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August 4, 2009

Renee J. Jenkins
Secretary
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Re: Case Nos. 09-414-HT-AIS, 09-453-HT-AEM, 09-315-HT-ATA, 09-441-HT-AEC, 09-442-HC-AEC

Dear Secretary Jenkins:

Apparently the City of Akron's attempt to correct its original reply brief filing caused some confusion. Accordingly, please find attached a complete, corrected version of the City of Akron's brief in this proceeding, including the attachment.

Very truly yours,

Joseph M. Clark

Attorney for City of Akron

Enclosure
JMC:ss

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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

CITY OF AKRON'S REPLY BRIEF

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CITY OF AKRON'S REPLY BRIEF

In accordance with the briefing schedule established by the Attorney Examiners, the City of Akron ("Akron") submits its reply brief ("Reply") in these consolidated proceedings for consideration by the Public Utilities Commission of Ohio ("Commission"). Akron's primary focus in its Reply remains 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 Reply is not any indication that it supports or does not object to the other relief requested by ATLP.

I. GENERAL OVERVIEW OF THE INITIAL BRIEFS

With the exception of the Trustee for the Creditors' Trust ("Trustee"), the initial briefs submitted by the other non-utility parties, including the Commission's Staff ("Staff"), either urge the Commission to deny ATLP's request for emergency relief or, in the case of Canal Place, Ltd. ("Canal Place"), request that the Commission keep the emergency increase out of their bills for service provided by ATLP.

The brief filed by Canal Place withholds argument on the hard issues and urges the Commission to approve modifications to its contract with ATLP in a context that shows that ATLP is not going to be able to meet its service obligations to Canal Place or any other customer.

Unlike Canal Place's brief, Children's Hospital Medical Center of Akron's ("Children's") brief urges the Commission to approve its contract with ATLP and to not grant ATLP's request for emergency rate relief.

The County of Summit, Ohio's ("Summit County") brief describes its own financial problems arising because of the significant decline in revenues needed to fund its activities and urges the Commission to reject the emergency rate increase request because: (1) ATLP failed to meet its burden of proof; and, (2) ATLP has no long-term plan to become solvent.

The brief filed by the $347-per-hour[1] Trustee contains not one citation to the record or to any law or regulation, although he makes grand claims about what the Commission must or must not do according to the law. The Trustee's brief urges the Commission to act "... solely based on Akron Thermal's projections, evidence and

[1] Tr. Vol. II at 23.

analysis"[2] and, in effect, urges the Commission to repeat the Trustee's fundamental errors by doing so. This is, apparently, the contribution that Trustee had in mind when he filed his request to intervene in these consolidated proceedings; the Trustee's brief confirms that the Trustee functions to provide little more than an ATLP echo.

The brief submitted by ATLP takes many improper liberties with the record and the law by, among other things: (1) wrongly characterizing or restating the positions of opposing witnesses; (2) substituting an attack on Akron for a substantive response to the issues raised by Akron;[3] (3) attempting to reframe the issues in ways that distract the Commission from attending to its public interest responsibilities and following the law of Ohio; (4) further muddying the water on the question of just how much, if any, of the requested emergency relief is the minimum needed to avert or relieve the emergency;[4] (5) rejecting directly or indirectly positions expressed by ATLP's witnesses;

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[2] Trustee's Brief at 2.

[3] For example, at page 4 of its brief, ATLP claims that but for Akron's participation, the hearings in these proceedings would have concluded in hours and that Akron's contribution to the record consists of supplying "... enough red herrings in this record to open a fish market."

For what it may be worth and according to the record evidence, the hearing on July 15 2009 started at 10:00 AM and concluded at 4:41 PM. The second and last day of the hearing took place on July 20, 2009 and it started at 9:00 AM and concluded at 12:55 PM. Counting time taken for lunch and breaks, the hearing included testimony from eleven witnesses, rebuttal testimony from one witness and surrebuttal from three witnesses and it lasted a matter of hours; a total of 10 hours and 36 minutes to be precise. Counsel worked cooperatively to complete the discovery phase on an expedited basis. Counsel worked cooperatively to identify documents from prior Commission proceedings and the bankruptcy proceeding so that they could be included in the record and reduce the amount of hearing time required. There was no fuss made when ATLP was unable to get its direct testimony filed on the original due date or when the other parties and their witnesses had to rearrange their schedules to accommodate ATLP counsel's other commitments on July 16 and 17. There was no fuss when transcripts were not filed by ATLP in accordance with the expectations of the parties. Counsel worked cooperatively with the Examiners to establish a prompt briefing schedule. There may be cases in which parties make inefficient use of the Commission's process for resolving contested issues. But this is not one of those cases.

[4] ATLP Brief at 25-27. During the hearing, counsel for ATLP objected to a cross-examination question posed by Akron's counsel. In the question, Akron's counsel interpreted a statement by Mr. Bees to indicate that ATLP had to have the full amount of the requested emergency rate relief to keep its doors open. Counsel for ATLP objected to the question stating that Mr. Bees had only discussed what would happen if ATLP received 50 percent of the requested relief. Tr. Vol. II at 47-48. When Mr. Bees resumed the stand to offer his rebuttal testimony, Examiner Farkas explored this topic again with Mr. Bees who

(6) claiming that its financial problems entitle it to an emergency rate increase; (7) describing the issue between ATLP and the Staff as being "quite narrow"[5] and resolved by the so-called forbearance agreement which, as the Staff's brief points out, is not even before the Commission;[6] (8) claiming that issues raised by Akron and other parties cannot be addressed by the Commission because to do so would interfere with the Plan of Reorganization ("Plan") which, according to ATLP, was to be implemented with no rate increases; (9) threatening the public interest by asserting that its departure will be neither quickly nor seamlessly accomplished;[7] (10) suggesting that it is not possible for Akron to rely on an interim operating agreement with another operator even though ATLP itself operated Akron's heating and cooling system under an interim agreement for two years;[8] and (11) asserting that Thermal Ventures II ("TV II"), which holds the full equity interest in ATLP, assumed the full financial risk associated with the feasibility of the Plan while demanding that the Commission make ATLP's tariff customers financially responsible for the colossal mismatch between the Plan's assumptions and reality.

