice. In no event shall Landlord do or omit to do any act which results or may results in cancellation of any such insurance.

10.3 Tenant shall carry at least the following minimum amounts of insurance throughout the remainder of the Term, with Landlord named as an additional insured thereunder and with companies approved by Landlord, which approval shall not be unreasonably withheld: (i) a policy or policies of automobile insurance covering all officers, partners, agents, and employees of Tenant in an amount not less than $5,000,000; and (ii) workers' compensation insurance as required by the State of Ohio.

10.4 Each policy of insurance referred to in Sections 10.1, 10.2, 10.3 and 10.5 and any other fire or casualty insurance maintained by Tenant as to the Leased Property, or by Landlord as to Buildings A and D and the land area outside of the Annex, as the case may be, shall provide a waiver and release by the insurer of any and all claims, demands, actions, suits, and rights (including, without limitation, any and all rights of subrogation) which said insurer might otherwise have against either party hereto as a result of any acts or omissions of such party.

10.5 Tenant shall be responsible for maintaining casualty insurance covering Tenant's personal property and improvements located on the Leased Property, and Landlord shall have no liability with respect to any damage or loss to such personal property unless caused by the wilful misconduct or gross negligence of Landlord or its agents, employees, or representatives. Any insurance proceeds payable under this Section 10.5 shall be paid directly to Tenant, and Landlord shall have no right or interest whatsoever in any such proceeds.

10.6 Tenant shall deliver to Landlord true and accurate copies of all insurance policies required in this Section 10 on an annual basis. Upon request of Tenant, but not more often than once in any 12-month period, Landlord shall deliver to Tenant a copy of Landlord's liability insurance policy covering its use of Buildings A and D or, in the alternative, evidence of adequate self-insurance as to the foregoing risk.

Section 11. Damage and Destruction. In the event of any damage to or destruction of the Leased Property or any portion thereof during the Term by fire, explosion or other casualty ("Damage or Destruction"), Tenant shall remain in possession of the Leased Property and shall repair or restore the affected portions of the Leased Property. Notwithstanding the foregoing, Tenant shall only be required in the event of Damage or Destruction to provide a functional replacement for the RES and/or the Annex for purposes of continuing electric.

steam, hot water and chilled water services consistent with those currently provided by the System.

Section 12. Eminent Domain.

12.1 If the possession of, title to, or ownership of all of the Leased Property shall be permanently taken during the Term by any Governmental Authority under a statutory power of condemnation or eminent domain or by private sale in lieu thereof, this Lease shall terminate upon the transfer of title to such Governmental Authority.

12.2 If the possession of, title to, or ownership of any portion, but less than all, of the Leased Property shall be permanently taken during the Term by any Governmental Authority under a statutory power of condemnation or eminent domain or by private sale in lieu thereof, and the operation of the System is thereby materially impaired and cannot be restored, Tenant may, at its option, elect to terminate this Lease by the delivery of notice thereof to Landlord within 45 days after the date any judgment or order ordering such taking (or agreed settlement in lieu thereof) becomes final and no longer subject to appeal or the date upon which title transfers to such Governmental Authority, whichever is earlier. In the event Tenant elects to terminate this Lease pursuant to this Section 12.2, this Lease shall terminate on the earlier of (a) the date of the transfer of title to such Governmental Authority or (b) the date on which Tenant delivers notice of its election to terminate to Landlord. If Tenant does not elect to terminate this Lease, this Lease shall remain in full force and effect for the balance of the Term.

12.3 The provisions for termination of this Lease contained in Section 12.2 shall not be construed so as to adversely affect or prejudice the rights of either Landlord or Tenant to recover from any Governmental Authority the full and proper compensation, damages, and expense allowed by law for the taking or any partial taking or resulting from the taking or any partial taking of their respective interests. Without limiting the generality of the foregoing, Tenant shall be entitled to make a claim and recover an award for the value of Tenant's improvements and property of whatsoever nature located in on or about the Leased Property, and to the extent allowed by law, for any lost business, and Landlord shall be entitled to make a claim and recover an award for the value of Landlord's fee simple interest in the Leased Property.

Section 13. Default.

13.1 The occurrence of any of the following shall constitute an event of default (an "Event of Default") by Tenant under this Lease:

(a) the failure of Tenant to pay any lease payment or any other amounts payable by Tenant hereunder at the time provided herein and such failure shall continue for 30 days after the same becomes due and payable;

(b) the failure of Tenant to perform any other covenant or obligation or to comply with any other term or condition imposed upon Tenant under this Lease if such failure shall continue for a period of 30 days or more after Tenant receives written notice thereof from Landlord; provided that, if such failure is of such a nature that it cannot, using reasonable diligence, be cured within said period, such failure shall not constitute an Event of Default if Tenant promptly commences to cure such failure and diligently and continuously pursues the same to completion thereafter and, in fact, fully cures same within 90 days after such notice;

(c) the making by Tenant of any general assignment of all or a substantial portion of all of Tenant's assets for the benefit of creditors; or the filing by or against Tenant of a petition in bankruptcy, insolvency or for reorganization or arrangement or for the appointment of a receiver of all or any substantial portion of Tenant's assets pursuant to any statute of the United States or any state, and Tenant fails to secure a stay or discharge within 60 days, or the attachment, execution or other judicial seizure of substantially all of Tenant's assets where such seizure is not discharged in 60 days;

(d) the failure of Tenant to continuously operate the System as required under this Lease, unless such failure results from a Damage or Destruction or a taking pursuant to Section 12; or

(e) any default or breach of the terms of the Guaranty referred to in Section 39 below.

13.2 Upon the occurrence of an Event of Default, Landlord shall have the right, without further notice to Tenant, to terminate this Lease and re-enter and repossess the Leased Property by summary proceedings or otherwise. Tenant and Landlord acknowledge that, in the event that Landlord elects to terminate this Lease as a result of Tenant's default of any of its obligations under this Lease after expiration of the applicable notice and cure periods, including, without limitation, subsection 13.1(d) above, Landlord will suffer damages arising from the interruption and/or discontinuance of the operation of the System. The exact amount of such damages are and will be difficult to ascertain with certainty, and, accordingly, Tenant and Landlord agree that $2,000,000.00 (the "Liquidated

Damages") shall constitute liquidated damages for Tenant's default of any of its obligations under this Lease after expiration of the applicable notice and cure periods. Notwithstanding that Landlord's actual damages would be uncertain and difficult to ascertain, Tenant and Landlord agree that the Liquidated Damages are reasonable and bear a relationship to the damages that Landlord might sustain in the event of Tenant's default under this Lease. Tenant and Landlord agree that the Liquidated Damages is not intended to be, and in no event should be construed to be, a penalty, but is intended as fixed damages agreed to by the parties as settlement of damages in advance. Landlord hereby agrees that, except as provided in Section 13.3 below, its receipt of the Liquidated Damages in the event of Tenant's default in any of its obligations under this Lease is the sole and exclusive right or remedy that Landlord has, or may be entitled to exercise or pursue, against Tenant, whether at law or in equity, as to such failure or default, except, however, that Landlord shall be entitled to take any and all necessary action against Tenant to obtain immediate delivery of all permits needed to operate the System. In addition, the parties agree that the provisions of this Lease shall be enforceable by injunction, specific performance, or other equitable relief (without reference to whether or not an adequate remedy at law may be available) in addition to any other remedy which may be available in law or in equity or by statute or otherwise pursuant to this Lease.

13.3 In addition to, but not in limitation of, any of the remedies set forth in this Lease or given to Landlord at law or in equity, Landlord shall also have the right and option, in the event of any default by Tenant under this Lease and the continuance of such default after the period of notice above provided, to elect to have this Lease continue and to proceed against Tenant for recovery of all loss or damage arising from or in any way related to such default as permitted under applicable law, and any such action by Landlord shall not be construed as an election to terminate this Lease unless Landlord expressly exercises its option hereinbefore provided to repossess the Leased Property and to declare the Term hereof ended. In such event, Tenant shall continue to be liable for the payment of the rents and the performance of the other covenants and conditions hereof and shall pay to Landlord all deficits as the amounts of such deficits from time to time are ascertained. Notwithstanding anything to the contrary in this Section 13.3, Landlord and Tenant hereby acknowledge and agree that in any legal proceeding based upon Tenant's default, except as to any proceeding involving or pertaining to Tenant's obligations with respect to Environmental Conditions, Landlord's total recovery against Tenant shall not exceed the Liquidated Damages.

13.4 Landlord and Tenant hereby waive trial by jury in any action, proceeding or counterclaim brought by either against the other upon any matters pertaining to or affecting title to or occupancy and/or possession of the

Leased Property, including without limitation any proceeding for forcible entry and detainer or ejectment.

13.5 Every demand for rent due wherever and whenever made shall have the same effect as if made at the time it falls due and at the place of payment, and after the service of any notice or commencement of any suit, or final judgment therein, Landlord may receive and collect any rent due, and such collection or receipt shall not operate as a waiver of nor affect such notice, suit or judgement.

Section 14. Access to Premises. Landlord shall have the right, following reasonable advance notice to Tenant, to enter any portion of the Leased Property during Tenant's normal business hours for the purpose of exercising Landlord's right to cure pursuant to Sections 13 and 17 or examining and inspecting the Leased Property or for any other reasonable civic or business purpose as Landlord may deem necessary or appropriate. As a condition to such entry, Landlord shall keep strictly confidential all of Tenant's trade secrets, processes, and business information and practices which Landlord may observe or to which it may become privy during any such entry to the Leased Property, and shall use reasonable efforts not to interfere with the conduct of Tenant's business in connection with any such entry.

Section 15. Assignment and Subletting. Except as set forth herein, Tenant shall not assign this Lease, or sublet the Leased Property or any part thereof, without the prior consent of Landlord, which consent may be given or withheld in the sole and absolute discretion of Landlord. Landlord shall notify Tenant in writing within 30 days of any request by Tenant for such consent as to whether or not Landlord consents to such assignment. Notwithstanding the foregoing, Tenant shall have the right to assign or pledge Tenant's right, title, and interest in this Lease to a financial lending institution as collateral security in connection with any purchase money financing of the System or any financing in connection with improvements to the System; provided, however, that in the event such lending institution exercises any right under such assignment or pledge to realize upon such security or pledge, any attempted transfer by the lending institution to any third party shall be and is hereby prohibited unless the foregoing provisions of this Section 15 are fully complied with and the prior consent of the Director of Public Service is obtained. For purposes of this Section 15, an assignment requiring approval of Landlord shall include, without limiting the foregoing, (a) any change of the general partner of Tenant or in the majority ownership or control of the general partner of Tenant other than a transfer of the general partnership interest in Tenant to North American Thermal Systems Limited Lability Company ("NATS") so long as NATS is and remains at least owned 50% by TVI (as defined below) and TVI continues to control NATS and manage its day-

to-day operations, (b) any transfer of an interest or change in control of Tenant such that Carl E. Avers, Lewis A. Mahoney, or NATS would no longer directly control Tenant, (c) any transfer of a majority of the assets of Tenant whether in the aggregate or in a series of transactions, (d) any transfer of a majority of the stock or substantially all of the assets of Thermal Ventures, Inc. ("TVI"), whether in the aggregate or in a series of transactions (other than a transfer of general partnership interests to NATS), or any merger, consolidation, or liquidation of either Tenant or TVI. Notwithstanding anything contained in this Lease to the contrary, the assignment of Tenant's rights in this Lease or the subletting of all or part of the Leased Property to an entity whose sole general partner is either TVI or NATS and which is controlled by Lewis A. Mahoney and/or Carl E. Avers shall not be considered an assignment requiring approval of Landlord. Any attempted assignment in violation of this Section shall be void and shall constitute a material default of this Lease.

Section 16. Covenant of Quiet Enjoyment. Landlord, for itself and its successors and assigns, covenants with Tenant that, upon performing the covenants and obligations on Tenant's part to be kept and performed under this Lease, Tenant shall and may peaceably and quietly have, hold and enjoy the Leased Property during the Term without any hindrance of Landlord, its successors and assigns, or any other person lawfully claiming the Leased Property or any portion thereof by, through or under Landlord.

Section 17. Right to Perform Covenants. If either party hereto shall at any time fail or refuse to perform any of its covenants or obligations hereunder, the other party may, upon 30 days' prior notice to the party so failing or refusing to perform, but shall not be obligated to, perform such covenant or obligation without waiving or releasing the party so failing or refusing to perform from any liability therefor. All sums paid, advanced or expended by the other party hereto pursuant to this Section 17 and all costs and expenses incurred by such other party in connection therewith (including, without limitation, attorneys' fees) shall be repaid to such other party by the party so failing to perform, on demand following delivery to the other party of reasonable documentation evidencing the expenditure, together with interest on any balance thereof from and after the date such sums, costs and expenses were so paid, advanced, expended or incurred by such other party at a rate equal to two percent (2%) per annum above the prime rate of interest of First Merit Bank of Akron, Ohio, from time to time in effect. Any and all sums due from Tenant to Landlord hereunder shall be deemed to be additional rent due Landlord under this Lease and, except as otherwise provided in this Lease, shall be paid by Tenant to Landlord within 30 days after notice from Landlord together with applicable invoices or other evidence of such expenditure.

Section 18. Surrender of Leased Property. Upon the expiration or termination of this Lease for any reason other than consummation of the sale of the Leased Property to Tenant pursuant to the Purchase Agreement, Tenant shall surrender (i) the Leased Property to Landlord broom-clean and in its current operating condition existing on the Lease Closing Date, subject to any Improvements made during the Term, normal wear and tear excepted, (ii) the Acquired Inventory, except such Acquired Inventory consumed or used by Tenant or Landlord between the date hereof and the date of such expiration or termination, in the ordinary course of business and in accordance with the terms of this Lease and the Purchase Agreement, and (iii) the Acquired Equipment in good order and repair, normal wear and tear and insured casualty excepted.

Section 19. Termination.

19.1 Notwithstanding anything to the contrary in this Lease but subject to obtaining any necessary governmental approvals, this Lease may be terminated prior to expiration of the Term as follows:

(a) at any time upon the mutual agreement of Landlord and Tenant;

(b) pursuant to the terms of Section 12.1;

(c) by Tenant pursuant to Section 12.2;

(d) by Landlord pursuant to Section 13.2; or

(e) by Tenant pursuant to Section 10.4(b) of the Asset Purchase Agreement.

