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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Akron Thermal, Limited Partnership for Authority to Issue Three (3) Promissory Long-Term Notes.)	Case No. 09-414-HT-AIS
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
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of Revised Tariffs.)	Case No. 09-315-HT-ATA
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of an Arrangement with an Existing Customer.)	Case No. 09-441-HT-AEC
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of a Modification to an Existing Arrangement.)	Case No. 09-442-HC-AEC

CITY OF AKRON'S INITIAL BRIEF

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CITY OF AKRON'S INITIAL BRIEF

In accordance with the briefing schedule established by the Attorney Examiners, the City of Akron ("Akron") submits its initial brief ("Brief") in these consolidated proceedings for consideration by the Public Utilities Commission of Ohio ("Commission"). Akron's primary focus for purposes of this Brief is on the issues raised by Akron Thermal, Limited Partnership's ("ATLP") request for emergency rate relief and for authority to issue securities because of the threshold significance of these subjects. Akron's failure to address other subjects in this Brief is not any indication that it supports or does not object to the other relief requested by ATLP.

I. BACKGROUND¹

On May 18, 2009, ATLP² filed an Application for Authority to Issue Three (3) Promissory Long-Term Notes ("AIS Application") that ATLP previously issued without first obtaining the Commission's approval.³ The three notes have initial principal amounts of \$2,060,000, \$1,350,000, and \$250,000, respectively. The underlying obligation for the three long-term promissory notes was addressed in ATLP's bankruptcy proceeding which is discussed below.

While ATLP's AIS Application contends that the proceeds from the notes are reasonably required by ATLP to meet its present and prospective obligations to provide utility service, there are no proceeds from these notes that will be used for the benefit of ATLP's customers; the principal and interest due and payable by the terms of the notes

¹ The history of ATLP's prior encounters with Ohio utility regulation is set forth in Mr. Bowser's testimony (City of Akron Exhibit 2) and will not be repeated here.

² Based on ATLP's assertions in various proceedings, it is Akron's understanding 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 from Boiler 32 at prices and on terms and conditions that are different from and "way below" those that apply to tariff or contract customers. *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, First Amended Disclosure Statement for Debtor's Second Amended Plan of Reorganization Dated July 14, 2008 (filed July 28, 2008). Pursuant to Section 7.1.5 of the Modified Second Amended Plan of Reorganization ("Plan") confirmed by the bankruptcy court and attached to Mr. Bees' direct testimony (Applicant's Exhibit 2), Thermal Ventures II ("TV II") is obligated to contribute ATC's income and earnings to ATLP. Despite the fact that ATC is using property owned by Akron and leased to ATLP, ATC has secured no consent from Akron to use such property and has obtained no franchise from Akron to operate a cooling company business within Akron. Tr. Vol. I at 49-50.

³ ATLP's AIS Application omits requests for approval of other actions that Akron understands that ATLP took prior to initiating its bankruptcy proceeding. For example and according to pleadings filed by ATLP in the bankruptcy proceeding, ATLP, immediately prior to filing the bankruptcy petition, executed a demand promissory note dated June 15, 2007 in favor of TV II, an affiliate, of up to \$750,000. It is Akron's understanding that ATLP also provided TV II a pre-petition security interest by virtue of a security agreement dated January 25, 2005, covering the following collateral: (1) all accounts receivable; (2) all deposit accounts; and, (3) all proceeds and products of all of the foregoing. Furthermore, Akron understands that ATLP granted TV II a blanket lien on its personal property through a June 15, 2007 Security Agreement. City of Akron Exhibit 2 at 9.

are the result of ATLP's failure to timely pay its past tax and other bills.⁴ The AIS Application was filed by ATLP just days prior to ATLP filing an Application for an Emergency Rate Increase ("AEM Application") in Case No. 09-453-HT-AEM.

ATLP's AEM Application wrongly alleges that it is entitled to emergency rate relief in the approximate amount of \$4.2 million. ATLP asserts that the loss of the University of Akron ("UA") as a customer has produced a financial emergency that entitles it to a substantial emergency increase in rates for some of its customers, but not others, including its affiliate, ATC. AEM Application at 8, Tr. Vol. I at 140. More specifically, the AEM Application states that, absent approval of the proposed 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 ATLP will be unable to meet its obligation to provide steam and hot water service to its customers.⁵ ATLP's claims are advanced within a few months of it receiving confirmation of the Plan⁶ as a result of a bankruptcy proceeding⁷ it initiated by petition on June 18, 2007.