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testified that ATLP would have to examine what it could do if the Commission granted less than the requested emergency increase before he could respond to the Examiner's question of whether the full amount of the requested emergency relief was necessary to continue operations. Tr. Vol. II at 75-77. After all of this, ATLP now asserts, at page 26 of its brief and with no citation to the record, that "the full amount of the rate relief requested is the amount necessary to avert the emergency." Combining ATLP's testimony with its brief, ATLP stands firmly behind the proposition that either some or all of the requested emergency rate relief is the minimum amount required to avert or relieve the emergency.

[5] ATLP Brief at 2.

[6] *Id.* at 6. ATLP claims that the sole basis for the Staff's objection to the approval of the application for authority to issue three (3) promissory long-term notes in Case No. 09-414-HT-AIS has been removed by the so-called forbearance agreement which is void if the Commission does not make the right guess about how much emergency rate relief is required to enable the forbearance agreement. At page 9 of Staff's brief, it correctly observes that the restructuring of the notes which the Trustee and ATLP attribute to the forebearance agreement is not before the Commission. ATLP has not amended its application to issue securities.

[7] ATLP Brief at 3.

[8] City of Akron Exhibit 2 at 10-11.

The logical extension of ATLP's legal arguments would, if adopted, require the Commission to bail out a utility's management and equity owners by granting emergency rate relief to solve a negative cash flow condition regardless of cause, regardless of the "strict scrutiny" and "clear and convincing" evidentiary burden that must be overcome by the utility and regardless of the consequences for customers and the utility itself. Apparently, the reservation of the Commission's jurisdiction and authority that is specifically identified in ATLP's Plan means, according to ATLP, that the Commission must approve whatever ATLP requests.

ATLP's brief also confirms the extraordinary lengths to which ATLP has gone to avoid taking responsibility for the mess that it has created. It boldly claims that the Commission and its Staff will be responsible for putting ATLP out of business should the Commission dare to not grant the requested emergency relief. And what happens if the Commission does what ATLP demands? Well, as ATLP's brief acknowledges at page 25, by the end of 2009 ATLP will have about $630,000 less than what its "projections and analysis" show it needs to timely pay its bills. And ATLP's "projections and analysis" assume that ATLP is able to somehow maintain all of its remaining customers once they are socked with a huge increase in their demand charges.

It is also important to note that ATLP's claim that the positions of Akron and the Staff will put ATLP out of business are claims that have been advanced in the same proceeding in which ATLP's witness, Mr. Bees, agreed that ATLP has told Akron that it wants to go out of business and end its tenure as Akron's tenant.[9]

[9] City of Akron Exhibit 2 at 12.

The Staff's brief applies the law to the facts and circumstances. The brief also lives in the real world and it demonstrates that even if the Commission could approve ATLP's request for emergency rate relief, ATLP's wheels are coming off just the same. Of course, if the Commission authorizes an extension of ATLP's ongoing flight of financial fantasy, the predictable consequences of a $630,000 cash flow gap will likely and ultimately cause ATLP to implicate its regulator for not providing all the rate relief that ATLP really needed even though ATLP received the full amount requested.[10]

Below Akron responds more specifically to the assertions, claims and positions of the parties who submitted briefs that oppose or do not support Akron's position in these contested proceedings.

II. CANAL PLACE'S BRIEF

As indicated above, Canal Place's brief abstains on the question of whether the Commission should grant ATLP any amount of emergency rate relief notwithstanding its witness' views on this subject. But, the narrowed position Canal Place expresses in its brief still has consequences for ATLP and those consequences cannot be ignored by the Commission for purposes of resolving the contested issues.

As Mr. Bowser described in his testimony, the Commission has previously classified a contract between Canal Place and ATLP as a competitive response contract and held that ATLP would be exclusively responsible for any "delta revenue".[11] The

[10] ATLP Exhibit 2 at 6.

[11] City of Akron Exhibit 2 at 26-27.

testimony of Canal Place's witness indicates that the rates established by the most recent contract were negotiated as a result of Canal Place's "competitive alternative".[12]

While Akron does not object to Canal Place's somewhat futile request for approval of the modifications to its prior contract with ATLP (or the somewhat similar request by Children's), it does contest ATLP's proposal to make tariff customers responsible for any amount of emergency increase that would effectively include the delta revenue associated with the arrangement with Canal Place or any other contract customer. In more specific terms, ATLP's voluntary withdrawal of its proposal to apply the emergency increase to contract customers and limit its proposal to increasing only the rates of tariff customers must not and cannot result in tariff customers being responsible residually for the amount that ATLP has decided to not seek from contract customers. In other words, and while the record evidence and the law precludes the Commission from granting any emergency increase, ATLP's **voluntary** withdrawal of its proposal to increase rates for contract customers makes 47.8 percent the absolute limit on any increase the Commission might otherwise consider for tariff customers.

Also, limiting the amount of any emergency increase in this fashion is consistent with ATLP's obligations pursuant to the Commission-approved settlement in ATLP's most recent permanent rate increase proceeding. As Mr. Bowser described, that settlement essentially required ATLP to obtain any incremental revenue from its contract customers.[13]

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[12] Canal Place Exhibit 1 at 6.

