

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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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

PUCO

MOTION TO INTERVENE
OF
CANAL PLACE, LTD

Pursuant to Ohio Revised Code ("R.C.") Section 4903.221 and Ohio Administrative Code ("OAC") Rule 4901-1-11, Canal Place, LTD ("Canal Place") hereby respectfully moves the Public Utilities Commission of Ohio for leave to intervene in this proceeding.¹ As set forth in the attached Memorandum in Support, Canal Place submits that it has a real and substantial interest in this proceeding, that it is so situated that the disposition of this complaint without Canal Place's participation may impair or impede its ability to protect that interest, and that its participation in this proceeding will contribute to a just result. Canal Place further submits that no existing party represents its interest in these proceedings and that granting its motion to intervene will not unduly delay this complaint or unjustly prejudice any existing party.

¹ Canal Place has separately moved to intervene in Case No. 09-442-HC-AEC. Canal Place is aware of the Motion for Consolidation filed on June 11, 2009 by the City of Akron in Case Nos. 09-442-HC-AEC and 09-453-HT-AEM on June 11, 2009. Because the Commission has not yet ruled upon the City of Akron's Motion, Canal Place has separately moved to intervene in both cases.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT

Introduction

1. Canal Place.

Canal Place LTD ("Canal Place") owns and operates a 1.4 million square foot nationally recognized redeveloped property located in downtown Akron, Ohio that operates under the name Canal Place. This large complex currently is comprised of more than 91 local, regional, national and global companies representing more than 40 different types of businesses and having a combined work force of more than 2,500 people. In terms of total square footage, Canal Place is larger than Akron's entire downtown central business district, and is an important economic development center for the City of Akron.

To heat and cool the numerous industrial and office buildings operated by Canal Place, Canal Place purchases steam and chilled water service from Akron Thermal, Limited Partnership ("Akron Thermal") pursuant to a special contract dated May 18, 2001. The special contract is a reasonable arrangement under R.C. 4905.31 that was filed with, and approved by, the Commission in Case No. 01-3333-HC-AEC on February 21, 2002 ("Special Contract"). The term of the Special Contract continues through March 31, 2012.

2. Akron Thermal's Bankruptcy Proceeding.

On June 18, 2007, Akron Thermal filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Ohio (Case No. 07-51884). During the pendency of the bankruptcy proceeding, Akron Thermal filed a motion seeking to reject the Special Contract between Canal Place and Akron Thermal as previously filed with, and approved by, the Commission in Case No. 01-3333-HC-AEC on February 21, 2002.

While the aforementioned motion was pending, Akron Thermal and Canal Place

mutually negotiated an interim agreement covering the rate for steam services from August 1, 2007 through July 31, 2008 ("Interim Agreement"). Executed on September 27, 2007, and approved by the Bankruptcy Court on October 1, 2007, the Interim Agreement required Canal Place to pay an additional monthly "surcharge" over and above the rate approved by the Commission as part of the Special Contract. The amount of the surcharge set forth in the Interim Agreement was \$40,000 per month for the first three months (August-October 2007), and approximately \$13,333 per month for the remaining nine (9) months of the Interim Agreement. In all, Akron Thermal collected total surcharges in the amount of \$240,000 in addition to the rates set forth in the Special Contract during the period of the Interim Agreement.

3. The Amended Special Contract awaiting Commission-approval in Case No. 09-442-HC-AEC.

On September 30, 2008, Akron Thermal and Canal Place entered into a second agreement (the "September 2008 Agreement") covering the rate of service from August 1, 2008 through the termination of the Special Contract on March 31, 2012. The September 2008 Agreement was formally approved by the Bankruptcy Court by Order dated December 1, 2008. Similar to the Interim Agreement, the September 2008 Agreement imposed a second significant increase to the rates for service paid by Canal Place. The effective date of this rate increase was the effective date on which the Bankruptcy Court approved Akron Thermal's reorganization plan on February 20, 2009. The amount of the additional surcharge to be paid by Canal Place under the September 2008 Agreement is scheduled to be \$375,000. Canal Place has been paying the increased steam rates since February 2009. Commission approval of the September 2008 Agreement remains pending in Case No. 09-442-HC-AEC.

4. Akron Thermal's Emergency Rate Case proceeding.

On May 29, 2009, and despite the two previous large rate increases obtained by Akron Thermal from Canal Place as part of its Chapter 11 bankruptcy proceedings, Akron Thermal filed an Application for an emergency increase in rates and charges for steam and chilled water service provided throughout its service territory. Akron Thermal's proposed "emergency" increase states that it would increase the rates of Akron Thermal's customers by either 47.8 or 71.6 percent, which means that the rates paid by Canal Place would increase by a minimum of 47.8 percent – a very significant amount, especially in light of the two previous major increases in Canal Place's steam rates in the last 18 months.²

Legal Argument

1. The Standard.

Ohio Revised Code Section 4903.221(B) establishes criteria for the Commission to consider in ruling on motions to intervene:

- (1) the nature and extent of the movant's interest;
- (2) the movant's legal position and its probable relation to the merits;
- (3) whether the movant will unduly prolong or delay the case; and
- (4) whether the movant will significantly contribute to resolution of the factual issues.

