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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	
Akron Thermal, Limited Partnership for	:	Case No. 09-315-HT-ATA
Approval of Revised Tariffs.	:	

In the Matter of the Application of	:	
Akron Thermal, Limited Partnership for	:	Case No. 09-414-HT-AIS
Authority to Issue Three (3) Promissory	:	
Long-Term Notes.	:	

In the Matter of the Application of	:	
Akron Thermal, Limited Partnership for	:	Case No. 09-441-HT-AEC
Approval of an Arrangement with an	:	
Existing Customer.	:	

In the Matter of the Application of	:	
Akron Thermal, Limited Partnership for	:	Case No. 09-442-HC-AEC
Approval of a Modification to an	:	
Existing Arrangement.	:	

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

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MOTION TO INTERVENE
OF
DAVID WEHRLE, IN HIS CAPACITY AS TRUSTEE OF THE
CREDITORS' TRUST FOR AKRON THERMAL, LIMITED PARTNERSHIP

By the above-styled applications, Akron Thermal, Limited Partnership ("Akron Thermal") seeks, among other things, an emergency rate increase (Case No. 09-453-HT-AEM) and Commission approval of certain promissory notes, including a February 20, 2009 promissory note payable to Creditors' Trust (Case No. 09-414-HT-AIS). David Wehrle is the Trustee of the

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Creditors' Trust (the "Trust"), which was created for the benefit of unsecured creditors of Akron Thermal pursuant to the Second Amended Plan of Reorganization for Akron Thermal, Limited Partnership Dated July 14, 2008, as amended (the "Plan").

The Trustee recognizes that the intervention deadline established in this proceeding elapsed on July 8, 2009. The Trustee nonetheless respectfully seeks leave to intervene at this time on the grounds that the Trustee could not have anticipated that the Staff testimony filed in these matters the afternoon of July 8, 2009, would contain certain recommendations that are contrary to law and contrary to the interests of the Trust beneficiaries, which are mainly comprised of the State of Ohio, Ohio Edison Company (an Ohio public utility), and the City of Akron. As more fully discussed in the accompanying memorandum, the Trust has a real and substantial interest in these proceedings, and is so situated that the disposition of these proceedings may impair or prevent the Trustee's ability to protect that interest. The Trustee therefore requests that this motion be granted notwithstanding that it is late-filed.

Further, the Trust's interest in these proceedings is not represented by any existing party, and its participation in this proceeding will contribute to a just and expeditious resolution of the issues involved without unduly delaying the proceeding or unjustly prejudicing any existing party.

Accordingly, the Trustee hereby moves to intervene in this proceeding pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code ("OAC").

WHEREFORE, the Trustee respectfully requests that the Commission grant his motion to intervene.

Respectfully submitted,



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

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
OF
DAVID WEHRLE, IN HIS CAPACITY AS TRUSTEE OF THE
CREDITORS' TRUST FOR AKRON THERMAL, LIMITED PARTNERSHIP

By its application of May 18, 2009 in Case No. 09-414-HT-AIS, Akron Thermal seeks Commission approval of three promissory notes, including a note payable to the Trust, which, taken together, restructure Akron Thermal's indebtedness in accordance with the Plan approved by the Bankruptcy Court. This case was consolidated with certain other pending Akron Thermal applications, including its May 29, 2009 application for emergency rate relief, by the

Commission's entry in these dockets of June 17, 2009. Section 4903.221 of the Ohio Revised Code provides that any "person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding." The Commission has discretion to grant motions to intervene which are filed after the deadline for intervention established by the Commission for good cause shown. O.R.C. § 4903.221(A)(2).

