FILE

BEFORE THE
OHIO POWER SITING BOARD

In the Matter of the Application of American Municipal Power-Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for an Electric Generation Station and Related Facilities in Meigs County, Ohio.	))))))	**Case No. 06-1358-EL-BGN**

AMP-OHIO'S MEMORANDUM CONTRA ELISA YOUNG'S PETITION TO INTERVENE

On October 29, 2007, Elisa Young ("Young") filed a Petition to Intervene in this proceeding. American Municipal Power-Ohio, Inc. ("AMP-Ohio") requests that the Ohio Power Siting Board ("Board" or "OPSB") deny Young's Petition for the following reasons. First, the Petition was not filed in a timely manner as required by Ohio Revised Code ("R.C.") §4906.08(A)(3). Second, no "extraordinary circumstances" have been articulated by Young that satisfy the mandates of R.C. §4906.08(B) to allow late intervention. Third, Young failed to demonstrate good cause as required by both R.C. §4906.08(A)(3) and R.C. §4906.08(B) for persons seeking to intervene in OPSB proceedings.

I. Factual Background

On May 4, 2007, AMP-Ohio filed an application for a Certificate of Environmental Compatibility and Public Need ("Application") with the OPSB to construct a nine hundred sixty megawatt electric generation facility in Meigs County, Ohio, known as the American Municipal Power Generating Station ("AMPGS"). The AMPGS is being proposed to address the current energy needs of AMP-Ohio's municipal members located throughout Ohio and surrounding states.

On August 2, 2007, the assigned Administrative Law Judge issued an Entry setting the effective date of the filing of the Application as August 10, 2007. The Entry also set a non-adjudicatory hearing to be held on November 1, 2007 and an adjudicatory hearing to be held on November 8, 2007. In compliance with O.A.C. §4906-5-09 and in response to the Entry declaring the effective date of filing as August 10, 2007, AMP-Ohio published a notice in *The Daily Sentinel*, in Meigs County, Ohio, on August 24, 2007, notifying interested parties of the AMPGS Application. Additionally, on October 22, 2007, AMP-Ohio published a second notice of the AMPGS Application in *The Daily Sentinel*.

On October 29, 2007, three days before the scheduled non-adjudicatory hearing and more than two months after the official notice of AMP-Ohio's Application, Young filed a petition to intervene into the AMPGS Application matter ("Petition"). On that day, Young also filed a Motion to Extend Time/Postpone Testimony for Sixty Days ("Sixty Day Extension").

II. Legal Framework

Per R.C. §4906.04, an entity seeking to build a jurisdictional electric generating facility must obtain a Certificate of Environmental Compatibility and Need ("Certificate") from the OPSB. By statute, the OPSB must fix a date for a public hearing concerning any application for a Certificate no less than sixty days and no more than ninety days after the receipt of such application. R.C. §4906.07(A). Once an application for a Certificate is filed, an applicant must give public notice to interested persons by publishing a summary of the application in a newspaper of general circulation in the area for the project. R.C. §4906.06(C).

Only those persons satisfying the statutory criteria set forth in R.C. §4906.08 may participate as parties in OPSB proceedings. There are four qualifying groups of persons. First, the applicant is a party as of right to the proceeding. R.C. §4906.08(A)(1). Second, a

municipality or other individual that is entitled to receive service and specific notice of the filing of an application is entitled to intervene if a notice of intervention is filed within thirty days of the date upon which the application was served. R.C. §4906.08(A)(2). Third, an interested person may become a party if the person has petitioned the board for leave to intervene within thirty days after the date upon which notice of the filing of the application has been published in a newspaper of general circulation and has demonstrated good cause for intervention. R.C. §4906.08(A)(3). Fourth, the OPSB may grant a petition for leave to intervene filed by a person that failed to file a timely notice of intervention or petition for leave to intervene, but only "in extraordinary circumstances for good cause shown." R.C. §4906.08(B).

For intervention pursuant to R.C. §4906.08(A)(3) or R.C. §4906.08(B), there also must be a showing of "good cause" sufficient to justify intervention. O.A.C. §4906-7-04(B) articulates the factors that the OPSB shall consider when determining whether good cause exists. Those factors are set forth as:

(a) The nature and extent of the person's interest.

(b) The extent to which the person's interest is represented by existing parties.

(c) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding.

