

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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

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

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

OPINION AND ORDER

The Commission, coming now to consider the above-entitled applications filed by Akron Thermal, Limited Partnership, hereby issues its opinion and order.

APPEARANCES:

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, on behalf of Akron Thermal, Limited Partnership.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Thomas McNamee, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

Linda Murphy, Executives' Office, 175 South Main Street, 8th Floor, Akron, Ohio 44308, on behalf of the County of Summit, Ohio.

Max Rothal and Cheri B. Cunningham, 161 South High Street, Suite 202, Akron, Ohio 44308, and McNees, Wallace & Nurick LLC, by Samuel C. Randazzo, Lisa G. McAlister, and Gretchen J. Hummel, 21 East State Street, 17th Floor, Columbus, Ohio 43215, on behalf of the city of Akron.

Bricker & Eckler LLP, by E. Brett Breitschwerdt and Mathew W. Warnock, 100 South Third Street, Columbus, Ohio 43215, and Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, on behalf of Canal Place, Ltd.

Porter Wright Morris & Arthur LLP, by Daniel R. Conway, 41 South High Street, Columbus, Ohio 43215, on behalf of Children's Hospital Medical Center of Akron.

Christopher J. Niekamp, Michael J. Palumbo, Bernlohr Wertz, LLP, The Nantucket Building, 23 South Main Street, Third Floor, Akron, Ohio 44308-1822, on behalf of The Community Hall Foundation, Inc. dba The Akron Civic Theater.

Baker & Hostetler LLP, by Joseph F. Hutchinson, Jr. and Kelly S. Burgan, 3200 National City Center, 1900 East Ninth Street, Cleveland, Ohio 44114-3485, on behalf of the Trustee of the Creditors' Trust for Akron Thermal, Limited Partnership.

HISTORY OF THE PROCEEDING:

Akron Thermal, Limited Partnership (ATLP or company) is a public utility as defined by Section 4905.02, Revised Code, and a heating company as defined by Section 4905.03(A)(9), Revised Code, engaged in the business of providing steam and hot water through pipes or tubing to consumers within the central business district of Akron, Ohio.¹ ATLP provides service to 52 steam customers and 96 hot water customers. The steam system in Akron was first developed by the city of Akron (City) and was operated by the City from 1974 to 1995 as part of a combination trash burning and steam producing plant. ATLP began operating the steam system in November 1995 as part of a lease arrangement with the City. Under this lease arrangement, ATLP was obligated to charge the rates developed by the City until November 1998.

On May 29, 2009, ATLP filed an application in 09-453-HT-AEM (09-453) for an emergency annual increase of \$4,195,561 in its rates and charges for steam and hot water service. The company seeks to recover the revenue increase through a temporary adder to the monthly demand charge component of its current rates. According to ATLP, if the temporary adder is applied to all tariff customers and two contract customers, Children's

¹ ATLP originally provided steam for air conditioning and chilled water service, but the provision of chilled water service has transferred to Akron Thermal Cooling.

Hospital Medical Center of Akron (Children's Hospital) and Canal Place, Ltd.² (Canal Place), the amount of the temporary adder would be \$54.78 per Mlb, which would represent an overall rate increase to customers of 47.8 percent. However, if the adder is applied to only tariff customers, the amount of the temporary adder would be \$81.49 per Mlb, or an overall increase of 71.6 percent.

During April and May 2009, ATLP filed four additional applications that, together with 09-453, are the subject matter of the current proceeding. On April 10, 2009, ATLP filed an application in Case No. 09-315-HT-ATA (09-315) to modify and apply its tariff for hot water heating to 98 customers in the Canal Park Condominium (Canal Park). According to the application, ATLP's current contract with Canal Park expires in September 2009, and ATLP now seeks to modify and apply its tariff to these customers so that hot water heating service will continue after the expiration of the contract.

On May 18, 2009, ATLP filed an application in 09-414-HT-AIS (09-414) for authority to issue three promissory long-term notes in the principal amounts of \$2,060,000 to the Creditor's Trust, \$1,350,000 to the state of Ohio, and \$250,000 to Thermal Ventures II, L.P. (TVII), ATLP's limited partner. (ATLP Ex. 2 at 7). ATLP states that it has entered into the three long-term promissory notes on February 20, 2009, as a result of the restructuring of its indebtedness through a bankruptcy proceeding.

On May 26, 2009, ATLP filed an application in Case No. 09-441-HT-AEC (09-441) for approval of a contract for steam service to Children's Hospital Medical Center of Akron (Children's Hospital). Children's Hospital is a nonresidential user of thermal energy within the service area of ATLP. According to the application, ATLP seeks approval of an arrangement whereby it will provide steam to Children's Hospital, and Children's Hospital will purchase its steam requirements from ATLP on an uninterruptible basis. The contract addresses service through March 31, 2011.

Also on May 26, 2009, ATLP filed an application in Case No. 09-442-HC-AEC (09-442) for approval of an amendment to an existing contract for steam service with Canal Place. According to the application, the contract addresses service during the period from August 1, 2008, until March 31, 2012.

By entry dated June 17, 2009, 09-453, 09-442, 09-441, 09-414, and 09-315 were consolidated. The June 17 entry also scheduled a hearing on the applications for July 15, 2009, and directed ATLP to publish notice of the applications in a newspaper of general circulation throughout its service area. By entry of July 10, 2009, motions to intervene filed by the City, Children's Hospital, Canal Place, the County of Summit, Ohio (Summit County), and Community Hall Foundation, Inc. dba The Akron Civic Theatre were granted. In addition, the motion to admit Thomas Mullooly to practice *pro hac vice* on

² Canal Place is a real estate development company that owns and operates a 1.5 million square foot redeveloped adaptive use complex in Akron, Ohio.

behalf of ATLP in this proceeding before the Commission was also granted. The hearing was held on July 15 and July 20, 2009. At the hearing, the attorney examiner granted the intervention of David Wehrle, in his capacity as Trustee of the Creditors' Trust for ATLP (Creditor's Trust). In addition, at the hearing, Jeffrey P. Bees, Richard J. Pucak, and Janet D. Stott presented testimony in support of ATLP; Shahid Mahmud, Stephen E. Puican, and David R. Hodgden presented testimony on behalf of the Commission staff (Staff); Brian L. Lorman presented testimony on behalf of Canal Place, Ltd.; Richard Merolla and Joseph G. Bowser presented testimony on behalf of the City; Linda L. Gentile presented testimony on behalf of the Children's Hospital; and David Wehrle presented testimony in his capacity as Trustee of the Creditor's Trust. Initial briefs were filed on July 28, 2009, by ATLP, the City, the Staff, Canal Place, Children's Hospital, and Summit County. Reply briefs were filed on August 4, 2009, by ATLP, the City, Staff, and Canal Place.

COMMISSION REVIEW AND DISCUSSION:

As indicated above, these matters are before the Commission upon the applications of ATLP for emergency rate relief, approval of contracts, approval of a tariff revision, and approval of three long-term promissory notes. In order to gain perspective on the present applications, it will help to review the history of ATLP's various rate applications before the Commission.

Prior Applications Filed at the Commission

On September 28, 1998, ATLP filed an application with this Commission to have its own rates approved as a first filing. The company's rates were approved in that case, effective April 1, 1999, on an interim basis until July 1, 1999. *In the Matter of the Application of Akron Thermal, Limited Partnership, for Approval of a First Filing of Tariffs Pursuant to Section 4909.18, Revised Code*, Case No. 98-1360-HT-ATA (April 1, 1999).

On November 17, 2000, ATLP filed an application seeking emergency rate relief for an increase of 21 percent pursuant to Section 4909.16, Revised Code. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM (00-2260) (January 25, 2001). In its January 25, 2001 opinion and order, the Commission approved a stipulation between Staff and ATLP, whereby an 18 percent surcharge was applied to tariff customers' bills. The opinion and order also directed ATLP to file an application for permanent rate relief within a reasonable time.³

³ ATLP filed a notice of intent to submit a permanent rate increase application on July 8, 2003, in Case No. 03-1497-HT-AIR, but later requested dismissal of the request on February 2, 2005. A new notice of intent to file a permanent rate application was filed on January 3, 2005, that initiated its rate increase application in Case No. 05-05-HT-AIR. (ATLP Ex. 2 at 5).

On November 29, 2001, the Commission approved the joint application of ATLP and Akron Thermal Cooling (ATC) to establish ATC as a public utility cooling company for the purpose of owning and operating ATLP's cooling assets and chilled water assets in Akron, Ohio, such that ATLP would no longer provide chilled water service. *In the Matter of the Joint Application of Akron Thermal, Limited Partnership and Akron Thermal Cooling, LLC for Approval of the Establishment of Akron Thermal Cooling, LLC for the Purpose of Owning and Operating the Cooling Assets in Akron, the Issuance of Membership Interest in Akron Thermal Cooling, LLC to Thermal Ventures, II, L.P., and to Add Akron Thermal Cooling, LLC to the Roll of Public Utilities*, Case No. 01-2921-CC-UNC.

On August 16, 2004, ATLP filed a self-complaint, pursuant to Section 4905.26, Revised Code, seeking an increase in its charges due to an increase in fuel costs. *In the Matter of the Self-Complaint of Akron Thermal, Limited Partnership*, Case No. 04-1298-HT-SLF. In its November 3, 2004 finding and order, the Commission approved a temporary fuel cost surcharge rider of \$3.50 per Mlb to ATLP's tariff customers, subject to refund, pending the determination of a base rate case which was directed to be filed no later than 90 days after the date of the finding and order.

On March 4, 2005, ATLP filed an application for a permanent rate increase in *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. 05-05-HT-AIR (05-05). In its September 28, 2005 opinion and order, the Commission terminated the emergency surcharge approved in 00-2260 and granted the company an overall revenue increase of \$4,636,963. Further, the Commission directed that only \$2,597,327 of the revenue increase was to be assigned to tariff customers and it directed the company to obtain the remainder of the overall revenue increase through renegotiation of its existing contracts. The tariff rates approved in 05-05 are currently in effect.

Other History

On June 8, 2007, ATLP filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Ohio (Bankruptcy Court). The Bankruptcy Court approved ATLP's second amended plan of reorganization (Plan) on February 20, 2009. In relation to the immediate proceeding, the Plan provides that: "Any and all approvals and consents appropriate under the public utility laws of Ohio or required by the PUCO shall have been obtained." (ATLP Ex. 2 at JPB-1, Section 13.2, pg. 33). With respect to rates charged by ATLP, the Plan provides that: "The PUCO will retain jurisdiction over any rate change to be requested by Debtor, and all other matters otherwise within the jurisdiction of the Public Utilities Commission of Ohio." (ATLP Ex. 2 at JPB-1, Section 15.2, pg. 35). In addition, as part of its approval of the Plan, the Bankruptcy Court ordered ATLP to execute three long-term promissory notes that are the subject of 09-414.