⁴ If ATLP was seeking rate relief to pay bills that ATLP did not pay, it would be unlawful for the Commission to consider or grant such rate relief because it would be retroactive ratemaking. As discussed below and absent an accounting order permitting ATLP to defer expenses thereby creating a "regulatory asset", the effect of ATLP's request for emergency rate relief in such amount as is sufficient to permit it to make the principal and interest payments pursuant to the three promissory notes is, as a matter of law, a request that the Commission unlawfully engage in retroactive ratemaking.

⁵ AEM Application at 4.

⁶ ATLP's main witness, Mr. Bees, included the Plan as an attachment to his direct testimony, Applicant's Exhibit 2.

⁷ *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 Plan 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 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

The Plan was opposed by Akron and Ohio Edison Company, ATLP's two largest unsecured creditors, because, among other things, they believed and demonstrated to the bankruptcy court that the Plan could not be feasibly implemented.⁸ ATLP's filing of the AEM Application confirms that Akron and the Ohio Edison Company were right all along.

The Plan specifically states (in Section 13.2) that its effective date is conditioned on the Commission providing all approvals that may be required. Yet, ATLP has already substantially consummated the Plan prior to receiving the Commission's authorization to issue securities and enter into contracts ("reasonable arrangements"). Tr. Vol. I at 36-37, 45.

ATLP's AEM Application and its conduct throughout these proceedings indicate that ATLP has no intention of advising the bankruptcy court that the feasibility of its Plan (including payment of the promissory notes it presented to the bankruptcy court) now depends on: (1) ATLP obtaining Commission authorization for a very large emergency rate increase; and then, (2) ATLP's ability to actually collect the Commission-authorized

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.

Thus, the loss of UA as a customer was foreseeable and the consequences for ATLP were predictable and predicted. Canal Place Exhibit 1 at 12.

⁸ The bankruptcy court's confirmation order was appealed by Akron on numerous grounds and the District Court issued an Order granting Akron's appeal in part. *City of Akron v. Akron Thermal, LP*, United States District Court, Northern District of Ohio, Eastern Division, Case No. 5:09CV601 (June 17, 2009 Order). Among other things, the District Court's Order permits Akron to challenge the lower court's determination that ATLP did not have to make good on its unpaid water and sewer bills as part of the "cure" required by the Bankruptcy Code. As Mr. Merolla testified, ATLP had accumulated over \$5.7 million in unpaid water and sewer bills when it filed its bankruptcy petition. City of Akron Exhibit 1 at 3.

revenue from customers, including some customers that presently have or will pursue alternative means of meeting their service needs.⁹

ATLP's verified AIS Application contains balance sheet and income statement information that portrays a financial condition that is in irreconcilable conflict with the picture painted by ATLP in its verified AEM Application. As noted above, ATLP's AIS Application omits requests for approval of other securities or guarantees that ATLP has issued.

Meanwhile, the AEM Application filed by ATLP suggests that ATLP will be unable to satisfy any obligations it may have under the promissory notes attached to the AIS Application (and implicitly the ones not presented to the Commission for approval) if the relief sought by ATLP in the AEM Application is not forthcoming.

And any question about ATLP's ability to satisfy the obligations set forth in the promissory notes was resolved in the negative by evidence presented by the Commission's Staff and Staff's acknowledgement that ATLP will not be able to generate positive cash flow even if the full amount of the requested rate increase is granted. Tr. Vol. II at 133.

Undeterred, somebody acting on behalf of ATLP – and ATLP does not know who – manufactured a mysterious “forbearance agreement” that ATLP tried unsuccessfully to use to fill the financial, regulatory and credibility holes that ATLP has dug deeper and deeper for itself over time.

⁹As part of the Plan (Section 7.1.5), ATC is required to contribute income and earnings to the reorganized ATLP. Section 14.1 of the Plan 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.