(d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

In addition, for untimely intervention pursuant to R.C. §4906.08(B), there must be an additional showing of "extraordinary circumstances" that justify the granting of the petition for intervention. O.A.C. §4906-7-04(C)(1).

In judging whether good cause exists and what constitutes extraordinary circumstances, it is important to distinguish the meaning of each term. Good cause is the required showing, as

defined in rule, which a party must provide to demonstrate that intervention is necessary. O.A.C. §4906-7-04(B). Extraordinary circumstances are the reasons explaining why a person filed a petition outside the thirty day statutory timeframe for seeking intervention (i.e., why the petition is untimely).

III. Argument

A. Young Has Failed to Meet the Required Criteria Set Forth in R.C. §4906.08(A)(3) for Intervention.

As articulated above, in order to gain intervention pursuant to R.C. §4906.08(A)(3), a person must meet two criteria: (1) the person must file a petition for intervention within thirty days after the date of publication of the notice as set forth in R.C. §4906.06(C) and (2) the person must articulate "good cause" using the criteria set forth in O.A.C. §4906-7-04(B). In this case, Young has failed to meet both requirements and cannot be granted intervention thereunder.

1. *The Petition for Intervention Is Untimely.*

Young should not be permitted to intervene because she did not file a petition to intervene within the statutory timeframe mandated for filing such a petition. R.C. §4906.06(C) requires an applicant to publish a notice providing a summary of an application in a newspaper of general circulation within fifteen days of the date an application is filed. In this matter, the OPSB set the effective date of filing of the AMPGS Application as August 10, 2007. On August 24, 2007, AMP-Ohio published notice providing a summary of the Application in *The Daily Sentinal* (i.e. fourteen days after filing of the Application).

Thus, all persons desiring to intervene in the AMPGS Application, pursuant to R.C. §4906.08(A)(3), had a statutory duty to file a petition for leave to intervene no later than September 24, 2007. Young did not file her Petition to Intervene until October 29, 2007—more than a month after the statutory deadline required for a filing pursuant to R.C. §4906.08(A)(3).

In State of West Virginia v. State of Ohio, 1985 WL 4158 (Ohio App. 10 Dist., Dec. 3, 1985) (hereinafter "State of Ohio"), a similar legal issue was determined. Attachment 1. In that matter, West Virginia filed a Motion to Intervene one day before an administrative hearing on a hazardous waste permit, purportedly relying on an administrative rule allowing such intervention. The underlying statute stated:

> Any other person who would be aggrieved or adversely affected by the proposed facility and who files a petition to intervene in the adjudication hearing not later than 30 days after the date of publication of the notice required in division (C)(3)(b) of this section, if the petition is granted by the board for good cause shown. R.C. §3734.05(C)(4).

An applicable administrative rule, O.A.C. §3734-1-12, permitted intervention after the thirty day deadline, with a showing of extraordinary circumstances. Id. at *4-5. The Court ruled that the statutory language of R.C. §3734.05 was mandatory and that the administrative rule allowing intervention after the thirty day deadline extended beyond statutory authority. Id. As such, the Court determined that the statute must be applied strictly to only allow intervention within the thirty day deadline, and that adherence to the applicable regulation, O.A.C. §3734-1-12, "appears to extend the board's authority for allowing intervention beyond the statute." Id. at *4.

Similarly, the thirty day filing requirement of R.C. 4906.08(A)(3) is mandatory. Young clearly did not file to intervene within the thirty days set forth in statute. As a result, Young's Petition is untimely and should be denied.

2. *The Petition for Intervention Fails to Demonstrate Good Cause.*

R.C. §4906.08(A)(3) requires that a petition to intervene may only be granted "for good cause shown." The standard for determining whether good cause exists is set forth in O.A.C.

§4906-7-04(B)(1)(a-d), which lists the following factors that the OPSB shall consider when determining whether a person has good cause to intervene:

(a) The nature and extent of the person's interest.

(b) The extent to which the person's interest is represented by existing parties.

(c) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding.

(d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

a. Nature and Extent of Interest

A recent order by the OPSB defined the elements necessary for a demonstration of nature and extent of interest. *See* In The Matter of Columbus Southern Power and Ohio Power Company for a Certificate of Environmental Compatibility and Public Need, OPSB Case No. 06-0030-EL-BGN (hereinafter "Columbus Southern Power"), Attachment 2. In Columbus Southern Power, OPSB held that "the purpose of this Board proceeding is to evaluate the likely environmental effects of the construction, operation and maintenance of the proposed...project on the immediate surrounding community." Id. at *4. OPSB also stated that the Board would consider noise levels, aesthetics, health and safety of the surrounding community. Id.