[13] City of Akron Exhibit 2 at 16. As the Commission stated in its Opinion and Order in ATLP's last permanent rate case:

> ...[t]he stipulation explains that, 'a very significant portion of Akron Thermal's annual revenues are from contract customers. [But, t]he revenue increase sought [in this case] relates to tariff customers only. As shown on Schedule A-1 of the staff report, the

III. THE TRUSTEE'S BRIEF

The Trustee's brief (at page 2) indicates that the Trustee has returned to the bankruptcy court to secure authority to do what the Trustee testified was a "done deal". He has filed an emergency motion with the bankruptcy court for authority to enter into the previously executed and so-called "forbearance agreement." This is the forbearance agreement which ATLP and the Trustee held up as the plug for the cash flow hole identified by the Staff and others who commented on ATLP's ability to service the debt established by the three notes. The Trustee's effort to secure such authority includes the following description of the effect of the forbearance agreement:

> The Trustee's Agreement will not delay the commencement of distributions to unsecured creditors, nor will it delay the timing of any other distributions other than the timing of the final payment. The Trustee's Agreement does not change the amount of the Creditors' Trust Note ...[14]

Thus, on one hand and before the Commission, the Trustee and ATLP hold out the forbearance agreement as the means to plug the cash flow hole identified by the Staff

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> stipulated revenue increase shown on line 9 ... is much less than the increase necessary to achieve the overall revenue requirement shown on line 8... The signatory parties recognize that the remainder of the needed revenue increase will be the responsibility of Akron Thermal to secure through the negotiation of its contracts with its [contract] customers. Thus, the revenue increase proposed in the Stipulation and Recommendation as to tariff customers alone produces just and reasonable rates as shown on pages 16-17 of the staff report. The revenue increase sought from tariff customers plus reasonable increases in revenue from contract customers should provide Akron Thermal with a reasonable opportunity to achieve a fair and reasonable rate of return as recommended by the Staff on p. 14 of the staff report.' (stipulation at 4).

In Finding No. 5 of said Opinion and Order, the Commission made it clear that the balance of any revenue requirement above that assigned to tariff customers would, in accordance with the settlement signed by ATLP, come from ATLP's contract customers.

In the Matter of the Application of Akron Thermal, Limited Partnership for an Increase in its Rates for Steam and Hot Water Service, Case No. 05-5-HT-AIR, Opinion and Order at 4 and 8 (September 28, 2005).

[14] *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, Reply in Support of Emergency Motion for Order Approving Trustee's Agreement with Respect to Creditors' Trust Note at 2, filed and entered July 29, 2009. A copy of the Trustee's pleading is attached hereto as Exhibit 1.

and others. On the other hand and when before the bankruptcy court seeking authority to do what he has already done, the Trustee is claiming that the forbearance agreement really produces hardly any change at all (with the exception of the timing of the last payment).

As the Trustee did in prior pleadings, he claims (again with no supporting citation) 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 ...."[15] The Trustee's brief fails to mention that ATLP's Plan specifically reserves to the Commission whatever jurisdiction the Commission might otherwise have but for ATLP's bankruptcy. Tr. Vol. II at 55. And, apparently, ATLP's "projections and analysis" caused it to belatedly conclude that it needed the Commission's approval to issue the three notes. Given ATLP's unfortunate and long-standing failure to obtain Commission approvals required for the issuance of securities, why would ATLP have filed for such approval otherwise?

By the way, if the Commission adopts the Trustee's position that the Commission is obligated to approve the notes **as they came out of ATLP's bankruptcy proceeding**, ATLP's "projections and analysis" show (in agreement with the Staff's projections and analysis) that this outcome will leave ATLP with inadequate cash flow to make principal and interest payments required by such notes even if all or substantially all of the proposed emergency rate relief is wrongly granted. Thus, the Trustee seems to be demanding that the Commission approve the notes as they came out of the bankruptcy proceeding (without the last minute modifications that the Trustee scrambled to agree to shortly after July 8, 2009) and put ATLP out of business all at the same time.

[15] Trustee's Brief at 4.

IV. ATLP'S BRIEF

As indicated above, ATLP's brief tries to rub out the facts, the law, and common sense. In pursuit of its most ambitious mission, ATLP's brief makes a substantial contribution to ATLP's already substantial effort to eliminate what, if any, credibility it may have left. In the end, ATLP's brief can be distilled into an argument in support of a hurry-up-and-give-us-lots-more-cash plea accompanied by a request that the Commission find Akron guilty of improperly distributing herrings.[16]

ATLP's brief, like the case it presented to support its request for emergency rate relief, is without merit. Below, Akron takes on some of the more outlandish assertions made or positions taken by ATLP in its 43-page brief.

A. "No party to these proceedings disputes that UA's decision not to renew its contract with Akron Thermal has created a financial emergency for Akron Thermal." (ATLP Brief at 2.)

Akron agrees that ALTP has once again put itself in the position of not being able to pay its bills. Indeed, not paying bills seems to be ATLP's normal course of business, regardless of whether it has the cash to do so or not and regardless of who is supposed to be managing ATLP. Akron agrees that the University of Akron ("UA") predictably did not choose to continue to obtain service from ATLP at the end of UA's contract. But, Akron contests ATLP's claim that these facts give rise to a financial emergency that can be lawfully addressed through the exercise of the Commission's authority pursuant to Section 4909.16, Revised Code, based on the Commission's long-standing emergency rate relief criteria.

[16] See page 4 of ATLP's brief where ATLP accuses Akron of distributing red herrings in sufficient quantity to open a fish market.

ATLP continues to assert that the revenue loss associated with the predictable departure of UA is somehow controlling on the question of whether it has a financial emergency that can be remedied by the Commission.[17] But, ATLP never submitted the UA contract to the Commission for approval[18] and it never presented the contract as part of its case so that the Commission might actually see what it might have required or not required had it been approved by the Commission. In this circumstance, the Commission has no authority, as a matter of law, to treat the UA contract as though it ever existed.[19] Whatever was in the contract, how ATLP may have respected its terms and no matter what the loss of the revenue might do to ATLP's financial condition, the Commission must regard the contract as a nullity for purposes of exercising its authority. If the facts here have any relevance to the exercise of the Commission's authority (as the Staff brief correctly states),[20] they expose ATLP and its changing population of officers to civil and criminal penalties.

