IT IS SO ORDERED.

Dated: 11:46 AM February 10 2009

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

In re:	)	
	)	**Chapter 11**
AKRON THERMAL, LIMITED PARTNERSHIP,	)	
	)	**Case No. 07-51884**
	)	
Debtor and Debtor-in-Possession.	)	**Chief Judge Marilyn Shea-Stonum**
	)	
	)	**MEMORANDUM OPINION DENYING THE CITY'S MOTION FOR STAY**
	)	

I. PROCEDURAL BACKGROUND

On January 26, 2009, the Court issued an Opinion Re: Confirmation of Modified Second Amended Plan of Reorganization ("Confirmation Opinion") [docket # 567] confirming Debtor's Plan. On the same day, the Court issued a separate Entry of Judgment with respect to the Confirmation Opinion and related matters ("Confirmation Judgment") [docket #568]. [1] The

[1] Unless otherwise specified, capitalized terms and phrases used herein have the meanings assigned to them

procedural history of this case is lengthy and has been adequately summarized in the Confirmation Opinion and in the parties briefs. (*See, e.g.*, Memorandum (defined *infra*) at pp. 1-4). Thus it will not be repeated here.

The City has filed a Motion for Stay Pending Appeal with the District Court and Request for Expedited Hearing ("Motion for Stay") [docket #576] seeking to preclude the Debtor from implementing the Plan. During a telephonic status conference on February 5, 2009, this Court scheduled an expedited hearing on the Motion for Stay ("Stay Hearing") for February 6, 2009. Prior to the Stay Hearing, the Court reviewed (1) the Motion for Stay and supporting brief; (2) Response of the State of Ohio to the Motion for Stay ("Response") [docket #577]; (3) Objection of the UCC to the Motion For Stay ("Objection")[docket #578]; and (4) Memorandum of Debtor in Opposition to the City's Motion for Stay ("Memorandum") and Affidavit of Jeffrey P. Bees [docket #579] in support.

During the Stay Hearing, the Court heard the testimony of Jeffery Bees and the arguments of counsel for the City in support of the issuance of the stay and from counsel for the Debtor, the UCC, and various State of Ohio agencies in opposition to any stay pending appeal. For the reasons set forth below, the Motion for Stay will be denied.

II. DISCUSSION

A. Fed. R. Bankr. P. 8005

The City's Motion for Stay is governed by Fed. R. Bankr. P. 8005, which states in pertinent part as follows:

> A motion for stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief

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in the Plan or Confirmation Opinion. In addition, any term used in this Memorandum Opinion that is not defined in the Plan or the Confirmation Opinion, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable

> pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court…reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

Whether to grant a motion for a stay pending appeal is within the court's discretion. *In re Level Propane Gases, Inc.*, 304 B.R. 775, 777 (Bankr. N.D. Ohio 2004). In determining whether a stay should be granted, the Court considers the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction. *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)(citing *Frisch's Restaurant, Inc. v. Shoney's Inc*., 759 F.2d 1261, 1263 (6th Cir. 1985)); *Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean* (*In re Delorean Motor Co.)*, 755 F.2d 1223, 1228 (6th Cir. 1985). These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Griepentrog*, 945 F.2d at 153. "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id.; Delorean*, 755 F.2d at 1229. The City as the movant bears the burden of proving each factor by a preponderance of the evidence. *Level Propane Gases*, 304 B.R. at 777.

In *Griepentrog,* the Sixth Circuit Court of Appeals set forth the following standard for the balancing test:

> [A] motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action and issued judgment, usually following completion of discovery. As a result, a movant seeking a stay pending review on

> the merits of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Presumably, there is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit of a complete record that can be reviewed by this court when considering the motion for a stay.
>
> To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [movant] will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."
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> ….
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> Of course, in order for a reviewing court to adequately consider these four factors, the movant must address each factor, regardless of its relative strength, ***providing specific facts and affidavits supporting assertions that these factors exist***. This, in turn, develops an adequate record from which we can determine the merits of the motion.

Griepentrog, 945 F.2d. at 153-154 (Emphasis added) (internal citations omitted).

While these factors are to be balanced, *Griepentrog* does not require the Court to balance each of the four factors equally. *Webb Mtn, LLC*, 2007 WL 4126016, *3 (Bankr. E.D. Tenn. Nov. 20, 2007); *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). *Griepentrog* provides clear direction to both counsel and courts in addressing requested stays pending appeal. In the 18 years since *Griepentrog* was decided, there has not been a hint that it is not the controlling case on this issue in the Sixth Circuit.