COMMISSION'S AUTHORITY TO REVIEW EMERGENCY RATE APPLICATIONS

The Commission's authority to grant emergency relief arises under Section 4909.16, Revised Code, which provides as follows:

When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.

The Supreme Court of Ohio has consistently construed this statute as vesting the Commission with broad discretionary powers in determining when an emergency exists, and in tailoring a remedy which will enable the public utility involved to meet that emergency. *Cambridge v. Pub. Util. Comm.* (1953), 159 Ohio St. 88; *Jackson v. Pub. Util. Comm.* (1953), 159 Ohio St. 123; *Manufacturer's Light and Heat Co. v. Pub. Util. Comm.* (1955), 163 Ohio St. 78. The Supreme Court has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature. *Cincinnati v. Pub. Util. Comm.* (1948), 149 Ohio St. 570.

In reviewing emergency rate applications, the Commission has, in the past, set out several standards by which it is guided in exercising the discretion conferred by the statute. Those standards rely principally on determining the existence of an emergency. As set forth by the Commission, several considerations must be examined. First, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the applicant's supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation. Next, emergency relief will not be granted pursuant to Section 4909.16, Revised Code, if the emergency request is filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency. The ultimate question for the Commission is whether, absent emergency relief, the public utility will be financially imperiled or its ability to render service will be impaired. If the applicant fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end. See *In the Matter of the Application of The Toledo Edison Company for Authority to Change Certain of its Filed*

Schedules Fixing Rates and Charges for Electric Services, Case No. 84-1286-EL-AEM (February 19, 1985).

We should also note that Section 4909.16, Revised Code, is a separate and distinct rate proceeding from that set forth for traditional rate applications filed under Section 4909.15, Revised Code. The latter includes a mandatory ratemaking formula, where the Commission must determine just and reasonable rates and charges, and the company must have the opportunity to earn a revenue requirement and a fair and reasonable rate of return. Proceedings under Section 4909.16, Revised Code, do not proceed under such requirements. The Commission's determinations under each part of Section 4909.16, Revised Code, are discretionary. As noted by the Supreme Court, "the determination of whether an emergency exists, warranting a temporary alteration of rates, and the length of time such emergency rates shall remain in effect are within the judgment and sound discretion of the Public Utilities Commission." *Manufacturers Light & Heat Co. v. Pub. Util. Comm'n* (1955), 163 Ohio St. 78, 80, 125 N.E.2d 183, 184-185 (citing *City of Cambridge v. Pub. Util. Comm'n* (1953), 159 Ohio St. 88, 111 N.E.2d 1). Therefore, in considering this emergency rate application, we must first answer the threshold question of whether an emergency exists that imperils the public utility. As we noted, if the public utility fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end.

Existence of an Emergency

ATLP argues that its current cash flow crisis financially imperils its survival as a business concern and impairs its ability to render service to its customers. It contends that it faces a genuine emergency situation for purposes of the Commission granting it an emergency rate increase. (ATLP Ex. 4 at 2).

ATLP argues that the emergency situation in which it finds itself is the result of the University of Akron's (University) decision not to renew its contract with ATLP. Witness Janet Stott, controller of ATLP, testified that the loss of the University load "will obviously have a devastating effect on the company's financial condition and cash flow situation." (Id.) ATLP witness Richard Pucak testified that, in 2008, the University represented approximately 30 percent of ATLP's annual steam sales volumes, and accounted for approximately 26 percent of its total revenues. (ATLP Ex. 3 at 3). ATLP represents that the \$4,195,561 requested in its emergency rate application is equivalent to the revenue loss resulting from the University leaving ATLP's system. (ATLP Ex. 4 at 6). ATLP witness Jeffrey Bees testified that when ATLP emerged from bankruptcy, it did not believe there was a significant risk that the University would leave its system and turn to natural gas to meet its heating requirements. (ATLP Ex. 2 at 9; Tr. I at 98). ATLP based this expectation on the volatility of natural gas prices and the "attractive" nature of its rates to the University. (Id.). ATLP contends that the unexpected loss of the University load imperiled it from a financial standpoint, leaving it with no choice but to apply to the Commission for emergency rate relief, so that it is able to continue providing service to its

other customers. (ATLP Ex. 2 at 8). Mr. Bees testified that without the additional revenue generated by an emergency rate increase, ATLP will not be able to pay its normal course of bills. (Tr. I at 115).

In addition, Ms. Stott testified that, in the absence of emergency rate relief, the loss of the University as a customer will cause ATLP's cash flow to be negative by the end of July 2009 and that it will not have sufficient cash available to meet its expenses from that point through the end of the year. (ATLP Ex. 4 at 5-6, JDS-2 at 4). ATLP also argued that Staff witness Puican agreed with Ms. Stott's revenue shortfall calculation and no party to the proceeding presented a different cash flow projection or proposed adjustments to Ms. Stott's analysis. (Tr. II at 140).

Staff does not dispute the existence of an emergency. Staff witness Puican acknowledged that the loss of the University revenue has created a financial emergency for the company. He also agreed with ATLP's assessment that ATLP would not be able to provide service without the emergency relief and that, as a consequence of the denial of emergency rate relief, the company would be forced to cease operations. (Tr. II at 138-139).

The City maintains that ATLP has not demonstrated that extraordinary circumstances exist which constitute a genuine emergency situation by clear and convincing evidence, subjected to the strictest scrutiny. The City claims that the University's decision not to extend its prior contract or enter into a new contract does not result in the existence of an emergency. The City also asserts that, because the contract with the University was never approved by the Commission, the Commission must treat the contract as though it never existed. (Tr. I at 68; City Reply Brief at 11). The City argues that ATLP should have anticipated the loss of the University, as it was an interruptible customer that had been interrupted in 2006 and 2007. In addition, ATLP offered the University a contract rate that would have reduced the University payments by about 15 percent; however, the University elected to not renew its contract and chose to turn to an alternate means of meeting its steam needs. In support of its argument that no emergency exists, the City also referenced Mr. Lorman's testimony, discussed in more detail below, where he stated that the situation confronting ATLP is no emergency. (Canal Place Ex. 1 at 13-14). The City argues that, even if the loss of the University could be viewed as resulting in an emergency, there is no basis for the Commission to require ATLP's other customers to reimburse ATLP in the amount of \$4,018,845 to cover ATLP's "self-inflicted" lost revenue. (City Initial Brief at 10-13; City Reply Brief at 15).

According to Canal Place witness Lorman, the series of events associated with ATLP's recent history may be extraordinary, but do not create a justifiable emergency warranting Commission approval of the emergency rate increase. First, Mr. Lorman claims that the possibility that the University would choose not to renew or extend its contract with ATLP was recognized by the Bankruptcy Court. In its opinion confirming the Plan, the Bankruptcy Court indicated that, if the University could satisfy its own steam

needs at a cost that was predictably lower than what it is charged by the debtor, that portion of the debtor's business would likely evaporate. (City Initial Brief at 11). In addition, Mr. Lorman pointed out that ATLP agreed to a Chapter 11 reorganization plan less than five months ago that failed to sufficiently address the risk of the University leaving the system. (Canal Place Ex. 1 at 13-14). He further pointed to ATLP being in a position where it is producing 30 percent less steam, but increasing its overall fuel costs by approximately 25 percent. (Id.). Lastly, he noted that ATLP's proposed rate increase includes a \$1,533,088 annual increase in fuel costs, while at the same time, ATLP finds it infeasible to make a \$1,800,000 capital investment one of its boilers, Boiler 32, rather than cease using the boiler. (Id.).

Summit County similarly argues that ATLP has failed to prove that an emergency exists and that it has failed to meet the requirements of Section 4909.16, Revised Code. Summit County asserts that ATLP is the sole source of steam heat for several county-owned buildings and Summit County's duty to provide for police protection and the safety and welfare of its citizens is directly related to Summit County's ability to keep its buildings heated and open to the public. Summit County questions whether the termination of ATLP's contract with the University warrants the finding of an emergency, when Summit County also incurred a financial emergency in 2009. According to Summit County, it has incurred a loss of \$1,800,000 in sales and use taxes, a loss of \$2,700,000 in property transfer taxes, a loss of \$500,000 in interest income, a loss of \$1,200,000 in intergovernmental receipts, and a loss of \$1,000,000 in service charges, fines, and other miscellaneous items. The general fund expenditures also sustained a loss of \$1,600,000, and the 2009 forecast predicts a loss in Summit County revenues and funds resulting in a budget deficit of \$12,800,000. (Summit County Initial Brief at 5-6).

Minimum Amount of Rate Increase

According to ATLP, in the final analysis the cash flow situation will be tenuous, even with the full amount of emergency rate relief. Thus, the full amount of the rate relief requested is the amount necessary to avert the emergency. (ATLP Initial Brief at 25-26).⁴ ATLP contends in its briefs that this figure is the minimum level of temporary rate relief necessary to definitively avert its financial emergency. Mr. Bees testified that, if the Commission does not approve the full amount of rate relief requested in ATLP's emergency application, ATLP cannot continue to operate. (Id.). ATLP represents that the \$4,195,561 it requests quantifies the annual net revenue impact of the University leaving ATLP's system. (ATLP Ex. 4 at 6). The \$4,195,561 amount was developed by determining

⁴ ATLP witness Bees initially testified that it is clear that the company could not survive on an emergency rate increase significantly less than that requested, such as 50 percent of the requested increase suggested at the hearing. In his rebuttal testimony, Mr. Bees indicated that, if the amount of the emergency rate relief granted by the Commission were only slightly less than the request, ATLP would have to make a determination as to whether it could delay payments to vendors in order to continue to provide service to customers in the near term. (Tr. II at 75-78).

the annual reduction in steam volumes resulting from the University leaving the system, which amounted to a 20.8 percent reduction. (Id.). ATLP also took into account the impact of the operational change it plans to make as a result of losing the University load when calculating its minimum level of temporary rate relief necessary. ATLP anticipates that it will stop using Boiler 32 at the BF Goodrich plant and will rely primarily on the Akron plant to produce the steam necessary to supply its remaining customers. (ATLP Ex. 3 at 5; ATLP Ex. 4 at 6). Despite the reduction in the number of employees that will occur as a result of shutting down Boiler 32, ATLP anticipates a net increase in the total cost of fuel amounting to \$1,533,088 as a result of the change. (ATLP Ex. 4 at 7). ATLP also accounted for non-fuel related operating changes and other cost-savings measures, including \$600,000 annual savings in labor costs resulting from the reduction in its work force when calculating the requested amount of \$4,195,561. (Id.).