19.2 In the event of the termination of this Lease, Tenant shall take all reasonable action requested by Landlord, and shall execute any and all agreements, certificates, and other documents which may be reasonably required by Landlord, in order to transfer possession of the Leased Property and the rights and obligations of Tenant under the Assigned Contracts and Authorizations to Landlord or another party and to otherwise terminate the effect of this Lease, and Landlord will thereafter assume the full obligations under the Assigned Contracts.

Section 20. Waiver. No consent or waiver, express or implied, by either party hereto with respect to any breach or default by the other party hereto in the performance of any of the covenants or obligations of such other party hereto under this Lease shall be deemed or construed to be a consent to or waiver of any other such breach or default. Failure or delay on the part of either

party hereto to complain of any act (whether of commission or omission) of the other party hereto or to declare a breach of or default under this Lease, irrespective of how long such failure or delay continues, shall not constitute a waiver by such party hereto of its rights hereunder. No waiver by either party hereto of any default or breach by the other party hereto in the performance of any of the covenants or obligations of such other party hereto under this Lease shall be deemed to have been made by such party unless contained in a writing executed by such party hereto.

Section 21. Amendment. This Lease may be amended only by an agreement or instrument in writing which refers to this Lease and is duly executed by the parties to this Lease.

Section 22. Entire Contract. This Lease, together with the Schedules hereto, the Purchase Agreement and the other related agreements referred to herein or therein, is the entire contract between the parties relating to the subject matter hereof, and supersedes all prior and contemporaneous negotiations, understandings, and agreements, written or oral, between the parties and, specifically, the Interim Agreement is hereby terminated and superseded by this Lease and the Purchase Agreement.

Section 23. Third Parties. Nothing in this Lease, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Lease on any other persons other than the parties and their respective successors and assigns, nor is anything in this Lease intended to relieve or discharge the obligation or liability of any third persons to any party, nor shall any provision give any third parties any right of subrogation or action over or against any of the parties hereto. This Lease is not intended to and does not create any third party beneficiary rights whatsoever.

Section 24. Counterparts. Any number of counterparts of this Lease may be executed and delivered and each shall be considered an original and together such counterparts shall constitute one agreement.

Section 25. Headings. The headings contained in this Lease have been inserted for convenience only and shall not affect the meaning of any of the language contained herein.

Section 26. Notices. Any notice, demand, or request required or permitted to be given under the provisions of this Lease shall be in writing and delivered personally, or by registered or certified mail, postage prepaid, or by a nationally recognized overnight express courier service for next day delivery, in each case, addressed to the following persons at their respective addresses set forth

below, or to such other addresses or persons as either party may designate by subsequent notice to the other party:

If to Tenant, to:

Akron Thermal, Limited Partnership
c/o Thermal Ventures, Inc.
29 East Front Street
Youngstown, Ohio 44503
Attention: Lewis A. Mahoney, President

With a copy to:

Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Attention: Neil F. Luria, Esq.

If to Landlord, to:

City of Akron
Room 201
166 South High Street
Akron, Ohio 44308
Attention: Joseph Kidder,
Director of Public Service

With a copy to:

City of Akron
Room 201
161 South High Street
Akron, Ohio 44308
Attention: Max Rothal, Director of Law

and to:

Samuel R. Knezevic, Esq.
Thompson, Hine & Flory LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114

Section 27. Public Announcements. No press release or public announcement regarding this Lease or the contents hereof shall be made by either party without the prior written approval of the other party (which approval shall not be unreasonably withheld), except as may be necessary, in the opinion of counsel for such party, to meet the requirements or regulation of any applicable law, or to comply with any request of any stock exchange on which the securities of such party may be listed. It is expressly understood that this Lease may be disclosed by either party in connection with obtaining any privileges, permits, licenses, grants, franchises, variances, waivers, approval, consents, exemptions, and certifications, and by Tenant in connection with its securing financing for the transactions contemplated hereby.

Section 28. Severability. Each article, section, subsection, and lesser section of this Lease constitutes a separate and distinct undertaking, covenant, and/or provision hereof. Whenever possible, each provision of this Lease shall be interpreted in such manner as to be effective and valid under applicable law. In the event that any provision of this Lease shall be determined to be unlawful, such provision shall be deemed severed from this Lease, but every other provision of this Lease shall remain in full force and effect, and in substitution for any such provision held unlawful there shall be substituted a provision of similar import reflecting the original intent of the parties hereto to the extent permissible under law.

Section 29. Governing Law. This Lease shall in all respects be interpreted, construed, and governed by and in accordance with the internal substantive law of the State of Ohio.

Section 30. Definitions. Capitalized terms used herein shall have the meanings ascribed to them in the Purchase Agreement unless otherwise defined herein.

Section 31. Signs/Advertising. Tenant shall not place, construct, or maintain any sign, advertisement or banner upon any building or part of the System without Landlord's prior consent; except, however, that Tenant shall be entitled to post a sign outside the RES and the Annex containing the name "Akron Thermal, Limited Partnership" and the address of the RES or the Annex, as the case may be, provided that Tenant obtains all normally required approvals from Landlord, if required by law, including but not limited to, approval of the City Planning Commission and the City Council, and that such sign complies at all times with all applicable ordinances of Landlord.

Section 32. Books and Records. Tenant agrees that it shall preserve and maintain any books and records belonging to the Landlord on the

premises of the RES, the Annex, or, with the permission of the Landlord, an offsite storage area. Tenant agrees not to destroy any such books and records without first obtaining the prior written approval of the Landlord. In addition, Tenant agrees to, whenever reasonably requested by the Landlord, permit the Landlord to have access to, and make copies of (at the Landlord's expense), during regular business hours, all books and records relating to the Akron Energy System which are in Tenant's possession.

Section 33. Buildings A and D. Tenant and Landlord hereby acknowledge and agree that Landlord shall be entitled to continue to use buildings A and D of the RES, which buildings are more fully described on Exhibit B attached hereto ("Buildings A and D"), for storage of certain books, records, and files to be retained by Landlord (the "Retained Records") and other file storage and any other purposes not interfering with Tenant's operations. Landlord shall at all times during which personal property is stored in Buildings A or D and at all times that Landlord's employees or agents are using Buildings A and D carry liability insurance, or self-insure such risk, in amounts and at levels required under this Lease.

Section 34. Electrical Substations. Tenant hereby acknowledges and agrees that the electrical substations located in and around the RES and the Annex (the "Substations") shall at all times remain the property of the Landlord; provided, however, Tenant shall serve as the agent of the Landlord and operate the Substations, collect payments from the businesses and other establishments that receive electricity through such Substations and then remit such funds to the Ohio Edison Company. The terms and provisions of this Section 34 shall survive any termination or merger of this Lease resulting from a purchase by Tenant of the System, until such time as the PUCO permits the transfer of ownership of the Substations from Landlord to Tenant.

Section 35. Retained Contract Agency Agreement.

35.1 Effective during the term specified below, Landlord hereby contracts with Tenant to provide the services which Landlord is required to deliver under, and appoints and employs Tenant as its agent for, the heating and cooling service contracts listed on Schedule 6.2 as modified from time to time (the "Retained Contracts"). The Retained Contracts cannot by their terms be assigned to Tenant without the consent of a third party, which consent has either not yet been obtained or is subject to further action or confirmation. Tenant hereby accepts such appointment upon the terms and conditions set forth below.

35.2 The term of this appointment shall become effective as of the date of the Interim Agreement and shall continue thereafter until the earlier of

(a) termination of all of the Retained Contracts, (b) assignment of all of the Retained Contracts to Tenant, or (c) expiration of the Term if the Leased Property is not purchased by Tenant pursuant to the Purchase Agreement. Upon receipt of all consents to assignment from Landlord to Tenant required from third parties under or in connection with a Retained Contract, such Retained Contract automatically shall be deemed to have been assigned to Tenant without further action by any person. Thereafter, such contract shall cease to be a Retained Contract under this Section 35.

35.3 Landlord hereby grants to Tenant all of its authority and powers under or with respect to the Retained Contracts including but not limited to the authority and power (all of which may be exercised in the name of Landlord):

(a) To enforce the terms and provisions of any such Retained Contract now in effect and to comply with the terms and provisions thereof as the same impose obligations on Landlord;

(b) To maintain and perform during the term of this appointment the Retained Contracts and in connection therewith to renegotiate, replace, modify, amend, or terminate any Retained Contract;

(c) To collect payment for services rendered and give receipts therefor;

(d) To institute and prosecute actions against customers for failure to comply with any term of any Retained Contract, sue and recover payment and when deemed necessary or advisable by Tenant, to compromise and release such actions or suits and reinstate such Retained Contracts; and

(e) To communicate in the ordinary course of business or otherwise with the other party of any such Retained Contracts.

35.4 (a) To the extent that Tenant is provided the benefits of the Retained Contracts pursuant to this Section 35, Tenant shall perform the benefit of the issuer thereof or the other party or parties thereto, the obligations of seller thereunder or in connection therewith, but only to the extent that (i) such action by Tenant would not result in any default thereunder or in connection therewith and (ii) such obligation would have been an Assumed Obligation but for the nonassignability or nontransferability thereof.

(b) Tenant shall, in cooperation with Landlord, use its best efforts to obtain the consent of any person required to assign the Retained Contracts to Tenant.

35.5 Landlord hereby agrees as follows:

(a) Landlord shall use all reasonable efforts, in cooperation with Tenant, to obtain the consent of any person required to assign the Retained Contracts to Tenant and to provide to Tenant all of the benefits of the Retained Contracts;

(b) Landlord shall direct the other party or parties to each Retained Contract to directly remit payments thereunder or in connection therewith directly to a lockbox designated by Tenant and to hold as trustee for, and promptly remit to, Tenant any payment Landlord receives under or in connection with any such Retained Contract;

(c) To grant Tenant and any lender of that Tenant so designates a security interest in all of Landlord's rights under the Retained Contracts including but not limited to Landlord's rights to receive payments thereunder and to execute, deliver, and file such documents and instruments as Tenant and Tenant's lenders may request to effect, perfect, evidence, or enforce such security interest;

(d) To enforce, at the request of Tenant, any and all rights of Landlord under the Retained Contracts against the other party or parties thereto;

(e) Not to renegotiate, replace, modify, amend, or terminate any Retained Contract; and

(f) To promptly notify Tenant of any correspondence or communications pertaining to the System or the Retained Contract with any other party to any Retained Contract.

Section 36. Electrical Contracts.

36.1 Effective during the term specified below, Landlord hereby contracts with Tenant to provide the services which Landlord is required to deliver under, and appoints and employs Tenant as its agent for, the electrical service contracts listed on Schedule 36.1 as modified from time to time (the "Electrical Contracts") The Electrical Contracts cannot by their terms be assigned to the Tenant without the consent of a third party, which consent has either not yet been obtained or is subject to further action or confirmation. Tenant hereby accepts such appointment upon the terms and conditions set forth below.

36.2 The term of this appointment (the "Substation Term") shall become effective as of the Interim Agreement and shall continue thereafter until termination of all of the Electrical Contracts.

36.3 Landlord hereby grants to Tenant all of its authority and powers under or with respect to the Electrical Contracts including but not limited to the authority and power (all of which may be exercised in the name of Landlord):

(a) To enforce the terms and provisions of any such Electrical Contract now in effect and to comply with the terms and provisions thereof as the same impose obligations on Landlord.

(b) To maintain and perform during the Substation Term the Electrical Contracts and in connection therewith to renegotiate, replace, modify, amend, or terminate any Electrical Contract.

(c) To collect payment for services rendered and give receipts therefor.

(d) To institute and prosecute actions against customers for failure to comply with any term of any Electrical Contract, sue and recover payment and when deemed necessary or advisable by Tenant, to compromise and release such actions or suits, and reinstate such Electrical Contracts.

(e) To communicate in the ordinary course or otherwise with the other party of any such Electrical Contracts.

36.4 (a) To the extent that Tenant is provided the benefits of the Electrical Contracts pursuant to this Section 36, Tenant shall perform for the benefit of the issuer thereof or the other party or parties thereto, the obligations of Landlord thereunder or in connection therewith, but only to the extent that such action by Tenant would not result in any default thereunder or in connection therewith.

36.5 Landlord hereby agrees as follows:

(a) To direct the other party or parties to each Electrical Contract to directly remit payments thereunder or in connection therewith directly to a lockbox designated by Tenant and to hold as trustee for, and promptly remit to, Tenant any payment Landlord receives under or in connection with any such Electrical Contract;

(b) Amend Schedule 36.1 hereto to include additional Electrical Contracts that Landlord enters into with electrical customers who receive their electricity through the electrical substations located on the Real Property and the land outside of the Annex;

(c) To enforce, at the request of Tenant, any and all rights of Landlord under the Electrical Contracts against the other party or parties thereto;

(d) Not to renegotiate, replace, modify, amend, or terminate any Electrical Contract; and

(e) To promptly notify Tenant of any and all correspondence or communication with any other party to any Electrical Contract.

36.6 All of the terms and provisions of this Section 36 shall survive any termination or merger of this Lease resulting from a purchase by Tenant of the System, until such time as the PUCO permits the transfer of the Substations from Landlord to Tenant or until termination of all of the Electrical Contracts as provided in Section 36.2 above.

Section 37. As Is Condition; Environmental Liability.

37.1 Tenant hereby acknowledges and agrees that Landlord has made no representation or warranty whatsoever, express or implied, as to the condition, quantity, or quality of the System, or any portion thereof. Except as and to the extent provided in Section 37.2 below, Tenant further agrees to accept the System and all portions thereof including, without limitation, all Leased Property, in their "As-Is" condition as of November 4, 1995, subject to all defects and conditions therein, and Tenant shall assert no claim, and Landlord shall have no liability or obligation whatsoever to Tenant, with respect to any and all foreseeable or unforeseeable damage, loss, cost, liability or expense, directly or indirectly arising from any condition existing on November 4, 1995, or which now exists or may hereafter be found to exist in, on, under or about the System, including, without limitation, the RES and the Annex, or from any determination that the System or any portion thereof, violates any applicable law, ordinance, regulation or ruling.