B. Likelihood of Success on the Merits

In order for the court to grant a motion for stay,

> [T]he [movant] must nevertheless offer something more than an assertion that it expects to succeed on the merits in order to prove to the court the existence of serious questions as to the merits of the case and a reasonable possibility that it will, in fact, succeed on the merits of its appeal in order to justify granting the Motion For Stay.

Webb Mtn, LLC, 2007 WL 4126016 at *3. The movant's assertions must be backed up by substantial proof and not be speculative or theoretical. *Webb Mtn, LLC*, 2007 WL at *3; *Griepentrog*, 945 F.2d at 154. Here, the City has offered little concerning its likelihood of success on appeal other than the hope that a reviewing court will view the law and evidence differently than this Court did.

This Court acknowledges that it is not easy for a party to ask a trial court to conclude that its opinions are likely to be reversed. That said, this Court recognizes the need to consider with as much objectivity as it can muster the prospect that it has committed reversible error. In doing so, at a minimum, the Court should have the assistance of the movant in identifying issues that the movant views as likely to be reversed. Here the City points to five matters that it labels serious and substantial.

First is this Court's finding that there is no language in the Lease requiring the lessee to be current with its obligations under the contract at the time that it gave notice of its exercise of the option to extend the Lease for the one ten-year option period. The City has argued that this Court should fill that contractual void. Applying the parties' choice of law, Ohio law, there is long-standing authority that, when sophisticated parties have included an integration clause in their contract, courts should not supply terms that the parties did not. *Bd. of Trustees of Union Tp. v. Planned Dev. Co. of Ohio*, 2000 WL 1818540 * 7 (Ohio App. 12th Dist. Dec. 11, 2000); *Truetries Svc. Co. v. Hager*, 691 N.E.2d 1112, 1115 (Ohio Ct. App. 8th Dist. 1997); *Aultman*

Hosp. Ass'n v. Cmty. Mut. Ins. Co., 46 Ohio St. 3d 51, 53-4 (Ohio 1989). The single, unreported decision from an intermediate Ohio appellate court on which the City relies, *Horn v. LaPille*, 984 WL 6969 (Ohio App. 1 Dist. 1984), has been fully addressed in the Oral Ruling of January 31, 2008. On the facts of this case, the likelihood of reversal on this question is not substantial.

Second is the Court's finding that the City's attempt to terminate the Lease prior to the Petition Date of the case was not effective any earlier than June 19, 2007, after the Petition date, and that this Court erred in not concluding that the notice of termination should be allowed to operate according to its terms in the post petition time frame. The Debtor has consistently argued that the Lease required that the City give the lessee 30 days notice of any termination of the Lease by the City. This Court did not adopt that position in its Oral Decision of January 31, 2008, and thus the Court would expect that there would be a cross-appeal on this question.

The Court did find that the City's June 12, 2007, notice did not operate to terminate the Lease prior to the Petition Date. The question of precisely what breaches of the Lease existed on June 12, 2007, now has been shown to be both a more complex and a monetarily less extensive issue than the City perceived in June 2007. Only the nonpayment of rent and franchise fees constituted breaches of the Lease. In seeking to reorganize under Chapter 11, to assume the Lease and to cure all monetary breaches with interest under the Lease, and now having the capacity to do so pursuant to the terms of the Plan, the Debtor has acted to make the City whole with respect to those monetary breaches. Since the Petition Date, the Debtor has worked diligently to improve the condition of the Leased Premises. Against that background, the Debtor cites to the examination of Ohio law, its abhorrence of lease forfeiture, and its recognition of the ability of courts to provide relief from forfeiture set forth in *In re 1345Main Partner, Ltd.*, 215 B.R. 536, 541 (Bankr. S.D. Ohio 1997) (citing *In re Fry Bros. Co.*, 52 B.R. 169 (Bankr. S.D.

Ohio 1985), relying in turn upon *Peppe v. Knoepp*, 103 Ohio App. 223, 140 N.E.2d 26 (1956)). As the Court learned in a hearing on a motion for preliminary injunction in an adversary proceeding related to this case, *ATLP v. The Community Fall Foundation, Inc*., Adv. Pro. No. 07-5131, the City was assigning or at least purporting to assign portions of its payment rights to other entities.

In short, this is an issue that can be viewed through a variety of lenses. It is a serious issue. This Court cannot predict whether the City would succeed in obtaining a reversal of this Court's holdings on appeal. Following *Griepentrog*, this Court does assign some weight to this argument.