The applications filed by ATLP in Case Nos. 09-441-HT-AEC and 09-442-HC-AEC request that the Commission approve contracts with customers. In accordance with ATLP's illegal but standard operating procedure, the contracts were entered into by ATLP and the customers some time ago but were never presented to the Commission for approval. The record evidence shows that ATLP has other non-tariff service relationships for which ATLP has never sought Commission approval. Tr. Vol. I at 68, 75-78, 82-83, 133, 137.

The application filed by ATLP in Case No. 09-315-HT-ATA appears to seek a modification to ATLP's standard tariff to meet the somewhat unique service circumstances that ATLP attributes to Canal Park Condominium. The application in Case No. 09-315-HT-ATA indicates (at page 3) that ATLP will only inform the Canal Park Condominium Board about this proposed change after the Commission approves the change.

Akron, ATLP's landlord pursuant to an Operating Lease Agreement ("OLA") dated August 15, 1997,¹⁰ reached the end of its rope with ATLP in 2007 and notified ATLP that it was terminating the OLA. Upon receipt of the termination notice, ATLP filed its petition in the bankruptcy court to block Akron's efforts to put an end to ATLP's problem-plagued possession of Akron's property. City of Akron Exhibit 2 at 18; City of Akron Exhibit 1 at 2-3.

¹⁰ In an uncharacteristic display of respect for the Commission's jurisdiction and Ohio's public utility laws, ATLP presented the OLA to the Commission for approval in Case No. 97-1059-HT-AIS. In addition to the OLA, ATLP and Akron entered into an Asset Purchase Agreement that, among other things, gave ATLP the right to purchase the leased property from Akron. *In the Matter of the Application of Akron Thermal, Limited Partnership, for Authorization of an Operating Lease Agreement with the City of Akron, Ohio and Approval of a Senior Term Loan and Revolving Line of Credit Financing Arrangement*, Case No. 97-1059-HT-AIS, Finding and Order at 2 (September 25, 1997).

II. THE COMMISSION'S EMERGENCY RATE RELIEF CRITERIA AND CONDITIONS

The discussion that follows can be found, in slightly varying forms, in virtually every emergency rate case finding and order that has been issued by the Commission pursuant to Section 4909.16, Revised Code.¹¹

The authority of the Commission to order temporary changes to the permanent tariffed rates of public utilities is found in Section 4909.16, Revised Code, which states as follows:

When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.¹²

The Ohio Supreme Court has routinely found that this statute vests the Commission with discretion to determine what constitutes an emergency and to prescribe the remedy designed to address the emergency. *Cambridge v. Pub. Util. Comm.* (1953), 159 Ohio St. 88; *Jackson v. Pub. Util. Comm.* (1953), 159 Ohio St. 123; *Manufacturer's Light and Heat Co. v. Pub. Util. Comm.* (1955), 163 Ohio St. 78. The court has also made it clear that the Commission's authority to grant emergency relief is extraordinary. *Cincinnati v. Pub. Util. Comm.* (1948), 149 Ohio St. 570.

¹¹ Including ATLP's most recent prior emergency rate case (Case No. 00-2260-HT-AEM).

¹² Section 4909.16, Revised Code.

For decades, the Commission has applied its same criteria for reviewing and evaluating requests for emergency relief.¹³ Mr. Bowser was the only witness who specifically identified the criteria and applied them to the facts and circumstances presented in these proceedings to support his recommendation that the Commission deny ATLP's emergency rate increase request.¹⁴ ATLP offered no rebuttal to Mr. Bowser's testimony and did not otherwise contest his opinions through cross-examination.

The Commission's five-prong test applied to emergency rate increase requests is as follows:

1. Emergency relief is "extraordinary" in nature;
2. The existence of an "emergency" is a condition precedent to temporary rate relief;
3. Temporary rate relief will be granted only at the "minimum level" necessary to avert or relieve the emergency;
4. The applicant's evidence will be reviewed with the "strictest scrutiny" and that evidence must "clearly and convincingly" demonstrate the presence of "extraordinary circumstances" which constitute a genuine emergency situation; and

¹³ See *In the Matter of the Application of Columbus and Southern Ohio Electric Company for the Authority to Increase its Rates pursuant to Section 4909.16, Revised Code*, Case No. 78-1439-EL-AEM, Opinion and Order (February 28, 1979).