37.2 Tenant's acceptance of the Leased Property in the condition described in Section 37.1 above shall include, without limitation, Tenant's acceptance of all events, accidents, occurrences or conditions caused by, related to or resulting from the presence, use, generation, storage, transportation, treatment, recycling, reuse, reclamation, disposition, handling or release of any Contaminant

(collectively and individually, an "Environmental Condition"); except, however, Tenant shall not assume or accept responsibility for: (a) any Environmental Condition which may exist or arise outside of the Annex unless such Environmental Condition arises directly or indirectly from acts or omissions of Tenant, its employees, partners, agents, contractors or invitees; or (b) the trichloroethane found in certain groundwater samples under the RES and described in the Phase II Environmental Assessment prepared by GPD Associates, dated _____. Notwithstanding the foregoing, Landlord agrees that it will clean up all of the Polychlorinated Biphenyls located on top of the precipitators in the RES and more fully described in the Phase I Environmental Assessment of the Akron Recycled Energy System Plant prepared by Environmental Strategies Group, a copy of which has previously been delivered to Landlord, and Tenant agrees that it will reimburse Landlord for one-half of the Landlord's out-of-pocket expenses associated with such clean-up.

Section 38. Indemnification. Tenant shall indemnify, defend, and hold harmless Landlord from and against any and all losses, damages, expenses, judgments, claims, demands, suits, liabilities, actions, and causes of action (collectively, "Losses") arising from or in any way related to (a) Tenant's breach of or failure to comply with any of the terms, covenants, provisions, or conditions of this Lease, or (b) any and all events, accidents, occurrences, or conditions caused by or resulting from an Environmental Condition on the Leased Property (except those which may exist, due to no act or omission of Tenant, outside of the Annex, and the trichloroethane referred to in Section 37.2 above) including, without limitation, any injury or death to any person or damage to any property or the removal or treatment of any such hazardous or toxic substance or waste or any other remedial action or investigatory action involving the Leased Property or the operations conducted therein. In the event that this Lease terminates or expires and Tenant has not consummated the purchase of the Leased Property in accordance with the terms of the Purchase Agreement, then and thereafter (1) the foregoing indemnification obligation of Tenant shall not apply with respect to any Environmental Condition on the Leased Property which existed prior to November 4, 1995, and (2) Landlord shall indemnify, defend and hold harmless Tenant from and against any losses arising from any Environmental Condition on the Leased Property which existed prior to November 4, 1995, and which was not in any way enlarged, expanded, exacerbated or otherwise adversely affected by acts of Tenant, its employees, partners, agents, contractors or invitees. Landlord shall indemnify, defend and hold harmless Tenant from and against any Losses arising from any Environmental Condition existing outside of the Annex and not arising directly or indirectly from acts or omissions of Tenant, its employees, partners, agents, contractors or invitees, and from and against any Losses arising from the trichloroethane referred to in Section 37.2 above. The provisions of this Section 38 shall survive the termination or expiration of this Lease and the Purchase Agreement.

Section 39. Guaranty of Thermal Ventures, Inc. As further consideration for this Lease, and as a condition precedent to its effectiveness, Tenant covenants and agrees to deliver to Landlord on or before the Lease Closing Date, a guarantee by Thermal Ventures, Inc. of all obligations, liabilities, covenants, conditions, and agreements contained in this Lease and in the Purchase Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the date first written above.

Rhonda L. Rodford

Catherine D. Watson

Rhonda L. Rodford

Catherine D. Watson

THE CITY OF AKRON

By: _____
Donald L. Plusquellic,
Mayor

And By: _____
Joseph Kidder,
Director of Public
Service

AKRON THERMAL, LIMITED
PARTNERSHIP

By: THERMAL VENTURES, INC., its
general partner

Jeffrey P. Beer

Linda A. Lowe

By: _____
~~Lewis A. Mahoney, President~~ CEO
CARL E AYERS, Chairman

Approved as to form and correctness:

_____
Max Rothal,
Director of Law

STATE OF OHIO)
) SS.
COUNTY OF Summit)

On this, the 14th day of August, 1997, before me, a notary public, personally appeared Donald L. Plusquellic and Joseph Kidder, who acknowledged themselves to be the Mayor and Director of Public Service, respectively, of the City of Akron; and that they as such Mayor and Director of Public Service of the City of Akron, being authorized to do so, executed the foregoing instrument for the purposes therein contained, by signing the name of the City of Akron by themselves as such Mayor and Director of Public Service of the City of Akron.

Cheri B Cunningham
Notary Public

CHERI B. CUNNINGHAM
ATTORNEY AT LAW
STATE OF OHIO - NOTARY PUBLIC
NO EXPIRATION DATE

[SEAL]

My Commission expires:

STATE OF OHIO)
) SS.
COUNTY OF Mahoning)

On this, the 15th day of August, 1997, before me, a notary public, personally appeared ~~Lewis A. Mahoney~~ Paul E. Ayers who acknowledged himself to be ~~President~~ Treasurer of Thermal Ventures, Inc., the general partner of AKRON THERMAL, LIMITED PARTNERSHIP, and that as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained, on behalf of the corporation and the limited partnership.

Mary E Wagner
Notary Public

[SEAL]

My Commission expires: May 4, 2000

This instrument prepared by:

Thompson Hine & Flory LLP
3900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1216

Index of Schedules & Exhibits

Schedule 3.1 - Lease Payments

Base Annual Lease Payment: $90,000

Escalator: On the anniversary date beginning with January 1, 1999, the base annual lease payment shall be adjusted by the increase in the index described below. The monthly payments for each following year shall be made in accordance with the percentage of payment column applied to the adjusted Annual Lease Payment.

Anniversary Date: January 1, 1998

Index: Consumers Price Index for Urban Wage Earners & Clerical Workers, All items (1982-84 = 100), United States City Average, published by the United States Department of Labor, Bureau of Labor Statistics

First Payment: January 1, 1998

Schedule of Monthly Payments:

Month:	% of Payment	Standard Schedule of Payments	Make-Up of 1997 Payments	1998 Payments (1st of Each Month)
January	13%	$11,700.00	$ 8,775.00	$ 20,475.00
February	13%	$11,700.00	$ 8,775.00	$ 20,475.00
March	11%	$ 9,900.00	$ 8,775.00	$ 18,675.00
April	8%	$ 7,200.00	$ 8,775.00	$ 15,975.00
May	6%	$ 5,400.00	$ -	$ 5,400.00
June	5%	$ 4,500.00	$ -	$ 4,500.00
July	5%	$ 4,500.00	$ -	$ 4,500.00
August	5%	$ 4,500.00	$ -	$ 4,500.00
September	6%	$ 5,400.00	$ -	$ 5,400.00
October	6%	$ 5,400.00	$ -	$ 5,400.00
November	10%	$ 9,000.00	$ -	$ 9,000.00
December	12%	$10,800.00	$ -	$ 10,800.00
Total	100%	$90,000.00	$35,100.00	$125,100.00

SCHEDULE 6.1

Assigned Contracts and Authorizations

See Asset Purchase Agreement by and between the City of Akron, Ohio and Akron Thermal, Limited Partnership dated as of the date hereof, Schedule 2.1(d) - Acquired Contracts, and Schedule 2.1(f) - Acquired Authorizations.

OPERATING LEASE AGREEMENT

THIS OPERATING LEASE AGREEMENT (this "Lease"), made as of the 15TH day of August, 1997 (the "Lease Closing Date"), by and between the CITY OF AKRON, OHIO, a municipal corporation organized and existing under and by virtue of the constitution and laws of the State of Ohio ("Landlord"), and AKRON THERMAL, LIMITED PARTNERSHIP, a Delaware limited partnership ("Tenant").

RECITALS

WHEREAS, Landlord owns and operates the district heating and cooling system that supplies to approximately 200 customers steam, hot water and chilled water for the heating and cooling of businesses and residences located in the Central Business District of the City of Akron, County of Summit, State of Ohio (the "EDS"), including, without limitation, a certain steam power plant formerly owned by BF Goodrich Company (the "Annex"), a certain solid waste to energy incinerator facility (the "RES", and together with the Annex, the EDS, and the steam and water main distribution system located throughout the Seller's municipal area and associated underground piping, manholes, and related facilities, the "System") in Akron, Ohio;

WHEREAS, Landlord and Tenant have entered into that certain Interim License and Operating Agreement (the "RES Interim Agreement"), dated as of August 4, 1995, pursuant to which, among other things, (i) Landlord granted to Tenant a non-exclusive license to enter into, upon, and across, and to use and have access to the Annex, and (ii) Tenant agreed to furnish all labor and related services pertaining to the operation and maintenance of the Annex;

WHEREAS, Landlord and Tenant have entered into that certain Addendum to Interim License and Operating Agreement (the "Addendum", and together with the RES Interim Agreement, the "Interim Agreement"), dated as of November 4, 1995, pursuant to which, among other things, (i) Landlord granted to Tenant a non-exclusive license to enter into, upon, and across, and to use and have access to the RES, and (ii) Tenant agreed to furnish all labor and related services pertaining to the operation and maintenance of the RES;

WHEREAS, Landlord and Tenant are parties to that certain Asset Purchase Agreement, dated as of the date hereof (the "Purchase Agreement"), pursuant to which Tenant may elect to purchase and Landlord may elect to sell the System and substantially all of the assets and properties of Landlord associated with the System;

WHEREAS, the Purchase Agreement and the Interim Agreement contemplate the lease of the System to Tenant pursuant to this Lease in order to permit Tenant to operate the System, pending the closing of the transactions described in the Purchase Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

Section 1. Premises. For the term set forth in Section 2 and otherwise upon the terms and conditions hereinafter set forth, Landlord does hereby lease to Tenant, and Tenant does hereby lease and take from Landlord, the System and all of the land, buildings, structures, systems, fixtures, improvements, equipment, manholes, and underground piping of any kind whatsoever and wherever located and all appurtenant rights, privileges, and easements in favor of Landlord relating to the System and the orderly operation thereof including, without limitation, all of the assets and properties contemplated by Section 2.1 of the Purchase Agreement (all of the foregoing sometimes hereinafter referred to collectively as the "Leased Property"). The Leased Property shall not include the land outside of the Annex; however, Landlord hereby grants to Tenant a non-exclusive license for and during the term of this Lease for purposes of ingress and egress to and from the Annex and the public right of way. Notwithstanding the foregoing, Landlord hereby reserves at all times during the Term the right to install or cause to be installed on the roof of the RES a radio and/or cellular communications tower, and to place any and all required transmission equipment inside of Building A. Such installation and placement shall be at no cost or expense to Tenant. Any and all revenues generated by such installation and placement, net of Landlord's costs and expenses (including without limitation, Landlord's attorney fees), shall be divided equally between Landlord and Tenant. Landlord agrees that any such tower and equipment shall not result in any damage to the roof or structure of the RES, and Landlord covenants to assume all responsibility for any such damage.

Section 2. Term. The term (the "Term") of this Lease shall commence on the date of this Agreement (the "Lease Closing Date"). The initial term of this Lease shall be for ten (10) years commencing on the Lease Closing Date and Tenant shall have the right to renew and extend the initial term for one additional period of ten (10) years. The Term shall end on the earlier to occur of (a) the Purchase Closing Date or (b) the tenth anniversary of the Lease Closing Date or in the event that the Tenant has elected to extend the term for an additional ten (10) years, on the twentieth anniversary of the Lease Closing Date, unless earlier terminated pursuant to the provisions of this Lease.

Section 3. Lease Payments.

3.1 For each year of the Term, Tenant shall pay to Landlord an annual rent equal to $90,000 per year. Tenant shall pay such rent by paying monthly installments pursuant to the "Standard Schedule of Payments" set forth on Schedule 3.1 hereto. Such payments shall be made on the last day of each and every calendar month during the Term. In the event this Lease commences other than on the first day of a calendar year or is terminated other than on the last day of a calendar year, the lease payment for such year during which this Lease commences or is terminated shall be paid pursuant to the Standard Schedule of Payments, and the obligation to pay such rent shall survive the Lease termination.

3.2 Tenant shall pay to Landlord and/or assume all liability for, as the case may be, as additional rent during the Term all of the following:

(a) an annual sum equal to the franchise fee identified in that certain Franchise Ordinance passed by Akron City Council on September 30, 1996, a copy of which is attached hereto as Exhibit A and made a part hereof; Tenant shall make this payment within 30 days after the close of each calendar year;

(b) all property taxes and assessments attributable to the Leased Property during the Term; Landlord shall give notice of receipt of any tax assessments to Tenant within 10 days of Landlord's receipt of such assessment; Tenant shall not pay or be obligated with respect to taxes or other assessments payable with respect to the income of Landlord; Tenant may, at Tenant's expense and with written notice to Landlord, contest the validity or amount of any taxes or other assessments with respect to the Leased Property by appropriate proceedings duly instituted and diligently prosecuted, and in such event, Landlord will provide Tenant access to any books and records of the Landlord that may relate to such taxes or assessments; Landlord shall cooperate fully with Tenant, provided Landlord shall not incur any cost or expense in doing so, in connection with any such contest, and shall permit any such contest to be prosecuted in Landlord's name if the same shall be required for the proper resolution of the disputed matter; Despite any such contest pending, Tenant shall comply with the disputed assessment to the extent required by applicable law, and the Landlord will not be subjected to civil or criminal sanctions, penalties or fees, and that the Leased Property will not be subjected to imminent loss or forfeiture, as a result thereof; During the Term of this Lease the Tenant shall be

responsible for all governmental filings with respect to property taxes related to the Leased Property; and

(c) all of the following liabilities of Landlord (the "Assumed Liabilities") which are hereby expressly assumed and shall be satisfied and discharged by Tenant: (i) all obligations of Landlord to be performed on or after November 4, 1995 under all of the Acquired Contracts (as defined in the Asset Purchase Agreement of even date herewith); and (ii) any liability or obligation relating to or arising from any Environmental Condition as provided in Section 37 below, except to the extent limited by the terms of Section 37.