Even if the loss of revenue associated with UA's predictable departure is something the Commission could remedy through the use of its emergency authority, Akron disputes ATLP's claim that the facts set forth by ATLP are, if assumed true,

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[17] As Akron explained in its brief at pages 12 and 13, ATLP's lost-revenue claim is overstated in any event because it does not accurately reflect the amount of revenue that ATLP may have had an opportunity to collect had UA remained a contract customer of ATLP. Had UA remained a contract customer based on the offer ATLP made to UA, ATLP's revenue would have declined by about 15 percent (15%). ATLP has asserted that it would not have sought emergency rate relief but for the fact of UA electing to not continue its service relationship with ATLP.

[18] Tr. Vol. I at 68.

[19] In the law's eyes, the UA contract never went away because it never existed in the first place. Section 4905.31(E), Revised Code, provides that no financial arrangement between a public utility and consumers "is lawful unless it is filed with and approved by" the Commission. *See, Cookson Pottery v. Pub. Util. Comm.* (1954) 161 OS 498, 120 NE2d 98; *Marion Steam Shovel Co. v. Columbus D. & M Elec. Co.* (1918) 28 OApp 351, 162 NE 735.

[20] Staff Brief at 8.

sufficient to permit the Commission to lawfully grant ATLP emergency rate relief. Indeed, Akron's brief shows that ATLP has failed to meet each prong of the Commission's long-standing test for evaluating applications for emergency rate relief. Akron's view is shared by the Canal Place's witness, the Staff, Children's and Summit County.[21]

B. **"No party disputes that, in the absence of emergency rate relief, Akron Thermal will be financially imperiled and its ability to render service to its customers will be impaired."** (ATLP Brief at 2.)

As stated above, Akron agrees that ALTP has once again put itself in the position of not being able to pay its bills. But, the record shows that this is not a new condition and that ATLP has been sending large amounts of cash out its door regardless of its financial condition. For example, during the period between June 2007 and February 2009, ATLP was able to come up with large sums of cash to pay its bankruptcy counsel over $2,000,000;[22] pay $713,000 to counsel for the creditors' committee;[23] pay $194,000 to the advisor to the creditors' committee;[24] and pay its now-removed management consulting firm, Sasco Hill Advisers, $624,670.20.[25] More recently and since the effective date of the Plan, the record shows that ATLP has paid the Trustee $30,000, paid the Trustee's counsel $40,000;[26] and hired a new management consulting firm. The facts indicate that there has been a lot of cash flowing out of ATLP at times when it claims to be running on empty.

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[21] See Akron's brief beginning at page 13.

[22] Tr. Vol. II at 21.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 17.

[26] *Id.* at 23-25.

But assuming, for purposes of argument, that ATLP does have cash flow problems that imperil its financial condition and further impair its already questionable ability to render service, there is nothing in the record that even suggests that the whopper rate increase requested by ATLP will turn things around if it is granted by the Commission. As Akron discussed in its brief, an applicant for emergency rate relief must, in addition to meeting the other criteria, show that the temporary rate increase is the minimum amount required to avert or relieve the emergency. If the Commission gifts ATLP the full amount of the requested emergency rate increase, ATLP's own projections show that it will have $630,000 less than it needs to pay its bills by the end of 2009.[27] "In short, an emergency increase would only prolong the inevitable closure of Akron Thermal's operations."[28]

C. **"Mr. Puican recommends that the Commission force Akron Thermal to cease operations ...."** (ATLP Brief at 2.)

"The question for the Commission is whether it should make the unprecedented decision to put a Commission-regulated utility out of business by denying it the temporary rate relief necessary to avert a financial emergency ...." (ATLP Brief at 3.)

"Where is the statute that confers upon the Commission the authority to put a utility out of business ...?" (ATLP Brief at 33.)

"Mr. Puican would have the Commission put the company out of business ...." (ATLP Brief at 34.)

"Mr. Puican's recommendation that the Commission put Akron Thermal out of business ignores that scope of the Commission's authority." (ATLP Brief at 35.)

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[27] ATLP Brief at 25. At page 26 of its brief, ATLP states that "... the cash flow situation, even with the full amount of emergency rate relief, is very tight". This would appear to be a bit of an understatement unless ATLP's definition for the word "tight" gives it the same meaning as "inadequate".

[28] Staff Brief at 2.

ATLP's brief repeatedly claims that the choice the Commission must make in this proceeding is between: (1) imposing the full amount of the requested emergency rate increase on tariff customers; or, (2) putting ATLP out of business. If this were true, Akron would certainly urge the Commission to pick the latter option. But, it is not true. And, the way that ATLP has framed the core issue before the Commission totally ignores the role of the Commission's long-standing emergency rate relief criteria and, more fundamentally, wrongly characterizes the legislatively defined role of an economic regulator such as the Commission.

An economic regulator such as the Commission does not establish, review or authorize rates based on whether the outcome selected by the regulator will guarantee a utility financial success. Conceptually speaking, "... the process of fixing reasonable rates requires the application of standards which will substitute for free competition - methods which will assure that the service provided be adequate and satisfactory and permit the price to approximate that which would result from unrestrained, free competition."[29] In practice, the standards applied by the economic regulator are those set forth by the legislature (the General Assembly in the Commission's case). As the Commission indicated in ATLP's last permanent rate case, ratemaking performed in accordance with the statutory standards established by the General Assembly provides an ***opportunity*** for the utility to earn a ***just and reasonable*** rate of return[30] by

[29] Statement of D. Bruce Mansfield on RCNLD (reproduction cost new less depreciation) before the Joint Select Committee on Energy, June 24, 1975 at pages 4-6. Mr. Mansfield was retained to speak on behalf of the investor-owned electric, gas and telephone utilities following his retirement as President of Ohio Edison Company.

[30] Citation supplied in footnote 13.

collecting the authorized revenue in exchange for providing service in accordance with the rates and tariffs approved by the Commission.