Third, the City identifies this Court's disposition of the City's objections to confirmation stemming from the NOVs that have been served on both the Debtor and the City by the USEPA. Compliance with environmental laws is a serious matter. As noted in the Confirmation Opinion, this Court's jurisdiction to consider the open issues between the Debtor and the USEPA is simply limited to consideration of the feasibility of the Plan and whether the Debtor's current operation of Boiler 32 when considered in relation to federal environmental law gives rise to a current breach of the Lease.

Notwithstanding that this Court's determination of these two issues cannot address the current controversy between the Debtor and the USEPA, this Court heard the testimony of both the Debtor's and the City's experts addressing both the technical aspects of whether Boiler 32 should be considered a new source or a "grandfathered" facility and the competing interpretations of the Clean Air Act on this issue. This Court found the Debtor's experts to be far more persuasive and can only predict that, should the open issues between the Debtor and the USEPA be litigated, the court with jurisdiction to actually determine those issues likewise would

be persuaded by the Debtor's experts and environmental counsel. Long prior to any such litigation, this Court anticipates that the USEPA will resolve these open issues with the Debtor, taking into account the minor differences (92% vs. 90%) that separate them on certain issues and the impossibility of any operator of the Leased Premises being able to afford the equipment that the City views as the best available technology.

That the Debtor has been engaged in ongoing and partially successful discussions with the USEPA is plain. The sense and sensibility of the USEPA in these negotiations already has been evinced in its settlement of its alleged administrative claim for an amount that now is less than 1/500th of its opening demand. In considering whether the City's view of the environmental issues weighs in favor of issuing a stay pending appeal, this Court concludes that the City's record evidence on these issues will not cause a reviewing court to reverse the Confirmation Judgment.

The City identifies as its fourth issue the loss of a purported guaranty by TVII of the Reorganized Debtor's performance under the Lease. The City completely fails to develop this issue. That being the case, this Court is not in a position to further address the matter in this procedural context. *See Griepentrog*, 945 F.2d at 153-54.

The final issue identified by the City is based upon a contorted reading of § 365(d)(4)(A). The City confuses the deadline for a debtor to seek authority to assume a lease with the time that a court may reasonably take in the circumstances of a particular case to determine the issue. The City is correct that this Court was unwilling to tolerate delay in the Debtor's initial action in considering whether it would and could assume the Lease. The City's argument simply ignores the discretion that bankruptcy courts must have in managing their dockets. The deadline in § 365(d)(4)(A) is not a deadline for the court's determination of this issue. *Compare* 11 U.S.C. §

362(e). This issue does not add any weight to the City's case for a stay pending appeal.

C. Irreparable Injury

In evaluating the harm that will occur, depending upon whether or not the stay is granted, the Sixth Circuit has stated the following in *Griepentrog*:

> In evaluating the harm that will occur depending upon whether or not the stay is granted, we generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. In evaluating the degree of injury, it is important to remember that [t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again.

Griepentrog, 945 F.2d at 154 (quoting *Sampson v. Murray*, 94 S. Ct. 937, 953(1974)).

Despite the explicit direction that the City could have taken from this controlling Six Circuit authority, the City presented no evidence at the Stay Hearing. Rather, in a case where the Court heard evidence on 16 different days, the City asserted that evidence of irreparable harm to it could be found in the evidentiary record of the case. In making this assertion, the City did not bother to direct this Court's attention to any particular evidence that had been admitted previously. Thus, the City not only failed to carry its burden on this element, it made no effort to do so.

The Court's review of the record that the City has neglected in seeking a stay pending appeal discloses the following: (1) when the Plan becomes effective, the City will receive the largest payment made to any claimant in the case, i.e., more than $2.5 million; (2) that payment

will be made as soon as any other payment to be made pursuant to the Plan and substantially sooner than payments to most other claimants; (3) the City will have its rights as a landlord under the Lease that the Reorganized Debtor will have assumed and thus will receive ongoing payments due under that Lease, just as it has received Lease payments since this case was filed; and (4) by not later than August 2017, i.e., the end of the second and final term of the Lease between the City and the Reorganized Debtor, the Reorganized Debtor either will exercise its purchase option at a price of $5 million or will no longer have the right to operate the Leased Facilities. None of this remotely suggests irreparable harm.[2]

During the Stay Hearing, the City repeatedly argued that it would be harmed if it were left with an operator with whom it is dissatisfied and which had not met its obligations under the Lease. The prepetition payment breaches will be cured under the Plan. The Court has analyzed the City's claims of ongoing maintenance breaches and found that the City's arguments ignore the evidence that measure its entitlement on these matters. The environmental issues are addressed in the next section. The Court continues to be concerned that the City apparently prefers to contemplate improbable "worse case scenarios" rather than to participate in the Debtor's efforts to resolve those issues. Those efforts have brought a level of success thus far and a stay would only impede the Debtor's ability to resolve the NOVs issued by the USEPA.