¹⁴ The Staff reached the same conclusion but expressed the conclusion in more practical terms:

Although the Company may be able to survive a while longer with the increase, I do not believe it changes the overall prospects for the long-term viability of Akron Thermal. The likelihood that the proposed rates will generate the required revenues is dependent on the stability of the current customer base such that any further loss of customers will require additional rate increases. As discussed in my pre-filed testimony, if the proposed emergency rates are approved, tariff customers would be facing extremely large rate increases in the midst of one of the worst recessions since the Great Depression. A rate increase of this magnitude would almost certainly cause customers to re-evaluate the economics of staying with Akron Thermal vs. other alternatives. Some business customers without alternatives may even be forced to close. In either case, the long-term stability of the current customer base is questionable at best. Given this uncertainty as to Akron Thermal's long-term viability, the Commission should not approve the proposed emergency surcharge.

Staff Exhibit 6 at 2-3.

5. Emergency rate relief will not be granted under Section 4909.16, Revised Code, if the emergency request was filed merely to circumvent and as a substitute for permanent rate relief under Section 4909.18, Revised Code.¹⁵

Based on the above criteria, an applicant for temporary emergency rate relief must show, by clear and convincing evidence subjected to the strictest scrutiny, that it will be financially imperiled but for an emergency increase in rates. If the utility cannot meet the heightened burden of proof that applies to requests for emergency rate relief, the Commission's inquiry ends.¹⁶

In addition to the consistent application of its criteria, the Commission has imposed a refund condition of one kind or another in conjunction with grants of emergency rate relief.¹⁷ Unlike in prior emergency rate increase cases initiated by

¹⁵ See *In the Matter of the Application of Columbus and Southern Ohio Electric Company for the Authority to Increase its Rates pursuant to Section 4909.16, Revised Code*, Case No. 78-1439-EL-AEM, Opinion and Order (February 28, 1979).

¹⁶ See *In the Matter of Application of The Toledo Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 84-1286-EL-AEM, Opinion and Order (February 19, 1985).

¹⁷ Thirty years ago, the Commission ordered, as a result of Staff recommendations, two refund provisions in a number of orders granting emergency rate relief. For example, in a case in which the Columbus and Southern Ohio Electric Company sought emergency relief, the Commission ordered two refund provisions as follows:

.... The first two additional [Staff] recommendations involve establishing a mechanism for determining whether the Company is realizing operating income in excess of the amount of operating income which is deemed necessary in this case to prevent a financial emergency. We find that such recommendations are reasonable and hereby direct Columbus and Southern to file monthly financial reports with this Commission comparing the actual monthly results of the Company's operations with the budgeted data.... Such reports shall be filed as soon as practical after actual monthly operating statistics are available. The first monthly report to be filed will be the report for the month of March, 1979. The emergency surcharge allowed in the case shall be subject to refund with respect to any excess over the level of relief which may be granted in the permanent case. It will also be subject to refund with respect to any set amount of operating income in excess of the amount of operating income which is deemed necessary in this case to prevent a financial emergency.

See *In the Matter of the Application of the Columbus and Southern Ohio Electric Company for the Authority to Increase its Rates pursuant to Section 4909.16, Revised Code*, Case No. 78-1439-EL-AEM, Opinion and Order at 17 (February 28, 1979). The refund requirement based on a comparison of the emergency relief to that ultimately resulting from a permanent rate application has enjoyed routine application. In fact, in ATLPs 2000 emergency case, a stipulation approved by the Commission in the

ATLP,¹⁸ ATLP did not affirmatively state it would accept such a condition in its AEM Application or prefiled testimony and refused to clearly and convincingly state that it would do so when it was questioned about this subject during the hearing. Tr. Vol. I at 100-103.

III. APPLICATION OF THE COMMISSION'S CRITERIA

- A. The existence of an "emergency" is a condition precedent to temporary rate relief.**

ATLP's request for emergency rate relief rests on one thing and one thing only.