3.3 Tenant shall deliver to Landlord within 90 days after the end of each fiscal year throughout the Term of this Lease complete financial statements of Tenant, certified by the President of Tenant and an independent auditor reasonably acceptable to the City as being true and accurate in all respects. Landlord shall have the right, subject to Section 14 below, to audit the books and records of Tenant at any time during the Term of this Lease upon 15 days advance written notice to Tenant.

Section 4. Use of Premises; Compliance with Laws.

4.1 The System and all of the Leased Property shall be used and operated on a continuous basis and without interruption by Tenant for the purpose of generating steam, hot water and chilled water to provide heating and cooling services. Notwithstanding any provision of this Lease to the contrary, Tenant shall not be in default under this Lease for any temporary interruption of operations by Tenant, provided (i) in the event such interruption exceeds twelve (12) hours Tenant immediately delivers written notice to Landlord setting forth the date operations temporarily ceased and the cause of such temporary interruption, and (ii) Tenant resumes operations within ninety (90) days after the date operations temporarily ceased. In the event Tenant desires to discontinue its operation of the Leased Property, Tenant shall first make written request to Landlord stating with specificity the reasons for such desired discontinuance, which request shall be delivered to Landlord not later than two (2) years prior to the desired date of such discontinuance. Nothing in this Lease shall be deemed to require Landlord to consent to any discontinuance of Tenant's operations, and such consent shall be given or withheld at the sole and absolute discretion of Landlord; provided, however, that such discontinuance shall be subject at all times to the statutes, rules and regulations applicable to the Public Utilities Commission of Ohio (the "PUCO").

4.2 Tenant shall not commit or permit any waste to the Leased Property, and shall comply with all laws, rules, regulations, orders, and

other requirements applicable to the Leased Property imposed by any Governmental Authority having jurisdiction with respect thereto, including, without limitation, those pertaining to the condition of the environment (collectively, "Applicable Legal Requirements"). Notwithstanding any provision of this Lease to the contrary, Tenant may, but shall not be obligated to, contest any Applicable Legal Requirements by appropriate proceedings duly instituted and diligently prosecuted at Tenant's expense, and Tenant shall notify Landlord prior to the commencement of any such contest. So long as any such contest is pending, Tenant shall comply with the disputed Applicable Legal Requirement to the extent required by applicable law. The responsibility for any alterations, additions, improvements, repairs or replacements to the Lease Property required by Applicable Legal Requirements shall be as set forth in Sections 9 and 10.

Section 5. Operation of System; Authority.

5.1 Subject to Section 4.1 above, Tenant shall operate and manage the System on a continuous basis and without interruption during the Term and shall be entitled to any and all revenues and profits from the operation of the System. Tenant shall have full authority for the operation and management of the System and the Leased Property during the Term including, without limitation, full power and authority with respect to:

(a) all matters with respect to the operation of the System and the generation of steam, hot water and chilled water and the delivery of steam and chilled water to the present and future customers of the System;

(b) setting and modifying the billing rates for the provision of steam, hot water and chilled water to the System's customers (subject to any required Governmental Authority approvals) and preparing and presenting all information and data required by any Governmental Authority in connection with rate increases or modifications; provided, however, Tenant shall hold all steam, hot water and chilled water prices at current levels for all existing customers and end users of the System as of November 4, 1995 (but subject to imposition of any gross receipts tax or other tax on such prices imposed by the PUCO or other tax authority), and shall charge the Landlord at Landlord's current rate or less (subject to any of the aforementioned taxes), for a period of at least three years from November 4, 1995; Tenant shall not increase the rates charged to Landlord for or during the period from November 5, 1998 to December 31, 1998 unless Tenant shall have given at least ninety (90) days notice of such an increase to Landlord. Thereafter, Tenant shall

not increase the rates charged to Landlord unless Tenant shall have given notice to Landlord at least 180 days prior to the beginning of Landlord's fiscal year; provided, however, that in no event shall the rates charged to Landlord at any time exceed the most favorable rates charged by Tenant to the class of customers most similar to Landlord;

(c) employing personnel required for the operation and management of the System and planning and administering all matters pertaining to labor relations, salaries, wages, working conditions, hours of work, termination of employment, employee benefits, employee staffing, safety, and related matters pertaining to such employees;

(d) engaging and supervising such independent contractors as it may deem necessary;

(e) purchasing materials, supplies, fuel, light, power, transportation, and services necessary or desirable for the operation of the System;

(f) making or directing all maintenance and repairs to the System and the Leased Property;

(g) billing to and collecting from customers all charges in connection with the operation of the System and the delivery of steam and chilled water;

(h) making all disbursements in connection with the operation and management of the System;

(i) securing and maintaining adequate and reasonable insurance, as set forth in Section 10, with respect to the operation of the System and Tenant's possession of the Leased Property, including insurance covering the risk of personal injury to, or death of, the Tenant's personnel or others, the risk of fire, and other damage to the Leased Property;

(j) securing and maintaining all permits, certificates, licenses, approvals, evidences of authority, easements, and rights-of-way necessary or desirable for the operation of the System and filing all reports and notices and disbursing funds for all payments required in connection therewith; and

(k) maintaining books of account, including all ledgers and journals, and generally performing all accounting and disbursing services with respect to the operation of the System.

Section 6. Assignment of Contracts and Authorizations; License of Intellectual Property.

6.1 Except as provided in Section 6.2 hereof, all contracts and authorizations listed on Schedule 6.1 hereto which would constitute an Acquired Contract or Acquired Authorization are assigned by Landlord to Tenant as of November 4, 1995, by execution of this Lease (the "Assigned Contracts and Authorizations") and Landlord shall, at Tenant's request, execute and deliver any and all agreements, certificates, and other documents reasonably requested by Tenant and in form acceptable to Landlord, which are necessary or desirable to effect the assignment of such Assigned Contracts and Authorizations to Tenant. Tenant hereby assumes and agrees to perform the obligations of Landlord under the Assigned Contracts and Authorizations except for those obligations which (a) are the result of Landlord's breach of an Assigned Contract or Authorization, (b) should have been performed by Landlord prior to November 4, 1995, under the terms of such Assigned Contract or Authorization, or (c) constitute an inaccuracy in or breach of Landlord's representations and warranties in this Lease or the Purchase Agreement. Except as provided in Section 6.3, and subject to the limitations set forth in this Lease, Tenant shall have the right to renegotiate, replace, modify, amend, or terminate such Assigned Contracts and Authorizations as it shall, in its sole discretion, determine.

6.2 All Acquired Contracts and Acquired Authorizations which cannot, by their terms or because consent is not granted by a customer, be assigned to Tenant ("Retained Contracts and Authorizations") shall be retained by Landlord until such time as such Retained Contracts and Authorizations can be assigned to Tenant; provided, however, that all monetary obligations thereunder shall be reimbursed by Tenant to Landlord and that all benefits of such Retained Contracts and Authorizations shall inure to Tenant. Until such time, Tenant shall serve as agent for Landlord under such Retained Contracts and Authorizations with respect to all matters covered thereby, and, except as provided in Section 6.3, and subject to the limitations set forth in this Lease, Tenant shall have the authority, as agent for Landlord, to renegotiate, replace, modify, amend, or terminate any such Retained Contract and Authorization. Landlord shall cooperate with Tenant, at no cost or expense to Landlord, in obtaining any consent required to assign the Retained Contracts and Authorizations to Tenant or provide to Tenant the benefits of such Contract or Authorization as promptly as possible after the Lease Closing Date.

6.3 Tenant shall maintain and perform during the Term all heating and cooling contracts listed on Schedule 6.3 attached hereto (the "Heating/Cooling Contracts") in their current form and shall not renegotiate, replace, modify, amend, or terminate such Heating/Cooling Contracts without the prior written consent of Landlord, which consent shall not be unreasonably withheld. Landlord agrees not to take any action to cause any Heating/Cooling Contract to be terminated and Landlord shall not force the Tenant to terminate any Heating/Cooling Contract. Tenant hereby indemnifies and agrees to defend and hold harmless Landlord from and against any and all losses, costs, claims, liabilities, damages and expenses (including, without limitation, reasonably attorneys' and expert fees and expenses), fines, penalties, charges, remedial actions, and requirements, imposed upon, suffered, or incurred by Landlord by reason of claims arising from or related to acts or omissions of Tenant occurring on or after November 4, 1995, with respect to the Heating/Cooling Contracts.

6.4 Landlord hereby grants Tenant an exclusive, royalty free license to use the patents, trademarks, trade names, copyrights, licenses, inventions, processes, trade secrets, discoveries, and other intellectual property described on Schedule 6.4 hereto. The term of the license granted by Landlord to Tenant shall be equal to the Term of this Lease.

Section 7. Management; Employees. Tenant shall be responsible for providing the management, accounting, engineering, administrative, and general personnel required for the operation off the System during the Term, and for all matters relating to the employment and dismissal of such personnel. In order to obtain such personnel, Tenant may hire its own employees or contract for personnel with others.

Section 8. Expansion or Modification of Premises. Tenant shall be entitled to make such modifications, additions, and improvements, including capital improvements (collectively, "Improvements") to the Leased Property as Tenant deems necessary or desirable; provided, however, that Tenant shall only make material Improvements (i.e. those costing $50,000 or more) to the Leased Property with the prior approval of the Director of Public Service of the City of Akron or her/his predetermined designee, such approval not to be unreasonably withheld; and, provided further, that Tenant shall not be entitled to make any Improvement if such Improvement would materially adversely impair the value of the System or the Leased Property for its current use.

Section 9. Maintenance of the Leased Property. Tenant shall be responsible for, and shall pay the cost of, all maintenance of the System and the Leased Property. Tenant shall not make any major repairs to the Leased Property without the prior consent of the Director of Public Service of the Landlord or his

authorized designee, which consent shall not be unreasonably withheld. Tenant shall be responsible for maintaining the exterior landscaping around the RES in a commercially reasonable manner and at an appearance level substantially equivalent to past practices.

Section 10. Insurance.

10.1 Tenant shall at all times during the Term, at its own expense, maintain in full force and effect a comprehensive commercial general liability insurance policy, including products liability insurance, with a company or companies approved by the Landlord, which approval shall not be unreasonably withheld, having a combined single limit of at least $5,000,000 per occurrence, with respect to bodily injury and property damage. All such policies shall name the Landlord as an additional insured and shall specify that the insurance evidenced thereby will not be cancelled unless the insurer has given the Landlord at least 30 days prior written notice. In no event shall Tenant do or omit to do any act which results or may result in cancellation of such insurance.

10.2 Tenant shall keep the RES and the Annex and all additions, alterations, modifications and improvements thereto, including all boilers and machinery, insured, with a company or companies approved by Landlord, which approval shall not be unreasonably withheld, against loss by fire and all other risks and hazards covered under a standard form All-Risk fire and extended coverage insurance policy and such policy shall insure the RES at a replacement value of $5,150,000 and the Annex at a replacement value of $4,120,000. Tenant covenants and agrees to promptly add such improvements and/or modifications to the foregoing policy or policies of insurance. Tenant hereby waives any and all claims for loss, damage, destruction, or theft to any personal property which it places or causes to be placed in, on or within the RES or the Annex, whether or not such personal property is owned by Tenant, and regardless of whether Tenant has maintained adequate insurance pertaining to such personal property. All such policies shall name Landlord as an additional insured. Tenant and Landlord agree that, except for loss or damage resulting from Tenant's negligent acts or omissions or those of its officers, employees and agents, Tenant shall not be responsible for the property stored by Landlord in Buildings A and D pursuant to Section 33 below and that Landlord shall bear the risk of loss with respect to such property. Landlord shall not recover any proceeds of Tenant's insurance policies to cover losses related to such property. Additionally with respect to Landlord's use of Buildings A and D, Landlord shall carry a comprehensive commercial general liability insurance policy having a combined single limit of at least $1,000,000 per occurrence, with respect to bodily injury and property damage, or Landlord may self-insure the foregoing risks. All such policies shall name Tenant as an additional insured and shall specify that the insurance evidenced thereby will not be cancelled unless the insurer has given

the Tenant at least 30 days prior written notice. In no event shall Landlord do or omit to do any act which results or may results in cancellation of any such insurance.

10.3 Tenant shall carry at least the following minimum amounts of insurance throughout the remainder of the Term, with Landlord named as an additional insured thereunder and with companies approved by Landlord, which approval shall not be unreasonably withheld: (i) a policy or policies of automobile insurance covering all officers, partners, agents, and employees of Tenant in an amount not less than $5,000,000; and (ii) workers' compensation insurance as required by the State of Ohio.

10.4 Each policy of insurance referred to in Sections 10.1, 10.2, 10.3 and 10.5 and any other fire or casualty insurance maintained by Tenant as to the Leased Property, or by Landlord as to Buildings A and D and the land area outside of the Annex, as the case may be, shall provide a waiver and release by the insurer of any and all claims, demands, actions, suits, and rights (including, without limitation, any and all rights of subrogation) which said insurer might otherwise have against either party hereto as a result of any acts or omissions of such party.

10.5 Tenant shall be responsible for maintaining casualty insurance covering Tenant's personal property and improvements located on the Leased Property, and Landlord shall have no liability with respect to any damage or loss to such personal property unless caused by the wilful misconduct or gross negligence of Landlord or its agents, employees, or representatives. Any insurance proceeds payable under this Section 10.5 shall be paid directly to Tenant, and Landlord shall have no right or interest whatsoever in any such proceeds.

10.6 Tenant shall deliver to Landlord true and accurate copies of all insurance policies required in this Section 10 on an annual basis. Upon request of Tenant, but not more often than once in any 12-month period, Landlord shall deliver to Tenant a copy of Landlord's liability insurance policy covering its use of Buildings A and D or, in the alternative, evidence of adequate self-insurance as to the foregoing risk.

Section 11. Damage and Destruction. In the event of any damage to or destruction of the Leased Property or any portion thereof during the Term by fire, explosion or other casualty ("Damage or Destruction"), Tenant shall remain in possession of the Leased Property and shall repair or restore the affected portions of the Leased Property. Notwithstanding the foregoing, Tenant shall only be required in the event of Damage or Destruction to provide a functional replacement for the RES and/or the Annex for purposes of continuing electric

steam, hot water and chilled water services consistent with those currently provided by the System.

Section 12. Eminent Domain.

