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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MOTION TO INTERVENE, MOTION TO CONSOLIDATE AND MEMORANDUM IN SUPPORT OF THE CITY OF AKRON

Max Rothal (No. 0009431)
Director of Law
Cheri B. Cunningham (No.0009433)
Assistant Director of Law
161 S. High Street, Suite 202
Akron, OH 44308
Telephone: (330) 375-2030
Telecopier: (330) 375-2041
Cunnich@ci.akron.oh.us

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Technician SM Date Processed 6/12/09

Samuel C. Randazzo (Counsel of Record)
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

June 11, 2009

Attorneys for the City of Akron

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MOTION TO INTERVENE
AND
MOTION TO CONSOLIDATE OF THE CITY OF AKRON

The City of Akron ("Akron") hereby respectfully moves the Public Utilities Commission of Ohio ("PUCO" or "Commission"), pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code ("O.A.C."), for leave to intervene in Case Nos. 09-414-HT-AIS, 09-315-HT-ATA, 09-441-HT-AEC and 09-442-HC-AEC

with the full powers and rights granted by the Commission, specifically by statute or by the provisions of the O.A.C., to intervening parties.[1]

On May 18, 2009, Akron Thermal, Limited Partnership ("ATLP")[2] filed an Application for Authority to Issue Three (3) Promissory Long-Term Notes ("AIS Application") that ATLP appears to have already issued without previously obtaining the Commission's approval.[3] This AIS Application came days before ATLP filed an Application for an Emergency Rate Increase ("AEM Application") in Case No. 09-453-HT-AEM.

ATLP's AEM Application alleges that it is entitled to emergency rate relief in the amount of $4.2 million as a result of it being unable to maintain its service relationship with the University of Akron which was a "special contract" customer. ATLP's AIS

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[1] Akron has separately moved to intervene in Case No. 09-453-HT-AEM. This motion is being filed in Case No. 09-453-HT-AEM due to Akron's request that the Commission consolidate this case with the other cases recently initiated by ATLP.

[2] It is Akron's understanding from ATLP's assertions in various proceedings 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 at prices and on terms and conditions that may be different than those that apply to tariff or contract customers. The overlapping relationship between ATC and ATLP will require some sorting out by the Commission before it can fairly evaluate ATLP's request for emergency rate relief, for authority to issue securities and the request for retroactive approval of a contract to provide steam and cooling service to Canal Place. As noted in the following memorandum and pursuant to the Modified Second Amended Plan of Reorganization ("Plan") recently confirmed by the bankruptcy court, ATC is obligated to contribute its income and earnings to ATLP with the bankruptcy court concluding that said Plan is viewed as a modified form of substantive consolidation. A copy of the court's confirmation order is attached (as Exhibit 1) to Akron's motion to intervene in Case No. 09-453-HT-AEM.

[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 TVII of up to $750,000. It is Akron's understanding that ATLP also provided TVII 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 TVII a blanket lien in its personal property through a June 15, 2007 Security Agreement.

Application contains balance sheet and income statement information and a financial condition that paints a very different picture than ATLP paints in its AEM Application. As noted below, ATLP's AIS Application appears to omit a request 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 brought before the Commission) if the relief sought by ATLP in the AEM Application is not forthcoming.

The applications filed by ATLP in Case Nos. 09-441-HT-AEC and 09-442-HC-AEC request the Commission to approve contracts with customers that apparently were entered into by ATLP and the customers but never presented to the Commission for approval. Oddly, the significance of any approval that may come from the Commission based on the application in Case No. 09-442-HT-AEC is left in great doubt by ATLP's application since the unapproved contract appears to have expired on July 31, 2008.

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 also indicates (at page 1) that ATLP has a current contract with Canal Park Condominium that runs through September 2009. However, it is Akron's understanding that ATLP rejected this contract in its bankruptcy proceeding[4] and did so without securing the Commission's approval of the effects of this rejection on the contract. In any event, ATLP's application in Case No. 09-315-HT-ATA does not explain why it has neither presented nor asked the Commission to approve a new

[4] This understanding is based on page 22 of ATLP's amended plan of reorganization and exhibit 8.2 (schedule of rejected contracts) of such amended plan.

contract to meet the needs of Canal Park Condominium. On a more disturbing note, 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.