- Q. If, as you indicated, Akron Thermal was well positioned to operate successfully after it emerged from bankruptcy in February 2009, why was it necessary to file an application with the Commission for emergency rate relief two months later?**

- A.** On April 30, 2009, Akron Thermal's contract with its largest customer, the University of Akron ("UA"), expired. UA, which also has the capability to use natural gas for its heating requirements, declined to renew its contract with Akron Thermal. ... Thus, the loss of the UA revenue stream imperiled Akron Thermal from a financial standpoint and left Akron Thermal with no choice but to seek emergency rate relief in order to continue to meet its obligation to provide service to its remaining customers.¹⁹

* * *

- Q. Did the bankruptcy, the associated financial obligations you previously described, or any other terms of the approved Plan of Reorganization contribute in any way to the filing of the Akron Thermal's application for emergency rate relief in Case No. 09-4543-HT-AIR [sic]?**

case provided that, "... the emergency surcharge shall be subject to refund, in the event that the percentage increase granted in the permanent rate case is less than the emergency relief agreed to by Akron Thermal and the staff." See *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM, Opinion and Order at 5 (January 25, 2001).

¹⁸ *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM, Direct Testimony of Carl Avers at 8 (December 27, 2000).

¹⁹ Applicant's Exhibit 2 at 8.

- A. No, absolutely not. As explained in the testimony of Mr. Pucak and documented by the cash flow analysis presented by Akron Thermal witness Stott, the emergency rate application was driven solely by the loss of the UA revenue stream. If UA had not left the system, the emergency application would not have been filed. Indeed, if UA were to return as a customer, Akron Thermal would immediately withdraw the temporary surcharge it is asking the Commission to approve in its application.²⁰

As ATLP's testimony clearly states, its emergency rate relief request is based solely on UA's election to not extend its service relationship with ATLP beyond the stated term of a prior contract which was never filed with the Commission. Applicant's Exhibit 2 at 8, Tr. Vol. I at 68. But the record clearly and convincingly shows that UA's election to not extend its prior contract or enter into a new contract does not result in the existence of an "emergency" in any ratemaking sense or otherwise.

As Mr. Lorman, the witness for Canal Place, LTD, testified:

...the UA never committed at any time to extending or renewing its agreement with ATLP, and ATLP was informed that the UA would not be renewing or extending its contract on or about the agreement's termination date of April 30, 2009.²¹ The possibility that the UA would choose not to renew or extend its contract with ATLP was even recognized by the bankruptcy court [in] its Opinion confirming Akron Thermal's reorganization plan stating that if the UA could satisfy its own steam needs "at a cost that was predictably lower than what they are charged the Debtor, that portion of Debtor's business would likely evaporate."²²

In my opinion, market forces and UA's non-commitment both during and after ATLP's bankruptcy made it highly likely and foreseeable that the UA would not extend its current agreement or agree to a subsequent agreement.

* * *

²⁰ Applicant's Exhibit 2 at 9.

²¹ Canal Place Exhibit 1 at 12. Mr. Lorman cites ATLP's responses to discovery requests and the citation is omitted from the above quote.

²² Mr. Lorman's citation to the bankruptcy court opinion is omitted from the above quote.

...it is extraordinary that ATLP agreed to a Chapter 11 reorganization plan less than five months ago that failed to sufficiently address the risk of the UA leaving the system. It is extraordinary that ATLP is in a position where it will be producing 30 percent less steam, but increasing its overall fuel costs by approximately 25 percent, mainly through a large increase in the use of natural gas at the Akron Plant, which is, in my opinion, due to ATLP's lack of access to capital. It is extraordinary that ATLP's \$4,195,561 rate increase includes a \$1,533,088 annual increase in fuel costs, while dismissing a \$1,800,000 capital investment in the Boiler 32 plant as not feasible and, therefore, not in the best interest of customers. To the extent these extraordinary circumstances create any emergency, they have been created by ATLP's actions and business decisions and should not be recovered from ATLP's customers ...²³

The evidence of record also shows that UA was an interruptible customer under its prior contract, a fact that ATLP neglected to mention. ATLP's First Amended Disclosure Statement (presented in the bankruptcy proceeding to secure support for its Plan) states (at page 46) that UA's service was interrupted for a total of 58 days in 2006 and 2007 due to problems that ATLP had with its steam generating plant or distribution system. Of course, the amount of revenue attributable to any service provided to UA implicitly assumes something about the ability of ATLP to maintain service to UA in the context of a history of being unable to do so.