The City's dissatisfaction simply does not rise to the level of irreparable harm as defined by *Griepentrog*. It is ironic that, in the same breath, the City contends that the Debtor will not be harmed by the issuance of a stay because it is successfully and profitably operating the business and at the same time the City continues to reject a course of action that would promote continued improvement of the Leased Premises on which so many important Akron customers depend.

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[2] Record references are not being set forth for these various items. If the City continues to seek a stay pending appeal from another court, this Court is depending upon parties opposing such relief to provide such record references to the appellate court.

The City contends that the Court has compromised the City's ability to effectively appeal the assumption issues by addressing those issues in the context of confirmation of the Plan. Specifically, the City argues that those appealable issues could be rendered equitably moot with the substantial consummation of the Debtor's Plan and that this alone constitutes irreparable injury. However, the fact that an appeal may become moot if a stay is not granted does not, in itself, demonstrate or establish irreparable harm. *In re Baldwin United Corp.*, 45 B.R. 385, 386 (Bankr. S.D. Ohio 1984); *see also In re Public Service Co. of New Hampshire*, 116 B.R. 347, 350 (Bankr. D.N.H. 1990) (possible mootness not enough to show sufficient injury to appellant to warrant the stay); *In re Dakota Rail*, 111 B.R. 818, 821 (Bankr. D. Minn. 1990); *In re Charter Co*., 72 B.R. 70, 72 (Bankr. M.D. Fla. 1987); *In re Great Barrington Fair and Amusement, Inc*. 53 B.R. 237, 240 (Bankr. D. Mass 1985).

The possibility that the City's appeal might be deemed moot, though not rising to the status of irreparable harm, is a factor that this Court weighs in accordance with *Griepentrog*. That risk of mootness is counterbalanced by the harm that would result to the State of Ohio and other unsecured creditors who would have no idea when the Effective Date, from which their rights under the Plan are computed, would occur.

D. Harm To Others

The City contends in its Motion for Stay that the Debtor will not be harmed if a stay is granted since a stay would simply preserve the status quo pending appeal. In effect, the City argues that delay is the only harm that would be imposed upon the Debtor in the event of a stay. The evidence is completely at odds with the City's assertion.

First, it is likely that the issuance of a stay would derail the Debtor's settlement negotiations with the USEPA. Not only would a stay upset the previous settlement with the

USEPA, but would also undermine the ability of the Debtor to resolve the injunctive claims of the USEPA, thereby endangering consummation of the Plan at the conclusion of an appeal.

The agreement regarding the USEPA's penalty claims is memorialized in a Stipulation and Agreed Order Resolving Objection of USEPA entered October 9, 2008 ("USEPA Agreed Order")[docket #536]. Under the USEPA Agreed Order, the USEPA is granted, *inter alia*, an administrative claim of $25,000 for penalty claims arising from the Petition Date through the Effective Date. However, with respect to the administrative claim, the resolution is expressly conditioned upon the Effective Date occurring by a date certain. Thus far, the USEPA has indicated it will agree to move the deadline for the Effective Date to not later than March 31, 2009. Issuance of a stay would make it impossible to achieve a March 31, 2009, Effective Date. Absent further approval to extend the deadline, the resolution of the administrative claim could be voided, and the USEPA could assert an administrative claim of $32,500 per day from June 18, 2007, forward.

The USEPA Agreed Order does not resolve the USEPA's demand that the Debtor install new air pollution control measures. Debtor has strongly disputed the USEPA's claims that additional control measures are required on Boiler 32. In an effort to reach a compromise and avoid litigation, Debtor has proposed the installation of certain additional control measures. As the Debtor continues its negotiations with the USEPA, a stay would undercut the Debtor's ability to commit to such equipment installation that could resolve this issue.

