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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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. 09-315-HT-ATA
of Revised Tariffs.)

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 for Approval) Case No. 09-442-HC-AEC
of a Modification to an Existing Arrangement.)

INITIAL POST HEARING BRIEF OF CANAL PLACE, LTD.

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I. Introduction

On May 26, 2009, Akron Thermal, Limited Partnership (“ATLP”) filed Case No. 09-442-HC-AEC with the Commission requesting approval of a modification to the utility’s existing reasonable arrangement¹ with Canal Place, Ltd. (“Canal Place”). Canal Place is a special contract customer of ATLP, and is an important economic development center in the Akron community.

Three days later, on May 29, 2009, ATLP filed Case No. 09-453-HT-AEM with the Commission requesting an emergency rate increase in the amount of \$4,195,561 to avert the alleged emergency caused by the University of Akron’s (“UA”) decision not to renew its special contract with ATLP. Initially, ATLP’s application presented the Commission with the option of applying this rate increase to Canal Place and Children’s Hospital Medical Center (“Children’s Hospital”) as special contract customers along with tariff customers. Direct testimony filed on behalf of Canal Place², Children’s Hospital³ and the Commission Staff⁴ all opposed applying any emergency rate increase to special contract customers, and the City of Akron (“City”) has vigorously opposed approval of any rate increase for ATLP throughout the proceeding. Subsequently, through rebuttal testimony, the Applicant withdrew the proposed option of unilaterally requesting the rate increase be applied to Canal Place’s and Children’s Hospital’s special contracts.⁵

These two cases directly affecting Canal Place were also consolidated with three other ATLP proceedings by Commission Entry on June 17, 2009. While these consolidated cases present the Commission with numerous and complex policy and legal issues, Canal Place’s position, as set forth herein, is straightforward.

¹ As discussed further herein, the Commission approved the May 18, 2001 reasonable arrangement between ATLP and Canal Place underlying this modification on February 21, 2002 in Case No. 01-3333-HC-AEC.

² Canal Place Exhibit 1, Direct Testimony of Brian L. Lorman, at 4.

³ Children’s Hospital Exhibit 1, Direct Testimony of Linda L. Gentile, at 3.

⁴ Commission Staff Exhibit 5, Direct Testimony of Stephen E. Puican, at 5-6.

⁵ Applicant’s Exhibit 5, Rebuttal Testimony of Jeffrey P. Bees, at 11.

1. The Commission should grant ATLP's unopposed request in Case No. 09-442-HC-AEC for approval of a modification to its reasonable arrangement with Canal Place.
2. Canal Place does not take a position on whether the Commission should grant ATLP's request for an emergency rate increase, and defers to the testimony of ATLP, the City, and Commission Staff to fully inform the Commission's decision on this issue.
3. However, should the Commission grant ATLP's request for emergency relief, the Commission should accept the consensus of all parties in the case, including the Applicant and Staff, that any approved emergency rate increase should not be applied to Canal Place as a special contract customer.

II. Discussion

A. Canal Place – An Approved Special Contract Customer

Canal Place owns and operates a 1.4 million square foot nationally recognized redeveloped property located in downtown Akron. This large complex is home to more than 91 local, regional, national and global companies representing more than 40 different types of businesses and having a combined work force of more than 2,500 people. Canal Place is an important economic development center for the City of Akron. In addition to employing over 2,500 people, the businesses that are located in the office and industrial buildings within Canal Place have an annual payroll of over \$80 million and contribute considerable amounts to the City of Akron's tax base. Many of the companies located in Canal Place are well recognized and important corporate citizens in the Akron community. Currently, these businesses are confronted with the same difficult economic hardships that are confronting businesses throughout Ohio.⁶

On May 18, 2001, Canal Place and ATLP executed a ten-year agreement for steam and chilled water service, which extends through March 31, 2012 ("May 2001 Agreement").⁷ The May 2001 Agreement was approved by the Commission as a reasonable arrangement on February 21, 2002 in Case No. 01-3333-HC-AEC. The terms of the May 2001 Agreement commit Canal Place to pay incrementally increasing rates for steam and chilled water service in each subsequent year through

⁶ See Canal Place Exhibit 1, Direct Testimony of Brian L. Lorman, at 1-2.

⁷ *Id.* at 5. Previously, Canal Place and ATLP had negotiated a shorter three-year agreement for steam and chilled water service for the period from March 24, 1999 through March 23, 2002. This previous contract was approved by the Commission as a reasonable arrangement on April 1, 1999 in Case No. 99-379-HT-AEC.