12.1 If the possession of, title to, or ownership of all of the Leased Property shall be permanently taken during the Term by any Governmental Authority under a statutory power of condemnation or eminent domain or by private sale in lieu thereof, this Lease shall terminate upon the transfer of title to such Governmental Authority.

12.2 If the possession of, title to, or ownership of any portion, but less than all, of the Leased Property shall be permanently taken during the Term by any Governmental Authority under a statutory power of condemnation or eminent domain or by private sale in lieu thereof, and the operation of the System is thereby materially impaired and cannot be restored, Tenant may, at its option, elect to terminate this Lease by the delivery of notice thereof to Landlord within 45 days after the date any judgment or order ordering such taking (or agreed settlement in lieu thereof) becomes final and no longer subject to appeal or the date upon which title transfers to such Governmental Authority, whichever is earlier. In the event Tenant elects to terminate this Lease pursuant to this Section 12.2, this Lease shall terminate on the earlier of (a) the date of the transfer of title to such Governmental Authority or (b) the date on which Tenant delivers notice of its election to terminate to Landlord. If Tenant does not elect to terminate this Lease, this Lease shall remain in full force and effect for the balance of the Term.

12.3 The provisions for termination of this Lease contained in Section 12.2 shall not be construed so as to adversely affect or prejudice the rights of either Landlord or Tenant to recover from any Governmental Authority the full and proper compensation, damages, and expense allowed by law for the taking or any partial taking or resulting from the taking or any partial taking of their respective interests. Without limiting the generality of the foregoing, Tenant shall be entitled to make a claim and recover an award for the value of Tenant's improvements and property of whatsoever nature located in on or about the Leased Property, and to the extent allowed by law, for any lost business, and Landlord shall be entitled to make a claim and recover an award for the value of Landlord's fee simple interest in the Leased Property.

Section 13. Default.

13.1 The occurrence of any of the following shall constitute an event of default (an "Event of Default") by Tenant under this Lease:

(a) the failure of Tenant to pay any lease payment or any other amounts payable by Tenant hereunder at the time provided herein and such failure shall continue for 30 days after the same becomes due and payable;

(b) the failure of Tenant to perform any other covenant or obligation or to comply with any other term or condition imposed upon Tenant under this Lease if such failure shall continue for a period of 30 days or more after Tenant receives written notice thereof from Landlord; provided that, if such failure is of such a nature that it cannot, using reasonable diligence, be cured within said period, such failure shall not constitute an Event of Default if Tenant promptly commences to cure such failure and diligently and continuously pursues the same to completion thereafter and, in fact, fully cures same within 90 days after such notice;

(c) the making by Tenant of any general assignment of all or a substantial portion of all of Tenant's assets for the benefit of creditors; or the filing by or against Tenant of a petition in bankruptcy, insolvency or for reorganization or arrangement or for the appointment of a receiver of all or any substantial portion of Tenant's assets pursuant to any statute of the United States or any state, and Tenant fails to secure a stay or discharge within 60 days, or the attachment, execution or other judicial seizure of substantially all of Tenant's assets where such seizure is not discharged in 60 days;

(d) the failure of Tenant to continuously operate the System as required under this Lease, unless such failure results from a Damage or Destruction or a taking pursuant to Section 12; or

(e) any default or breach of the terms of the Guaranty referred to in Section 39 below.

13.2 Upon the occurrence of an Event of Default, Landlord shall have the right, without further notice to Tenant, to terminate this Lease and re-enter and repossess the Leased Property by summary proceedings or otherwise. Tenant and Landlord acknowledge that, in the event that Landlord elects to terminate this Lease as a result of Tenant's default of any of its obligations under this Lease after expiration of the applicable notice and cure periods, including, without limitation, subsection 13.1(d) above, Landlord will suffer damages arising from the interruption and/or discontinuance of the operation of the System. The exact amount of such damages are and will be difficult to ascertain with certainty, and, accordingly, Tenant and Landlord agree that $2,000,000.00 (the "Liquidated

Damages") shall constitute liquidated damages for Tenant's default of any of its obligations under this Lease after expiration of the applicable notice and cure periods. Notwithstanding that Landlord's actual damages would be uncertain and difficult to ascertain, Tenant and Landlord agree that the Liquidated Damages are reasonable and bear a relationship to the damages that Landlord might sustain in the event of Tenant's default under this Lease. Tenant and Landlord agree that the Liquidated Damages is not intended to be, and in no event should be construed to be, a penalty, but is intended as fixed damages agreed to by the parties as settlement of damages in advance. Landlord hereby agrees that, except as provided in Section 13.3 below, its receipt of the Liquidated Damages in the event of Tenant's default in any of its obligations under this Lease is the sole and exclusive right or remedy that Landlord has, or may be entitled to exercise or pursue, against Tenant, whether at law or in equity, as to such failure or default, except, however, that Landlord shall be entitled to take any and all necessary action against Tenant to obtain immediate delivery of all permits needed to operate the System. In addition, the parties agree that the provisions of this Lease shall be enforceable by injunction, specific performance, or other equitable relief (without reference to whether or not an adequate remedy at law may be available) in addition to any other remedy which may be available in law or in equity or by statute or otherwise pursuant to this Lease.

13.3 In addition to, but not in limitation of, any of the remedies set forth in this Lease or given to Landlord at law or in equity, Landlord shall also have the right and option, in the event of any default by Tenant under this Lease and the continuance of such default after the period of notice above provided, to elect to have this Lease continue and to proceed against Tenant for recovery of all loss or damage arising from or in any way related to such default as permitted under applicable law, and any such action by Landlord shall not be construed as an election to terminate this Lease unless Landlord expressly exercises its option hereinbefore provided to repossess the Leased Property and to declare the Term hereof ended. In such event, Tenant shall continue to be liable for the payment of the rents and the performance of the other covenants and conditions hereof and shall pay to Landlord all deficits as the amounts of such deficits from time to time are ascertained. Notwithstanding anything to the contrary in this Section 13.3, Landlord and Tenant hereby acknowledge and agree that in any legal proceeding based upon Tenant's default, except as to any proceeding involving or pertaining to Tenant's obligations with respect to Environmental Conditions, Landlord's total recovery against Tenant shall not exceed the Liquidated Damages.

13.4 Landlord and Tenant hereby waive trial by jury in any action, proceeding or counterclaim brought by either against the other upon any matters pertaining to or affecting title to or occupancy and/or possession of the

Leased Property, including without limitation any proceeding for forcible entry and detainer or ejectment.

13.5 Every demand for rent due wherever and whenever made shall have the same effect as if made at the time it falls due and at the place of payment, and after the service of any notice or commencement of any suit, or final judgment therein, Landlord may receive and collect any rent due, and such collection or receipt shall not operate as a waiver of nor affect such notice, suit or judgement.

Section 14. Access to Premises. Landlord shall have the right, following reasonable advance notice to Tenant, to enter any portion of the Leased Property during Tenant's normal business hours for the purpose of exercising Landlord's right to cure pursuant to Sections 13 and 17 or examining and inspecting the Leased Property or for any other reasonable civic or business purpose as Landlord may deem necessary or appropriate. As a condition to such entry, Landlord shall keep strictly confidential all of Tenant's trade secrets, processes, and business information and practices which Landlord may observe or to which it may become privy during any such entry to the Leased Property, and shall use reasonable efforts not to interfere with the conduct of Tenant's business in connection with any such entry.

Section 15. Assignment and Subletting. Except as set forth herein, Tenant shall not assign this Lease, or sublet the Leased Property or any part thereof, without the prior consent of Landlord, which consent may be given or withheld in the sole and absolute discretion of Landlord. Landlord shall notify Tenant in writing within 30 days of any request by Tenant for such consent as to whether or not Landlord consents to such assignment. Notwithstanding the foregoing, Tenant shall have the right to assign or pledge Tenant's right, title, and interest in this Lease to a financial lending institution as collateral security in connection with any purchase money financing of the System or any financing in connection with improvements to the System; provided, however, that in the event such lending institution exercises any right under such assignment or pledge to realize upon such security or pledge, any attempted transfer by the lending institution to any third party shall be and is hereby prohibited unless the foregoing provisions of this Section 15 are fully complied with and the prior consent of the Director of Public Service is obtained. For purposes of this Section 15, an assignment requiring approval of Landlord shall include, without limiting the foregoing, (a) any change of the general partner of Tenant or in the majority ownership or control of the general partner of Tenant other than a transfer of the general partnership interest in Tenant to North American Thermal Systems Limited Lability Company ("NATS") so long as NATS is and remains at least owned 50% by TVI (as defined below) and TVI continues to control NATS and manage its day-

to-day operations, (b) any transfer of an interest or change in control of Tenant such that Carl E. Avers, Lewis A. Mahoney, or NATS would no longer directly control Tenant, (c) any transfer of a majority of the assets of Tenant whether in the aggregate or in a series of transactions, (d) any transfer of a majority of the stock or substantially all of the assets of Thermal Ventures, Inc. ("TVI"), whether in the aggregate or in a series of transactions (other than a transfer of general partnership interests to NATS), or any merger, consolidation, or liquidation of either Tenant or TVI. Notwithstanding anything contained in this Lease to the contrary, the assignment of Tenant's rights in this Lease or the subletting of all or part of the Leased Property to an entity whose sole general partner is either TVI or NATS and which is controlled by Lewis A. Mahoney and/or Carl E. Avers shall not be considered an assignment requiring approval of Landlord. Any attempted assignment in violation of this Section shall be void and shall constitute a material default of this Lease.

Section 16. Covenant of Quiet Enjoyment. Landlord, for itself and its successors and assigns, covenants with Tenant that, upon performing the covenants and obligations on Tenant's part to be kept and performed under this Lease, Tenant shall and may peaceably and quietly have, hold and enjoy the Leased Property during the Term without any hindrance of Landlord, its successors and assigns, or any other person lawfully claiming the Leased Property or any portion thereof by, through or under Landlord.

Section 17. Right to Perform Covenants. If either party hereto shall at any time fail or refuse to perform any of its covenants or obligations hereunder, the other party may, upon 30 days' prior notice to the party so failing or refusing to perform, but shall not be obligated to, perform such covenant or obligation without waiving or releasing the party so failing or refusing to perform from any liability therefor. All sums paid, advanced or expended by the other party hereto pursuant to this Section 17 and all costs and expenses incurred by such other party in connection therewith (including, without limitation, attorneys' fees) shall be repaid to such other party by the party so failing to perform, on demand following delivery to the other party of reasonable documentation evidencing the expenditure, together with interest on any balance thereof from and after the date such sums, costs and expenses were so paid, advanced, expended or incurred by such other party at a rate equal to two percent (2%) per annum above the prime rate of interest of First Merit Bank of Akron, Ohio, from time to time in effect. Any and all sums due from Tenant to Landlord hereunder shall be deemed to be additional rent due Landlord under this Lease and, except as otherwise provided in this Lease, shall be paid by Tenant to Landlord within 30 days after notice from Landlord together with applicable invoices or other evidence of such expenditure.

Section 18. Surrender of Leased Property. Upon the expiration or termination of this Lease for any reason other than consummation of the sale of the Leased Property to Tenant pursuant to the Purchase Agreement, Tenant shall surrender (i) the Leased Property to Landlord broom-clean and in its current operating condition existing on the Lease Closing Date, subject to any Improvements made during the Term, normal wear and tear excepted, (ii) the Acquired Inventory, except such Acquired Inventory consumed or used by Tenant or Landlord between the date hereof and the date of such expiration or termination, in the ordinary course of business and in accordance with the terms of this Lease and the Purchase Agreement, and (iii) the Acquired Equipment in good order and repair, normal wear and tear and insured casualty excepted.

Section 19. Termination.

19.1 Notwithstanding anything to the contrary in this Lease but subject to obtaining any necessary governmental approvals, this Lease may be terminated prior to expiration of the Term as follows:

(a) at any time upon the mutual agreement of Landlord and Tenant;

(b) pursuant to the terms of Section 12.1;

(c) by Tenant pursuant to Section 12.2;

(d) by Landlord pursuant to Section 13.2; or

(e) by Tenant pursuant to Section 10.4(b) of the Asset Purchase Agreement.

19.2 In the event of the termination of this Lease, Tenant shall take all reasonable action requested by Landlord, and shall execute any and all agreements, certificates, and other documents which may be reasonably required by Landlord, in order to transfer possession of the Leased Property and the rights and obligations of Tenant under the Assigned Contracts and Authorizations to Landlord or another party and to otherwise terminate the effect of this Lease, and Landlord will thereafter assume the full obligations under the Assigned Contracts.

Section 20. Waiver. No consent or waiver, express or implied, by either party hereto with respect to any breach or default by the other party hereto in the performance of any of the covenants or obligations of such other party hereto under this Lease shall be deemed or construed to be a consent to or waiver of any other such breach or default. Failure or delay on the part of either

party hereto to complain of any act (whether of commission or omission) of the other party hereto or to declare a breach of or default under this Lease, irrespective of how long such failure or delay continues, shall not constitute a waiver by such party hereto of its rights hereunder. No waiver by either party hereto of any default or breach by the other party hereto in the performance of any of the covenants or obligations of such other party hereto under this Lease shall be deemed to have been made by such party unless contained in a writing executed by such party hereto.

Section 21. Amendment. This Lease may be amended only by an agreement or instrument in writing which refers to this Lease and is duly executed by the parties to this Lease.

Section 22. Entire Contract. This Lease, together with the Schedules hereto, the Purchase Agreement and the other related agreements referred to herein or therein, is the entire contract between the parties relating to the subject matter hereof, and supersedes all prior and contemporaneous negotiations, understandings, and agreements, written or oral, between the parties and, specifically, the Interim Agreement is hereby terminated and superseded by this Lease and the Purchase Agreement.

Section 23. Third Parties. Nothing in this Lease, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Lease on any other persons other than the parties and their respective successors and assigns, nor is anything in this Lease intended to relieve or discharge the obligation or liability of any third persons to any party, nor shall any provision give any third parties any right of subrogation or action over or against any of the parties hereto. This Lease is not intended to and does not create any third party beneficiary rights whatsoever.

Section 24. Counterparts. Any number of counterparts of this Lease may be executed and delivered and each shall be considered an original and together such counterparts shall constitute one agreement.