In the Petition, Young includes three sentences addressing her "substantial interest" in the AMPGS Application; however, these conclusory assertions are not fact-specific to AMPGS. While Young may live in the proximity of AMPGS, it is impossible for OPSB to ascertain the nature and extent of Young's interest. Specifically, Young fails to provide any specific or concrete interest in the AMPGS Application, beyond a general statement that she lives "within 10-15 miles of the proposed AMP-Ohio plant" and that her family's property ownership "dates back to the Revolutionary War." Young Petition at 1.(a), p. 1. Further, Young fails to provide

any detailed interest as to any of the factors articulated in Columbus Southern Power, such as noise, aesthetics, health and safety of the surrounding community.

Young's general statements, absent concrete and specific factual information, fail to satisfy the rule's requirement to articulate and demonstrate the nature and extent of interest factor. As such, Young has failed to adequately address this factor.

b. Extent Interest is Represented by Existing Parties

In an effort to meet this regulatory prong, Young makes a vague and conclusory statement that "since no other party lives in such close proximity to the proposed plant, no party can have an interest that is close enough to Ms. Young's interest to justify consolidating her position with other intervenors." Young Petition at 2.(b), p. 2. Young also asserts that "no other parties will be impacted as directly by the 'noise levels, aesthetics, health and safety." Young Petition at 2.(b), p. 2.

Young's vague, conclusory references to her proximity to the AMPGS project and her desire not to have her position consolidated with the position of other intervenors fail to explain how her interests are not adequately represented by the existing parties (which do not include any other intervenors). Young does not even provide a hint as to how or why her interests are not already adequately represented by AMP-Ohio and by the OPSB Staff as required in concert with Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio (1982) 69 Ohio St.2d 559, 562 ("Intervenor...must make a compelling showing that the party already participating can not or will not adequately represent the prospective intervenor's interest"). Attachment 3.

Based on the lack of detail provided, Young has not met her burden to demonstrate that her interests are not represented by the existing parties.

c. Contribution to a Just and Expeditious Resolution

There are two distinct issues contained in this factor: (1) contribution to a just resolution and (2) contribution to an expeditious resolution. With respect to contribution to a just resolution, Young asserts that she is directly impacted and that, as such, no just resolution can occur without her participation. Young Petition at 3.(c), p. 2. However, Young fails to provide any explanation as to how and to what extent she is directly impacted. For instance, she fails to explain how her health, safety, local aesthetics or quiet enjoyment will be impacted negatively by AMPGS. Thus, the Board cannot and should not ascertain whether or not Young is required for a just resolution.

Second, Young completely fails to address how she will contribute to an expeditious resolution. In fact, her companion pleading demonstrates just the opposite. On the same date that Young's Petition was filed, Young also filed a Sixty Day Extension requesting that the Board postpone the hearing and/or testimony for the hearing for two months. Obviously, Young does not seek to expeditiously resolve this matter.

Young fails to demonstrate that her intervention will result in a just resolution of this matter. Similarly, Young fails to demonstrate that her intervention will result in an expeditious resolution of this matter. As such, Young has failed to meet her required burden.

d. Potential for Undue Delay/Unjust Prejudice to Existing Party

This factor also includes two elements: (1) potential for undue delay and (2) unjust prejudice to an existing party. Again, Young fails to explain or demonstrate either element. First, Young fails to articulate any facts to demonstrate that her intervention will not cause delay. As explained above, it has already been demonstrated that Young intends to cause delay. She filed a Sixty Day Extension concurrent with her Petition. She has established a public record,

through speeches, testimony, published quotes and You Tube postings, which clearly demonstrates that her goal is to delay or stop AMPGS. *See*, for example, Nine Coal Plants Within Ten Miles, Parts I-IV, posted on You Tube, April 2007. In addition, she has clearly admitted that she has known about and has had dialog with OPSB about AMPGS for two years. Young Petition at 2.(b) and Footnote #5, p. 2.