ATLP also argues that it has implemented cost-savings measures to mitigate the amount of emergency rate relief required to avert the emergency. According to ATLP, it first made the decision to stop using Boiler 32 at the BF Goodrich plant, which will result in a net increase in the total cost of fuel of some \$1,533,088. (ATLP Ex. 4 at 7). ATLP believes that stopping its use of Boiler 32 was the least-cost response and the most prudent economic decision in view of the lost revenue from the University, notwithstanding that this decision would increase its fuel costs due to the increased reliance on wood chips, tire-derived fuel and natural gas for other boilers as opposed to the use of coal used to fuel Boiler 32. (ATLP Ex. 3 at 4-6).⁵ The decision to cease using Boiler 32 was made, in part, as the result of a notice of violation issued by the U.S. Environmental Protection Agency (USEPA) on the use of the boiler. In addition, the company realized annual savings in its labor costs of \$600,000 by terminating 15 employee positions. Further, Ms. Stott testified that other than holdbacks of certain professional fees made to conserve cash, there are no other outstanding obligations relating to the bankruptcy proceeding, and consequently, none were included in the company's determination of the amount of the emergency relief request. (ATLP Ex. 4 at 4-5).

Staff witness Hodgden testified that he had performed a financial analysis based on information provided in ATLP's applications. Mr. Hodgden stated that he calculated a regulatory revenue requirement for ATLP using the revenue requirement model that Staff used in 05-05 (ATLP's last base rate case) and the 2008 financial information ATLP filed with its current case. He then analyzed ATLP's capability to service its debt requirement of the promissory notes requested in 09-414. Based on a total company revenue increase of \$3,995,120, the required net operating income would be \$366,640. He calculated that the

⁵ ATLP argues that as a result of the notice of violation issued by USEPA, the cost of air pollution control technology that would be required for Boiler 32 would be approximately \$2.8 million, the associated annual operating costs would be in the range of \$500,000, and the company would be subject to substantial civil penalties for continuing to operate Boiler 32. (ATLP Ex. 3 at 4).

cash flow available to meet debt service payments would be \$912,202. (Staff Ex. 1 at 5-6)⁶. He also indicated that he calculated that ATLP's first year annualized debt service payments would be \$1,244,237, which results in a short-fall of \$332,035. For the next three years, ATLP's debt service payments for these notes would be \$981,736 per year. According to Mr. Hodgden, under Ohio's public utility rate setting methods, the revenue increase of \$3,995,120 would be insufficient to enable ATLP to meet its debt service needs. (Staff Ex. 1 at 6-7). Mr. Hodgden indicated that one of ATLP's largest problems is that its long-term debt, plus owner's equity, exceeds rate base assets, meaning it is "overcapitalized." Mr. Hodgden indicated that typically a public utility recovers its financing costs by earning a return on and a return of its investment in property, plant, and facilities used to provide service; however, the traditional regulatory rate setting model does not establish revenue in an amount that would allow the company to fully recover its financing cost if its capitalization is greater than rate base. Mr. Hodgden estimated ATLP's rate base at \$3,666,387. ATLP has applied for authority to issue a total of \$3,660,000 in promissory notes. Mr. Hodgden additionally noted that ATLP received an owner's equity infusion of \$3 million. According to Mr. Hodgden, ATLP's capitalization would exceed its rate base by about \$3 million and, therefore, its asset base, financial structure, and operating costs do not support a revenue requirement under Ohio public utility rate setting procedures that would be sufficient to cover its financing costs. (Staff Ex. 1 at 5-10).

In response to Mr. Hodgden's testimony, ATLP indicated that it had negotiated a proposed Forbearance Agreement whereby its long-term notes would be restructured (ATLP Ex. 5, Attachment 1 at JPB-1). According to Mr. Bees, the Forbearance Agreement was signed by the affected parties on July 3, 2009, and provides that the obligations due TVII under the \$250,000 note will be extended with no principal or interest due until the notes to the Creditor's Trust and the state of Ohio have been paid in full. The Forbearance Agreement also provides that the combined installment payments due will be reduced by \$100,000 with a 60 percent reduction to the Creditor's Trust and a 40 percent reduction to state of Ohio (Staff Ex. 2 at 2). In response to the Forbearance Agreement, Staff witness Hodgden testified that he prepared a new "breakeven" analysis to calculate the total company revenue requirement that would enable the applicant to cover its annual operating expenses and its updated debt service requirements, but that no return on equity was factored into his calculation. He estimated that the total company revenue increase required for ATLP to cover annual operating expenses and debt service payments, under the Forbearance Agreement, would be \$3,797,831, or a total company revenue requirement of \$15,312,140. According to Mr. Hodgden, as long as the rates set by the Commission are sufficient to cover annual operating expenses and its debt service obligations, a company could meet its public utility service obligation for an interim

⁶ Mr. Hodgden testified that he used a measure of financial performance called OIBDA (operating income before depreciation and amortization) as a shortcut to estimate the cash flow available to meet debt service payments. (Staff Ex. 1 at 6).

period of time, until a permanent rate case proceeding. (Staff Ex. 2 at 4). He then concluded that a total company revenue increase in a range between \$3,797,831 and \$3,995,120 would enable the company to service its debt under the Forbearance Agreement. (Staff Ex. 2 at 4-5).

The City argues that ATLP has failed to demonstrate that the requested temporary rate relief is the minimum level necessary or that such minimum level, even if granted by the Commission, will avert or relieve the emergency. The City claims that, once Staff's direct testimony was filed, ATLP was, through the Forbearance Agreement, immediately able to secure the signature of the Trustee for the Creditor's Trust, the state of Ohio, and TVII in order to defer the payment due dates. (ATLP Ex. 5). The City also noted that, in his supplemental testimony, Mr. Bees acknowledged that ATLP was actually unsure on the amount of the level of rate relief necessary. According to the City, Mr. Bees stated: "What I believe we developed in the application was our understanding of what the minimum requirements would be for the revenue that supports the expenses of the system as we projected." However, the City argues that ATLP has no idea what the minimum level of relief needed is and it points to Mr. Bees' acknowledgement that, if the Commission granted less than the request, ATLP would have to conduct another thorough review to understand whether there are any other areas that might further reduce the company's costs to be able to meet the revenue that would be provided. (Tr. II at 75-77).

The City also argues that the amount of the emergency rate relief relies on a questionable forecast of increased fuel expense of \$1,533,088 that ATLP claims will occur as a result of a shutdown of Boiler 32. (ATLP Ex. 4 at 7). The City contends that ATLP has undertaken no efforts to secure the fuel supply that it associates with the increase in fuel expense. According to the City, at the same time ATLP is seeking emergency rate relief and claiming that the company has taken all necessary steps to reduce its expenses, ATLP witness Stott acknowledged that the plan to shut down Boiler 32 will increase the amount of cash that ATLP claims it needs pursuant to the emergency rate increase. (City Initial Brief at 13-16). City witness Bowser testified that shutting Boiler 32 appears to negatively affect the viability of ATLP. He indicated that ATLP has not entered into any long-term agreements for wood supply and ATLP intends to continue to purchase wood chips on a spot-market basis. Mr. Bowser concluded that the reductions in labor costs, gross receipts tax, and other claimed reductions, totaling \$12,356,381, will be offset by increased fuel costs of \$1,533,088. (City Ex. 2 at 27-28, 31).

In Lieu of a Permanent Rate Application

ATLP also contends that its emergency rate increase application was not filed in order to circumvent the filing of a permanent rate increase application, or as a substitute for permanent rate relief. Mr. Bees testified that ATLP will likely file, "in the next month or so," a notice of intent to file an application for a permanent rate increase. (Tr. I at 100). Ms. Stott also represented in her direct testimony that ATLP will file a notice of intent to

file a Section 4909.18, Revised Code, permanent rate case application by September 1, 2009. (ATLP Ex. 4 at 12).

As to whether the emergency application was filed to circumvent the filing of a rate application, the City raised some doubt on the issue. The City notes that Staff witness Hodgden indicated that a utility that intends to make an application for a rate increase pursuant to Section 4909.18, Revised Code, will typically meet with Staff to discuss the test year specifications and date certain, but that ATLP had not initiated any such meetings with Staff (Tr. II at 122-123). In addition, the City maintains that, while in her direct testimony, Ms. Stott testified that ATLP would be filing a notice of intent by September 1, 2009, she acknowledged at hearing that no one had discussed specifying a date certain or that the notice of intent for a rate application was to be filed by September 1, 2009. (Tr. I at 192-193).

Conclusion Regarding Emergency

We find that the evidence presented clearly and convincingly demonstrates the presence of extraordinary circumstances, which constitute an emergency situation, pursuant to Section 4909.16, Revised Code. The evidence demonstrates that, in 2008, the University represented approximately 30 percent of ATLP's annual steam sales volumes, and accounted for approximately 26 percent of its total revenue. The loss of this sizable percentage of revenue represents a significant impact to ATLP. Staff did not dispute that ATLP faces a financial emergency and that, without emergency rate relief, ATLP will be financially imperiled and its ability to render service will be impaired. In addition, Staff did not contest the cash flow projections and savings calculations set forth by ATLP. Although it is worth noting that the University was an interruptible customer that had experienced interruptions more than once and had access to natural gas and, consequently, the ability to leave the system at any time, we are not convinced from the evidence that the loss of the University should have been anticipated by ATLP. Nonetheless, we are not persuaded that the evidence supports ATLP's position that the amount of the increase it proposes of \$4,195,561 is the minimum amount necessary to avoid the emergency. Staff provided testimony that the range of increase would be from \$3,797,831, representing approximately 90.5 percent of the increase proposed by ATLP, to \$3,995,120, representing approximately 95.2 percent of the increase proposed by ATLP. The difference represents a return on equity component. Although there is some question as to whether ATLP can or will file a notice of intent to file a permanent rate application by September 1, 2009, we find insufficient evidence to support a finding that the emergency rate application was filed to circumvent the filing of a rate application. In addition, there is insufficient evidence to fully evaluate the economic advantages and disadvantages related to the continued operation or shut down of Boiler 32, as it relates to possible USEPA civil forfeitures, fuel choices of alternative boilers, and long-term contracts for fuel. As a result, we do not factor the operation of Boiler 32 into this decision.

Impact of the Emergency Rate Increase on Customers

Although we have concluded that the evidence in this case demonstrates the existence of an emergency pursuant to Section 4909.16, Revised Code; the amount of revenue increase that could be justified; and that the application was not filed to circumvent the filing of a permanent rate case application, these findings do not end our inquiry under the statute. Section 4909.16, Revised Code, also requires that any increase authorized pursuant to statute be deemed necessary to prevent injury to the interests of the public or of the public utility. Consequently, the next portion of our review of the emergency rate increase application will consider the interests of the public, namely the customers of ATLP.