2012.⁸ The Agreement also provides Canal Place with the ability to unilaterally terminate the Agreement upon one years notice to ATLP and provides that installation of alternative fuel equipment by Canal Place does not constitute a breach of the Agreement.⁹ Finally, the May 2001 Agreement expressly prohibits ATLP from unilaterally modifying the rates paid for steam during the term of the agreement without Canal Place's written agreement.¹⁰

Since the effective date of the May 2001 Agreement, ATLP had not sought in any proceeding for the Commission to unilaterally modify the rates paid by Canal Place under the Agreement.¹¹ As discussed below, however, Canal Place has agreed to a modification to the terms of the still-effective May 2001 Agreement.

B. Canal Place Joins the Applicant in Requesting Approval of the Modification to the May 2001 Reasonable Arrangement Now Before the Commission in Case No. 09-442-HC-AEC.

Canal Place joins ATLP's request that the Commission approve the September 30, 2008 amendment to the May 2001 Agreement as a reasonable modification to an approved reasonable arrangement under Section 4905.31, Ohio Revised Code. As set forth in the Application in Case No. 09-442-HC-AEC, this amendment was negotiated while ATLP was under the Chapter 11 protections of the Bankruptcy Court.¹² The net effect of this modification for Canal Place is to increase the steam rates negotiated under the May 2001 Agreement by \$375,000 per year for the remainder of the Agreement's term through March

⁸ *Id.*

⁹ See Case No. 01-3333-HC-AEC, Joint Application - Exhibit A, at 12, 17.

¹⁰ *Id.* at 10, 15. See also Canal Place Exhibit 1, Direct Testimony of Brian L. Lorman, at 6-7.

¹¹ See Canal Place Exhibit 1, Direct Testimony of Brian L. Lorman, at 7 (noting that the chilled water portion of the May 2001 Agreement was assigned to Akron Thermal Cooling in 2002, after agreement and approval by Canal Place).

¹² See Case No. 09-442-HC-AEC, Application at 2.

31, 2012.¹³ This equates to an average rate of \$ 16.88 per Mlb for the August 2009 through July 2010 period, which will incrementally increase per the terms of the May 2001 Agreement thereafter. This is an approximately 75 percent increase over the negotiated rates under the May 2001 Agreement. Canal Place began paying this rate increase pursuant to the September 2008 amendment on February 20, 2009, the effective date of ATLP's plan of reorganization.¹⁴

During the hearing, ATLP Witness Bees confirmed that the amendment was an arms-length negotiated agreement between the parties (Canal Place and ATLP), and that the Applicant is expressly requesting approval of the amendment.¹⁵ Further, Commission Staff also expressly reviewed and recommended that the Commission approve the amendment to the May 2001 Agreement.¹⁶ Finally, no other parties have expressed any opposition to the approval of this amendment.

Therefore, based on the request of the Applicant and Commission Staff and Canal Place's warranting as to the application's reasonableness, Canal Place requests the Commission approve ATLP's application in Case No. 09-442-HC-AEC for the duration of the May 2001 Agreement's term.

C. If the Commission Approves ATLP's Request for Emergency Rate Relief, in Any Amount, Such an Additional Rate Increase Should Not be Applied to Canal Place, as a Special Contract Customer.

¹³ See Canal Place Exhibit 1, Direct Testimony of Brian L. Lorman, at 10.

¹⁴ *Id.* at 15. See also Tr. Vol. I, at 166 (examination of ATLP Witness Pucak confirming that Canal Place began paying the \$375,000 rate increase on or about February 20, 2009.)

¹⁵ Tr. Vol. I, at 110-111.

¹⁶ Commission Staff Exhibit 5, Direct Testimony of Stephen E. Puican, at 7 (asserting "Staff has reviewed this contract and recommends it also be approved.")

Canal Place will defer to the testimony of ATLP, the City, and Commission Staff to fully inform the Commission's decision whether to grant ATLP any emergency rate increase. Canal Place, however, strongly asserts that should there be any rate increase authorized by the Commission, it should not be applied to Canal Place. This result would be consistent with the consensus of the parties, is consistent with ATLP's Application as amended by the Rebuttal Testimony of Witness Bees, and is, as a matter of contract, indisputably correct.

1. The Consensus of the Parties is that the Proposed Emergency Rate Increase, if Approved at Any Level, Should Not be Applied to Canal Place and Children's Hospital as Special Contract Customers.

In its initial Application, filed on May 29, 2009, ATLP proposed two options to recover the requested temporary emergency rate increase, without expressly supporting either option.¹⁷ One option applied the rate increase to tariff customers and to the Children's Hospital and Canal Place special contracts while the other option applied the rate increase to tariff customers only. Canal Place strongly opposes the option that would unilaterally modify its approved reasonable arrangement by charging the rate increase to Canal Place and Children's Hospital in abrogation of their contracts and without their consent.