Given that knowledge, she could have easily filed a petition for intervention months ago, but did not do so. Instead, she waited until after the statutory and regulatory deadlines for filing closed and then attempted to intervene and postpone the hearing. Despite being *pro se*, Young states she has "participated in many proceedings in the number power plants". Therefore, Young must be charged with knowledge of the law and regulations in this area; thus, one must assume that her Petition was filed late intentionally. Young Petition at 4.(b), p. 3.

Second, Young has failed to articulate clear and persuasive reasons why her intervention would not prejudice AMP-Ohio. In fact, Young has completely failed to recognize that her intervention at such a late juncture would clearly prejudice AMP-Ohio. Despite her advanced notice of this project and this proceeding, Young waited to file for intervention until mere days before the hearing. Such late intervention, if granted, puts AMP-Ohio at an unfair and unjust disadvantage. AMP-Ohio will be subjected to compressed discovery and must defend against a significant number of irrelevant, yet time consuming, issues.

Simply put, Young has failed to articulate persuasive reasons, or any reasons, that demonstrate she has "good cause" to invervene into this matter. As such, OPSB should deny Young's Petition.

B. Young Has Failed to Allege or Meet the Required Criteria Set Forth in R.C. §4906.08(B) for Intervention.

1. ***Young Did Not Request Intervention Pursuant to R.C. §4906.08(B).***

As set forth above, persons may also seek to untimely intervene pursuant to R.C. §4906.08(B). In the instant matter, Young has not filed a Petition pursuant to R.C. §4906.08(B). Therefore, this Board need not consider whether or not Young is entitled to intervention pursuant to this statutory authority.

2. ***The Petition for Intervention Fails to Follow Applicable Law and Regulation.***

Young fails to acknowledge or articulate the statutory and regulatory requirements to show both good cause and extraordinary circumstances for her late filing. R.C. §4906.08(B) and O.A.C. §4906-7-04(C). Young does not make any mention whatsoever of "extraordinary circumstances." To the extent Young has attempted to demonstrate such circumstances, her petition fails as explained below in III.B.4.

3. ***The Petition for Intervention Fails to Demonstrate Good Cause.***

Identical to the requirements of R.C. §4906.08(A)(3), R.C. §4906.08(B) also requires that potential intervenors demonstrate the requisite showing of "good cause" before intervention shall be granted. As set forth in III.A.2. above, Young has failed to demonstrate "good cause" utilizing the factors set forth in O.A.C. §4906-7-04(B). As such, any claim to intervention pursuant to R.C. §4906.08(B) must, likewise, be denied.

4. ***The Petition for Intervention Fails to Articulate any Extraordinary Circumstances.***

Even assuming that Young had sought intervention pursuant to R.C. §4906.08(B) and had demonstrated good cause necessary for such intervention, Young still has failed to make any showing of "extraordinary circumstances" justifying the grant of an untimely Petition as explicitly required by R.C. §4906.08(B) and as articulated by O.A.C. §4906-7-04(C).

R.C. §4906.08(B) permits intervention for parties that missed the thirty day deadline under R.C. §4906.08(A)(3), only "in extraordinary circumstances for good cause shown." In concert with the statute, O.A.C §4906-7-04(C) requires:

> (a)ny petition filed under this paragraph must contain, in addition to the information set forth in paragraph O.A.C §4906-7-04 (A)(2) of this rule, a statement of good cause for failing to timely file the notice or petition and shall be granted only upon a finding that, (1) Extraordinary circumstances justify the granting of the petition.

O.A.C. §4906-7-04(C) (emphasis added).

Young articulates two reasons for her late filing: (1) Young lives three hours from Columbus, and she does not have internet access and (2) Young was unable to overnight the pleading on time because the copy store, forty minutes from her home, is only open to 11p.m., and she works until 11 p.m. Young Motion to Request Extension of Time of Elisa Young, filed October 29, 2007.

While Young's assertions may be factually correct, they cannot and do no serve as extraordinary circumstances that justify the late filing for a number of reasons. First, Young has been aware of AMPGS project for more than two years and the filing of the Application for more than five months. Young Petition at 2.(b) and Footnote #5, p. 2. Despite her inquiry and advanced notice, Young still waited until just three days before the non-adjudicatory hearing to file her Petition.

