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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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

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

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**POST-HEARING BRIEF**  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**July 28, 2009**

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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
	)	
	)	

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

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 to Issue Three Promissory Long-Term Notes.	)	
	)	Case No. 09-414-HT-AIS
	)	

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

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**INTRODUCTION**

Akron Thermal, Limited Partnership (Akron Thermal or ATLTP) asks the Public Utilities Commission of Ohio (Commission) for approval of several matters. Primarily, Akron Thermal requests an emergency rate increase of more than \$4 million in additional annual revenues by way of a 71.6 percent increase in the rates of its tariff customers.

Akron Thermal currently faces a major cash flow problem and has requested the emergency rate increase in order to sustain its operations following the loss of its largest customer, the University of Akron, which elected not to renew its special contract with Akron Thermal.

Akron Thermal claims that it will be required to cease operations if its application for an emergency rate increase is not granted in full. Granting the increase, however, may merely allow Akron Thermal to continue its operations for a brief period, and may further have the adverse consequence of driving remaining customers off the system. In short, an emergency rate increase would only prolong the inevitable closure of Akron Thermal's operations. The city of Akron, which owns the steam facilities currently operated by Akron Thermal, has an interim arrangement in place to continue steam and hot water service in the event that Akron Thermal ceases to operate. For these reasons, the Staff of the Public Utilities Commission of Ohio (Staff) recommends that the Commission deny Akron Thermal's request for an emergency rate increase.

### **PROCEDURAL HISTORY**

Akron Thermal is a limited partnership<sup>1</sup> and heating company that provides steam and hot water service to residential and commercial customers in downtown Akron, Ohio. Akron Thermal has operated the steam system pursuant to a lease agreement with the city of Akron since 1995. Akron Thermal's customers include the city of Akron, as well as

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<sup>1</sup> Akron Thermal's limited partner is Thermal Ventures II, LP, a Delaware limited partnership. Its general partner is Opportunity Parkway, LLC, an Ohio limited liability company.

Akron Thermal's affiliate, Akron Thermal Cooling, LLC. Akron Thermal's largest steam customer, the University of Akron, recently elected not to renew or extend its special contract with Akron Thermal.<sup>2</sup>

The departure of the University of Akron from the system left Akron Thermal in a precarious financial condition, prompting the company, on May 29, 2009, to file an application for an emergency rate increase pursuant to Revised Code Section 4909.16. The emergency rate increase application, Case No. 09-453-HT-AEM, was consolidated with a number of other pending cases in which Akron Thermal seeks approval of special contracts with Children's Hospital Medical Center of Akron (Case No. 09-441-HT-AEC) and Canal Place, Ltd. (Case No. 09-442-HT-AEC); seeks approval to amend its tariffs (Case No. 09-315-HT-ATA); and seeks authority to issue three long-term promissory notes (Case No. 09-414-HT-AIS).

Extensive evidence was taken over two days of hearings held on July 15 and July 20, 2009. Direct, rebuttal, and surrebuttal testimony was sponsored by several witnesses for Akron Thermal, the city of Akron, Children's Hospital Medical Center of Akron, Canal Place, Ltd., and the Staff. Following is a brief description of each of Akron Thermal's pending applications.

#### **A. Case No. 09-315-HT-ATA**

Akron Thermal provides hot water heating service to approximately ninety-eight customers in the Canal Park Condominium (Canal Park). Service is currently provided

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<sup>2</sup> The contract lapsed on April 30, 2009. In 2008, revenues from the University of Akron amounted to \$4,018,854 and sales to the university accounted for 29.9 percent of Akron Thermal's total steam sales volume.

pursuant to a contract, which is set to expire in September 2009. In order to continue service after the expiration of the contract, Akron Thermal filed an application on April 10, 2009 to modify and apply its tariffs to the Canal Park customers. Under the contract, these customers have been paying a fixed price for service without regard to individual or collective monthly consumption levels. The revised tariffs provide for master metering, and Akron Thermal intends to issue virtually identical monthly bills to each of the Canal Park customers based on an allocation of the master meter read.

**B. Case Nos. 09-441-HT-AEC and 09-442-HT-AEC**

On May 26, 2009, in Case No. 09-441-HT-AEC, Akron Thermal filed an application for approval of a “reasonable arrangement” pursuant to Revised Code Section 4905.31 for the provision of steam service to Children’s Hospital Medical Center of Akron (Children’s Hospital). Under the terms of the agreement, which is dated June 30, 2006, Akron Thermal intends to provide steam service to Children’s Hospital on an uninterruptible basis at least until March 31, 2011.