The record also shows that during ATLP's efforts to encourage UA to enter into a new contract (see Applicant's Exhibit 2 at 8), ATLP offered UA a price that would have reduced the UA revenue (had it been accepted by UA) by about 15 percent (15%). Tr. Vol. I at 79-82. Thus (and even if the predictable departure of the UA could somehow be legally viewed as resulting in an emergency), there is no basis for the Commission to require ATLP's other customers (mostly tariff customers) to reimburse

²³ Canal Place Exhibit 1 at 13-14. (emphasis in original). City of Akron Exhibit 2, Mr. Bowser's direct testimony, indicates that he agrees with Mr. Lorman.

ATLP in the amount of \$4,018,845²⁴ to cover ATLP's self-inflicted lost revenue opportunity. Had UA stayed a contract customer, ATLP would not have had an opportunity to collect \$4,018,845.

ATLP's request for an emergency rate increase must be dismissed by the Commission. It has not demonstrated the presence of extraordinary circumstances which constitute a genuine emergency situation by clear and convincing evidence subjected to the strictest scrutiny.

B. Temporary rate relief will be granted only at the "minimum level" necessary to avert or relieve the emergency.

ATLP's verified AEM Application states (at page 8) that \$4,195,561 is the minimum amount of rate relief required to avert the emergency. But, ATLP's actions following the prefiling of the Staff's testimony show that this verified statement was speculative when submitted to the Commission on May 29, 2009 and false when Mr. Bees testified in support of the AEM Application on July 15, 2009.²⁵

Once ATLP had access to the Staff's prefiled testimony on July 8, 2009 and was able to see that the Staff's "sanity check"²⁶ analysis demonstrated that ATLP would be unable to pay the principal and interest associated with the three promissory notes submitted with the AIS Application, it was immediately able to secure, prior to July 15, 2009 when Mr. Bees testified, the signature of the Trustee for the Creditors' Trust,²⁷ the

²⁴ This is the amount specified by ATLP in its AEM Application at page 4.

²⁵ Mr. Bees testified that the purpose of his testimony was to support the AEM Application. Applicant's Exhibit 2 at 2.

²⁶ Tr. Vol. II at 111.

²⁷ The Trustee signed the "forbearance agreement" without consulting with the beneficiaries of the Trust and managed somehow to agree with the apparent advice of counsel to an extended payment schedule that will put some of the extended payments outside the five-year term of the Trust. Tr. Vol. II at 39, 44-45, Plan Section 10.14.

State of Ohio²⁸ and TV II to defer the due date for payments. In the case of TV II, Mr. Bees put on his TV II hat to "negotiate" the so-called forbearance agreement²⁹ so that any payment on the \$250,000 TV II note is now contingent on full payment of the notes to the State of Ohio and the Creditors' Trust.

During questioning by Examiner Farkas, Mr. Bees implied (at least to Akron) that ATLP believed that the full amount of the requested increase had to be authorized by the Commission to enable ATLP to keep its doors open:

Q. On Page 9, on Line 20 you say, "Ms. Stott's analysis shows that this is a bare-bones request and contains no profit component." Also, on Page 11, Line 20, you say, "In the absence of emergency relief, Akron Thermal will be unable to continue to operate." Are you stating that if Akron Thermal – if the Commission does not approve Akron Thermal's request as stated in the application, that Akron Thermal will no longer be able to operate?

A. Well, without the additional revenue, Akron Thermal will not be able to continue to pay its normal course of bills.

Q. So if the Commission were to come back and grant 50 percent of the request, that doesn't do Akron Thermal any good? They'd still have to stop operating?

A. I think that's correct.³⁰

However, Mr. Bees' subsequent testimony (again responding to questions from Examiner Farkas³¹) made it clear that ATLP really has no idea how much rate relief, if any, is the minimum amount required to "avert or relieve the emergency":

²⁸ As the Commission knows, the State of Ohio is also very short on cash but is, apparently, ready and willing to cut ATLP more slack.