As demonstrated further in the Memorandum in Support attached hereto and incorporated herein, Akron has a direct, real, and substantial interest in the issues and matters involved in the above-captioned proceedings, and is so situated as a municipality, regulator, customer, utility services supplier, sometimes creditor and lessor that the disposition of these proceedings may, as a practical matter, impair or impede its ability to protect such interest. Akron believes that its participation will not unduly prolong or delay these proceedings and that it will significantly contribute to the full development and equitable resolution of the contested issues of fact or law. The interests of Akron will not be adequately represented by other parties to the proceedings and, as such, Akron is entitled to intervene with the full powers and rights granted by the Commission, specifically by statute and by the provisions of the O.A.C., to intervening parties.

By this motion, Akron also urges the Commission to consolidate the above-referenced proceedings. These proceedings are related and will involve many of the same regulatory personnel and subject matter. Akron, therefore, concludes that it would be administratively efficient to consolidate the proceedings under one procedural schedule. The relief requested by ATLP in some of these cases is inconsistent with the relief requested by ATLP in others. The relief requested in all of these cases will potentially affect the financial condition of ATLP, the cost and availability of steam and chilled water service to ATLP's customers and the economic health of downtown Akron.

The comprehensive consolidation requested by Akron in this motion will reduce the risk that facts and circumstances that may be relevant to the overall condition of ATLP, the significance of its bankruptcy proceeding and the needs of its customers might not become known to the Commission or be taken into account by the Commission if it proceeds to consider each Application on a stand-alone basis.

Respectfully submitted,

Max Rothal (No. 0009431)
Director of Law
Cheri B. Cunningham (No.0009433)
Assistant Director of Law
161 S. High Street, Suite 202
Akron, OH 44308
Telephone: (330) 375-2030
Telecopier: (330) 375-2041
Cunnich@ci.akron.oh.us

Samuel C. Randazzo (Counsel of Record)
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Attorneys for the City of Akron

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MEMORANDUM IN SUPPORT

On May 18, 2009, ATLP filed an AIS Application that ATLP appears to have already issued without previously obtaining the Commission's approval. This AIS Application came days before ATLP filed the AEM Application.

ATLP's AEM Application alleges that it is entitled to emergency rate relief in the amount of $4.2 million as a result of it being unable to maintain its service relationship with the University of Akron which was a "special contract" customer. ATLP's AIS Application contains balance sheet and income statement information and a financial condition that is very different than the picture ATLP paints in its AEM Application. As noted below, ATLP's AIS Application appears to omit a request 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 or the ones not brought before the Commission if the relief sought by ATLP in the AEM Application is not forthcoming.

More specifically, the AEM Application states that, absent the 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 that ATLP will be unable to meet its obligation to provide steam and hot water service to its customers.[5] ATLP's claims are advanced in the context of it recently receiving confirmation of a plan of reorganization in a pending bankruptcy proceeding[6] and with no indication of any intention (on ATLP's part) to advise the bankruptcy court, the trustee in bankruptcy and the parties in the bankruptcy proceeding that the viability of its plan of reorganization and its ability to meet the obligations of the promissory notes that it presented to the bankruptcy court now depends on ATLP obtaining authorization for a sizeable emergency rate increase from the PUCO and then its ability to collect the Commission-authorized revenue from

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[5] AEM Application at 4.

[6] 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 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 the Debtor's business would likely evaporate.

Thus, the loss of the University of Akron as a customer was foreseeable and the consequences for ATLP were predictable and predicted. A copy of the court's confirmation order is attached (as Exhibit 1) to Akron's motion to intervene in Case No. 09-453-HT-AEM.

customers, including some customers that have alternative means of meeting their service needs.[7]

Akron is a municipality, a regulator of public utilities such as ATLP pursuant to the Ohio Constitution, the lessor of the steam and hot water system operated by ATLP, a supplier of utility services to ATLP, at times a creditor of ATLP, and a customer of ATLP. Akron's rights and obligations as a lessor are defined by the Operating Lease Agreement ("Lease Agreement")[8] and its Ordinance No. 670-1996 ("Ordinance").[9] Akron is also a party in the above-mentioned bankruptcy proceeding in which ATLP recently received approval of a plan of reorganization.

Under Rule 4901-1-11(A)(2), O.A.C., an interested party may intervene in a Commission proceeding if the interested party can demonstrate a real and substantial interest in the proceeding and the interested person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing

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[7] As 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.