Section 25. Headings. The headings contained in this Lease have been inserted for convenience only and shall not affect the meaning of any of the language contained herein.

Section 26. Notices. Any notice, demand, or request required or permitted to be given under the provisions of this Lease shall be in writing and delivered personally, or by registered or certified mail, postage prepaid, or by a nationally recognized overnight express courier service for next day delivery, in each case, addressed to the following persons at their respective addresses set forth

below, or to such other addresses or persons as either party may designate by subsequent notice to the other party:

If to Tenant, to:

Akron Thermal, Limited Partnership
c/o Thermal Ventures, Inc.
29 East Front Street
Youngstown, Ohio 44503
Attention: Lewis A. Mahoney, President

With a copy to:

Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Attention: Neil F. Luria, Esq.

If to Landlord, to:

City of Akron
Room 201
166 South High Street
Akron, Ohio 44308
Attention: Joseph Kidder,
Director of Public Service

With a copy to:

City of Akron
Room 201
161 South High Street
Akron, Ohio 44308
Attention: Max Rothal, Director of Law

and to:

Samuel R. Knezevic, Esq.
Thompson, Hine & Flory LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114

Section 27. Public Announcements. No press release or public announcement regarding this Lease or the contents hereof shall be made by either party without the prior written approval of the other party (which approval shall not be unreasonably withheld), except as may be necessary, in the opinion of counsel for such party, to meet the requirements or regulation of any applicable law, or to comply with any request of any stock exchange on which the securities of such party may be listed. It is expressly understood that this Lease may be disclosed by either party in connection with obtaining any privileges, permits, licenses, grants, franchises, variances, waivers, approval, consents, exemptions, and certifications, and by Tenant in connection with its securing financing for the transactions contemplated hereby.

Section 28. Severability. Each article, section, subsection, and lesser section of this Lease constitutes a separate and distinct undertaking, covenant, and/or provision hereof. Whenever possible, each provision of this Lease shall be interpreted in such manner as to be effective and valid under applicable law. In the event that any provision of this Lease shall be determined to be unlawful, such provision shall be deemed severed from this Lease, but every other provision of this Lease shall remain in full force and effect, and in substitution for any such provision held unlawful there shall be substituted a provision of similar import reflecting the original intent of the parties hereto to the extent permissible under law.

Section 29. Governing Law. This Lease shall in all respects be interpreted, construed, and governed by and in accordance with the internal substantive law of the State of Ohio.

Section 30. Definitions. Capitalized terms used herein shall have the meanings ascribed to them in the Purchase Agreement unless otherwise defined herein.

Section 31. Signs/Advertising. Tenant shall not place, construct, or maintain any sign, advertisement or banner upon any building or part of the System without Landlord's prior consent; except, however, that Tenant shall be entitled to post a sign outside the RES and the Annex containing the name "Akron Thermal, Limited Partnership" and the address of the RES or the Annex, as the case may be, provided that Tenant obtains all normally required approvals from Landlord, if required by law, including but not limited to, approval of the City Planning Commission and the City Council, and that such sign complies at all times with all applicable ordinances of Landlord.

Section 32. Books and Records. Tenant agrees that it shall preserve and maintain any books and records belonging to the Landlord on the

premises of the RES, the Annex, or, with the permission of the Landlord, an offsite storage area. Tenant agrees not to destroy any such books and records without first obtaining the prior written approval of the Landlord. In addition, Tenant agrees to, whenever reasonably requested by the Landlord, permit the Landlord to have access to, and make copies of (at the Landlord's expense), during regular business hours, all books and records relating to the Akron Energy System which are in Tenant's possession.

Section 33. Buildings A and D. Tenant and Landlord hereby acknowledge and agree that Landlord shall be entitled to continue to use buildings A and D of the RES, which buildings are more fully described on Exhibit B attached hereto ("Buildings A and D"), for storage of certain books, records, and files to be retained by Landlord (the "Retained Records") and other file storage and any other purposes not interfering with Tenant's operations. Landlord shall at all times during which personal property is stored in Buildings A or D and at all times that Landlord's employees or agents are using Buildings A and D carry liability insurance, or self-insure such risk, in amounts and at levels required under this Lease.

Section 34. Electrical Substations. Tenant hereby acknowledges and agrees that the electrical substations located in and around the RES and the Annex (the "Substations") shall at all times remain the property of the Landlord; provided, however, Tenant shall serve as the agent of the Landlord and operate the Substations, collect payments from the businesses and other establishments that receive electricity through such Substations and then remit such funds to the Ohio Edison Company. The terms and provisions of this Section 34 shall survive any termination or merger of this Lease resulting from a purchase by Tenant of the System, until such time as the PUCO permits the transfer of ownership of the Substations from Landlord to Tenant.

Section 35. Retained Contract Agency Agreement.

35.1 Effective during the term specified below, Landlord hereby contracts with Tenant to provide the services which Landlord is required to deliver under, and appoints and employs Tenant as its agent for, the heating and cooling service contracts listed on Schedule 6.2 as modified from time to time (the "Retained Contracts"). The Retained Contracts cannot by their terms be assigned to Tenant without the consent of a third party, which consent has either not yet been obtained or is subject to further action or confirmation. Tenant hereby accepts such appointment upon the terms and conditions set forth below.

35.2 The term of this appointment shall become effective as of the date of the Interim Agreement and shall continue thereafter until the earlier of

(a) termination of all of the Retained Contracts, (b) assignment of all of the Retained Contracts to Tenant, or (c) expiration of the Term if the Leased Property is not purchased by Tenant pursuant to the Purchase Agreement. Upon receipt of all consents to assignment from Landlord to Tenant required from third parties under or in connection with a Retained Contract, such Retained Contract automatically shall be deemed to have been assigned to Tenant without further action by any person. Thereafter, such contract shall cease to be a Retained Contract under this Section 35.

35.3 Landlord hereby grants to Tenant all of its authority and powers under or with respect to the Retained Contracts including but not limited to the authority and power (all of which may be exercised in the name of Landlord):

(a) To enforce the terms and provisions of any such Retained Contract now in effect and to comply with the terms and provisions thereof as the same impose obligations on Landlord;

(b) To maintain and perform during the term of this appointment the Retained Contracts and in connection therewith to renegotiate, replace, modify, amend, or terminate any Retained Contract;

(c) To collect payment for services rendered and give receipts therefor;

(d) To institute and prosecute actions against customers for failure to comply with any term of any Retained Contract, sue and recover payment and when deemed necessary or advisable by Tenant, to compromise and release such actions or suits and reinstate such Retained Contracts; and

(e) To communicate in the ordinary course of business or otherwise with the other party of any such Retained Contracts.

35.4 (a) To the extent that Tenant is provided the benefits of the Retained Contracts pursuant to this Section 35, Tenant shall perform the benefit of the issuer thereof or the other party or parties thereto, the obligations of seller thereunder or in connection therewith, but only to the extent that (i) such action by Tenant would not result in any default thereunder or in connection therewith and (ii) such obligation would have been an Assumed Obligation but for the nonassignability or nontransferability thereof.

(b) Tenant shall, in cooperation with Landlord, use its best efforts to obtain the consent of any person required to assign the Retained Contracts to Tenant.

35.5 Landlord hereby agrees as follows:

(a) Landlord shall use all reasonable efforts, in cooperation with Tenant, to obtain the consent of any person required to assign the Retained Contracts to Tenant and to provide to Tenant all of the benefits of the Retained Contracts;

(b) Landlord shall direct the other party or parties to each Retained Contract to directly remit payments thereunder or in connection therewith directly to a lockbox designated by Tenant and to hold as trustee for, and promptly remit to, Tenant any payment Landlord receives under or in connection with any such Retained Contract;

(c) To grant Tenant and any lender of that Tenant so designates a security interest in all of Landlord's rights under the Retained Contracts including but not limited to Landlord's rights to receive payments thereunder and to execute, deliver, and file such documents and instruments as Tenant and Tenant's lenders may request to effect, perfect, evidence, or enforce such security interest;

(d) To enforce, at the request of Tenant, any and all rights of Landlord under the Retained Contracts against the other party or parties thereto;

(e) Not to renegotiate, replace, modify, amend, or terminate any Retained Contract; and

(f) To promptly notify Tenant of any correspondence or communications pertaining to the System or the Retained Contract with any other party to any Retained Contract.

Section 36. Electrical Contracts.

36.1 Effective during the term specified below, Landlord hereby contracts with Tenant to provide the services which Landlord is required to deliver under, and appoints and employs Tenant as its agent for, the electrical service contracts listed on Schedule 36.1 as modified from time to time (the "Electrical Contracts") The Electrical Contracts cannot by their terms be assigned to the Tenant without the consent of a third party, which consent has either not yet been obtained or is subject to further action or confirmation. Tenant hereby accepts such appointment upon the terms and conditions set forth below.

36.2 The term of this appointment (the "Substation Term") shall become effective as of the Interim Agreement and shall continue thereafter until termination of all of the Electrical Contracts.

36.3 Landlord hereby grants to Tenant all of its authority and powers under or with respect to the Electrical Contracts including but not limited to the authority and power (all of which may be exercised in the name of Landlord):

(a) To enforce the terms and provisions of any such Electrical Contract now in effect and to comply with the terms and provisions thereof as the same impose obligations on Landlord.

(b) To maintain and perform during the Substation Term the Electrical Contracts and in connection therewith to renegotiate, replace, modify, amend, or terminate any Electrical Contract.

(c) To collect payment for services rendered and give receipts therefor.

(d) To institute and prosecute actions against customers for failure to comply with any term of any Electrical Contract, sue and recover payment and when deemed necessary or advisable by Tenant, to compromise and release such actions or suits, and reinstate such Electrical Contracts.

(e) To communicate in the ordinary course or otherwise with the other party of any such Electrical Contracts.

36.4 (a) To the extent that Tenant is provided the benefits of the Electrical Contracts pursuant to this Section 36, Tenant shall perform for the benefit of the issuer thereof or the other party or parties thereto, the obligations of Landlord thereunder or in connection therewith, but only to the extent that such action by Tenant would not result in any default thereunder or in connection therewith.

36.5 Landlord hereby agrees as follows:

(a) To direct the other party or parties to each Electrical Contract to directly remit payments thereunder or in connection therewith directly to a lockbox designated by Tenant and to hold as trustee for, and promptly remit to, Tenant any payment Landlord receives under or in connection with any such Electrical Contract;

(b) Amend Schedule 36.1 hereto to include additional Electrical Contracts that Landlord enters into with electrical customers who receive their electricity through the electrical substations located on the Real Property and the land outside of the Annex;

(c) To enforce, at the request of Tenant, any and all rights of Landlord under the Electrical Contracts against the other party or parties thereto;

(d) Not to renegotiate, replace, modify, amend, or terminate any Electrical Contract; and

(e) To promptly notify Tenant of any and all correspondence or communication with any other party to any Electrical Contract.

36.6 All of the terms and provisions of this Section 36 shall survive any termination or merger of this Lease resulting from a purchase by Tenant of the System, until such time as the PUCO permits the transfer of the Substations from Landlord to Tenant or until termination of all of the Electrical Contracts as provided in Section 36.2 above.

Section 37. As Is Condition; Environmental Liability.

37.1 Tenant hereby acknowledges and agrees that Landlord has made no representation or warranty whatsoever, express or implied, as to the condition, quantity, or quality of the System, or any portion thereof. Except as and to the extent provided in Section 37.2 below, Tenant further agrees to accept the System and all portions thereof including, without limitation, all Leased Property, in their "As-Is" condition as of November 4, 1995, subject to all defects and conditions therein, and Tenant shall assert no claim, and Landlord shall have no liability or obligation whatsoever to Tenant, with respect to any and all foreseeable or unforeseeable damage, loss, cost, liability or expense, directly or indirectly arising from any condition existing on November 4, 1995, or which now exists or may hereafter be found to exist in, on, under or about the System, including, without limitation, the RES and the Annex, or from any determination that the System or any portion thereof, violates any applicable law, ordinance, regulation or ruling.

37.2 Tenant's acceptance of the Leased Property in the condition described in Section 37.1 above shall include, without limitation, Tenant's acceptance of all events, accidents, occurrences or conditions caused by, related to or resulting from the presence, use, generation, storage, transportation, treatment, recycling, reuse, reclamation, disposition, handling or release of any Contaminant

(collectively and individually, an "Environmental Condition"); except, however, Tenant shall not assume or accept responsibility for: (a) any Environmental Condition which may exist or arise outside of the Annex unless such Environmental Condition arises directly or indirectly from acts or omissions of Tenant, its employees, partners, agents, contractors or invitees; or (b) the trichloroethane found in certain groundwater samples under the RES and described in the Phase II Environmental Assessment prepared by GPD Associates, dated _____. Notwithstanding the foregoing, Landlord agrees that it will clean up all of the Polychlorinated Biphenyls located on top of the precipitators in the RES and more fully described in the Phase I Environmental Assessment of the Akron Recycled Energy System Plant prepared by Environmental Strategies Group, a copy of which has previously been delivered to Landlord, and Tenant agrees that it will reimburse Landlord for one-half of the Landlord's out-of-pocket expenses associated with such clean-up.

Section 38. Indemnification. Tenant shall indemnify, defend, and hold harmless Landlord from and against any and all losses, damages, expenses, judgments, claims, demands, suits, liabilities, actions, and causes of action (collectively, "Losses") arising from or in any way related to (a) Tenant's breach of or failure to comply with any of the terms, covenants, provisions, or conditions of this Lease, or (b) any and all events, accidents, occurrences, or conditions caused by or resulting from an Environmental Condition on the Leased Property (except those which may exist, due to no act or omission of Tenant, outside of the Annex, and the trichloroethane referred to in Section 37.2 above) including, without limitation, any injury or death to any person or damage to any property or the removal or treatment of any such hazardous or toxic substance or waste or any other remedial action or investigatory action involving the Leased Property or the operations conducted therein. In the event that this Lease terminates or expires and Tenant has not consummated the purchase of the Leased Property in accordance with the terms of the Purchase Agreement, then and thereafter (1) the foregoing indemnification obligation of Tenant shall not apply with respect to any Environmental Condition on the Leased Property which existed prior to November 4, 1995, and (2) Landlord shall indemnify, defend and hold harmless Tenant from and against any losses arising from any Environmental Condition on the Leased Property which existed prior to November 4, 1995, and which was not in any way enlarged, expanded, exacerbated or otherwise adversely affected by acts of Tenant, its employees, partners, agents, contractors or invitees. Landlord shall indemnify, defend and hold harmless Tenant from and against any Losses arising from any Environmental Condition existing outside of the Annex and not arising directly or indirectly from acts or omissions of Tenant, its employees, partners, agents, contractors or invitees, and from and against any Losses arising from the trichloroethane referred to in Section 37.2 above. The provisions of this Section 38 shall survive the termination or expiration of this Lease and the Purchase Agreement.