Current Rate Structure

In 2007, contract customers accounted for 85 percent of unit sales and 76 percent of ATLP's revenue. In addition, those contract customers were charged according to special arrangements at rates lower than ATLP's tariff. (First Amended Disclosure Statement at 43.).

Through its emergency rate application, ATLP seeks authority to impose on tariff customers an annual increase of \$4,195,561 in additional annual revenue through an adder to the monthly demand charge component of its current rates. According to its application, the current demand charge for steam customers is \$33.66 per Mlb, while the current hot water demand charge is \$17.82 per Mlb. As initially proposed, the emergency rate increase could be imposed in one of two ways. The rate increase could be applied to all tariff customers and to the Children's Hospital and Canal Place contract rates, representing an increase of \$54.78 per Mlb or 47.8 percent. Alternatively, the rate increase could be applied solely to tariff customers, and would represent an increase of \$81.49 per Mlb or 71.6 percent (Application at 8). During the hearing, ATLP indicated that it had withdrawn its proposal that would have applied the rate increase to Children's Hospital and Canal Place, and it was now proposing that the increase apply solely to tariff customers. (ATLP Ex. 5 at 11). The following chart represents the changes in demand charges proposed by ATLP in its application:

	<u>Steam Tariff</u>	<u>Hot Water Tariff</u>
<u>Demand Peak</u>	49,808	1,580
Increase in Demand Charge	\$ 81.49/Mlb	\$81.49/Mlb
Current Demand Charge	\$ 33.66	\$17.82
New Demand Charge	\$115.15	\$99.31

<u>Revenue</u>	\$5,747,765	\$108,293
Increase in Revenue	\$4,117,975	\$ 77,586
Percent Increase	71.6	71.6

(Application at Ex. 3)

Rates for Customers with Special Arrangements

Although ATLP identified Canal Place and Children's Hospital as the only contract customers not affected by the rate increase, at hearing, ATLP admitted that, in addition to Canal Place and Children's Hospital, there were two other customers that were charged rates at below tariff. These customers include Summa Health System (Summa), which is responsible for approximately 15 percent of ATLP's sales, and ATC. (Tr. I at 78). In its Reply Brief, ATLP acknowledged that still another customer, Rogers Industrial Products (Rogers), is similarly served with a contract at rates below tariff. ATLP indicated that Summa maintains an energy system that burns natural gas, which, according to the application, "precludes ATLP from seeking to increase its rates."⁷ As a result, ATLP indicated that it has attempted to maintain revenue from Summa under a month-to-month agreement. At the hearing, Mr. Pucak confirmed that there is no written agreement between ATLP and Summa, noting that "a few months ago I went back to them and told them we have to have some kind of documented paper between us to get into compliance with the commission rules." (Tr. I at 32). Mr. Bees acknowledged that, under their agreement, Summa was charged approximately 50 percent below tariff rates and that this agreement had never been filed at the Commission. (Tr. I at 75, 82-83, 138). In its application in 09-453, ATLP also acknowledged that still another customer, ATC, uses waste steam from ATLP that would be exhausted and is charged a rate approximately 50 percent of the rate charged to Summa. (Tr. I at 83, 137-138). Mr. Pucak confirmed at hearing that there is no written agreement that describes the pricing structure and that the arrangement with ATC has never been approved by the Commission.⁸ (Tr. I at 83, 137). In its reply brief, ATLP indicated that it has now filed an application in Case No. 09-681-HT-AEC for approval of a contract with Summa. It also maintained that the contracts with Rogers and Canal Park predated ATLP's operation of the system and were assigned by the City to ATLP and, therefore, ATLP did not believe that it was required to submit these contracts to the Commission for approval. (ATLP Reply Brief at 28).

⁷ In its Reply Brief, ATLP indicated that there are currently only five customers that are not served at tariff rates including Children's Hospital, Canal Place, Summa, Rogers Industrial Products, and Canal Park and that "Akron Thermal currently has no special contracts that have not either been approved by the Commission or filed with the Commission for approval." (ATLP Reply Brief at 27).

⁸ Akron Thermal acknowledged that, in addition to ATC and Summa, there were at least ten other customers, including the University, that received service at rates below tariff in accordance with agreements never approved by the Commission. Most of those contracts have terminated because the customer left the system, the contract expired and was not renewed, or the Bankruptcy Court terminated the contract. (Tr. I at 68, 77; First Amended Disclosure Statement at 42).

According to ATLP, in 2007, five of its largest customers, including the University, Summa, Akron General Medical Center (AGMC), Children's Hospital, and Canal Place, which each had special arrangements with ATLP, accounted for some 66 percent of ATLP's unit sales and 69 percent of its revenue, as represented below (First Amended Disclosure Statement at 43):

<u>Customer</u>	<u>Unit Sales</u>	<u>\$ Sales</u>
University	277,260	3,450,711
Summa	150,399	2,089,337
AGMC	123,389	2,108,322
Children's Hospital	109,649	1,898,381
Canal Place	<u>52,574</u>	<u>628,069</u>
Total	713,271	10,174,820

Impact of Emergency Rate Increase on Customers

In its review of the emergency rate application, Staff attempted to gauge the impact of the proposed increase on customers. In this section of the order, we first review the impact of the increase on tariff customers. Next, we review the impact of the emergency rate increase on special arrangement customers.

Impact on Tariff Customers

Staff witness Puican testified that the information was not available to calculate the peak demand of the tariff steam customers. As a result, he used an estimate of 1,000 Mlb of peak demand to illustrate the impact of the increase on a typical tariff steam customer. No parties contested this estimate. According to Mr. Puican, a customer's demand charge is set by multiplying the demand charge rate by the customer's peak demand (the highest monthly consumption for that customer), and dividing that amount by 12 for a monthly demand charge. The current demand rate for steam is 33.65 per Mlb. At the assumed peak demand of 1,000 Mlb, the current demand charge would be \$2,805 per month. Applying Staff's alternative revenue requirement estimate, a \$77.60 surcharge (rather than the \$81.49 surcharge ATLP seeks in its application) would result in an increase of \$6,467 per month, or a 231 percent increase in the demand charge. As applied to hot water customers, the current demand charge rate is \$17.82 per Mlb. Assuming a peak demand of 1,000 Mlb, the current demand charge would be \$1,485 per month and the increase would be the same as for a steam customer, resulting in a 435 percent increase in the demand charge. (Staff Ex. 5 at 4).

Summit County argued that the proposed increase is not just and reasonable and is in violation of Section 4905.22, Revised Code. According to Summit County, Section 4905.22, Revised Code, provides that: "All charges made or demanded for any service

rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission." Summit County contends that ATLP failed to obtain the Commission's approval for the rates it charges to three of its contract customers: Summa, Rogers Industrial, and O'Neil's Parking Condo Customers. Summit County argues that the proposed rate increase is not just and reasonable because all rates currently charged for all of ATLP's customers were not approved by the Commission. According to Summit County, until the Commission approves all rates, it is unknown if all of ATLP's customers are being charged fair and reasonable rates.

Summit County also argues that the proposed rates would mandate either a 47.8 percent increase of \$54.78 Mlb or a 71.6 percent increase of \$81.49 per Mlb. Based on its 2008 usage, the proposed increase would increase Summit County's costs from \$974,749.87 to either approximately \$2,089,043 (47.8 percent increase) or \$3,108,971.44 (71.6 percent increase). Summit County argues that, because it does not have the funds available to satisfy the proposed increase and because it cannot appropriate the amount ATLP is demanding to be paid, the proposed rate is not just and reasonable. (Summit County Initial Brief 1-4). In its reply brief, ATLP pointed out that because the proposed \$81.49 increase is an adder to the demand charge component of ATLP's rates, and not a surcharge of total usage, Summit County's calculation does not accurately portray the impact of the emergency increase on its total annual costs for steam service. According to ATLP, under its proposal the annual total cost for steam service to Summit County would be \$1,548,304.27, representing an increase of \$573,554.85. (ATLP Reply Brief at 33).

Impact of Emergency Rate Increase on Special Arrangement Customers

Two customers with special arrangements opposed the emergency rate increase and argued that it should not be applicable to them. Canal Place opposes granting ATLP's emergency rate increase application. Canal Place witness Brian L. Lorman testified that the Commission initially approved a contract between Canal Place and ATLP in Case No. 99-379-HT-AEC for the period through March 23, 2002. He stated that a second agreement was approved by the Commission in Case No. 01-3333-HT-AEC (01-3333) which extended the contract through March 30, 2012. Mr. Lorman indicated that in 09-442, ATLP seeks Commission approval of an amendment to the contract that would extend the contract for a period of ten years. Mr. Lorman noted that the contract provides that Canal Place's rates will increase approximately 75 percent above the rates in the 2001 contract.⁹ He also explained that, if the emergency rate increase is applied to it, Canal Place would likely consider whether it is in its economic interest to apply the amount of the rate increase

⁹ According to Mr. Lorman, Canal Place may terminate the May 2001 agreement at any time; and there is nothing in the agreement that permits unilateral modifications to the agreement without Canal Place's consent.

toward the financing of its own alternative heating system and leave ATLP's system. Mr. Lorman asserted that Canal Place and ATLP have a reasonable arrangement agreed to by the parties, approved by the Bankruptcy Court, and that is now before the Commission for approval and it would be unfair and unreasonable to allow that contract to be unilaterally modified to the detriment of one of the parties. He also argued that applying the rate increase to Canal Place would result in an average overall 47.8 percent rate increase, in addition to the 75 percent increase that Canal Place has been paying under the amendment since February 20, 2009. (Canal Place Ex. 1 at 1-15).

Linda L. Gentile testified that Children's Hospital currently obtains its steam supply from ATLP pursuant to a contract that began on April 1, 2006, which continues until March 31, 2011.¹⁰ She explained that ATLP filed an application in 09-441, seeking Commission approval of this contract. She noted that, as part of the contract, there are separate adjustable fuel and non-fuel components which have, since its inception, continued to increase, allowing ATLP to recover approximately \$300,000 in aggregate cost increases since the beginning of the contract up through March 2009. Ms. Gentile stated that Children's Hospital could, if the circumstances from a cost and reliability standpoint warranted, implement an alternative to ATLP. In addition, she indicated that it would not be reasonable to impose a surcharge on the hospital because that would violate the contractual arrangement to which the hospital and ATLP agreed in 2006. She also noted that the hospital has foregone its opportunity to implement an alternative steam supply arrangement since the contract began in 2006 and that the contract provided substantial benefits to ATLP. She argued that, if the Commission approves any increase in ATLP's rates from this application, it should not apply any increase to the hospital, and the terms of its contract should govern. (Children's Hospital Ex. 1 at 4-10).