[8] The Lease Agreement was attached to Akron's Motion to Intervene in Case No. 09-453-HT-AEM as Exhibit 2.

[9] The Ordinance was attached to Akron's Motion to Intervene in Case No. 09-453-HT-AEM as Exhibit A to Exhibit 2. While Section 18.A of the Ordinance requires ATLP to timely provide the City (Akron) with copies of all notices, filings, applications or other documents submitted to the Commission, ATLP has not provided Akron with a copy of the applications referenced herein. Section 10 of the Ordinance precludes ATLP from increasing Akron's rates and charges unless ATLP has given notice to Akron at least 180 days prior to the start of Akron's fiscal year. By seeking intervention and consolidation of these proceedings, Akron is not waiving its right to seek a dismissal of the various applications as a result of ATLP's failure to first comply with the procedural or other requirements of the Lease Agreement and Ordinance.

parties.[10] When determining whether a party may intervene under Rule 4901:1-11(A)(2), O.A.C., the Commission considers:[11]

(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.

Under these criteria, intervention "ought to be liberally allowed so that the positions of all persons with a real and substantial interest" in a proceeding can be considered by the Commission.[12]

Akron respectfully submits that it has a real and substantial interest in these proceedings and meets the Commission's criteria for intervention in Commission proceedings. As a municipality and regulator of public utilities, ATLP's applications indicate that Akron may need to consider if it should establish rates and charges through its ratemaking powers. ATLP's applications indicate that Akron's interest as a lessor may be impaired or impeded as a result of issues that ATLP has asked the Commission to address. And, ATLP's applications indicate that Akron's interests as a supplier of utility services to and as a customer of ATLP may be impaired or impeded in these proceedings.

The legal positions advanced by Akron will directly relate to the merits of ATLP's request for relief and other approvals. Akron's involvement in these proceedings will not unduly prolong or delay the proceedings and Akron will significantly contribute to the full

[10] 4901-1-11(A)(2), O.A.C.

[11] *See also* Section 4903.221, Revised Code.

[12] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶20.

development and equitable resolution of factual and other issues by, in part, applying the experience and knowledge Akron has obtained from its active participation in ATLP's bankruptcy proceeding. Finally, no other person or entity is representing or can represent Akron's interests in these proceedings.

Akron is aware of the Commission's practice of not permitting interventions in cases where a utility is seeking authority to issue securities. But, Akron believes that the facts presented in this particular situation and in the case of ATLP merit an exception to this Commission practice. To the extent the Commission grants the consolidation request of Akron and Akron is thereby permitted to protect its varied interests across the many cases recently initiated by ATLP, Akron believes its ability to protect its interests will, as a practical matter, be preserved through such a Commission-ordered consolidation.

As indicated in the foregoing motion, Akron believes its consolidation request should be sustained by the Commission because the proceedings are related and will involve many of the same regulatory personnel and subject matter. Therefore, it would be administratively efficient to consolidate the proceedings under one procedural schedule. The relief requested by ATLP in some of these cases is inconsistent with the relief requested by ATLP in others. The relief requested in all of these cases will potentially affect the financial condition of ATLP, the cost and availability of steam and chilled water service to ATLP's customers and the economic health of downtown Akron. The comprehensive consolidation requested by Akron in this motion will reduce the risk that facts and circumstances that may be relevant to the overall condition of ATLP, the significance of its bankruptcy proceeding and the needs of its customers might not

become known to the Commission or taken into account by the Commission if it proceeds to consider each application on a stand-alone basis.

For the foregoing reasons, Akron respectfully requests that the Commission grant its Motion to Intervene.

Respectfully submitted,

Max Rothal (No. 0009431)
Director of Law
Cheri B. Cunningham (No.0009433)
Assistant Director of Law
161 S. High Street, Suite 202
Akron, OH 44308
Telephone: (330) 375-2030
Telecopier: (330) 375-2041
Cunnich@ci.akron.oh.us

Samuel C. Randazzo (Counsel of Record)
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Attorneys for the City of Akron

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Intervene, Motion to Consolidate and Memorandum in Support of the City of Akron* was served upon the following parties of record this 11th day of June 2009, via hand-delivery, electronic transmission or first class mail, postage prepaid.

Samuel C. Randazzo

Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Attorneys for Akron Thermal, Limited Partnership