In the present circumstances, the record shows that ATLP's loss of UA as a large customer is the consequence of UA freely and predictably doing what it had every right to do; UA turned to an alternate means of meeting its steam needs. ATLP lost out to its competition and now it wants the Commission to require its tariff customers to pay rates higher by 71.6 percent so that ATLP's lost opportunity is transformed into ATLP's gain. If all of ATLP's customers had switched to their own natural gas-fired steam or hot water systems, leaving ATLP with no actual cash flow, economic regulation in general and the law of Ohio more specifically would not allow ATLP to lawfully demand of and obtain from the Commission either an emergency or permanent financial safety net. And just as plainly, ATLP is not entitled to lawfully demand of and obtain from the Commission an emergency or permanent rate increase so that it can be made whole for the lost UA opportunity.

The Commission simply does not have the authority to save ATLP from financial problems that are the result of predictable market forces, predictable customer choices or ATLP's own predictable failures to effectively manage its business and financial risk. If, as ATLP asserts, the Commission does not have authority to put ATLP out of business, it cannot also have authority to keep ATLP in business if to do so would cause the Commission to ignore its other duties or otherwise violate the statutory standards that dictate how and when the Commission can authorize a rate increase, including an emergency rate increase.

ATLP's campaign is made no more lawful or deserving by its frequent attempts to leverage sympathy for ATLP's creditors. The Trustee, for example, was actively involved in the bankruptcy proceeding and actively supported the Plan that assumed that UA would continue as a customer even though natural gas prices were dropping drastically[31] and assumed that ATLP would be able to feasibly implement the Plan without rate increases. Unlike ATLP's tariff customers, creditors like the State of Ohio and the beneficiaries of the Creditors' Trust along with their fiduciary agent the Trustee, had numerous opportunities to raise Plan feasibility issues, inquire about the obvious consequences of ATLP's repeated failures to secure Commission approvals, examine the conflict between ATLP's business model and Ohio's ratemaking laws which is described in ATLP's Disclosure Statement[32] and to protest ATLP's huge cash payments to its suppliers like Sasco Hill Advisors who helped to create and promote the Plan. It is unfortunate for the creditors (including Akron) that the Plan quickly imploded, but as between the interests of creditors or the Trustee and the interests of ATLP's tariff customers, the creditors and the Trustee elected to take the risk and did so with the advice and expensive assistance of counsel and financial advisors.

As a final word on this subject, Akron also believes that ATLP's suggestion that its status as a "Commission-regulated utility" somehow causes the Commission to owe ATLP something is, in the present circumstances, laughable. ATLP is, of course, a Commission-regulated utility – in fact as Mr. Bowser discussed, ATLP is two

[31] Tr. Vol. I at 153.

[32] *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, ATLP's First Amended Disclosure Statement for Second Amended Plan of Reorganization at 23-25 (filed July 28, 2008).

Commission-regulated utilities.[33] But, the Commission would never know that ATLP was regulated as a result of ATLP's actions. ATLP's relatively brief regulatory history is littered with repeated failures to satisfy its public utility obligations, pay its taxes (including the assessments that help fund the Commission) and do the things that might otherwise be expected from a Commission-regulated utility.

D. **"Nor should the Commission take comfort in Staff witness Puican's theory that service to customers would not be jeopardized by a decision that would throw Akron Thermal and its creditors to the dogs. The assumption that ...[Akron]... could simply take back the system that Akron Thermal leases from it and become the service provider ignores that any such transition would be far from seamless and certainly could not be accomplished overnight."** (ATLP Brief at 3.)

The above language is taken word for word from ATLP's brief because it is tantamount to an ATLP threat. Through this language and ATLP's other actions, ATLP is telling the Commission that ATLP will stand in the way of any actions taken to meet the service needs of customers and to safely maintain and operate the leased system to the extent that such actions do not meet ATLP's demands. Akron urges the Commission to affirmatively address this threat in the order which rejects ATLP's request for emergency rate relief.

In its brief, ATLP has clearly stated that it will not be able to meet its often unmet public utility obligations if the Commission does not grant all of the emergency rate relief it has requested. Akron assumes that ATLP equates the Commission's failure to grant the full amount of the emergency rate relief as being equivalent to throwing ATLP to the dogs. (Akron also assumes that these poor dogs will be on the receiving end regardless of any laws designed to prevent cruelty to animals.)

[33] City of Akron Exhibit 2 at 15.

In any event, ATLP has told Akron that it wants out and that it will get out in exchange for ATLP's receipt of the value demanded by ATLP.[34]

If ATLP shuts Boiler 32 (and perhaps sooner), it is going to again be in default under the terms of the Operating Lease Agreement. This will result in a termination of the Operating Lease Agreement and Akron's repossession of the leased system even if ATLP gets the full amount of the emergency rate relief requested.[35]

In other words and one way or the other, ATLP is on the exit ramp and Akron urges the Commission to do what it can to make sure that ATLP does not hurt customers or the ability of the system to meet their needs as it continues its destructive ways.

At the conclusion of Mr. Bowser's testimony, he made three recommendations:

> If the Commission accepts my recommendation to reject the request for emergency rate relief, I also urge the Commission to: (1) recommend that ATLP seek to abandon its public utility obligations; (2) terminate the Operating Lease Agreement and terminate its obligations under Akron's 1996 franchise; and (3) direct ATLP to engage in good faith negotiations with Akron to effectuate a business-like transfer of such obligations back to Akron. I also recommend that the Commission retain jurisdiction to monitor ATLP's actions.[36]

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[34] In effect, ATLP is attempting to capitalize on the value of its leasehold. For ratemaking purposes, the Commission is prohibited from authorizing the capitalization of any franchise or right to own or operate that is in excess of the amount actually paid to any political subdivision. Section 4905.47, Revised Code.