Underlying Causes of the Emergency

Finally, our analysis of the request for emergency rate increase requires that we consider the underlying causes of the emergency and whether, with or without the emergency increase, ATLP can survive. In this case, ATLP argues that the reason it is seeking the emergency rate increase is due to the loss of revenue from the University. ATLP acknowledges that there are certain large customers that obtain service pursuant to special arrangements at rates below tariff. ATLP also is cognizant that most of these arrangements have never been approved by the Commission. Nevertheless, ATLP is, in the words of Mr. Bees, "comfortable with its special contract situation." (ATLP Ex. 2 at 7). ATLP has largely based its operations on lease agreements with the City. Given this situation, ATLP's "rate base" is relatively small. According to Trustee Wehrle, ATLP "might own some of the improvements * * * some mobile equipment things * * * but the system itself is predominantly the boilers and all that sort of thing is under the lease. I

¹⁰ Children's Hospital uses steam for heating water, humidification, and sterilization of instruments and equipment.

think they still have assets of about \$3 million or so I think in the rate base." (Tr. II at 56). ATLP disputes the theory advanced by Staff that a "death spiral" is now unfolding. ATLP argues that it is pure conjecture and it would be an abuse of discretion for the Commission to conclude that the possibility of ATLP's customers leaving the system if the emergency rate relief is granted outweighs the likelihood of ATLP being forced to cease operating if its emergency application is denied. (ATLP Reply Brief at 6-7).

Staff believes that the underlying business model of ATLP is unsustainable. Staff argues that the proposed emergency rate increase will only generate the assumed revenue if the customer base remains stable. Staff contends that there is no reason to think this will be true. According to Staff, the emergency filing was precipitated by the loss of ATLP's largest customer and the largest remaining customer, Summa, has the physical ability to leave the system at any time. Further, Staff points to the testimony of Canal Place witness Lorman, who indicated that the rate increase proposed for it would justify a \$2.8 million dollar investment to install an alternative heating system. (Canal Place Ex. 1 at 16). This amount is more than 75 percent of ATLP's entire rate base and certainly sufficient to support equipment installation for Canal Place. Staff asserts that Children's Hospital is in a similar position. (Children's Hospital Ex. 1 at 7).

Staff believes that this is a death spiral where one customer leaves because the rates are too high, which creates a need for a rate increase, that causes another customer to leave, which drives the need for another rate increase, which drives more customers off the system and ultimately leads to a collapse of the system. Thus, Staff asserts that rate action by the Commission would be futile because the company appears to be doomed regardless of what the Commission chooses to do in this case. (Staff Initial Brief at 10-13).

Staff maintains that it may be true that emergency relief is necessary to allow ATLP to function; however, it may also be true that granting the emergency relief will precipitate the ultimate collapse of ATLP because of its existing structure. Staff notes that Section 4909.16, Revised Code, requires that the Commission consider the interests of the public and it argues that a 71 percent increase is clearly not in the public interest. According to Staff, a base rate case is the only way to determine what the revenue requirement should be and how that requirement should be apportioned among customers. Staff notes that ATLP's books have not been reviewed by an outside auditor. (ATLP Ex. 4 at 4). Staff's bottom line position is that, notwithstanding the Forbearance Agreement that temporarily resolves the immediate debt service obligations, the basic structure of ATLP is not compatible with regulation, because the company is overcapitalized. (Staff Ex. 1 at 8-9; Staff Initial Brief at 10-12). (Staff's discussion of ATLP's application for authority to issue promissory long-term notes, set forth in 09-414, is discussed later in this order.) Finally, Staff witness Puican indicated that the City has entered into an arrangement with Akron Energy Systems, LLC and Cleveland Thermal to manage and run the system should ATLP cease operating. According to Mr. Puican, this is described as an interim arrangement that is designed to permit the City to obtain the necessary assistance and support to continue

operation of the steam facilities in the event ATLP ceases to operate. Mr. Puican stated that he believed that this arrangement will provide for continuity of service in the event the Commission rejects ATLP's emergency rate increase. (Staff Ex. 6 at 3).

The City maintains that the record evidence clearly shows that increasing ATLP's rates by the amount of the emergency rate relief requested by ATLP will not avert or relieve the underlying cause of ATLP's "perpetual" problems. The City cites to Staff witness Puican's testimony that raising ATLP's rates in the context of a severe economic downturn and in the presence of a customer's capability to reduce or eliminate its purchases from ATLP will tighten the turns in ATLP's death spiral. (Tr. II at 148). The City also argues that, even with 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. (City Reply Brief at 13). The City therefore argues that granting emergency rate relief will make ATLP's cash flow problems worse, not better, and will provide an even stronger impetus for customers to end their service relationship with ATLP. (Tr. I at 198-199). The City also contests ATLP's proposal to impose the entirety of the rate increase on tariff customers making them solely responsible for the full amount of emergency increase, effectively resulting in tariff customers being responsible residually for the amount that ATLP has decided to not seek from contract customers. (City Reply Brief at 7).

With respect to the impact on customers if the emergency rate application is denied, the City points to the testimony of Richard Merolla, director of public service for the City, who indicated that the City has in place an arrangement that is designed to address how it will meet the needs of steam and hot water customers in the event the Commission does not grant ATLP's application and ATLP is unable to meet its service obligations. He indicated that the City has entered into an arrangement with Akron Energy Systems LLC and Cleveland Thermal for this purpose. (City Ex. 1 at 3). According to the July 2007 City Thermal Energy Task Force Report, the Task Force was to recommend to the Mayor the best long-term viable solution for providing district heating and cooling in the downtown area. According to the report, the City determined that the proposal of Cleveland Thermal represented the best solution to the downtown energy needs of the City. (City Ex. 1, Attachment 1).

Summit County argues that it would be imprudent to grant the rate increase when the management of ATLP has failed to prove its viability in accordance with Section 4909.154, Revised Code. According to Summit County, this section requires that the Commission shall not allow operating and maintenance expenses incurred by management policies or administrative practices that the Commission considers imprudent. Summit County also adds that Staff indicated that ATLP is currently in a precarious financial position and that there is no indication of any improvement in the near future. It cites to Staff witness Mahmud's testimony that, absent the requested rate

relief, ATLP will not even be able to service the restructured debt in 2010. (Staff Ex. 4 at 2-3).

Canal Place asserts that it is important that all customers are charged reasonable rates in order to maintain a viable, sustainable system over the long term. Canal Place noted that it joins Staff in its concern about the ongoing sustainability of the system if the emergency rate increase is granted, even if it is only applied to tariff customers. It also believes that the risk of customers leaving the system is real. (Canal Reply Brief at 3).

Finally, the Trustee argues that the entire emergency rate relief should be granted. It contends that Staff's recommendation to deny the emergency relief sought is largely based on the potential impact of future events, which may never actually occur. The Trustee notes that ATLP has been operating the utility for over ten years and successfully emerged from Chapter 11 bankruptcy. The Trustee also argues that there is no evidence that there is another suitable alternative operator who could resolve the challenges faced by ATLP any better or any differently. The Trustee also cites to the City's Task Force recommendation that ATLP be replaced; however, it claims that the Task Force recommendation occurred before ATLP's reorganization. It also claims that there is no evidence that another entity could operate the same plant operated by ATLP without obtaining substantial rate increases and no evidence that another operator could resolve the dispute with the USEPA regarding Boiler 32. (Trustee Initial Brief at 2-4).

The record in this case reveals that there are additional underlying causes for the emergency, beyond the loss of revenue from the University, that ATLP now faces. First, ATLP has acknowledged that the causes of its financial predicament include not only the loss of the revenue from the University, but also the manner by which ATLP obtains its revenue and the company's long-term debt obligations. In part, ATLP derives its revenue from customers that pay tariff rates and customers with special arrangements for service at rates less than tariff. Some of the arrangements have never been presented to the Commission for approval. One such customer, Summa, receives service, but at rates equal to Summa's avoided costs, leaving ATLP hamstrung to raise its rates, because Summa has access to another system and will leave the ATLP system if faced with a rate increase. Another customer, ATC, receives service from ATLP at rates 50 percent below tariff. This special arrangement has not even been reduced to writing. The evidence demonstrates that two customers, Children's Hospital and Canal Place, will seriously weigh the economic benefits of remaining with ATLP. The witness for Canal Place indicated that the rate increase proposed for it would justify a \$2.8 million dollar investment in facilities for a plant of its own. (Canal Place Ex. 1 at 16). This amount is more than 75 percent of ATLP's entire rate base and certainly sufficient to support equipment installation for Canal Place. ATLP indicated that, in 2007, five of its special arrangement customers accounted for some 66 percent of its unit sales and 69 percent of its revenue. The University revenue was one of the five customers. All of those customers paid less than tariff rates. However, since

that time, the University has left and Summa maintains a system that can be used as an alternative to ATLP.

ATLP's present financial situation is also the result of the accumulation of long-term debt obligations. As discussed by Staff witness Hodgden, between 2000 and 2007, ATLP experienced net losses in each year with losses ranging from \$1,165,824 to \$3,967,612. ATLP also reported a negative equity balance each year. In addition, in 2008, ATLP's total assets increased to \$4,338,820 while total liabilities increased to \$39,239,094, resulting in a negative equity balance of \$34,624,078 (Staff Ex. 1 at 7-8). Prior to entering a Chapter 11 bankruptcy, ATLP had accumulated a negative partner's deficit of \$34,624,078 with over \$5.7 million in unpaid water and sewer bills. (City Ex. 1 at 3). ATLP witness Bees acknowledged that the accumulated outstanding obligations to its vendors and the state of Ohio and others who became creditors were largely the result of not being able to pay bills. This situation existed even though the Commission granted ATLP's rate request in 05-05. (Tr. 1 at 55). Further, even though the Bankruptcy Court cancelled over \$32 million of ATLP's liabilities, ATLP emerged from bankruptcy with over \$3 million in debt and a plan that relied on long-term promissory notes requiring the approval of the Commission. (Staff Ex. 1 at 8-9). These long-term obligations totaling \$3,660,000 also constrain ATLP's operations.

According to Staff witness Hodgden, a primary concern is the ability of ATLP to service these debt obligations. Initially, Mr. Hodgden concluded that, as originally proposed, the results of ATLP's operations would not be sufficient to service its debt payments on an ongoing basis. Further, he indicated that ATLP's long-term debt plus owner's equity exceeds rate base assets and, therefore, the company is overcapitalized. He concluded that ATLP's revenue requirements, historical/financial performance, and financial structure raised serious doubts regarding the viability of ATLP's business model, and opined that ATLP's business model is incompatible with public utility regulatory rate setting principles. (Staff Ex. 1 at 3-4, 7-9).