Second, Young is not a novice to proceedings before the Board. For example, Young presented oral testimony during the non-adjudicatory hearing for American Electric Power's Great Bend IGCC Project. *See*, December 12, 2006 Public Hearing Transcript, pp. 40–50 (docketed December 27, 2006), OPSB Case No. 06-0030-EL-BGN. Young cannot now claim that she was unaware of the existence of deadlines and specific rules and procedures for

presentation of testimony and intervention before the Board, and in fact Young claims in her Petition that she is "familiar with the proceedings before bodies like the OPSB" and has "participated in many proceedings in [sic] the numerous power plants." Young Petition at 4.(b), p. 3. Young's self-proclaimed familiarity with Board proceedings surely includes knowledge of the existence of deadlines, thus making circumstances surrounding her untimely filing far from extraordinary.

Third, Young presents factual reasons, lack of internet, long drive and copy store hours, as the reasons for the late filing. However, these factual reasons were completely within Young's power to control. For instance, Young appeared in the City of Oberlin on October 1, 2007, to speak against AMPGS at a city council meeting. *See,* www.meigscan.org/news.html. Since Oberlin is north of Columbus, Young could have filed her Petition while driving north from Meigs County to Oberlin. As another example, Young claims that she could not make copies since the copy store closes at 11 p.m., and she works until 11 p.m. This dilemma could have easily been resolved if Young had traveled to the copy store prior to starting her work day. Assuming Young works a nine hour day, she would be free to visit the copy store anytime before 1 p.m. and still have time to safety return to work timely.

The OPSB has denied untimely motions to intervene in the past based on a lack of extraordinary circumstances. *See* In the Matter of the Application of Cincinnati Gas & Electric Company for a Certificate: Woodsdale Generating Station, OPSB Case No. 88-1447-EL-BGN ("Woodsdale"). In Woodsdale, Sierra Club attempted to intervene in the proceeding, but filed its petition outside of the statutory thirty day timeframe. In ruling that the Sierra Club's Petition to Intervene should be denied, the Board explained that "the public hearing on this proceeding commenced on August 28, 1989, making the Sierra Club's request untimely. The Sierra Club

has not shown extraordinary circumstances to grant the request. Accordingly Sierra Club's request should be denied." Attachment 4.

In that same case, Pacific Gas and Electric ("PG&E") also filed an untimely intervention motion and the Board ruled that PG&E had not shown extraordinary circumstances necessary to justify an untimely petition to intervene. Attachment 5.

Similarly, other administrative boards in Ohio have denied untimely Motions to Intervene for lack of extraordinary circumstances. For example, in Briarfield v. Cortland, 1993 WL 317236 (Ohio App. 10 Dist., Aug. 17, 1993) ("Cortland"), the State Certificate of Need Review Board ("CONRB") denied a third party's motion to intervene when it attempted to intervene just three days prior to the scheduled hearing. Attachment 6. On appeal, the Tenth District Court of Appeals upheld the ruling. O.A.C. §3702-2-13(B), the CONRB regulation at issue in Cortland, has similar language to O.A.C. §4906-7-04(C) regarding the need for a finding of extraordinary circumstances. O.A.C. §3702-2-13(B) reads as follows:

> Any affected person who fails to file a timely notice of intervention may file a motion to intervene with the hearing examiner. The assigned hearing examiner shall grant the motion to intervene only upon a showing of extraordinary circumstances and upon a finding that the intervention will not otherwise delay the proceedings.

In denying the Motion to Intervene, the court in Cortland noted that the appellant had nearly two months notice before the hearing, but chose to seek intervention just three days prior to the hearing. Id.; *see also* State of Ohio at 1985 WL 4158.

Just like those seeking to intervene in Cortland, Young here has waited until the eleventh hour to seek intervention, despite her knowledge of the AMPGS project nearly two years ago, despite receiving advanced notice in May 2007 that application materials had been received by

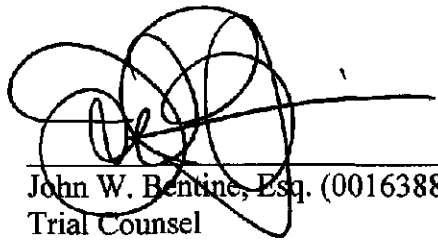
OPSB Staff, despite receiving official notice of the AMPGS Application over two months ago, and despite her familiarity with and participation in past Board proceedings.