²⁹ The forbearance agreement is attached to Mr. Bees' rebuttal testimony, Applicant's Exhibit 5.

³⁰ Tr. Vol. I at 114–115.

³¹ Tr. Vol. II at 75-77.

- Q. On your application that you filed for emergency rate relief, was it your testimony that if Akron Thermal Limited Partnership, if the Commission does not grant Akron Thermal Limited Partnership's application as it was filed for the amount that they're asking for, that any amount other than that would be insufficient for Akron Thermal Limited Partnership to continue operations?
- A. What I believe we developed in that application was our understanding of what the minimum requirements would be for the revenue that support the expenses of the system as we projected. Yes.
- Q. So any less than that amount will be insufficient for Akron Thermal Limited Partnership to operate.
- A. I guess what I would say is if the Commission comes back with an order that is less than that number, we will have to go back through another thorough review to understand whether there are any other areas where we might further reduce our costs to be able to meet the revenue that would be provided.
- Q. But if you didn't reduce costs, would it be insufficient? Any further costs I should say.
- A. I guess what we were trying to do with this application was to match what we believed the expenses were going to be, and if the number is less than that, we'll have to look again to see if there's a way that we can further reduce those expenses. I'm not sure, insufficient may be --

The amount of the requested emergency rate relief includes a dubious forecast of increased fuel expense of \$1,533,088³² that ATLP claims, with no empirical support, will occur as a result of a **possible** shut down of Boiler 32, its lowest cost source of steam. ATLP has undertaken no efforts to secure the fuel supply that it associates with this hypothetical increase in fuel expense even though it claims that it will shut down Boiler 32 in a little over three months (on or about November 1, 2009)³³. Even if the projected fuel cost increase was the byproduct of a reliable forecast, the increase in fuel

³² Applicant's Exhibit 4 at 7.

³³ Tr. Vol. I at 150-151, 155; Applicant's Exhibit 3 at 5.

costs is not necessitated by UA's decision to end its relationship with ATLP. In other words, ATLP's inclusion of the \$1,533,088 in its request for emergency rate relief to cover a hypothetical increase in fuel expense associated with its mind-numbing decision to shut down its least-cost boiler is nothing more than an attempt by ATLP to run up the customers' tab.

ATLP's witness Stott acknowledged that the plan to shut down Boiler 32 works to increase the amount of cash that ATLP claims that it needs by way of an emergency increase in rates:

Q. Would it be fair to say that if Boiler 32 stayed [on] operational status, that the cash required to meet operating expenses would be less than what you have portrayed in your testimony and exhibits?

A. Probably in the short term, yes.

Q. Short term?

A. 2009. I can't say beyond that.³⁴

Finally, the record evidence clearly shows that increasing ATLP's rates by the amount of the emergency rate relief requested by ATLP will not avert or relieve the root cause of ATLP's seemingly perpetual problems. As Mr. Puican testified, raising ATLP's rates in the context of a severe economic downturn and in the presence of customer capabilities to reduce or eliminate their purchases from ATLP will tighten the turns in ATLP's death spiral. Tr. Vol. II at 148.³⁵ Granting emergency rate relief will make ATLP's cash flow problems worse, not better. Granting ATLP's request to put the requested emergency increase into the demand charges will provide even a stronger impetus for customers to end their service relationship with ATLP. Tr. Vol. I at 198-199.

³⁴ Tr. Vol. 1 at 176-177.

³⁵ There is an error in the transcript here. The transcript indicates that Mr. Puican said the words "desk file", when he actually spoke the words "death spiral".

ATLP's request for an emergency rate increase must be dismissed by the Commission. As explained above, ATLP has not demonstrated the presence of extraordinary circumstances which constitute a genuine emergency situation by clear and convincing evidence subjected to the strictest scrutiny. It has also failed to demonstrate that the requested temporary rate relief is the minimum level necessary or that such minimum level, even if granted by the Commission, will avert or relieve the emergency as defined by ATLP.