While we note that Mr. Hodgden revised his testimony to some degree on rebuttal to reflect ATLP's assertions regarding a Forbearance Agreement, such agreement is not before the Commission for approval, nor has ATLP amended its debt applications in this proceeding to account for any such Forbearance Agreement. The Trustee has filed a motion in the Bankruptcy Court seeking its approval of the Forbearance Agreement. (Trustee Initial Brief at 2). However, the City has opposed that motion and there is no indication if or when the Bankruptcy Court might take action, or what the action might be. We believe that Staff's concern with the basic business model of ATLP remains a long-term valid concern for the Commission, as well as ATLP's customers.

ATLP also needs the approval of the Commission for the debt obligations in order to become operational. ATLP has asserted that the Forbearance Agreement will resolve the financial shortfall identified by Staff. However, the Forbearance Agreement is not

before the Commission. Just as we cannot base our decision on what ATLP has termed "pure conjecture," we cannot base our decision on assertions regarding the approval by the Bankruptcy Court of the Forbearance Agreement.

In this case, we are faced with a unique situation. The productive assets of ATLP, essentially its rate base, are all principally leased from the city of Akron. This is one of the structural problems that prevents ATLP from functioning as a business concern that is compatible with regulation. Nevertheless, during the past ten years, it has requested both traditional and emergency rate increases. All of ATLP's prior rate applications have been approved by the Commission. ATLP derives a disproportionate amount of its revenue from customers whose rates are based on special arrangements that are priced below ATLP's tariff rates. Some of those special arrangements have never been approved by the Commission. We note that, in its reply brief, ATLP claims that it "currently has no special contracts that have not either been approved by the Commission or filed with the Commission for approval." ATLP's statement is somewhat disingenuous. The terms under which ATLP provides service to ATC has never been reduced to writing, let alone filed with the Commission for approval. Further, ATLP has had a special arrangement with Summa for many years; yet a written agreement between ATLP and Summa was only first filed on August 4, 2009, the day the ATLP filed its reply brief in this proceeding. ATLP's applications seeking approval of contracts with Children's Hospital and Canal Place were filed on May 26, 2009, three days before it filed its application for emergency rate increase in 09-453. Finally, ATLP has two additional special arrangement contracts that have never approved by the Commission because ATLP believes that it is not required to seek Commission approval for them.

We do not dispute that, in part, what necessitated ATLP's filing of the instant 71 percent emergency rate increase was the decision by the University to cease receiving service from ATLP. This resulted in a loss of approximately 30 percent of ATLP's revenue. However, as we have indicated, the emergency is also the result of three other major factors, including its long-term debt obligations, which have developed over a ten-year time frame; the lack of a traditional regulatory rate base; and providing service to its largest customers at rates below tariff. It is this third factor that is dramatically demonstrated when comparing the rates charged to the five largest customers between 2005 and 2008 with the tariff rates during the same time frame, as shown below.

Price per Steam Mlb for Customers with Special Contracts

<u>Customer</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008 (Projected)</u>
University	\$ 7.01	\$11.20	\$11.90	\$12.49
Summa	\$ 9.04	\$11.86	\$13.89	\$13.65
AGMC	\$12.57	\$15.40	\$17.09	\$18.06
Children's Hospital	\$13.86	\$16.99	\$17.31	\$18.06
Canal Place	\$ 8.70	\$ 9.00	\$11.95	\$17.11

(First Amended Disclosure Statement at 44)

Charges to Tariff Customers

	<u>Steam</u> <u>Charge per Mlb</u>	<u>Hot Water</u> <u>Charge per mmBTU</u>
First 100/month	20.59	17.62
Next 200/month	19.40	16.43
Next 300/month	18.22	15.25
Next 400/month	16.63	13.66
Next 1,000/month	14.65	11.68
Next 5,000/month	11.48	8.51
Next 5,000/month	10.30	7.33
Over 12,000/month	8.71	5.74 ¹¹

(Application at Ex. 1).

The disparity between what the five largest customers of ATLP were charged and what they could have been charged according to the tariff is remarkable. For example, in 2005, some customers paid almost 70 percent below tariff and, as recently as 2007, some customers paid 50 percent below tariff. Such arrangements potentially created huge shortfalls in the revenue that could have been received by ATLP during this time period, notwithstanding the claim that some of these customers may have left if charged according to tariff.

What makes ATLP's financial predicament more serious for itself, as well as its customers, are the choices presented by granting the rate increase application. Imposing this rate increase on tariff customers and special arrangement customers would mean a 46 percent increase across the board; however, such an act would alter special arrangements between ATLP and its customers and result in a virtual certainty of at least one special

¹¹ Both steam and hot water charges are also subject to a monthly demand charge calculated by multiplying 33.60 (steam) and 17.82 (hot water) times the demand -- the highest monthly usage in Mlbs for steam and mmBTU for hot water during the 12 prior months -- and dividing that result by 12. (ATLP Application at Ex. 1)

arrangement customer, Summa, which supplies 15 percent of ATLP's revenue, leaving the system because it has its own backup system. While ATLP has pronounced this occurrence as pure conjecture, that claim is belied by its own witness' testimony that Summa will leave if any increase is imposed on it: Mr. Pucak testified that "Summa would leave the system, I'm sure of that." (Tr. I at 143). Mr. Pucak also testified that Summa would stop being a customer if ATLP charged it the tariff rate. (Tr. I at 132). If that happened, ATLP would be faced with another shortfall in revenue that would almost certainly necessitate another request for an increase in rates. In addition, the evidence shows that, just as Children's Hospital indicated that it would consider obtaining its steam supply from another source if the rate increase were imposed on it, Canal Place would also certainly consider leaving the system if subjected to a rate increase. The other choice, and presently the preferred choice of ATLP, is to impose the proposed rate increase solely on tariff customers. Such an increase would place a tremendously high rate increase on a smaller percentage of ATLP's customer base, while at the same time, allowing customers with special arrangements to avoid the increase.

These two alternative choices also spawn one of two types of cycles. Under the first type, rate increases are imposed solely on tariff customers and not special contract customers. Under the second type, as rates increase, customers elect to leave the system because an economic alternative to ATLP's increased rates is economically justifiable. As more customers elect to leave, the utility is faced with increased revenue shortfalls that necessitate further rate increases that necessarily cause higher rates on the remaining customers. Remaining customers are faced with the decision to either pay higher rates for service or leave the system. While in some cases there is no ready alternative to an existing utility, the evidence in this case shows that the City has contracted with another entity, Cleveland Thermal, which stands ready to provide the same services to all customers currently receiving service in the event ATLP no longer is able to provide utility service.

We believe that, pursuant to Section 4909.16, Revised Code, the interests of the public will not be served by approving the requested rate increase application. We also believe that granting this rate increase, even for a temporary period of time, will not benefit the company. The application places the burden on ATLP's tariff customers, who will bear an increasing share of rate increases, while customers with special arrangements, some of which have backup energy systems or access to an alternative energy supplies, negotiate rates less than ATLP's tariff rates. Essentially, these special arrangement customers hold ATLP hostage against increases to their rates, where such increases would help to ensure that all customers bear a reasonable proportionate share of ATLP's revenue shortfall. As noted by Staff, the long-term picture under ATLP's current business model cannot be sustained. While we are necessarily concerned with the health of all public utilities, the evidence demonstrates that the City has entered into a contract with another entity that stands ready to provide the same service provided by ATLP in the event ATLP seeks to abandon service. We must note that there is no evidence as to the rates the

current ATLP customers would be subject to in the event another entity replaces ATLP. Similarly, there is no evidence to discern whether the University would return as a customer with another entity operating the system. There is also no evidence regarding the operation of Boiler 32 or the settlement of the notice of violation which was issued as a result of the operation of Boiler 32. Nevertheless, we do know that the entity that replaces ATLP carries none of the "baggage" of the long-term promissory notes of ATLP. While ATLP argues that Staff's position regarding the operation of the system if ATLP ceased operations was not based on a complete review of the facts, Staff witness Puican stressed that Staff's position relied on the testimony of City witness Merolla and answers from the City to interrogatories from ATLP, which we believe is reasonable.

OTHER APPLICATIONS

Notwithstanding our denial of the emergency rate application, we believe that the other applications before the Commission should still be considered. First we consider the application in 09-315 for ATLP to modify and apply its tariff for hot water heating to 98 customers in Canal Park.

Case No. 09-315-HT-ATA

On April 10, 2009, ATLP filed an application in 09-315 to modify and apply its tariff for hot water heating to 98 customers in Canal Park. ATLP noted at the hearing that these are its only residential customers. According to the application, ATLP has provided hot water heating service to these customers for over 20 years pursuant to a contract that will expire September 2009. Under the contract, the 98 customers have been paying a fixed price for service regardless of the individual or collective monthly consumption levels of steam energy. ATLP seeks to modify and apply its tariff to these customers so that hot water heating service will continue after the expiration of the contract. ATLP proposes to install a single master meter at the location, calculate aggregate demand and usage, apply its tariff to the aggregated data, and calculate an average monthly demand and usage charge for each of the condominium customers. According to ATLP, this will assure virtually identical monthly bills to each customer. ATLP states that the proposed tariff amendment is not an increase in tariff rates, but instead, is an application of its current tariff rates that will provide for an average bill, based on monthly aggregate consumption to each of the 98 Canal Park hot water heating service customers.

Staff reviewed the application and indicated that the revised tariffs provide for master metering of these customers and, that ATLP proposed to issue virtually identical monthly bills to each of the Canal Park customers based on an allocation of the master meter reading. Staff indicated that it has no objection to the application and recommends that it be approved. (Staff Ex. 5 at 8; Staff Initial Brief at 9).

We believe that the application in 09-315 should be approved. Based on the application, the proposed tariff amendment will not be an increase in tariff rates, but will be the application of ATLP's current tariff rates. Approval of this application will ensure that hot water heating service will continue to these customers after the expiration of the contract and at ATLP's current tariff rates and will provide ATLP with revenue according to its tariff.