[35] Should ATLP act on its plans to shut Boiler 32 on or about November 1, 2009, the shutting of Boiler 32 will be an "Event of Default" according to the Operating Lease Agreement made as of August 15, 1997. Boiler 32 is part of the steam generating plant that was formerly owned by BF Goodrich Company ("BFG") and is therefore part of the "System" which is subject to the Operating Lease Agreement. Section 4.1 of the Operating Lease Agreement requires ATLP to: (1) use and operate continuously the "... System and all of the Leased Property ..."; (2) notify Akron of ATLP's desire to not do so two years prior to the desired date of any discontinuance by ATLP; and, (3) secure Akron's consent for such desired discontinuance. Section 5.1 of the Operating Lease Agreement repeats ATLP's obligation to operate the System on a continuous basis. Section 13.1.d of the Operating Lease Agreement specifically states that ATLP's failure to continuously operate the System is an "Event of Default".

[36] City of Akron Exhibit 2 at 37.

As mentioned previously, the Staff's brief identifies the potential risk of civil fines and criminal penalties as a result of ATLP's failure to comply with the laws of Ohio.[37]

The combination of Mr. Bowser's recommendations and the Staff's identification of the potential risk of civil fines and criminal penalties provides the Commission with the ingredients to assemble requirements that will make sure that ATLP does not stand in the way of any actions responsibly taken to meet the service needs of customers and to safely maintain and operate the leased system. More specifically and as part of its order rejecting ATLP's request for emergency rate relief, Akron urges the Commission to: (1) direct ATLP to engage in good faith negotiations with Akron to effectuate a business-like transfer of its service and other obligations to Akron; (2) either leave this case open or initiate, on its own motion, a new proceeding to monitor ATLP's performance in response to this directive; (3) require ATLP to file weekly written reports in the proceeding that identify its progress or lack thereof in such good faith negotiations with such reports served promptly on all parties to in these proceedings; and, (4) in light of ATLP's numerous violations of law, instruct the Attorney General to prepare to initiate such civil and criminal proceedings against ATLP and its officers as may be warranted in the event that ATLP offers the slightest hint that it is going to further disrespect the jurisdiction of the Commission or place its own needs above the needs of its customers.

[37] Pursuant to Section 4905.64, Revised Code, all forfeitures under Chapters 4901, 4903, 4905, and 4909 are cumulative and a suit for one does not bar the recovery for any other. Pursuant to Section 4905.60, Revised Code, the Commission may initiate a proceeding against a public utility (in mandamus, by injunction or by use of any other civil remedies) if the utility has failed or is about to fail to obey the law. Section 4905.54, Revised Code, states that a utility's failure to obey the law exposes the utility to a fine of up to $10,000 per violation with each day of any continuing violation day constituting a separate offense. For example, ATLP's failure to obtain approval of the rates and charges billed to UA over the period of just one year creates a risk of a $3,650,000 fine.

V. CONCLUSION

For the reasons explained in its initial brief and above, Akron urges the Commission to dismiss ATLP's application for an emergency rate increase and find that such dismissal has the practical effect of rendering ATLP's application to issue securities 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 that the relief that ATLP has requested in these consolidated cases will make ATLP's problems worse, not better.

As part of its order rejecting ATLP's request for emergency rate relief, Akron urges the Commission to: (1) direct ATLP to engage in good faith negotiations with Akron to effectuate a business-like transfer of its service and other obligations to Akron; (2) either leave this case open or initiate, on its own motion, a new proceeding to monitor ATLP's performance in response to this directive; (3) require ATLP to file weekly reports that identify its progress or lack thereof in such good faith negotiations with such reports served promptly on all parties to this proceeding; and, (4) in light of ATLP's numerous violations of law, instruct the Attorney General to prepare to initiate such civil and criminal proceedings against ATLP and its officers as may be warranted in the event that ATLP offers the slightest hint that it is going to further disrespect the jurisdiction of the Commission or place its own needs above the needs of its customers.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	
	)	Case No. 07-51884
AKRON THERMAL, LIMITED PARTNERSHIP,	)	
	)	Chapter 11
Reorganized Debtor.	)	
	)	Judge Marilyn Shea-Stonum

REPLY IN SUPPORT OF EMERGENCY MOTION FOR ORDER APPROVING TRUSTEE'S AGREEMENT WITH RESPECT TO CREDITORS' TRUST NOTE

David Wehrle ("**Trustee**"), in his capacity as Trustee of the Trust created pursuant to the Second Amended Plan of Reorganization for Akron Thermal, Limited Partnership Dated July 14, 2008, as amended (the "**Plan**"), by and through his undersigned counsel, files this Reply in support of his emergency motion for entry of an order approving the Trustee's agreement with respect to the Creditors' Trust Note [Docket No. 705] (the "**Motion**").[1] On July 28, 2009, the City filed its Response and Objection to the Motion [Docket No. 712] (the "**Objection**"). In support of the Motion, the Trustee respectfully states as follows:

I. INTRODUCTION

1. The Trustee sought this Court's approval of the Agreement in order to narrow the issues in the proceedings pending before the PUCO, when it became apparent that the City would take the position that the Agreement required the Bankruptcy Court's approval, even citing ¶ 16.2 of the Plan as a provision which required such approval. (See Transcript of July 15, 2009 Proceedings, attached in relevant part as **Exhibit A**, pp. 38-41). Having taken the position that the Agreement requires this Court's approval, the City must be estopped from taking an inconsistent position.

[1] Unless otherwise defined herein, capitalized terms have the meanings assigned to them in the Motion.

2. For the reasons set forth in the Motion, the Trustee is authorized, without the approval of this or any other court, to enter into the Agreement and, in fact is compelled to enter into the Agreement in order to preserve and liquidate the Creditors' Trust Note, which is the only Trust Asset. In the alternative, approval of the Agreement is squarely within this Court's jurisdiction.

II. THE AGREEMENT DOES NOT MODIFY THE PLAN

3. The City argues that the Trustee's Motion to approve the Agreement constitutes a modification of the Plan's terms. Objection, p. 4 ("...the Trustee is back before this Court, seeking to modify its [the Plan's] terms."). The City also argues that the Agreement "represents a significant and unauthorized departure from the obligation represented by the Creditor's Trust Note...". Objection, p. 8.

