

Baker Hostetler

RECEIVED-DOCKETING DIV

2009 JUL 29 AM 10:30

PUCO

Baker&Hostetler LLP

3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485T 216.621.0200
F 216.696.0740
www.bakerlaw.com

July 28, 2009

VIA FACSIMILE AND OVERNIGHT DELIVERY

Kelly S. Burgan
direct dial: 216.861.7395
kburgan@bakerlaw.comPublic Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, Ohio 43215-3793

Re: *Akron Thermal, Limited Partnership*
Case Nos. 09-315-HT-ATA, 09-414-HT-AIS, 09-441-HT-AEC, 09-442-HC-AEC,
and 09-453-HT-AEM

Dear Sir or Madam:

Enclosed please find an original and fifteen (15) copies of our Brief in Support of Emergency Increase In Rates Filed By David Wehrle, In His Capacity As Trustee Of The Creditors Trust For Akron Thermal, Limited Partnership.

Please accept for filing the original and all necessary copies, and return all extra copies to me, time-stamped, in the postage paid envelope provided.

If you have any questions regarding this filing, please contact me immediately at the above, direct-dial number.

Sincerely,


Kelly S. Burgan

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business
Technician Am Date Processed 7/29/09

102852594.3

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV
2009 JUL 29 AM 10:30
PUCO

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 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 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
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

BRIEF IN SUPPORT OF EMERGENCY INCREASE IN RATES
FILED BY 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) (together, the "**Applications**").

David Wehrle is the trustee (“**Trustee**”) of the 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**”). On July 15, 2009, the Commission granted the Trustee leave to intervene in these proceedings.

The Staff’s analysis, as set forth in the written surrebuttal testimony of its witnesses Shahid Mahmud and David R. Hodgden, filed July 17, 2009, confirms that the requested emergency rate relief and the forbearance agreement with respect to the Notes in favor of the Trust and the State of Ohio will enable Akron Thermal to operate, notwithstanding the loss of the contract with the University of Akron. Under the Plan and Trust Agreement, the Trustee is authorized and empowered to enter into the agreement to forbear on the Trust Note without Bankruptcy Court approval. That issue, however, is now moot, because the Trustee now has filed a motion seeking the Bankruptcy Court’s approval. The Trustee has done this in order to avoid the controversy that the City has attempted to impute to this issue and to narrow the issues for the Commission.

Based on the written surrebuttal testimony of Staff witness Stephen E. Puican, filed July 17, 2009, it appears the significant remaining issue is Akron Thermal’s long-term viability. Mr. Puican’s recommendation to deny the emergency relief, however, is largely based on the potential impact of future events which may never actually occur. The Trustee submits that the emergency rate relief should be granted, as determined solely based on Akron Thermal’s projections, evidence and analysis.

Akron Thermal has been operating the utility company for over ten years, and stepped in as operator in the wake of conflict between the City and the prior operator. Akron Thermal

sought, and successfully emerged from, chapter 11 protection. During these proceedings, the City has elicited testimony regarding professional fees incurred by Akron Thermal during the bankruptcy case. The majority of the legal fees during the bankruptcy case were incurred directly as a result of litigation initiated by the City, which made no secret of its motivation to oust Akron Thermal. Most notable, however, is that Akron Thermal was able to fund its operations throughout the bankruptcy case even while servicing those professional fees, which exceeded \$2 million as a result of the City's tactics. Akron Thermal will not have to bear professional fees of that magnitude going forward.

Perhaps most significant in evaluating Akron Thermal's long-term viability is the lack of evidence regarding any suitable alternative operator who could resolve the challenges faces by Akron Thermal any better or any differently. This fact was significant to the Committee in taking the position it did during Akron Thermal's bankruptcy case. There was no evidence then, just as there is no evidence now, that a new operator would resolve the issues that Akron Thermal faces. The City's only "evidence" is that, two years ago, a "Task Force" recommended that Akron Thermal be replaced. That was before Akron Thermal's reorganization. Moreover, there is no evidence that the Task Force was presented with any supporting information regarding the capabilities – financial or otherwise – of the proposed new operator. Certainly no such evidence was presented to the Commission. Thus, it appears the Task Force recommendation was nothing more than an indication that, prior to the bankruptcy, key users were, in theory, open to the possibility of a new operator.

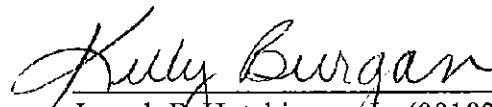
The City has not operated the utility for decades, and has presented no proof to the Bankruptcy Court or to the Commission that it has the ability to do so now. There is no evidence that Cleveland Thermal could operate the plant without obtaining substantial rate increases.

There also is no evidence regarding how the City and/or Cleveland Thermal would resolve other issues that confront Akron Thermal, such as pending disputes with the Environmental Protection Agency. For these reasons, the Trustee urges the Commission to reject the City's unsubstantiated, conclusory suggestion that a new operator could offer an "easy fix."

The Trustee maintains his position that the Commission lacks jurisdiction to deny the financial obligations, including the Notes, that were approved by the Bankruptcy Court in connection with Akron Thermal's Plan of Reorganization, on the grounds set forth in the Trustee's Motion to Intervene in these proceedings, which the Trustee incorporates herein by reference.

WHEREFORE, the Trustee respectfully requests that the Commission grant the Applications.

Respectfully submitted,



Joseph R. Hutchinson Jr. (0018210)

Kelly S. Burgan (0073649)

Baker & Hostetler LLP

3200 National City Center

1900 East Ninth Street

Cleveland, Ohio 44114-3485

Telephone: (216) 621-0200

Facsimile: (216) 696-0740

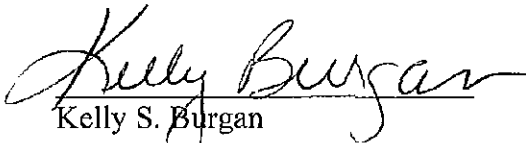
Email: jhutchinson@bakerlaw.com

Email: kburgan@bakerlaw.com

Counsel for the Trustee

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 28th day of July, 2009.


Kelly S. Burgan

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
(614) 228-0704 - Phone
(614) 228-0201 - Fax
barthroyer@aol.com - Email

Samuel C. Randazzo
Gretchen J. Hummel
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
(614) 469-8000 (T)
(614) 469-4653 (F)
sam@mwncmh.com
ghummel@mwncmh.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, OH 43215
dconway@porterwright.com

Glenn S. Krassen
Bricker & Eckler LLP
1375 East Ninth Street, Suite 1500
Cleveland OH 44114
gkrassen@bricker.com

E. Brett Breitschwerdt
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus OH 43215
BBreitschwerdt@bricker.com

Linda Murphy
Attorney for the County of Summit
Executives' Office
175 S. Main Street, 8th Floor
Akron, OH 44308
LMurphy@Summitoh.net

Thomas McNamee
Sarah Parrot
Attorney General's Section
Public Utilities Commission of Ohio
180 E. Broad St., 9th Floor
Columbus, OH 43215
thomas.mcnamee@puc.state.oh.us
Sarah.parrot@puc.state.oh.us

Christopher Niekamp
Michael J. Palumbo
Bernlohr Wertz, LLP
The Nantucket Building
23 South Main Street, Third Floor
Akron, OH 44308-1822
cjn@b-wlaw.com
Michael@b-wlaw.com