Section 39. Guaranty of Thermal Ventures, Inc. As further consideration for this Lease, and as a condition precedent to its effectiveness, Tenant covenants and agrees to deliver to Landlord on or before the Lease Closing Date, a guarantee by Thermal Ventures, Inc. of all obligations, liabilities, covenants, conditions, and agreements contained in this Lease and in the Purchase Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the date first written above.

Warren L. Woolford

Catherine G. Watson

Warren L. Woolford

Catherine G. Watson

THE CITY OF AKRON

By: _____
Donald L. Plusquellic,
Mayor

And By: _____
Joseph Kidder,
Director of Public
Service

AKRON THERMAL, LIMITED
PARTNERSHIP

By: THERMAL VENTURES, INC., its
general partner

By: _____
~~Lewis A. Mahoney, President~~ CEC
CARL E AYERS, Chairman

Jeffrey P. Beer

Linda A. Lowe

Approved as to form and correctness:

_____
Max Rothal,
Director of Law

STATE OF OHIO)
) SS.
COUNTY OF Summit)

On this, the 14th day of August, 1997, before me, a notary public, personally appeared Donald L. Plusquellic and Joseph Kidder, who acknowledged themselves to be the Mayor and Director of Public Service, respectively, of the City of Akron; and that they as such Mayor and Director of Public Service of the City of Akron, being authorized to do so, executed the foregoing instrument for the purposes therein contained, by signing the name of the City of Akron by themselves as such Mayor and Director of Public Service of the City of Akron.

Cheri B Cunningham
Notary Public

CHERI B. CUNNINGHAM
ATTORNEY AT LAW
STATE OF OHIO - NOTARY PUBLIC
NO EXPIRATION DATE

[SEAL]

My Commission expires:

STATE OF OHIO)
) SS.
COUNTY OF Mahoning)

On this, the 15th day of August, 1997, before me, a notary public, personally appeared ~~Lewis T. Mahoney~~ CARL E. AVERS who acknowledged himself to be ~~President~~ Chairman of Thermal Ventures, Inc., the general partner of AKRON THERMAL, LIMITED PARTNERSHIP, and that as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained, on behalf of the corporation and the limited partnership.

Mary E Wagner
Notary Public

[SEAL]

My Commission expires: May 4, 2000

This instrument prepared by:

Thompson Hine & Flory LLP
3900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1216

SCHEDULE 6.2

[Intentionally Omitted]

SCHEDULE 6.3

Heating/Cooling Contracts

See Asset Purchase Agreement by and between the City of Akron, Ohio and Akron Thermal, Limited Partnership dated as of the date hereof, Schedule 2.1(d) - Acquired Contracts (with the exception of the Easements for Pipelines).

SCHEDULE 6.4

Intellectual Property

See Asset Purchase Agreement by and between the City of Akron, Ohio and Akron Thermal, Limited Partnership dated as of the date hereof, Schedule 2.1(e) — Acquired Intellectual Property.

SCHEDULE 36.1

Electrical Contracts

1. Rogers Industries

Public Utilities

EXHIBIT A
ALL-STATE® INTERNATIONAL

7A R

RECEIVED
96 SEP 16 A9:20
CLERK OF COUNCIL
CITY OF AKRON

Offered By BOLDEN

ORDINANCE NO. 670-1996 granting a franchise to Akron Thermal, Limited Partnership, a Delaware limited partnership, its successors and assigns, to erect, construct, operate, maintain and use the necessary pipes, conduits, valves and such other fixtures and appliances, overhead and underground, as may be deemed by it necessary or essential to enable it to transmit and recover steam, hot water and chilled water over, through, along and under the streets, alleys, highways, ways, sidewalks and public places of the City of Akron, County of Summit, State of Ohio ("City") for the purpose of furnishing steam, hot water and chilled water to businesses and residences located in the City; and providing that this ordinance shall take effect and be enforced from and after the earliest period allowed by law, and shall remain in force for a period of twenty-five (25) years.

WHEREAS, the City of Akron, County of Summit, State of Ohio ("City") owns and operates the district heating and cooling system that supplies to approximately 200 customers steam, hot water and chilled water for the heating and cooling of businesses and residences located in the City (the "EDS"), including without limitation, a certain steam power plant formerly owned by BF Goodrich Company (the "Annex"), a certain solid waste energy incinerator facility (the "RES"), and together with the Annex, the EDS, and the steam and water main distribution systems located throughout the City area and associated underground piping, manholes and related facilities (the "System") in Akron, Ohio;

WHEREAS, the City and Akron Thermal, Limited Partnership, a Delaware limited partnership ("Akron Thermal"), have entered into a certain Interim Licensing Agreement (the "RES Interim Agreement"), dated as of August 4, 1995, pursuant to which, among other things, (1) the City granted to Akron Thermal a non-exclusive license to enter into, upon and across, and to use and have access to the Annex and (2) Akron Thermal agreed to furnish all related or unrelated services pertaining to the operation and maintenance of the Annex;

WHEREAS, the City and Akron Thermal have entered into a certain addendum to Interim License and Operating Agreement (the "Addendum"), and together with the RES Interim Agreement (the "Interim Agreement"), dated as of November 4, 1995, pursuant to which, among other things (1) the City granted to Akron Thermal a non-exclusive license to enter into, upon, and across, and to use and have access to the RES and (2) Akron Thermal agreed to furnish all related or unrelated services pertaining to the operation and maintenance of the RES;

WHEREAS, the City and Akron Thermal contemplate entering into an Asset Purchase Agreement ("Purchase Agreement") under which the City would sell the System as a going concern (the "Business"), including substantially all of the assets used in the operation of the System and the Business;

WHEREAS, the City and Akron Thermal contemplate entering into an Operating Lease Agreement in order to permit Akron Thermal to

operate the System, pending closing of the transactions described in the Purchase Agreement.

NOW, THEREFORE, BE IT ENACTED by the Council of the City of Akron, Ohio:

SECTION 1: AUTHORITY GRANTED BY FRANCHISE.

In consideration of the faithful performance and observance of the conditions and reservations hereinafter specified, and consistent with the provisions of Sections 39-51, inclusive, of the Akron City Charter, Akron Thermal, its successors and assigns, is hereby granted a franchise and right to erect, construct, operate, maintain and use the System and other necessary pipes, conduits, valves and such other fixtures and appliances, overhead and underground, as may be deemed by it to be necessary or essential to enable it to transmit and recover steam, hot water and chilled water over, through, along and under the streets, alleys, highways, ways, sidewalks and public places of the City for the purposes of furnishing steam, hot water and chilled water services (collectively, "Services") to businesses and residences located in the City under authority of 715.34 Ohio Revised Code, 4905.03(A)(9) Ohio Revised Code and 1723.02 Ohio Revised Code.

SECTION 2: OPERATION AND MAINTENANCE OF THE FRANCHISE.

(A) The location of all new pipes, conduits and such other fixtures and appliances as may be deemed by Akron Thermal to be necessary or essential to enable it to furnish the Services shall be done by Akron Thermal, its successors and assigns, only upon permits issued by the Public Service Director of the City, in

accordance with the City's Codified Ordinances as amended from time to time.

(B) Whenever Akron Thermal excavates in connection with the operation and maintenance of the System in, along, over, under, across and upon any highway, street, sidewalk, alley, or other public grounds and rights of way in the City and in the course of any new construction or addition to the System, Akron Thermal shall perform such work so as to cause no unreasonable inconvenience to the general public and as approved by the City. Akron Thermal, at its own cost and expense, shall leave all highways, streets, alleys, public grounds and rights of way, sidewalks, waterlines or sewers and other underground facilities upon which it may enter for the purposes herein authorized, in as good condition as they were at the time said excavation and work were started.

(C) No highway, street, alley, public ground or right of way, sidewalk, waterline or sewer or other underground facility shall be encumbered by construction, maintenance, removal, restoration or repair work, by Akron Thermal for a period longer than necessary to execute such work. If there is an unreasonable delay by Akron Thermal in restoring and maintaining any highway, street, alley, public ground or right of way, sidewalk, waterline, sewer or other underground facility after such excavation or repairs have been made, the City shall have the right after notice to restore or repair the same and to require Akron Thermal to pay the cost of such restoration or repair. Akron Thermal shall also, at its own cost and expense, restore and replace any other property disturbed,

damaged, or in any way injured by or on account of its activities to as good a condition as said property existed immediately prior to the disturbance, damage or injury.

(D) In addition, any opening or obstruction in the highways, streets, sidewalks, alleys or other public ground or right of way made by Akron Thermal in the course of its construction, operation or maintenance of the System shall be in accordance with rules and regulations governing the making of openings in highways, streets, sidewalks, alleys, or other public grounds or rights of way of the City as established by the ordinances and regulations of the City that are in effect at that time.

SECTION 3: COMPLIANCE BOND.

(A) Akron Thermal shall maintain, at its cost and expense during the entire term of this ordinance, a bond in the amount of $100,000.00 from a company authorized to do business in the State of Ohio, which shall be available for the City to utilize in the event Akron Thermal fails to restore any highway, street, alley, public ground or right of way, sidewalk, waterline, sewer or other underground facility to their original condition within a reasonable period of time after making excavations. This bond will also be available, in addition to any insurance provided under Section 8 herein, to indemnify the City for any damage to public property resulting from Akron Thermal's construction, operation or maintenance of the System, and for any other failure to comply with this ordinance.

(B) The rights reserved to the City with respect to the bond are in addition to all other rights of the City, whether reserved by this franchise or authorized by law, and no action, proceeding or exercise of a right with respect to such bond shall affect any other right the City may have.

SECTION 4: FRANCHISE SUBJECT TO POLICE POWERS OF THE CITY.

The construction, maintenance and operation of the System by Akron Thermal and all property of Akron Thermal subject to the provisions of this franchise shall be subject to the exercise of all lawful police powers of the City.

SECTION 5: COMPLIANCE WITH ALL APPLICABLE LAWS.

All work undertaken in connection with the rights and privileges of Akron Thermal under this franchise shall be subject to and governed by all present laws, rules and regulations of the City, the State of Ohio and the United States of America, including any state or federal agency having jurisdiction, as well as future laws, rules and regulations that are not inconsistent with the rights and obligations contained herein or, with respect to the City, all future provisions, ordinances and regulations adopted in the exercise of its police powers to protect the health, safety and welfare of its residents.

SECTION 6: NON-ASSIGNABILITY OF THE FRANCHISE.

No portion of the rights, privileges and franchise granted hereunder may be assigned without the prior consent of the City expressed by resolution or ordinance, which consent may be given or withheld in its sole and absolute discretion, and then only under

such reasonable conditions as may therein be prescribed. For purposes of this Section 6, an assignment requiring approval of the City shall include, without limiting the foregoing: (a) any change of the general partner of Akron Thermal or in the majority ownership or control of the general partner of Akron Thermal other than a transfer of the general partnership interest in Akron Thermal to North American Thermal Systems Limited Liability Company ("NATS") so long as NATS is and remains at least owned 50% by TVI (as defined below) and TVI continues to control NATS and manage its day-to-day operations, (b) any transfer of an interest or change in control of Akron Thermal such that Carl E. Avers, Lewis A. Mahoney, or NATS would no longer directly control Akron Thermal, (c) any transfer of a majority of the assets of Akron Thermal whether in the aggregate or in a series of transactions, (d) any transfer of a majority of the stock or substantially all of the assets of Thermal Ventures, Inc. ("TVI"), whether in the aggregate or in a series of transactions (other than a transfer of general partnership interests to NATS), or any merger, consolidation, or liquidation of either Akron Thermal or TVI. Notwithstanding anything contained in this ordinance to the contrary, the assignment of Akron Thermal's rights under this ordinance to an entity whose sole general partner is either TVI or NATS and which is controlled by Lewis A. Mahoney and/or Carl E. Avers shall not be considered an assignment requiring approval of the City so long as the City receives written notice of such assignment. Any attempted assignment in violation of this Section shall be void and shall

constitute a material violation of this ordinance. No assignment to any person or entity shall be effective until the assignee has filed with the City a notarized, unconditional acceptance of all the terms and conditions contained herein.

SECTION 7: FRANCHISE NOT EXCLUSIVE.

(A) This franchise shall not be exclusive and neither the granting thereof nor any other provisions contained herein shall abridge, diminish, alter, or affect, the right, privilege, power or authority of the City; and the City hereby reserves and preserves the right to grant any identical or similar or different franchise to any person, firm or corporation other than Akron Thermal either within or without or partly within or partly without the franchise area of any grantee.

(B) No privilege or exemption is granted or conferred except those specifically prescribed in this ordinance.

SECTION 8: INDEMNIFICATION AND INSURANCE.

(A) Akron Thermal shall, at its sole cost and expense, fully indemnify, defend and hold harmless the City, its officers, boards, commissions, agents and employees from and against any and all losses, damages, expenses, claims, demands, causes of actions, actions, suits, proceedings, liabilities and judgments of every kind and nature whatsoever arising out of Akron Thermal's construction, maintenance or operation of the System or from its exercise of the rights and privileges herein granted, including, without limitation, any injury or death to any person or damage to any property, real or personal.

(B) Akron Thermal shall at all times maintain commercial general liability insurance, including products liability coverage, to cover and protect itself and the City as an additional named insured against all claims that may arise from Akron Thermal's construction, operation or maintenance of the System or from its exercise of the rights and privileges herein granted. All such insurance shall be maintained with a company or companies approved by the City, which approval shall not be unreasonably withheld. Copies of Akron Thermal's currently effective policy or policies of insurance showing the City as an additional named insured shall be provided to the City's Law Department. Such insurance shall have a combined single limit of not less than $5,000,000.00 per occurrence with respect to bodily injury and property damage, and shall specify that such insurance will not be cancelled unless the insurer has given the City at least 30 days prior written notice. A certificate of such insurance is attached as Exhibit "A". Upon termination of said insurance, this franchise shall immediately terminate.