4. The Trustee's Agreement will not delay the commencement of distributions to unsecured creditors, nor will it delay the timing of any other distributions other than the timing of the final payment. The Trustee's Agreement does not change the amount of the Creditors' Trust Note or otherwise modify the substantive terms of the Plan. These factors were determinative in *Beal Bank, S.S.B. v. Jack's Marine, Inc.*, 201 B.R. 376, 380-81 (E.D. Pa. 1996), in which the District Court held that the bankruptcy court did not modify a confirmed chapter 11 plan by extending the deadline to pay mortgages, where the court did not modify the bank's substantive rights, the bank still would receive the amount promised under the plan in satisfaction of the mortgage obligation, and the relief granted prevented a creditor from forcing the conversion of the chapter 11 case. *See also, In re Johns-Manville Corp.*, 920 F.2d 121, 128-29 (2d Cir. 1990) (holding that "a variation...with respect to the timing and intensity of claim processing" was not an impermissible plan modification where the suspension and resulting

delay in claim payments did not alter the substantive rights of the claimants or frustrate legitimate claims).

5. In affirming the bankruptcy court's decision to approve the payment extension in *Beal Bank*, the District Court also found it significant that the objecting creditor itself shared responsibility for necessitating the extension. *Beal Bank*, 201 B.R. at 380. For the same reason, the City's reliance on the sanctity of the Court-approved Plan cannot be reconciled with the City's actions in opposing the Agreement in furtherance of its ultimate goal of destroying Akron Thermal, thereby assuring that the Plan collapses and the Trust Note is never paid. Without the Trustee's Agreement, that will be the all-but-certain result. The State of Ohio obviously recognized this, as is evident from the State's agreement to forbear on the terms of its own note.

6. The City points out (Objection, p. 2), that the Committee, on behalf of the unsecured creditors, opposed the City's request for a stay pending its appeal of the Confirmation Order. In support of the Committee's objection to the stay, the Committee argued that a stay would further extend the timing of payments to creditors. A stay, of course, would have delayed the commencement of distributions to unsecured creditors, potentially for years. As described above, the Agreement will not affect the commencement of distributions to unsecured creditors, and will not affect the timing of any payments on the Creditors' Trust Note, other than the final payment. This is a de minimus, insignificant consequence when compared to the likelihood of receiving no payments on the Creditors' Trust Note if the payment terms are not extended.

7. The Trustee's right to forbear is part of and integral to the Trustee's duty to collect, liquidate and administer the Trust Assets under section 10.1 of the Plan. Forbearance is a common tool used by creditors to maximize the value of claims and collateral. The City's view that section 10.1 of the Plan would preclude the Trustee's right to forbear in his efforts to

maximize the ability to collect on the Creditors' Trust Note is ill-considered and far too restrictive a reading of that section.

III. THE COURT HAS JURISDICTION TO APPROVE THE AGREEMENT

8. This Court has held that the Bankruptcy Court retains jurisdiction to determine matters which arise in connection with or relate to a liquidation trust, trustee and trust assets. *In re CSC Indus., Inc.*, 226 B.R. 402, 404-405 (Bankr. N.D. Ohio 1998) (holding bankruptcy court had jurisdiction to decide matter of payment of postconfirmation quarterly fees, despite lack of specific provision in confirmed plan regarding retention of jurisdiction). In *Beal Bank*, the District Court also held that the bankruptcy court exercised its equitable powers within its jurisdiction to protect plan confirmation in order to aid the execution of the plan. *Beal Bank*, 201 B.R. at 379 ("without court intervention the confirmed plan of reorganization would have failed.").

9. Without the Agreement, Akron Thermal would fail, and the unsecured creditors would receive no payments from the Creditors' Trust Note at all. The Trustee's Agreement, therefore, is wholly consistent with the terms and purposes of the Plan and the Trustee's duty to protect the Trust Assets for unsecured creditors.

10. The City admits that courts in the Sixth Circuit recognize that the Bankruptcy Court has post-confirmation jurisdiction over matters with a "close nexus" to the bankruptcy plan or proceeding, including "those that affect the interpretation, implementation, consummation, execution or administration of the confirmed plan." Objection, p. 7.

11. Contrary to the City's position (*see* Objection, p. 6), section 15.1 of the Plan is not fatal to this Court's jurisdiction. "[T]he absence of a provision retaining jurisdiction in a confirmed plan does not deprive a bankruptcy court of jurisdiction." *In re CSC Indus., Inc.*, 226 B.R. at 405. "[A] bankruptcy court may clarify a plan where it is silent or ambiguous.

Bankruptcy courts can also use this authority to 'interpret' plan provisions to further equitable concerns." *Beal Bank*, 201 B.R. at 380. Section 15.1 of the Plan authorizes this Court to approve the Trustee's Agreement, because the City's proposed interpretation of the Plan would be inconsistent with the Plan's intent and purpose of providing distributions to unsecured creditors. By approving the Agreement, the Court will be able to reconcile that inconsistency and cure the omission from the Plan of an exhaustive list of the means by which the Trustee may act in order to carry out his duty to protect and liquidate the Trust Assets.

12. The Trustee argues that the Plan authorizes him to enter into the Agreement. The City argues that it does not. Since the dispute requires the Court to interpret the Plan as applied to the Trustee's authority to enter into the Agreement, the Court unquestionably has jurisdiction to decide the issue. Furthermore, the Trustee's Agreement directly involves the administration of the Creditors' Trust and the terms of the Creditors' Trust Note, which are matters that affect the implementation, execution and administration of the Plan.

13. The City's argument that this is not a core proceeding merits little response, in light of the fact that the factors cited by the City as applicable to the determination compel the conclusion that this matter is a core proceeding. *See* Objection, pp. 9-10. First, for the reasons set forth above, this matter concerns the administration of the estate. The Plan and Trust were established for the purpose of administering claims. That is the essence of estate administration, which makes this a core proceeding as specifically enumerated under 28 U.S.C. § 157(b)(2)(B)(A). Second, since the Trust was created pursuant to the Plan, the Trust and related matters did not exist prior to the bankruptcy case. For the same reason, the matter would not continue to exist independent of the provisions of title 11, under which the Plan creating the Trust was confirmed. Finally, the parties' rights and obligations under the Trust are at issue

solely as a result of the filing of the bankruptcy case and the confirmation of the Plan. This is a core proceeding.