C. Emergency rate relief will not be granted under Section 4909.16, Revised Code, if the emergency request was filed merely to circumvent and as a substitute for permanent rate relief under Section 4909.18, Revised Code.

ATLP witness Stott's direct testimony contains the obligatory statement that ATLP is not seeking emergency as a substitute for permanent rate relief.³⁶ In her direct testimony, Ms. Stott testified that ATLP will file a notice of intent pursuant to Section 4909.18, Revised Code, by September 1, 2009.³⁷ But, ATLP's actions show that ATLP is not doing the things that it must do to file a notice of intent by September 1, 2009 or anytime thereafter. Once again, ATLP's actions speak louder than its words.

As Mr. Hodgden testified, a utility that intends to make an application for a rate increase pursuant to Section 4909.18, Revised Code, will typically meet with the Staff to discuss the specification of the test year and date certain that must be identified in the notice of intent. ATLP has not initiated any such meetings with the Staff. Tr. Vol. II at 122-123.

³⁶ Applicant's Exhibit 4 at 12.

³⁷ Applicant's Exhibit 4 at 12.

Based on the answers Ms. Stott provided during her cross-examination,³⁸ it appears that ATLP's claim that it will file a notice of intent by September 1, 2009 is headed for the long list which contains ATLP's other broken promises.

Q. Now, the -- I asked some questions of Mr. Bees about where things stood with regard to the preparation of the permanent rate case that he indicates will commence. Have you been asked to start pulling together information for the filing of a permanent rate case?

A. On a very preliminary basis, yes.

Q. And can you tell me have they -- have you been advised about what test period, what 12 month period will be used for purposes of developing your rate case information?

A. We have not discussed that yet.

Q. And are you familiar with the term date certain?

A. Yes.

Q. And do you understand that that's the date upon which the assets are valued for purposes of rate-making?

A. Yes.

Q. Has anybody talked to you about specifying a date certain?

A. No.

Q. As things currently stand, do you think it's humanly possible for you to file a Notice of Intent to seek a rate increase by September 1?

A. That I don't know.

Q. Has anybody told you that you have to get a rate case pulled together by September 1?

A. No.

³⁸ Tr. Vol. I at 192-193.

ATLP's request for an emergency rate increase must be dismissed by the Commission. As explained above, ATLP has not demonstrated the presence of extraordinary circumstances which constitute a genuine emergency situation by clear and convincing evidence subjected to the strictest scrutiny. It failed to demonstrate that the requested temporary rate relief is the minimum level necessary or that such minimum level, even if granted by the Commission, will avert or relieve the emergency as defined by ATLP. And, ATLP failed to demonstrate that its emergency rate relief is not designed to circumvent and substitute for permanent rate relief.

IV. CONCLUSION

During cross-examination, Mr. Bees acknowledged that ATLP has approached Akron to terminate the OLA and end its possession of Akron's property.³⁹ It is Akron's position that ATLP's emergency rate increase request is just another procedural move by ATLP to secure some bargaining position with Akron that ATLP can and will use to define how and when it will bring an end to its contested status as Akron's tenant. But regardless of ATLP's real motives, the Commission must reject the relief requested by ATLP.

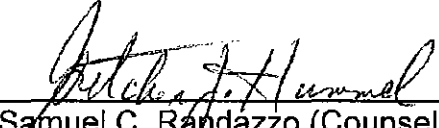
For the reasons explained above, Akron urges the Commission to dismiss ATLP's AEM Application and find that such dismissal has the practical effect of rendering ATLP's AIS Application moot. These results are compelled by the law of Ohio as applied to the evidence of record. On a more practical level, the evidence shows

³⁹ Tr. Vol. I at 33-35. Mr. Bees agreed that the emergency rate increase, if granted, would affect the value ATLP is demanding from Akron in exchange for ending the OLA.

that the relief that ATLP has requested in these consolidated cases will make ATLP's problems worse, not better.

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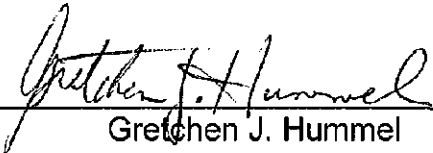


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CERTIFICATE OF SERVICE

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