The grounds for Canal Place's opposition to applying a potential emergency rate increase to its rates are set forth in detail in the Testimony of Brian L. Lorman. These grounds are further supported by the consensus of other parties that applying the rate increase to Canal Place and Children's Hospital should not be considered a viable or acceptable option by the Commission. In summary, these asserted positions are as follows:

- Canal Place negotiated and received approval of the May 2001 Agreement, which remains in effect through March 31, 2012. Only in the context of ATLP's bankruptcy, which legally provides for unilateral rejection of a contract, should Canal Place lose the benefit of its negotiated arrangement. The Commission should not unilaterally abrogate the terms of Canal Place's contract.¹⁸

¹⁷ See Case No. 09-453-HT-AEM, Application for Emergency Rate Increase, at 8.

¹⁸ Canal Place Exhibit 1, Direct Testimony of Brian L. Lorman, at 7-9.

- Effective February 20, 2009, Canal Place began paying an approximately 75 percent rate increase to ATLP under the September 2008 amendment. This additional annual consideration of \$375,000 to ATLP further justifies Canal Place's position that the Commission should not unilaterally abrogate the terms of Canal Place's contract.¹⁹
- Children's Hospital has similarly been funding incremental rate increases pursuant to the terms of its contract with ATLP since it became effective in 2006.²⁰
- The unintended consequence of forcing large customers to pay substantial rate increases is that it potentially rationalizes the decision to install alternative heating systems and leave ATLP's system, effectively exacerbating the problem intended to be resolved by the requested emergency rate increase. As expressed by the Testimony of Staff Witness Puican, "...there is a point at which revenue loss cannot be recovered through rate increases as additional customers simply will respond by leaving the system. At that point the system becomes unsustainable."²¹
- The net effect of applying this rate increase to Canal Place would create approximately \$700,000 of annual margin that could be used to finance an alternative system to serve its heating needs.²²
- Children's Hospital has also previously reviewed their options and would do so again if the rate increase was applied to the terms of the Hospital's special contract.²³
- Commission Staff chose not to even consider the option of applying the rate increase to Canal Place and Children's Hospital, as special contract customers, and expressed concern about the potential uncertainty of customers choosing to leave the system resulting in a "death spiral" for the utility.²⁴
- Similarly, no party, including the City, objected to ATLP's Rebuttal Testimony withdrawing the initially proposed option of applying the rate increase to Canal Place and Children's Hospital.

Based on the persuasiveness of these arguments and the consensus of the parties, applying the rate increase to Canal Place's and Children's Hospital's special contracts should not be considered a viable or approvable option by the Commission.

¹⁹ *Id.* at 10.

²⁰ Children's Hospital Exhibit 1, Direct Testimony of Linda L. Gentile, at 9.

²¹ Commission Staff Exhibit 5, Direct Testimony of Stephen E. Puican, at 5.

²² Canal Place Exhibit 1, Direct Testimony of Brian L. Lorman, at 7-9.

²³ Children's Hospital Exhibit 1, Direct Testimony of Linda L. Gentile, at 7.

²⁴ Tr. Vol. II, at 148.

2. ATLP has Withdrawn the Option of Applying the Proposed Emergency Rate Increase to Canal Place and Children's Hospital from its Emergency Rate Increase Application Before the Commission.

In addition to the impractical and inadvisable realities of applying any approved rate increase to Canal Place and Children's Hospital, procedurally, the Commission should not even consider this option as it was expressly withdrawn by the Applicant in the Rebuttal Testimony of Jeffery Bees. Specifically, Mr. Bees's rebuttal testimony states,

Q. Do you disagree with Staff witness Puican's conclusion with respect to the application of the surcharge to Children's Hospital and Canal Place?

A. No. As indicated in the direct testimony of Akron Thermal witness Pucak, Akron Thermal took no position with respect to which of the alternative mechanisms for recovering the proposed emergency increase should be approved. The intention was simply to show the amount of the adder that would be required under the two alternative scenarios. Akron Thermal does not disagree with Mr. Puican's observations regarding applying the surcharge to the special contract customers, and is also cognizant of the objections to this alternative discussed in the testimony of the Children's Hospital and Canal Place witnesses. Thus, Akron Thermal withdraws the proposed alternative surcharge that would have provided for the recovery of a portion of the emergency rate increase from these special contract customers.²⁵ (emphasis added)

Based on Mr. Bees's Rebuttal Testimony, ATLP has effectively amended their application to withdraw the proposed option that would apply the requested emergency rate increase to Canal Place and Children's Hospital. Therefore, this option is no longer before the Commission for consideration.