Case No. 09-414-HT-AIS

On May 18, 2009, ATLP filed an application in 09-414 for authority to issue three promissory long-term notes in the initial principal amounts of \$2,060,000, \$1,350,000, and \$250,000. ATLP states that it has entered into three long-term promissory notes that relate to the restructuring of its indebtedness through the bankruptcy proceeding. ATLP states that, on February 20, 2009, it entered into a long-term promissory note with the Creditors Trust for the principal sum of \$2,060,000 less a reduction amount, which shall be an amount equal to the total case payment made to class 3.1 claimants under the Plan. ATLP will pay eight equal semi-annual installments of principal and accrued interest, each in the total amount of \$293,055.76, which reflects an interest rate of five percent per annum. The first installment is due 18 months after the effective date of the plan, and the last installment is due February 20, 2014. On February 20, 2009, ATLP entered into a second long-term promissory note in which it promised to pay the state of Ohio the principal sum of \$1,350,000 due and payable in eight semi-annual installments of \$197,812.67, with the first installment being due 18 months after the effective date of the Plan and the final payment being due on February 20, 2014. ATLP also entered into a third long-term promissory note in which it promised to pay TVII \$250,000, with principal and accrued interest due April 30, 2011.

ATLP contends that the purpose to which the issuance of any proceeds shall be applied is reasonably required by it to meet its present and prospective obligations to provide utility service. ATLP also contends that the amount of these promissory notes and the probable cost is just and reasonable and the effect of the issuance of these notes and the cost thereof will not affect the present revenue requirements of the utility.

In its Reply Brief, ATLP argues that, even though it has not formally amended its application in 09-414, and though it has not filed the Forbearance Agreement, references were made to it at the hearing and it is discussed in Mr. Bees' rebuttal testimony. Therefore, ATLP argues, it is properly before the Commission. ATLP also notes that the City has disputed the authority of ATLP to enter into the Forbearance Agreement. ATLP has indicated that this issue is presently before the Bankruptcy Court. ATLP argues that, although the Commission retains authority over ATLP's rates, the preemption doctrine clearly precludes the Commission from undoing the debt restructuring provision of the Plan approved by the Bankruptcy Court. (ATLP Reply Brief at 18-21).

The Trustee similarly maintains the position that the Commission lacks jurisdiction to deny the financial obligations, including the notes that were approved by the Bankruptcy Court, in connection with ATLP's Plan. (Trustee Initial Brief at 4). The Trustee argues that these are revised payment schedules under the existing notes approved by the Bankruptcy Court, not new obligations, and, therefore, do not require the Commission's approval under Section 4905.40, Revised Code. (Trustee Motion to Intervene at 9).

Staff reviewed the application and recommends that it not be approved. Staff witness Mahmud testified that there is insufficient cash flow to cover the debt payments. (Staff Ex. 3 at 3-4). Staff argues that, while it may be possible to avoid the cash flow problem by spreading out the payments called for in the notes according to the application, this will only be possible if ATLP receives approval of the emergency rate increase, which Staff recommends against. (Staff Ex. 4 at 2-3). Staff witness Hodgden testified that his primary concern is the ability of ATLP to service its debt obligations from operating proceeds on an ongoing basis and that his review of the historical financial performance and financial structure raised serious doubts regarding the viability of ATLP's business model. (Staff Ex. 1 at 4). Mr. Hodgden also testified that he reviewed ATLP's annual reports for the years 2000 through 2007 and the 2008 information filed in 09-453, and that ATLP reported net losses in each year, ranging from \$1,165,824 to \$3,967,612. Further, ATLP reported a negative equity balance each year and its financial profile deteriorated materially over this time frame. (Staff Ex. 1 at 7-8). Mr. Hodgden noted Staff's concern that ATLP is overcapitalized, as its long-term debt, plus owner's equity, exceeds rate base assets. According to Mr. Hodgden, ATLP's asset base, financial structure, and operating costs do not support a revenue requirement under Ohio public utility rate setting procedures that would be sufficient to cover its financing costs. (Staff Ex. 1 at 9-10).

In response to the Forbearance Agreement, Mr. Mahmud testified that the restructured debt arrangement allows the deferral of principal and interest on the TVII note of \$250,000 until 2015 and alters the payment obligations of the Creditor's Trust notes and the state of Ohio notes by \$100,000 per year (Staff Ex. 4 at 2). Mr. Mahmud stated that, taking the restructured debt service cost into consideration, ATLP's cash flow projections for 2009, under its proposed rates, appears to enable ATLP to meet its debt service obligations in 2010. However, he insisted that, absent the emergency rate relief, ATLP will not even be able to service the restructured debt in 2010. (Staff Ex. 4 at 2-3). Mr. Hodgden further testified that, in response to the company's purported forbearance agreement, he prepared a breakeven analysis to calculate the total company revenue requirement that would enable the ATLP to cover its annual operating expenses and its updated debt service requirements. He calculated that the revenue requirement calculation would be in a range between \$3,797,831 and \$3,995,120. (Staff Ex. 3 at 2-5). Mr. Hodgden testified that as long as the rates set by the Commission are sufficient to cover annual operating expenses and its debt service obligations, a company could meet its

public utility service obligations for an interim period of time and, in the context of an emergency rate proceeding, it would be appropriate for interim or emergency rates to only cover annual operating expenses and to meet debt service obligations until the permanent rate case has been decided.

As noted by Staff, the Forbearance Agreement referenced by ATLP is not currently before the Commission and ATLP would be required to amend its current application or submit a new application in 09-414. Furthermore, even if such a revision to its application were filed, Staff would oppose it, as it opposes the application for emergency relief. Staff argues that the Forbearance Agreement only has the effect of slightly reducing the annual debt repayments in years 2010 to 2014, while extending the final payments by one year to 2015; but, more importantly, does not reduce the company's total debt obligations. According to Staff, this only serves to increase the obligation and worsen the financial situation of ATLP in the long term. According to Staff, the larger problem with ATLP's business model is that it is incompatible with public utility regulatory ratemaking principles. Staff noted that the productive assets of ATLP are essentially all leased from the city of Akron and this is one of the structural problems that prevents ATLP from being in a position compatible with regulation.

As to the argument that the Bankruptcy Court has obviated the need for Commission approval of any debt issuance, Staff cites to Section 15.2 of the Plan. Staff argues that the Bankruptcy Court did not take any action to reduce the Commission's authority. Staff believes that the Commission should use that authority to say no for the reason that the proposal before the Commission cannot be supported. (Staff Initial Brief at 9-10).

We believe that the application in 09-414 for authority to issue three promissory long-term notes in the initial principal amounts of \$2,060,000, \$1,350,000, and \$250,000 should not be approved. The evidence shows that ATLP has insufficient cash flow to cover these debt payments. While Staff indicated that it may be possible to avoid the cash flow problem by spreading out the payments called for in the notes according to the application, this will only be possible if ATLP receives approval of the emergency rate increase, which we have declined to approve. As to the Forbearance Agreement, contrary to ATLP's assertion, such document is not before the Commission. ATLP has not amended its application in this case to reflect the Forbearance Agreement terms. As with any application before the Commission, when the terms of the application have been modified, such modifications must necessarily come before the Commission for approval. In any event, the Forbearance Agreement has the effect of only slightly reducing the annual debt repayments in years 2010 to 2014, while extending the final payments by one year to 2015. More importantly, the Forbearance Agreement does not reduce the company's total debt obligations. Just as ATLP insists that the Commission cannot act on mere speculation with regard to its emergency rate increase application, we cannot act on mere speculation as to the effectiveness of this Forbearance Agreement in our

consideration of the application in this case. As to ATLP's argument that the Commission is preempted from altering the terms of the Plan approved by the Bankruptcy Court, we would note that it is ATLP, not the Commission, which is altering the terms of the Plan by attempting to restructure the terms of its long-term debts through the Forbearance Agreement.

Case No. 09-441-HT-AEC

On May 26, 2009, ATLP filed an application in Case No. 09-441 for approval of a contract for steam service to Children's Hospital (ATLP-Children's Hospital Contract). According to the application, ATLP seeks approval of an arrangement whereby it will provide to, and Children's Hospital will purchase, all of its steam requirements on an uninterrupted basis. The term of the ATLP-Children's Hospital Contract commenced on April 1, 2006, and continues through March 31, 2011. The rates charged under the ATLP-Children's Hospital Contract are less than the tariff rates. The contract rates are currently \$6.64 per Mlb fuel rate and \$9.37 per Mlb for nonfuel rate, with the sum of all charges being subject to a gross receipts tax multiplier of 1.0498 and potentially subject to a similar multiplier for any other applicable taxes.

Children's Hospital contends that increasing the Hospital's rate in the fashion that ATLP's proposal for obtaining emergency rate relief contemplates violates the contractual arrangement to which ATLP and the Hospital agreed in 2006. (Children's Hospital Initial Brief at 8). Children's Hospital further argues that no party is advocating that the emergency rate increase should be applied to the hospital. It notes that although ATLP originally presented the Commission with two alternatives for emergency rate relief, one applicable to tariff customers and one applicable to all customers, ATLP withdrew the latter based on Staff's testimony. (Children's Hospital Initial Brief at 6). Therefore, it argues, any emergency relief granted by the Commission should not be demanded of Children's Hospital.

Children's Hospital argues that there is undisputed testimony in the record that the ATLP-Children's Hospital Contract complies with Section 4905.31, Revised Code, and that all parties have abided by its terms since execution in 2006 (Children's Hospital Initial Brief at 3-4). According to Children's Hospital, it is not advocating that it should be exempt from any price increases, but because the ATLP-Children's Hospital Contract already includes price increases, it argues that it should not be subjected to further price increases by means of the emergency rate relief sought. Children's Hospital contends that, since April 2006, it has paid \$296,675 beyond the revenue that would have resulted if the original contract rate had remained fixed during that period. Because fuel and nonfuel costs have increased, its rates have increased. Children's Hospital contends that disapproving the ATLP-Children's Hospital contract would deprive the hospital of the benefit of its contract with ATLP and create a severe financial strain on the hospital. Children's Hospital also argues that no party objects to the approval of the ATLP-

Children's Hospital Contract and that Staff recommends Commission approval (Staff Ex. 5). Children's Hospital witness Gentile also testified that, should the Commission not approve the ATLP-Children's Hospital contract, there is a risk that the hospital will leave the system entirely should rates rise to a level that makes alternative steam supplies economically preferable. (Children's Hospital Initial Brief at 5).

ATLP did not file the ATLP-Children's Hospital Contract with the Commission for approval. Staff explained that Section 4905.32, Revised Code, required the contract to be filed and was not sure why ATLP did not timely file it. Section 4905.32, Revised Code, provides that:

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

Despite ATLP's failure to comply with this section, Staff believes that Children's Hospital is not responsible for ATLP's inaction. Further, Staff argues that there is no reason to deprive Children's Hospital of the benefit of the arrangement it thought it made with ATLP. Therefore, Staff concludes that it has no objection to the ATLP-Children's Hospital Contract and recommends its approval. (Staff Initial Brief at 7-8).