For the reasons articulated above, the OPSB should find that no extraordinary circumstances were presented or exist, and, as such, Young's Petition should fail.

IV. Conclusion

Young's Petition is untimely, there are no extraordinary circumstances present to allow late intervention, and no good cause exists to justify Young's participation as a party to this proceeding. Accordingly, AMP-Ohio requests that the OPSB deny Young's Petition.

Respectfully submitted,



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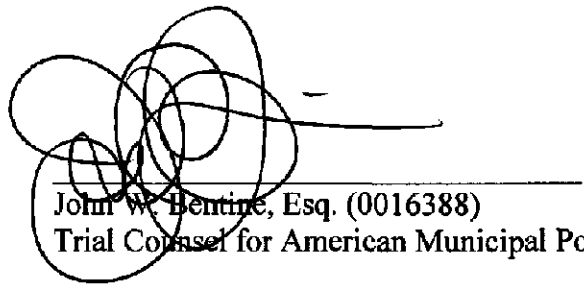
CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing American Municipal Power-Ohio, Inc.'s Memoranda Contra Elisa Young Petition to Intervene and Motion to Request Extension of Time for Case No. 06-1358-EL-BGN was served upon the following parties of record or as a courtesy to proposed persons via electronic mail and/or via postage prepaid U.S. Mail on November 13, 2007:



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ATTACHMENTS

1. State of West Virginia v. State of Ohio, 1985 WL 4158 (December 3, 1985)

2. Entry Denying Industrial Energy Users' Petition to Intervene
   June 14, 2006 (OPSB Case No. 06-0030-EL-BGN)

3. Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio,
   69 Ohio St.2d 559 (1982)

4. Entry Denying Sierra Club Petition to Intervene
   September 5, 1989 (OPSB Case No. 88-1447-EL-BGN)

5. Entry Denying Pacific Gas & Electric Petition to Intervene
   August 24, 1989 (OPSB Case No. 88-1447-EL-BGN)

6. Briarfield v. Cortland, 1993 WL 317236 (August 17, 1993)

STATE OF WEST VIRGINIA, Plaintiff-Appellee, v STATE of Ohio, HAZARDOUS WASTE FACILITY APPROVAL BOARD, Defendant-Appellee, (Board of Health of Columbiana County, Ohio, Defendant-Appellant).
Ohio App.,1985.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio, Tenth District, Franklin County.
STATE OF WEST VIRGINIA, Plaintiff-Appellee,
v
STATE of Ohio, HAZARDOUS WASTE FACILITY APPROVAL BOARD, Defendant-Appellee,
(Board of Health of Columbiana County, Ohio, Defendant-Appellant).
No. 85AP-496.

Dec. 3, 1985.

Appeal from the Hazardous Waste Facility Approval Board.

Knepper, White, Arter & Hadden, Richard P. Fahey, and Judi E. Trail, Special Assistants to Chauncey H. Browning, Jr., for plaintiff-appellee.
David Tobin, Prosecuting Attorney, for appellant, Board of Health of Columbiana County.
Anthony J. Celebrezze, Jr., Attorney General, Adam J. Wagenbach, Martyn T. Brodnik, and Susanne E. Miller, for appellees Hazardous Waste Facility Approval Board and Ohio Environmental Protection Agency.
Bricker & Eckler, Gerald L. Draper, and Charles H. Waterman, III, for intervenor-appellee, Waste Technologies Industries.
Buckingham, Doolittle & Burroughs, Ronald E. Alexander, and William L. Caplan, for Community Protection Association, Inc.
Hayes Taylor, Law Director, for Chief Executive Office of the City of East Liverpool.
McCORMAC, Judge.
*1 The state of West Virginia, the Columbiana County Board of Health, and the Community Protection Association, Inc., have appealed the order of the Ohio Hazardous Waste Facility Approval Board ("board"), granting a hazardous waste facility installation and operation permit to Waste Technology Industries ("WTI") to construct a hazardous waste storage and treatment facility in East Liverpool, Ohio.