On May 26, 2009, in Case No. 09-442-HT-AEC, Akron Thermal also filed an application for approval of an amended “reasonable arrangement” with Canal Place, Ltd. (Canal Place), which is dated September 30, 2008. Akron Thermal provides steam service to Canal Place, which owns and operates a 1.5 million square foot redeveloped adaptive use complex in Akron. The agreement addresses service during the period from August 1, 2008 until the contract terminates according to its terms.<sup>3</sup>

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<sup>3</sup> No such contracts are valid until approved by the Commission. Ohio Rev. Code Ann. § 4905.31 (Anderson 2009).

### C. Case No. 09-414-HT-AIS

On June 18, 2007, Akron Thermal filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Ohio (Bankruptcy Court).<sup>4</sup> The Bankruptcy Court approved Akron Thermal's Second Amended Plan of Reorganization (Plan of Reorganization) in February 2009. Section 15.2 of the Plan of Reorganization expressly reserves to the Commission its usual jurisdiction. It provides that the Commission "will retain jurisdiction over any rate change to be requested by [Akron Thermal], and all other matters otherwise within the jurisdiction of the [Commission]."<sup>5</sup>

In terms of the restructuring of Akron Thermal's indebtedness, the Plan of Reorganization provides that Akron Thermal will execute three long-term promissory notes in the initial principal amount of \$2,060,000 to the Creditors' Trust on behalf of all unsecured creditors (including the city of Akron); \$1,350,000 to the State of Ohio; and \$250,000 to Thermal Ventures II, LP, Akron Thermal's limited partner. In accordance with the terms of the Plan of Reorganization, Akron Thermal filed an application on May 18, 2009 to authorize the three promissory notes. In response to Staff's concerns that Akron Thermal would be unable to service its annual debt obligations even with the proposed emergency rate increase, Akron Thermal entered into a forbearance agreement on July 13, 2009 with the three note holders.<sup>6</sup> The agreement defers any payment on the

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<sup>4</sup> *In re Akron Thermal, Limited Partnership*, Case No. 07-51884 (Bankr. N.D. Ohio).

<sup>5</sup> Applicant Ex. 2, at Ex. JPB-1 at 35.

<sup>6</sup> Applicant Ex. 5 at 5-6.



note of Thermal Ventures II, LP until 2015 and reduces the annual payment on the other two notes by a combined \$100,000, thereby extending the repayment schedule.<sup>7</sup>

**D. Case No. 09-453-HT-AEM**

Akron Thermal filed an application for an emergency rate increase on May 29, 2009 in response to the University of Akron's decision not to renew its contract with Akron Thermal. In its application, Akron Thermal seeks an annual revenue increase of \$4,195,561 through an adder to the monthly demand charge component of its current rates. Akron Thermal has proposed two options, either applying the adder to tariff customers only or applying the adder to both tariff customers and to Children's Hospital and Canal Place. Akron Thermal subsequently purported to withdraw the latter proposal through the rebuttal testimony of one of its witnesses.<sup>8</sup> Under its proposal to apply the adder only to steam and hot water tariff customers, the amount of the adder would be \$81.49 per Mlb, which is an overall increase of 71.6 percent. If the adder is applied to Children's Hospital and Canal Place in addition to tariff customers, the amount of the adder would be \$54.78 per Mlb, which is an overall increase of 47.8 percent.

In its application, Akron Thermal describes a series of steps that it has taken to mitigate the financial consequences of the loss of the University of Akron from the system. Despite these measures, Akron Thermal maintains that it is unable to meet its current operating expenses and is projected to have a negative cash balance by August 2009. If the emergency rate increase is not granted in full, Akron Thermal claims that it

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<sup>7</sup> Applicant Ex. 5, at Ex. JPB (Rebuttal)-1 at 1-2

<sup>8</sup> Applicant Ex. 5 at 11.

will no longer be able to provide steam and hot water service to its customers. The requested annual increase of \$4,195,561 is the minimum amount of rate relief required to sustain Akron Thermal's operations, according to the company.

The city of Akron, which leases the steam facilities to Akron Thermal, is prepared to implement an interim arrangement with Akron Energy Systems LLC<sup>9</sup> in order to continue steam and hot water service in the event that Akron Thermal ceases to operate.<sup>10</sup>

## **ARGUMENT**

ATLP comes to the Commission asking for four approvals. It wants the Commission to approve a new contract and an amendment to an existing contract. It wants approval of tariff amendments. It wants approval for a debt issuance. Finally, it wants an emergency rate increase and the ability to impose that increase on either tariff customers or contract and tariff customers. Only the requests for approval of the contracts and tariff amendments should be granted. The other requests present insuperable difficulties and must be denied.

### **A. Contracts**

ATLP has sought approval of its July 13, 2006 contract with Children's Hospital. It is not clear at all why this agreement was not submitted to the Commission for approval timely. It is quite clear that ATLP has not been collecting the tariffed rate from this customer since the contract was signed. As the Commission is well aware:

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<sup>9</sup> Akron Energy Systems LLC is an affiliate of Cleveland Thermal Steam Distribution LLC, which is a regulated utility that provides steam service to customers in downtown Cleveland, Ohio.