Next, the issuance of a stay would hinder the Debtor's ability to negotiate terms with its large customers. During the Stay Hearing, Mr. Bees testified that the Debtor has attempted to pursue discussions with three of its largest customers over the past several months. However, in each instance, the customers were reluctant to engage in substantive discussions regarding long

term commitments until it was clear whether or not the Debtor would be the future operator. None of those discussions have concluded. Thus, if a stay is issued such that the Debtor is unable to implement the Plan, the Debtor will have to continue in this awkward position. Neither the City's nor the Reorganized Debtor's interests would be served should any of those customers pursue an alternate supplier, yet the City is deaf to this compelling argument.

Finally, both the State of Ohio and the UCC in their respective Response and Objection have set forth compelling arguments as to how they would suffer harm as a result of a stay. A stay would further extend the timing of payments to unsecured creditors under the Plan, payments which already are two years removed to creditors who are suffering a 90% loss on their claims. Asking those creditors to wait the duration of an appeal period would constitute substantial prejudice.[3]

The State of Ohio would be damaged immediately if a stay is issued because the initial $150,000 that the Debtor would pay at the Effective Date toward the State of Ohio priority claims pursuant to Section 5.5 of the Plan would not be paid until some uncertain date into the future. This initial payment was the result of negotiations between the Debtor and the State of Ohio which ultimately resulted in the agreement by the State of Ohio to modify what might have been the absolute priority treatment of various state agencies with claims that were or might have been argued to have various priorities under 11 U.S.C. § 507. Thus, granting a stay would deny the State of Ohio the benefit of its agreement which was reached in a spirit of accommodating other claimants junior to it, including those claims of the City for prepetition water and sewer charges. Further, since Section 5.5 of the Plan provides for the Debtor to execute a promissory

[3] As the UCC has noted during this case, in the spring of 2007, the City was in discussion with an alternate operator for the Leased Premises. That operator proposed to pay the City reportedly $5 million. The UCC's efforts to negotiate with the City over a more equitable distribution of such funds to the myriad of creditors who were not paid prior to the Petition Date were rebuffed. The City has been steadfast in its rejection of basic bankruptcy concepts of equality of distribution.

note in favor of the State of Ohio with interest commencing with the Effective Date, the accrual of interest will be delayed if a stay is granted.

The City has failed to demonstrate an absence of harm to other interested parties.

E. The Public Interest

The proper standing in evaluating this factor is "whether the public interest will be served in granting the motion [for stay], not harmed…." *Webb Mtn, LLC*, 2007 WL 4126016 at * 5. The Court does not find any way in which a stay in this matter serves the public interest. To the contrary, implementation of the Plan will enhance the Debtor's ability to provide reliable utility service to three hospitals, the University, downtown commercial and governmental offices,[4] and various residents of the City. Because consummation of the Plan will make the taxpayers whole on the Lease, granting a stay would harm the public interest because it would jeopardize the City's recovery on behalf of the taxpayers of the amounts due and owing from the Debtor for its use and occupancy of the Leased Premises.

F. Supersedeas Bond

Although this Court is not granting the requested stay, the City's silence on a supersedeas bond is noted. The need to protect those who are put at risk by the delay inherent in an appeal is analyzed in *ACC Bondholder Group v. Adelphia Commc'ns Corp*. (*In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 346 (S.D.N.Y. 2007). In *Adelphia*, the bond issue was described as follows in pertinent part:

> Because a supersedeas bond is designed to protect the [non-moving party], ***the party seeking a stay without bond has the burden of providing specific reasons why the court should depart from the standard requirement of granting a stay*** only after posting of a supersedeas bond in the full amount of the judgment.

[4] Although this Court is in a building at the center of downtown Akron, that building does not receive utility services from the Debtor.

In re Adelphia, 361 B.R. at 350-51. (Emphasis added)(footnotes omitted). The City, as the party seeking a stay without bond, certainly did not meet its burden of providing any reasons why this Court should deviate from the standard requirement of posting a supersedeas bond prior to granting the stay. This is yet another example of the City's total lack of evidentiary support for its Motion for Stay.

III. CONCLUSION

This Court has considered seriously the four factors that are determinative of whether the Confirmation Judgment should be stayed. Where appropriate, it has been noted that certain of the City's arguments established some weight on the side of granting a stay pending appeal. That said, the considerations weighing on the side of allowing the Debtor to proceed with implementation of the Plan are far heavier. The City simply has not been able to meet its burden of proof on its Motion for Stay.

Based on the foregoing, the City's Motion for Stay is **HEREBY DENIED**. The Court will make a separate entry of judgment that is consistent with this Memorandum Opinion.