Section 4905.31, Revised Code, provides that:

Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees * * * providing for any of the following:

* * *

(E) Any other financial device that may be practicable or advantageous to the parties interested.

* * *

Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs.

Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

In this case, the ATLP-Children's Hospital Contract was not timely submitted to the Commission for approval. Nevertheless, both parties have been operating according to the terms of the ATLP-Children's Hospital Contract since 2006. No parties object to the approval of the ATLP-Children's Hospital Contract. We believe that the evidence in the record warrants Commission approval of the ATLP-Children's Hospital contract, and that ATLP's failure to file the ATLP-Children's Hospital contract does not warrant denying Children's Hospital the fruits of its negotiation with ATLP. Accordingly, the application in 09-441 for approval of the ATLP-Children's Hospital Contract should be granted.

Case No. 09-442-HC-AEC

On May 26, 2009, ATLP filed an application in 09-442 for approval of a modification to an existing arrangement for steam service with Canal Place. ATLP provides steam to Canal Place pursuant to a ten-year contract, lasting through March 31, 2012, that was approved by the Commission in 01-3333 as a reasonable arrangement (May 2001 Agreement). On August 24, 2007, ATLP filed a motion for an order authorizing the rejection of an executory contract with Canal Place, which proposed to terminate Canal Place's May 2001 Agreement and return Canal Place to tariff rates under ATLP's future plan of reorganization. However, instead of ultimately terminating the May 2001 Agreement, ATLP and Canal Place negotiated an interim compromise agreement (Interim Agreement) on September 27, 2007, which was approved by the Bankruptcy Court. The contract period for the Interim Agreement expired on July 31, 2008. Subsequently, while still under the protection of the Bankruptcy Court, ATLP entered into a contract with Canal Place, dated September 30, 2008, which amends the May 2001 agreement for the period from August 1, 2008, until the end of the contract period, March 31, 2012 (ATLP-Canal Place 2008 Amendment). It is the ATLP-Canal Place 2008 Amendment for which ATLP is presently seeking approval.

Canal Place requests that the Commission approve the ATLP-Canal Place 2008 Amendment as a reasonable modification to the May 2001 Agreement pursuant to Section 4905.31, Revised Code. Canal Place stated that the ATLP-Canal Place 2008 Amendment was negotiated while ATLP was under the Chapter 11 protection of the Bankruptcy Court and includes an increase in steam rates, equating to an average rate of \$16.88 per Mlb for the August 2009 through July 2010 period. Canal Place claims that this equates to an approximate 75 percent increase over the negotiated rate under the May 2001 Agreement and that Canal Place began paying this rate increase beginning on February 20, 2009. (Canal Place Initial Brief at 4). Canal Place argues that Staff recommended that the Commission approve the ATLP-Canal Place 2008 Amendment and that no other parties

have expressed any opposition to the approval of the ATLP-Canal Place 2008 Amendment. (Staff Ex. 5; Canal Place Initial Brief at 4).

Canal Place argues that, if the Commission approves ATLP's request for emergency rate relief, in any amount, no additional rate increase should be applied to Canal Place. First, Canal Place argues that, based on Mr. Bees' rebuttal testimony, ATLP has withdrawn the option of applying the proposed emergency rate increase to Canal Place and Children's Hospital from its emergency rate application. (Canal Place Initial Brief at 7). Canal Place contends that the Commission should not unilaterally abrogate the terms of the ATLP-Canal Place 2008 Amendment, as the amendment is reasonable, was negotiated at arm's length, and was determined by Canal Place and ATLP to be economically reasonable and in each party's best interest. Canal Place further argues that it has been paying approximately a 75 percent rate increase to ATLP under the ATLP-Canal Place 2008 Amendment, resulting in additional annual compensation of \$375,000 to ATLP. Canal Place argues that 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, exacerbating the problem intended to be resolved by the requested emergency rate increase.

Canal Place further argues that the Commission's authority to modify a contract under Section 4905.31, Revised Code, is limited to extraordinary circumstances where the applicant has satisfied a burden of the highest order. Canal Place cites to the Sierra-Mobile doctrine to argue that the power to modify existing contracts between a utility and its customers as conferred by Section 4905.31, Revised Code, 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. *In the Matter of the Application of Ohio Power Company to Cancel Certain Special Power Agreements and for Other Relief*, Case No. 75-161-EL-SLF, Opinion and Order (August 4, 1976). Canal Place argues that 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. According to Canal Place, ATLP would have been required to satisfy the burden of proof to show that the May 2001 Agreement adversely affects the public interest by impairing ATLP's ability to continue to render service; that the contract creates an excessive burden on other customers of the company; and that the contract results in unjust discrimination in the amount of rates paid to ATLP. Canal Place argues that there is no support in this record for resorting to this extraordinary power. (Canal Place Initial Brief at 8-9).

In its review of this application, Staff noted that the ATLP-Canal Place 2008 Amendment is a revision to an existing contract that was approved by the Commission in 01-3333. Staff witness Puican testified that the amendment resulted from ATLP's bankruptcy proceeding, which altered the terms of the original agreement. (Staff Ex. 5 at 7). Staff indicated that it has reviewed this alteration of the Commission-approved May

2001 Agreement and has no objection. Staff recommends that the ATLP-Canal Place 2008 Amendment should be approved. (Staff Initial Brief at 8).

Both parties have asserted that the ATLP-Canal Place 2008 Amendment is reasonable and in each party's best interest and recommend approval of such. Thus, the ATLP-Canal Place 2008 Amendment appears to have been negotiated at arm's length. Additionally, no other party has expressed any opposition to the approval of the ATLP-Canal Place 2008 Amendment. Based upon the record before us, we find sufficient evidence to support the ATLP-Canal Place 2008 Amendment. Accordingly, this application should be approved. While we are approving the ATLP-Canal Place 2008 Amendment, we note that the amendment was not properly submitted to the Commission for approval. Nevertheless, we recognize that the ATLP-Canal Place 2008 Amendment was executed under extraordinary circumstances during the pendency of ATLP's bankruptcy proceeding. We, therefore, will give due consideration to the Amendment as a product of the bankruptcy proceeding.

Final Matter - Akron Thermal Cooling

During the hearing, ATLP presented no evidence to support its current charges to ATC, other than it is has an "understanding" with ATC that has not been reduced to writing and, that ATC uses steam that would otherwise be wasted. As noted previously, while many of the contracts entered into by the parties in this proceeding have been filed less than promptly by the parties thereto, we note that ATLP and ATC have not even attempted to reduce their arrangement to writing to be filed with and approved by the Commission. In light of this situation and the statutory mandate outlined above, we direct ATLP to file, within thirty days of the date of this order, an application for approval of the arrangement between ATLP and ATC. Failure to follow this directive may result in Commission action as discussed herein.

We advise ATLP that compliance with Commission requirements is not discretionary. Section 4905.54, Revised Code, demands that every public utility comply with "every order, direction, and requirement" of the Commission. These categories include the requirements for approval of reasonable arrangements under Section 4905.31, Revised Code. In view of the repeated failure of ATLP to follow the Commission's procedures for approval of reasonable arrangements, if ATLP fails hereafter to file an application for approval of an arrangement with a customer for Commission approval, or operates under an arrangement without Commission approval, it may be subject to a forfeiture to the state of not more than one thousand dollars for any such failure. Each day's continuance of the violation will be considered a separate offense, pursuant to Section 4905.54, Revised Code.

FINDINGS OF FACT:

- (1) ATLP is an Ohio limited partnership engaged in the business of providing steam and hot water through pipes or tubing in downtown Akron.
- (2) ATLP is a public utility as defined by Sections 4905.02 and 4905.03(A)(9), Revised Code, and is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.
- (3) On April 10, 2009, ATLP filed an application in 09-315 to modify and apply its tariff for hot water heating to 98 customers in Canal Park.
- (4) On May 18, 2009, ATLP filed an application in 09-414 for authority to issue three promissory long-term notes in the initial principal amounts of \$2,060,000, \$1,350,000, and \$250,000.
- (5) On May 26, 2009, ATLP filed an application in 09-441 for approval of a contract for steam service to Children's Hospital.
- (6) On May 26, 2009, ATLP filed an application in 09-442 for approval of a modification to an existing arrangement for steam service with Canal Place.
- (7) On May 29, 2009, ATLP filed an application in 09-453 for emergency rate relief, requesting an increase in its rates and charges for steam and hot water service provided to 52 steam customers and 96 hot water customers.
- (8) By entry of June 17, 2009, 09-453, 09-442, 09-441, 09-414, and 09-315 were consolidated.
- (9) The June 17, 2009, entry also scheduled a hearing on the applications for July 15, 2009, and directed ATLP to publish notice of the applications in a newspaper of general circulation throughout applicant's service area.
- (10) By entry of July 10, 2009, the motions to intervene filed by the city of Akron, Children's Hospital, Canal Place, Summit County, and Community Hall Foundation, Inc. dba The Akron

Civic Theatre were granted. In addition, the motion to admit Thomas Mullooly to practice *pro hac vice* on behalf of ATLP in this proceeding before the Commission was also granted.

- (11) A hearing in this proceeding was held on July 15 and 20, 2009.

CONCLUSIONS OF LAW:

- (1) ATLP is a public utility and a heating company within the definitions of Sections 4905.02 and 4905.03(A)(9), Revised Code, and is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.
- (2) The Commission has jurisdiction over the subject matter of the company's request for emergency rate relief pursuant to Section 4909.16, Revised Code.
- (3) A public hearing has been held in this matter, and the written notice has been duly published, in accordance with the Commission's directive.

ORDER:

It is, therefore,

ORDERED, That the application of ATLP in Case No. 09-453-HT-AEM for an emergency rate increase authority be denied. It is, further,

ORDERED, That the application of ATLP in Case No. 09-315-HT-ATA be approved. It is, further,

ORDERED, That the application of ATLP in Case No. 09-414-HT-AIS be denied. It is, further,

ORDERED, That the application in Case No. 09-441-HT-AEC be approved. It is, further,

ORDERED, That the application in Case No. 09-442-HC-AEC be approved. It is, further,

ORDERED, That ATLP file, within thirty days of the date of this order, an application for approval of an arrangement with ATC. It is, further,

ORDERED, That a copy of this order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



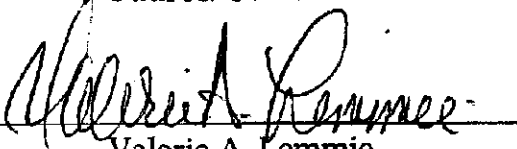
Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

SEF/RH:ct

Entered in the Journal

SEP 02 2000



Renee J. Jenkins
Secretary