Ohio Administrative Code Rule 4901-1-11(A) also provides for intervention upon a timely showing that the movant has a real and substantial interest in the proceeding. The Rule's criteria for the Commission to consider in ruling on motions to intervene are set forth under O.A.C. Rule 4901-1-11(B) as follows:

- (1) The nature and extent of the prospective intervenor's interest.

² See Case No. 09-453-HT-AEM, *Application of Akron Thermal for Emergency Rate Increase*, at 8, (May 29, 2009). The amount of the proposed increase to Canal Place is believed to be actually greater than those stated amounts.

- (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.

2. Applying the Standard to Canal Place.

As noted above, Canal Place has a direct and substantial interest in the nature and outcome of this proceeding. As a special contract customer whose negotiated contract rates have twice been significantly increased in the past 18 months as part of Akron Thermal's Chapter 11 bankruptcy proceeding, Canal Place yet again faces a proposed "emergency" rate increase sought to be imposed by Akron Thermal. Akron Thermal's proposed "emergency" rate increase, however, seeks to impose rate increases on Canal Place that are not permitted by the Special Contract, Interim Agreement, or September 2008 Agreement (which Akron Thermal has asked the Commission to approve). Moreover, the adverse impact on Canal Place of the proposed emergency rate increase would be extremely significant, especially in light of the contemporaneous rate increase being imposed by Akron Thermal on Canal Place under the September 2008 Agreement. Based upon the foregoing, Canal Place has a direct, real, and substantial interest in this proceeding, and requests that the Commission grant Canal Place intervention in this matter to fully protect its interests.

Canal Place's legal position in this case is in direct opposition to any articulated basis for the requested "emergency" rate increase. More specifically, Canal Place will focus on the: 1) "extraordinary" nature of emergency relief under R.C. 4909.16,³ including the

³ See *Amherst v. PUCO* (1976), 46 Ohio St.2d 256, 257.

principle that “[e]mergency rate relief cannot be a substitute for permanent rate increases;”⁴ 2) the Commission’s “extraordinary” power under R.C. 4905.31 to modify, alter or change special contracts except when there is a “showing that the contract adversely affects the public interest;”⁵ and the inherent unreasonableness of Akron Thermal’s proposed “emergency” rate increase, especially in light of the fact that Akron Thermal seeks to increase the rates charged to Canal Place for a third time in 18 months (and contemporaneous with its own filing with the Commission for approval of the September 2008 Agreement, which also would increase Canal Place’s rates). Therefore, Canal Place’s legal arguments are related to the merits of this case, and will inform and provide additional clarity to the issues in this case.

Canal Place’s participation is necessary to a just resolution of the merits in this case, and will neither unduly prolong nor delay the Commission’s review and consideration of the Application in this case. Canal Place’s longstanding contractual relationship with Akron Thermal, and its understanding of the factual issues at the heart of this case, make Canal Place well-suited to assist the Commission in resolving any factual issues. Furthermore, no other person or existing party represents Canal Place’s interest or grave concerns about Akron Thermal’s Application.

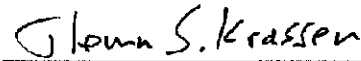
Simply put, Canal Place requests intervention to oppose the proposed “emergency” rate increase, which, among other things, 1) is inconsistent with, and not permitted, under the Special Contract as approved by the Commission; 2) is inconsistent with, and not permitted, under the September 2008 Agreement as approved by the Bankruptcy Court and

⁴ *Seneca Hills Service Co. v. PUCO* (1978), 56 Ohio St.2d 410, 414.

⁵ See e.g., *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, August 4, 1976 Opinion & Order, Case No. 75-161-EL-SLF (adopting the well-established Sierra-Mobile doctrine created by the United States Supreme Court).

for which Akron Thermal has sought Commission-approval; and 3) would have a substantial and detrimental impact on Canal Place. Accordingly, Canal Place LTD respectfully requests that the Commission grant its Motion to Intervene in this case.

Respectfully submitted,



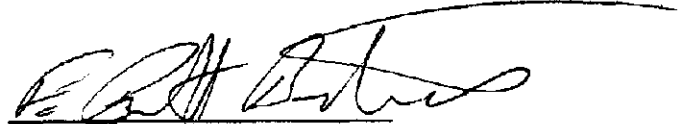
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Intervene was served upon the parties of record listed below this 15th day of June 2009 *via* Regular U.S. Mail, postage prepaid.


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