SECTION 9: ACCEPTANCE.

Akron Thermal shall have thirty (30) days from the passage and legal publication of this ordinance to file with the City Clerk a written acceptance of the terms and conditions of this franchise pursuant to Section 4909.34 of the Ohio Revised Code

SECTION 10: REGULATION OF RATES.

Akron Thermal shall have the right to set and modify the billing rates for the provision of steam, hot water and chilled

water to the System's customers (subject to any required governmental approvals) and preparing and presenting all information and data required by any governmental authority in connection with rate increases or modifications; provided, however, Akron Thermal shall hold all steam, hot water and chilled water prices at current levels for all existing customers and end users of the System as of November 4, 1995 (but subject to imposition of any gross receipts tax or other tax on such prices imposed by the PUCO or other tax authority), and shall charge the Landlord at Landlord's current rate or less (subject to the aforementioned taxes), for a period of at least three years from the date of the Operating Lease Agreement; and at the end of such three year period, Akron Thermal shall not increase the rates charged to the City unless Akron Thermal shall have given notice to the City at least 180 days prior to the beginning of the City's fiscal year; provided, however, that in no event shall the rates charged to the City at any time exceed the most favorable rates charged by the City to the class of customers most similar to the City. Notwithstanding anything to the contrary in this Section, the City shall have the right to review and revise all rates charged by Akron Thermal once every ten (10) years from and after the date of this ordinance, or at any other time as may be required by applicable laws, statutes, rules or regulations.

SECTION 11: FRANCHISE FEE.

(A) As a condition of receiving this franchise, Akron Thermal shall pay to the City (c/o Public Utilities Commissioner) a

franchise fee of Ten Thousand Dollars ($10,000.00) for the first year of the franchise (the "Base Fee"). The Base Fee shall be payable by Akron Thermal concurrent with its acceptance of this franchise.

(B) On the anniversary date of each respective year of the franchise (the "Adjustment Date"), the Base Fee shall be adjusted to an amount computed by multiplying the Base Fee established in subsection (A) by a fraction, the numerator of which is the Index as published for the calendar month immediately preceding the Adjustment Date and the denominator of which is the Index as published for the calendar month in which the franchise becomes effective ("Adjusted Base Fee"). If the Index is discontinued during the term of this franchise, such other comparable index shall be substituted for purposes of calculation of Base Fee adjustments. Notwithstanding the foregoing franchise fee adjustment formula, in no event shall the Adjusted Base Fee be less than that of the immediately preceding year. Akron Thermal shall pay the Adjusted Base Fee each year on or before the anniversary date of the franchise to the City (c/o Public Utilities Commissioner).

(C) For purposes of this franchise, the terms listed below have the following meanings:

(i) "Index" means the Consumer Price Index for Urban Wage Earners and Clerical Workers, All Items (1982-84 = 100), United States City Average, published by the United States Department of Labor, Bureau of Labor Statistics. If the base

period of the Index is changed from 1982-84, the Index shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics.

(ii) "Franchise year" means each twelve (12) month period commencing on the effective date of the franchise, and on each anniversary thereof during the franchise term.

SECTION 12: DURATION AND TERMINATION OF THE FRANCHISE.

(A) This franchise shall take effect and be in force from and after the earliest period allowed by law, and shall remain in effect for a term of twenty-five (25) years unless sooner terminated as provided herein. The City hereby reserves the right to terminate and cancel this franchise and all rights and privileges of Akron Thermal hereunder, in whole or in part, if any of the following events occur or for any of the following reasons:

(i) Akron Thermal, by act or omission, violates any material term, condition or provision of this franchise;

(ii) Akron Thermal becomes insolvent, unable or unwilling to pay its debts, or is adjudged a bankrupt; or all or part of Akron Thermal's facilities should be sold under an instrument to secure a debt and are not redeemed by it within thirty (30) days from the date of such sale; provided, however, this shall not be an event of termination or cancellation in the event of bankruptcy

proceeding and the trustee, receiver, or debtor in possession agrees in writing to be bound by the terms of this franchise;

(iii) Akron Thermal practices any fraud or deceit in its conduct or relations under this franchise with the City, customers or potential customers;

(iv) Akron Thermal fails materially to comply with Ohio law applicable to public utility heating and cooling companies.

(B) Method of Termination and Cancellation. Any such termination and cancellation of this franchise shall be by ordinance adopted by the City; provided, however, before any such ordinance is adopted, Akron Thermal must be given at least sixty (60) days' advance written notice, which shall set forth the causes and reasons for the proposed termination and cancellation and shall advise Akron Thermal that it will be provided an opportunity to be heard by the City regarding such proposed action before any such action is taken, and shall set forth the time, date and place of the hearing. In no event shall such hearing be held sooner than thirty (30) days following delivery of such notice to Akron Thermal.

(C) Force Majeure. Other than its failure, refusal or inability to pay its debts and obligations, including, specifically, the payments to the City required by this franchise, Akron Thermal shall not be declared in default or be subject to any

sanction under the provisions of this franchise in those cases in which performance of such provision is prevented by reasons beyond its reasonable control.

SECTION 13: CONDEMNATION PROCEEDINGS.

Nothing in this franchise shall prevent the City from acquiring the System, in whole or in part, by condemnation proceedings or any other method provided by law. This right shall be in addition to the City's power to purchase or lease the System, in whole or in part, pursuant to Section 14 of this ordinance.

SECTION 14: PURCHASE OR LEASE OF THE SYSTEM BY THE CITY.

(A) If Akron Thermal forfeits or the City terminates this franchise pursuant to the provisions of this ordinance, or at the normal expiration of the franchise term, the City shall have the right to purchase or lease the System.

(B) If the City elects to exercise its right to purchase or lease the System, the purchase price or rental price shall be agreed upon between the City and Akron Thermal. If the parties fail to agree upon a purchase price or a rental price within 30 days following the date of the City's election to purchase or lease, such purchase price or rental price shall be determined as follows:

> As used herein, the term "Fair Market Value" shall mean the price in terms of money which the System would generate in a sale or lease transaction, as the case may be, free and clear of all indebtedness, upon exposure to

the open market, allowing a reasonable time to find a purchaser or tenant. Except as otherwise herein provided, Fair Market Value shall be determined by an independent member of the American Institute of Real Estate Appraisers ("M.A.I. Appraiser") with at least five (5) years of experience in appraising real property in the Akron area. The M.A.I. Appraiser shall be mutually selected by the City and Akron Thermal within forty-five (45) days after the date of the City's election to purchase or lease, with the City and Akron Thermal each paying one-half of the M.A.I. Appraiser's fee. The M.A.I. Appraiser will furnish each party a written appraisal within one hundred eighty (180) days, and such appraisal shall be deemed to be Fair Market Value. If the City and Akron Thermal cannot, within forty-five (45) days after the City's election to purchase or lease, agree on an acceptable M.A.I. Appraiser, each party will select an M.A.I. Appraiser. Each selected appraiser will be paid by the party employing the appraiser and will furnish each party a written appraisal within one hundred eighty (180) days. If the difference between the two

appraisals is an amount not more than ten percent (10%) of the higher appraisal, Fair Market Value shall be the average of the two appraisals. If the difference between the two appraisals is an amount greater than ten percent (10%) of the higher appraisal, a third M.A.I. Appraiser will be appointed by the two selected appraisers. The appointed M.A.I. Appraiser will be paid equally by the City and Akron Thermal, and will independently appraise the System and submit a written appraisal within one hundred eighty (180) days to each party. Fair Market Value will then be equal to the appraisal of the third M.A.I. Appraiser. If either party or its selected M.A.I. Appraiser fails or refuses to select an M.A.I. Appraiser as required above, then either the City or Akron Thermal, on behalf of both, shall have the right to seek appointment of an M.A.I. Appraiser by requesting such appointment by the then-presiding administrative judge of the common pleas court of Summit County, Ohio. The other party shall not raise any question as to such judge's full power and jurisdiction to entertain the application and make the appointment.

The purchase price or rental price to be paid by the City shall exclude the value of the grant of this franchise. For a period of sixty (60) days following the City's receipt of notice of a determination of the purchase price or rental price, as the case may be, as provided above, the City shall have the right, exercisable by written notice to Akron Thermal, to rescind its election to purchase or lease the system.

(C) If Akron Thermal proposes to sell the System or the Business at any time after the closing of the Purchase Agreement to an entity which is not an affiliate of Thermal Ventures, Inc. or North American Thermal Systems Limited Liability Company, Akron Thermal first must deliver to the City a copy of the offer to purchase the System and the Business (the "Bona Fide Offer"), if such sale is based on a proposed acceptance of such Bona Fide Offer, or if such sale is not based on a Bona Fide Offer, a description of all terms of such sale including, without limitation, the identity of the proposed transferee and the consideration to be paid by the proposed transferee for the System and the Business (the "Description"), as the case may be (the "Offer"). The City shall have the right to purchase from Akron Thermal the System and the Business on the same terms and price as set forth in the Offer; provided, however, the purchase price shall

not include the value of the franchise. The City must exercise this right within ninety (90) days after its receipt of the Offer, which exercise shall be evidenced by writing or writing signed by or on behalf of the City and delivered or mailed by first-class mail, postage prepaid, to Akron Thermal.

SECTION 15: INTENTIONALLY OMITTED.

SECTION 16: STANDARDS OF SERVICE.

(A) Akron Thermal shall construct, operate and maintain the System in accordance with the accepted standards in the industry. Akron Thermal shall have the authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable it to exercise its rights and to perform its obligations under this franchise and to ensure uninterrupted service to all customers; provided, however, such rules, regulations, terms and conditions shall not be in conflict with any of the provisions of this franchise or any ordinance of the City, the laws of the State of Ohio and the United States of America and the rules and regulations of any state or federal agency having jurisdiction, and, before such rules, regulations, terms and conditions become effective, they shall be subject to approval of the City's Public Utilities Commissioner, whose approval shall not be unreasonably withheld.

(B) Notwithstanding subsection (A), the City reserves the right to establish standards of service of Akron Thermal for the System from time to time after the grant of this franchise.

(C) Akron Thermal shall continuously operate the System and shall not discontinue in whole or in part such operation or any of its product lines, without the prior written consent of the City. If Akron Thermal desires to discontinue any such operation or product line, it shall deliver to the City a written request for same, stating with specificity the reasons for the proposed discontinuance, (a "Request for Discontinuance") not later than two (2) years prior to the desired date of such discontinuance. If a Request for Discontinuance is made in a timely manner as provided above, the City agrees not to withhold unreasonably its consent to such Request for Discontinuance if and only: (i) if Akron Thermal is successful in petitioning the Public Utilities Commission of Ohio ("PUCO") to allow the discontinuance and obtains all written approvals of same from the PUCO, (ii) the City is served notice of Akron Thermal's filing of such discontinuance petition and is afforded the opportunity to participate in that proceeding, and (iii) the PUCO discontinuance approval expressly addresses the issue of alternative sources of heating and cooling services available to the then-current customers of the System. Any discontinuance of operations in violation of this Section 16 shall entitle the City to any and all remedies set forth in Section 10.4 of the Purchase Agreement, including, without limitation, the Liquidated Damages (as defined in the Operating Lease Agreement).

SECTION 17: ADEQUATE EXTENSION OF THE SYSTEM.

The City reserves the right to require adequate extension of the System to meet the needs and requirements of customers in the City.

SECTION 18: REPORTS AND FINANCIAL STATEMENTS.

(A) Akron Thermal, shall provide to the City's Public Utilities Commissioner timely copies of all notices, filings, applications and all other documents submitted to the PUCO concerning or affecting Akron Thermal's construction, operation and maintenance of the System.

(B) The City reserves the right to prescribe the form and manner in which Akron Thermal maintains its records and accounts related to the System, provided, however, that the form of accounts prescribed by the PUCO shall be controlling. Akron Thermal shall permit the City, upon reasonable notice, to have access to, to audit, examine and copy records and accounts of Akron Thermal related to the System. In addition, Akron Thermal shall provide the City's Public Utilities Commissioner, upon request, monthly, quarterly and annual financial and operating reports and reports relating to the management and ownership of Akron Thermal in such detail and form as the Public Utilities Commissioner may require.

SECTION 19: SEVERABILITY.

If any section, sentence or clause of this franchise is for any reason held illegal, invalid or unconstitutional, such holding shall not affect the enforceability of this ordinance. In the

event any section, sentence or clause of this franchise is for any reason held illegal, invalid or unconstitutional and such holding is subsequently reversed, modified or amended, the section, sentence or clause shall be valid and enforceable for the remaining term of this franchise.

PASSED: September 30, 1996

Vincent Ciaco
Clerk of Council

John W. Valle
President of Council

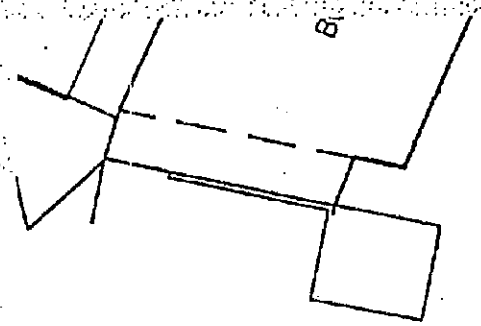
APPROVED: October 10, 1996

Mayor

Iowa - Fish Well

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF Ord No. 96-416 AS TAKEN FROM THE RECORDS ON FILE IN THE OFFICE OF THE CLERK OF COUNCIL.

Corinne Fenton
DEPUTY CLERK OF COUNCIL



EXHIBIT
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ALL-STATE® INTERNATIONAL

BOUNDARY SURVEY
RECYCLE ENERGY SYSTEM

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SURVEYED AND PREPARED BY:
THE CITY OF AKRON, OHIO
DEPARTMENT OF PUBLIC SERVICE
BUREAU OF ENGINEERING
SCALE: 1" = 100' DATE: MARCH, 1996