On July 8, 2009, the Staff filed the written testimony of its witnesses Shahid Mahmud (the "Mahmud Testimony") and David R. Hodgden (the "Hodgden Testimony"). The Mahmud Testimony recommends denial of the application in Case No. 09-414-HT-AIS based on Mr. Mahmud's assessment that the Akron Thermal's cash flow projections under the rates proposed in the emergency application appear to be insufficient to meet the debt service obligations associated with the promissory notes in question. The Hodgden Testimony recommends that the application for emergency relief in Case No. 09-4543-HT-AEM be denied based on Mr. Hodgden's conclusion that, in a subsequent general rate case, Akron Thermal would not, under the statutory ratemaking formula, be able to support rates at a level that would produce revenues sufficient to service its debt payments on an ongoing basis. Obviously, the Trust was not aware of these Staff recommendations until the testimony was filed on July 8, 2009, which was the deadline for seeking intervention. Upon review of this testimony the following day, the Trust acted promptly to discuss matters with Akron Thermal and to prepare and submit the foregoing motion to intervene. Accordingly, and as further discussed below, good cause exists to permit the Trust's late intervention in this proceeding.

The Committee of Unsecured Creditors in Akron Thermal's bankruptcy case heavily negotiated the terms of the Plan in order to obtain maximum benefit for Akron Thermal's unsecured creditors. The proceedings regarding Akron Thermal's ability to perform under its

operating lease and to confirm the Plan involved intensive litigation and collectively cost the parties and their professionals millions of dollars in fees. The Plan established the Trust and provided a recovery for unsecured creditors, who hold over \$20 million in claims, in the form of the Trust's note in excess of \$2 million and a \$1.35 million note to the State of Ohio. These creditors otherwise would have received nothing. The outcome of these proceedings will have a direct impact on Akron Thermal's ability to satisfy its Plan obligations, including its obligation to the Trust. Thus, the Trust, which supported Akron Thermal's reorganization and restructuring of its debt, clearly may be adversely affected by this proceeding.

The Trust satisfies the following statutory criteria that the Commission must consider in ruling upon applications to intervene in its proceedings:

- (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.

O.R.C. § 4903.221(B).

The Trust also satisfies each of the specific considerations that the Commission may, by rule, take into account in applying the standard for granting motions to intervene. Rule 4901-1-11(A), OAC, provides, in pertinent part, as follows:

(A) Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:

- (2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his ability to protect that interest, unless the person's interest is adequately represented by existing parties.

Rule 4901-1-11(B), OAC, provides as follows:

In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner case shall consider:

- (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;

First, as described above, the Trust's interest in connection with Akron Thermal's requests for approval of its financing application and for an emergency rate increase is obviously direct and substantial. As the Plan and the note payable to the Trust resolved over \$20 million in unsecured claims against Akron Thermal, the Trust has a real and substantial interest in proceedings in which the Staff is recommending that the Commission deny applications upon which Akron Thermal's ability to satisfying its Plan obligations – and, indeed, Akron Thermal's very existence – depends.

Second, the Bankruptcy Court approved Akron Thermal's Plan, including the note obligations to the State of Ohio and the Trust. Thus, no further approval is required with respect to those obligations. *See*, 11 U.S.C. §§ 1123(a), 1142(a); *Pacific Gas & Elec. Co v. California Dep't of Toxic Substances Control*, 350 F.3d 932, 949 (9th Cir. 2003) (holding otherwise applicable nonbankruptcy laws "relating to financial condition" are expressly preempted under

both §§ 1123(a) and 1142(a)); *Public Svc. Co. of New Hampshire v. State of New Hampshire (In re Public Svc. Co. of New Hampshire)*, 108 B.R. 854 (D.N.H. 1989) (holding bankruptcy provision that reorganization plan shall contain adequate provisions for implementation in terms of necessary restructuring of debtor and its assets and liabilities, notwithstanding any otherwise applicable nonbankruptcy law, preempted New Hampshire statutes requiring approvals of various actions by State Public Utilities Commission that would normally require approval of debtor's restructuring); 231 New York L.J. 9, 3 n.15 (every lower court to address the issue has "held that §1123(a)'s language was a statement of Congress's express intent to preempt all otherwise applicable nonbankruptcy laws.") (citing *Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber & Supply, Inc.)*, 850 F.2d 1338, 1340 (9th Cir. 1988); *In re Public Service Co. of New Hampshire, supra*; *Universal Cooperatives, Inc. v. FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149 (4th Cir. 1988); *Wade v. Bradford*, 39 F.3d 1126, 1130 (10th Cir. 1994); *In re Kizzac Mgmt. Corp.*, 44 B.R. 496, 504 (Bankr. S.D.N.Y. 1984)); 22 Energy L.J. 277, 292 (2001) (analysis of prior precedent indicates that regulatory agencies' authority with respect to a plan of reorganization is limited to the issue of rates set as part of the plan and does not extend to other core bankruptcy decisions regarding reorganization, notwithstanding non-bankruptcy law on the issue).