<sup>10</sup> Staff Ex. 6 at 3.

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.<sup>11</sup>

Violations of this section can result in sanctions for the utility and for the officers responsible.<sup>12</sup> Violations of Revised Code Section 4905.56 are felonies.<sup>13</sup>

Although ATLP's nonfeasance regarding the Children's Hospital agreement may be sanctionable in various ways, Children's Hospital is not accountable. There is no reason to deprive Children's Hospital of the benefit of the arrangement it thought it had made with ATLP. Staff has reviewed the agreement and has no objection.<sup>14</sup> The agreement in Case No. 09-441-HT-AEC should be approved.

ATLP has also sought Commission approval for an alteration of its existing, Commission-approved agreement with Canal Place. This alteration in the existing agreement arises as a result of the bankruptcy proceeding. Staff has reviewed this alteration and has no objection.<sup>15</sup> The agreement in Case No. 09-442-HT-AEC should be approved.

## **B. Tariff Amendments**

ATLP has sought Commission approval to modify and apply its tariffs to the Canal Park customers. These customers currently receive service under a contract that

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<sup>11</sup> Ohio Rev. Code Ann. § 4905.32 (Anderson 2009).

<sup>12</sup> Ohio Rev. Code Ann. §§ 4905.54, 4905.56 (Anderson 2009).

<sup>13</sup> Ohio Rev. Code Ann. § 4905.99(B) (Anderson 2009).

<sup>14</sup> Staff Ex. 5 at 7.

<sup>15</sup> *Id.*

will expire in September 2009. The revised tariffs provide for master metering of these customers, and Akron Thermal proposes to issue virtually identical monthly bills to each of the Canal Park customers based on an allocation of the master meter read. Staff has reviewed the proposal and has no objection.<sup>16</sup> The tariff amendments should be approved.

### **C. Debt Issuance**

The debt issuance that is before the Commission for its consideration cannot be approved. The reason for rejection is quite simple; the debt cannot be serviced. As explained in the testimony of Mr. Mahmud, there is insufficient cash flow to cover the debt payments.<sup>17</sup> It would not be responsible to approve a debt issuance where it appears that the debt cannot be repaid.

It appears that it may be possible to avoid the cash flow problem by spreading out the payments called for in the notes that are before the Commission currently but only if ATLP receives the emergency relief it seeks.<sup>18</sup> This restructuring is not currently before the Commission.<sup>19</sup> ATLP would need to submit a new application in Case No. 09-414-HT-AIS for that new proposal and has not, to date, done so. Even if this restructured

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<sup>16</sup> Staff Ex. 5 at 8.

<sup>17</sup> Staff Ex. 3 at 3-4.

<sup>18</sup> Staff Ex. 4 at 2-3.

<sup>19</sup> Company witness Bees submitted rebuttal testimony that introduced an agreement to amend the repayment provisions of the company's promissory notes. This agreement has the effect of slightly reducing the annual debt repayments in years 2010 to 2014, while extending the final payments by one year to 2015. The company's total debt obligations are not reduced.

In view of the company's financial structure that is incompatible with regulatory rate setting principles, the debt restructuring would only serve to prolong the inevitable financial collapse of the company even if emergency rate relief was authorized.

obligation were before the Commission, Staff would oppose because that restructured obligation would depend on emergency relief, which Staff opposes. Further, spreading out the payments only serves to increase the obligation, worsening the financial situation in the long term.

It will be argued that the action of the Bankruptcy Court has obviated the need for Commission approval of any debt issuance. Section 15.2 of the Plan of Reorganization provides:

The PUCO will retain jurisdiction over any rate change to be requested by Debtor, and all other matters otherwise within the jurisdiction of the Public Utilities Commission of Ohio ("PUCO").<sup>20</sup>

The federal court did not take any action to reduce the Commission's authority. The Commission should use that authority to say no for the simple reason that the proposal before the Commission cannot be supported. Any future filing can be considered at that time.

#### **D. Rates**

ATLP asks this Commission to grant it an emergency rate increase. The Commission has very broad emergency powers indeed. The law provides that:

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

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<sup>20</sup>

Applicant Ex. 2, at Ex. JPB-1 at 35.

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.<sup>21</sup>

It will be argued that emergency relief is necessary to allow ATLP to function. This may be true. It may be true that granting the emergency relief sought will precipitate the ultimate collapse of ATLP. It may be that both are true, which would mean that ATLP is doomed regardless of what the Commission does.<sup>22</sup> The statute also requires the Commission consider the interests of the public, and a 71 percent increase is clearly not in the public interest.