3. Even if the Applicant Had Requested the Emergency Rate Increase be Applied to Canal Place, The Commission's Authority to Modify A Contract Under Section 4905.31, Ohio Revised Code, is Limited to Extraordinary Circumstances Where the Applicant has Satisfied a Burden of the Highest Order.

Even assuming *arguendo* that the Applicant had requested the Commission modify the terms of Canal Place's previously-approved reasonable arrangement to apply any approved emergency rate increase to Canal Place, this would be an extraordinary remedy, which would have required ATLP to satisfy a burden of proof of the highest order. The Commission has, at least on one occasion, had an opportunity to examine its authority to modify private contracts previously approved by the

²⁵ Applicant's Exhibit 5, Rebuttal Testimony of Jeffrey P. Bees, at 11.

Commission and agreed to between a customer and the utility.²⁶ Citing to the Federal *Sierra-Mobile Doctrine*²⁷, the Commission has asserted that that “the power to modify existing contracts between a utility and its customers as conferred by Section 4905.31 must be viewed as an extraordinary power in light of constitutional restraints against impairment of the obligations of contract and constitutional guarantees of due process.”²⁸ The conditions precedent to an exercise of the Commission’s extraordinary power to modify an existing contract include a showing that the “contract adversely affects the public interest to the extent that it impairs the financial ability of the utility to continue to render service, creates an excessive burden on other customers of the company, and results in unjust discrimination.”²⁹ Importantly, an Applicant requesting the Commission modify a private contract is subject to a burden of proof of the highest order that the Contract’s modification would be in the public interest.³⁰

As an initial matter, nothing within the four corners of the Commission-approved and currently-effective May 2001 Agreement provides for the Commission to modify its terms without Canal Place’s agreement thereto. This was confirmed by the Applicant during the hearing.³¹ Therefore, ATLP would have been required to satisfy the extraordinarily heavy burden of proof to show that 1) Canal Place’s contract adversely affects the public interest by impairing ATLP’s ability to continue to render service; 2) that Canal Place’s agreement creates an excessive burden on other customers of the Company; and 3) that Canal Place’s contract results in unjust discrimination in the

²⁶ *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, August 4, 1976 Opinion & Order, Case No. 75-161-EL-SLF.

²⁷ This doctrine was established by the United States Supreme Court in the cases of *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* (1956), 350 U.S. 332, and *FPC v. Sierra Pacific Power Co.* (1956), 350 U.S. 348.

²⁸ *Id.* at 15.

²⁹ *Id.*

³⁰ *Id.* at 17.

³¹ Tr. Vol. I, at 166.

amount of rates paid to the Applicant. ATLP's application(s) and testimony in support utterly fail to address these issues, and, therefore, ATLP could not have satisfied this requisite high burden of proof.

Further, the record in this case in no way supports the Commission resorting to this extraordinary power. Nothing in the record suggests that Canal Place's contract is insufficient to compensate ATLP for its cost to serve Canal Place. Based on the September 2008 amendment to the May 2001 Agreement, the \$375,000 annual rate increase now in effect creates rates that are at least justly compensating ATLP for its cost to serve Canal Place. There was also no showing that Canal Place's contract contributed to the creation of the emergency conditions so the effect of Canal Place's negotiated contract on tariff customers is neutral. Finally, Canal Place's testimony explains that the rates negotiated in the May 2001 Agreement are based on Canal Place's unique customer characteristics including Canal Place's location on the ATLP system, its ability to return condensate to ATLP, its on-site natural gas reserves, and its agreement to the chilled water component of its May 2001 Agreement with ATLP. These unique characteristics justify the continued reasonableness of Canal Place's contract, even before the September 2008 amendment, and, therefore, precludes the Contract from being unjustly discriminatory.

Thus, even if ATLP would not have withdrawn the proposed option of applying the requested emergency rate increase to Canal Place, the Applicant would have failed to satisfy the burden of proof required to justify the Commission taking the extraordinary action of unilaterally abrogating Canal Place's reasonable arrangement.

III. Conclusion

Canal Place respectfully requests the Commission adopt its recommendations in this case, and approve ATLP's application in Case No. 09-442-HC-AEC without any additional modification. Further, for the reasons discussed herein, Canal Place asserts that the Commission should not subject Canal Place to any emergency rate increase in unilateral abrogation of its approved special contract with ATLP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Initial Post Hearing Brief of Canal Place, Ltd.* was served upon the parties of record listed below this 28th day of July, 2009 via e-mail.


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