As a result of the enormous impact adoption of the Staff's recommendations would have on the Trust beneficiaries, the Trust acted promptly after review of the Staff's analysis of Akron Thermal's ability to meet its debt service needs by approaching Akron Thermal to discuss Akron Thermal's obligation on the note payable to the Trust. As a result of these discussions, the Trust has agreed to a partial forbearance which, in conjunction with concessions that Akron Thermal has proposed for the Plan sponsor and the State of Ohio, would remedy the revenue shortfall

identified in the Mahmud Testimony and the Hodgden Testimony as the basis for denying these applications and provide Akron Thermal the cash flow required to operate and service its debts. Specifically, the proposed agreements with the Trust and the State of Ohio would result in up to \$100,000 additional cash availability per year. These revised payment schedules under the existing notes approved by the Bankruptcy Court pursuant to the Plan are not new obligations and, therefore, do not require the Commission's approval under O.R.C. §§ 4905.40. *See, e.g., Keycorp v. Tracy* (1999), 87 Ohio St. 3d 238, 242 (finding the types of indebtedness listed in § 4905.40 "represent indebtedness 'issued' by the public utility."); *See, International Telephone and Telegraph Corp. v. Public Utilities Comm'n of Ohio* (1969), 18 Ohio St. 2d 83, 84-85 (holding Commission properly declined to consider an application which patently failed to meet with statutory conditions). The proposed agreements with the note holders only modify the terms of Akron Thermal's *existing* obligations – they do not involve "issuing" new debt obligations. The Trust's legal position, therefore, directly bears on the merits, the Staff's analysis and the outcome of this proceeding.

Third, granting the Trust's motion to intervene will not unduly delay or prolong the proceeding. The Trust does not request any continuance and, subject to the Commission's approval of this Motion, anticipates appearing at the hearing already scheduled in this proceeding on July 15, 2009.

Fourth, the Trustee will significantly contribute to the full development and equitable resolution of the factual issues. The Trust regularly appeared and was integral in Akron Thermal's bankruptcy case and the negotiation and confirmation of its Plan. For example, the Trust attempted to negotiate with the City of Akron to propose a competing plan of reorganization involving a new operator but, as the Bankruptcy Court noted in its confirmation

order, the City never proposed any competing Plan. Notably, Akron Thermal also paid the City of Akron over \$2.5 million on the Plan's effective date for all lease payments, taxes, advances and interest. Having been paid those amounts in full, the City's efforts to now remove ATLP and thereby deprive other unsecured creditors of any recovery whatsoever appears somewhat duplicitous.

Furthermore, although a representative from a potential competing operator was present in the Bankruptcy Court during most of the proceedings, no new operator ever proposed a competing plan, and no evidence or information was ever offered regarding a specific new operator or its capability, financial or otherwise, to successfully operate Akron Thermal's business. Thus, the Trust will bring substantial experience to bear on the issues raised. The facts concerning the agreed forbearances with respect to Akron Thermal's financial obligations, as well as the facts regarding the lack of information necessary to evaluate the capabilities of any new operator, are necessary to fully develop and equitably resolve the factual issues.

Finally, not only are there no existing parties that represent the Trust's interest, but it would be inconsistent with the Commission's stated policy "to encourage the broadest possible participation in its proceedings" to deny its intervention (*see, e.g., Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR, Entry dated January 14, 1986, at 2). Thus, granting the Trustee intervenor status is consistent with all the requirements and considerations set forth in the statute and rules.

WHEREFORE, the Trustee respectfully requests that the Commission grant his motion to
intervene.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties by first class US mail, postage prepaid, and by electronic mail this 13th day of July, 2009.

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