A basic problem is that the state of knowledge is such that it cannot be determined whether an emergency increase would help or hurt the situation and, even if we could, we certainly cannot determine the level of that increase with any expectation of accuracy. What is needed is a base rate case. This is the only way to determine what the revenue requirement should be and how that requirement should be apportioned among the customers. In the absence of this kind of review, we are just shooting in the dark and that is no way to regulate even in an emergency.

It must be remembered that ATLP's books have not been reviewed by an outside auditor.<sup>23</sup> Under the time constraints of an emergency proceeding, the Staff has not performed an audit of ATLP's books.<sup>24</sup> All of Staff's various analyses have simply

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<sup>21</sup> Ohio Rev. Code Ann. § 4909.16 (Anderson 2009).

<sup>22</sup> Staff Ex. 6 at 2.

<sup>23</sup> Applicant Ex. 4 at 4.

<sup>24</sup> Tr. at \_\_\_. At the time of filing this brief, the transcript was not yet available.

assumed ATLP's numbers. With no external review of ATLP's accounting, there is no real reason to accept the accuracy of any accounting value in this record. They are simply unaudited assertions.

Although the accounting data in the record are doubtful, an examination of the company's unaudited assertions leads to the conclusion that the structure of ATLP is simply not compatible with regulation.<sup>25</sup> The entity is and will remain overcapitalized. This is not a sound basis on which a utility may operate.

The revenue increases assumed throughout this record are suspect in their own way. The rate increases sought will only generate the assumed revenues if the customer base remains stable. There is no reason to think this would be true. The filing itself was precipitated by the loss of ATLP's largest customer. The largest remaining customer, Summa, has the physical ability to leave ATLP service at any time and uses that clout to effectively set its own rates without regard to any tariff, contract, or indeed any written agreement at all.<sup>26</sup> The witness for Canal Place indicates that the rate increase proposed for it would justify a \$2.8 million dollar investment in plant.<sup>27</sup> This amount is more than 75 percent of ATLP's entire rate base. Indeed, it is a larger amount than would be necessary to bring Boiler 32 into EPA compliance,<sup>28</sup> making it certainly sufficient to support equipment installation for Canal Place. The situation appears similar for

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<sup>25</sup> Staff Ex. 1 at 8-9.

<sup>26</sup> Tr. at \_\_\_. At the time of filing of this brief, the transcript was not yet available.

<sup>27</sup> Canal Place Ex. 1 at 16.

<sup>28</sup> Applicant Ex. 3 at 4.

Children's Hospital.<sup>29</sup> This is a death spiral unfolding before us. First, a big customer leaves because the rates are too high. This creates a need for a rate increase but that rate increase spurs more customers to leave. This in turn drives the need for even higher rates, pushing more customers off utility service, and so on until the inevitable collapse.

Thus, it appears, based on the information in the record, that Commission rate action would be futile. Based on ATLP's unaudited information, it appears that rates cannot be set that would provide a stable, sustainable basis for this utility to operate, even if such rates could be collected and they cannot. The company appears to be doomed regardless of what the Commission chooses to do in this emergency case.<sup>30</sup> An accurate resolution can only come through a permanent rate case where a comprehensive examination of the company's operations and costs can be performed. In the absence of fully vetted information that would be obtained through a permanent rate case, Staff believes it is not reasonable to approve emergency relief at this time in this situation.

#### **E. Alternative**

The situation before the Commission is troubling, appearing, as it does, that there is no way to prevent ATLP from terminating service. There is an aspect of the situation that lends itself to some optimism. The productive assets of ATLP are essentially all leased from the city of Akron. Indeed, this is one of the structural problems that prevents ATLP from being in a position compatible with regulation. When ATLP terminates its operations, whether that is in several weeks or several months, the productive assets will

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<sup>29</sup> Akron Children's Hospital Ex. 1 at 7.

<sup>30</sup> Staff Ex. 6 at 2.



return to the control of the owner, the city of Akron, which has a plan in place to operate the equipment.<sup>31</sup> The contract calls for Akron Energy Services to operate the system immediately.<sup>32</sup> Staff believes that the end of ATLP will not, because of this arrangement, cause a disruption of service.<sup>33</sup>

## CONCLUSION

The Staff recommends that the Commission deny Akron Thermal's application for an emergency increase in its rates, as well as its application to issue three long-term promissory notes. The Staff further recommends that the Commission approve Akron Thermal's special contracts with Children's Hospital and Canal Place. Finally, the Staff recommends that the Commission approve Akron Thermal's application to amend its tariffs to reflect the provision of service to the residents of Canal Park at the current tariffed rates.

Respectfully submitted,

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<sup>31</sup> Staff Ex. 6 at 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Post-Hearing Brief was served via electronic mail to the following parties of record this 28th day of July, 2009.

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