14. The City, citing *In re Leeds Building Prods., Inc.*, 160 B.R. 689 (Bankr. N.D. Ga. 1993), suggests that the proper approach is for the Court to deny the motion for lack of jurisdiction so that creditors may challenge the Trustee's Agreement in state court. Objection, p. 8. The City also asserts the interests of the Trust beneficiaries as a basis for denying the Motion. It is disingenuous for the city to oppose the Agreement under the guise of championing the interests of unsecured creditors while ignoring the most critical fact – that, without the Agreement, and as a direct result of the City's continuing, postpetition campaign for Akron Thermal's demise, the Plan almost certainly would fail, and there likely would be little or no distribution to creditors at all.

IV. CONCLUSION

15. Based on the foregoing, the Trustee submits that he Agreement does not modify the Plan and is consistent with the Trustee's authority under the Plan and Trust Agreement. That this Court retains jurisdiction to interpret the Plan and to approve the Agreement, as is necessary to carry out the purposes and intent of the Plan.

WHEREFORE, The Trustee respectfully requests that the Court enter an order approving the Agreement and granting such other and further relief as is just and proper.

Dated: July 29, 2009

Respectfully submitted,

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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

- - -

PROCEEDINGS

before Scott E. Farkas and Rebecca L. Hussey, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-C, Columbus, Ohio, called at 10:00 a.m. on Wednesday, July 15, 2009.

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- - -

Reorganization, if you know?

A. I don't know.

Q. Let me ask you hypothetically. If that plan specified that Akron Thermal would need to seek the bankruptcy court's approval prior to modifying the Plan of Reorganization, I take it that you presently have no plans to seek bankruptcy approval of such a modification. Is that a correct statement?

MR. ROYER: Could I have that question again?

(Question read back.)

MR. ROYER: I'm not sure how he can answer that the way it's framed. I don't understand where he's going.

MR. RANDAZZO: I'll break it down. I'll withdraw and break it down.

Q. Mr. Bees, I want you to accept an assumption with me, and if you'd like, I'll show you where in the plan it requires this. I want you to assume with me that the Plan of Reorganization states that to the extent that Akron Thermal wishes to modify the Plan of Reorganization that's been approved by the bankruptcy court, after there is substantial consummation of the plan, that it has to obtain approval from the bankruptcy court. Will you assume

that for me? Just assume it for purposes of my question.

HEARING EXAMINER FARKAS: Why don't we refer to the section of the bankruptcy plan, and that way he can look at it for purposes -- do you have your Direct Testimony in front of you?

THE WITNESS: I do.

HEARING EXAMINER FARKAS: Attached to your Direct Testimony, I believe, is the bankruptcy second plan that's been approved.

THE WITNESS: Yes.

HEARING EXAMINER FARKAS: I believe Mr. Randazzo is referring to Page 35. If that's not the page, then let me know. Is that the page?

MR. RANDAZZO: Yes, at 16.2, Your Honor.

HEARING EXAMINER FARKAS: You're familiar with this plan, correct, this order?

THE WITNESS: Yes.

HEARING EXAMINER FARKAS: Okay. So go ahead.

MR. RANDAZZO: Thank you, Your Honor.

MR. ROYER: Your Honor, he's trying to ask the witness for a legal interpretation of what this provision requires. The plan itself is also subject to provisions of the Bankruptcy Code. There are also

provisions that govern what are -- there are also provisions that govern what the Trustee or -- Trustees or Claimants are entitled to do, so I'm just not sure what -- he's asking to accept a legal interpretation that we may not necessarily agree with, so he -- so I don't think it's appropriate. I don't think it's an appropriate -- I don't think it's appropriate as a hypothetical.

HEARING EXAMINER FARKAS: Okay. Do you want to respond?

MR. RANDAZZO: Your Honor, I wasn't asking -- I was asking the witness to just assume that this provision has some effect and whether or not, if a modification is required, there are any plans by ATLP to go to the bankruptcy court and request a modification of the plan.

HEARING EXAMINER FARKAS: Go ahead.

MR. ROYER: The short answer is that --

MR. RANDAZZO: I'd like the short answer from the witness, please.

MR. ROYER: But you're asking --

HEARING EXAMINER FARKAS: I'm going to allow the question, so go ahead and answer. Do you want the question?

THE WITNESS: I'd like the question

again.

HEARING EXAMINER FARKAS: You want to ask the question again?

MR. RANDAZZO: Yes.

Q. Mr. Bees, through the courtesy of the Attorney Examiner here, he's shortened this up a bit by directing us to the provision in the plan that's been approved by the bankruptcy court which is attached to your testimony, Section 16.2. Do you see that?

A. I do.

Q. Now, reading that, is it clear to you that if the Plan of Reorganization is modified, there may be a need to engage the bankruptcy court? Not a legal opinion, just from the clear language that's there.

A. I would have to say that there's enough, I think, language in here that it gives me a question as to whether we do or do not have to approach the bankruptcy court, and I frankly would not answer that without some kind of legal interpretation of what the section means.

Q. Okay. And I take it that this is the first time you've noticed this provision in the Plan of Reorganization, this 16.2 here today?

A. No. I'm sure I've seen it before, but --

Q. Who is responsible for the administration

CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, July 15, 2009, and carefully compared with my original stenographic notes.

s/Valerie J. Sloas
Valerie J. Sloas, Registered Professional Reporter and Notary Public in and for the State of Ohio.

My commission expires June 8, 2011.

(VJS-656)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served upon the following parties of record by Noon on this 4th day of August 2009, via electronic transmission.

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