WTI submitted a hazardous waste facility installation and permit application to the Ohio Environmental Protection Agency ("EPA") on November 7, 1982, in which it sought to locate a hazardous waste storage and treatment facility in East Liverpool, Columbiana County, Ohio on a 21.5 acre tract along the Ohio River. Pursuant to R.C. 3734.05, the staff of Ohio EPA initially reviewed the application for compliance with R.C. 3734.12(D). They determined that the application was complete and the director of the Ohio EPA transmitted the application to the board. Upon receipt of the permit application, the board published a notice in Columbiana County for a public hearing to be held on January 25, 1983. The board appointed attorney Mike Shapiro as the hearing examiner to preside over the public meeting in East Liverpool, Ohio. Thereafter, on March 17, 1983, an adjudication hearing was conducted before Richard Brudzynski. The participants were WTI, the staff of Ohio EPA, Columbiana County Board of Health, Columbiana County Commissioners, the Mayor of East Liverpool, and the Community Protection Association, Inc. West Virginia's motion to intervene in the adjudication hearing, which was filed on March 16, 1983, was denied, but West Virginia was permitted to participate in the limited status of "guest." After conclusion of the adjudication hearing, the hearing examiner submitted his report and recommendations to the board, following which the board issued its order and final opinion on April 27, 1984, granting WTI's application for a hazardous waste facility installation and operation permit.

The state of West Virginia, the Columbiana County Board of Health, and the Community Protection Association, Inc., have all appealed to this court from the board's order.

The Board of Health of Columbiana County, Ohio has submitted the following assignments of error:
"1. The Hazardous Waste Facility Approval Board (HWFAB) erred by not requiring that the applicant, Waste Technologies Industries, produce evidence on alternative technologies and alternative sites in order to show the facility represents the minimum adverse

environmental impact.
"2. The Hazardous Waste Facility Approval Board erred in finding that this facility represents the minimum risk of contamination of ground and surface water by leachate or run off and erred in finding that it represents the minimum risk of accident during transportation.
"3. The Hazardous Waste Facility Approval Board erred in granting the permit because the board could not determine from the application and evidence at the adjudicatory hearing the nature and volume of the waste to be treated.
***2** "4. The HWFAB erred in granting the permit to WTI because the facility did not comply with the Ohio Environmental Protection Agency's hazardous waste standards."

The Community Protection Association has submitted the following assignments of error:
"1. The Ohio Hazardous Waste Facility Approval Board committed prejudicial error as a result of its conduct of the public hearing.
"2. The Ohio Hazardous Waste Facility Approval Board committed prejudicial error when it denied appellant's objection to the person of the hearing examiner at the adjudicatory hearing.
"3. The Board committed prejudicial error when it overruled the recommendation of a hearing examiner.
"4. The Board's requirement that Waste Technologies Industries submit additional information to the Board violates the procedural protections contained in Section 3734.05 and constitutes prejudicial error.
"5. The Hazardous Waste Facility Approval Board erred when it found that the proposed facility represents the minimum adverse environmental impact and the minimum risk of contamination, fires or explosion, or accident during transportation."

The state of West Virginia has submitted the following assignments of error:
"1. The Hazardous Waste Facility Approval Board erred in approving WTI's application for a permit where the criteria and requirements contained in Section 3734.05(c)(6) of the Ohio Revised Code were not met.
"2. The Hazardous Waste Facility Approval Board erred in failing to grant the state of West Virginia party status in the adjudication hearing below."

The Community Protection Association has submitted two procedural assignments of error. First, it contends there was prejudicial error as a result of the conduct of the public hearing. Secondly, it argues that the board erred in denying its objections to the hearing examiner at the adjudication hearing.

With regard to the conduct of the public hearing, Community Protection Association asserts that limiting oral testimony to five minutes and failing to terminate all testimony after the 11:00 p.m. stated termination time was violative of R.C. 3734.05(C)(3)(a) and the Due Process Clauses of the Ohio and the United States Constitutions. R.C. 3734.05(C)(3) states:
"Upon receipt of the completed application for a hazardous waste facility installation and operation permit and a preliminary determination by the staff of the environmental protection agency that the application appears to comply with agency rules and to meet the performance standards set forth in divisions (D), (I), and (J) of section 3734.12 of the Revised Code, the director of environmental protection shall transmit the application to the hazardous waste facility board, which shall:
"(a) Promptly fix a date for public hearing thereon, not fewer than sixty nor more than ninety days after receipt of the completed application. At the public hearing, any person may submit written or oral comments or objections to the approval or disapproval of the application. * * * "

***3** It is clear that a right to a public hearing on this issue is statutorily granted and is not a constitutional requirement. The statute mandates that the opportunity for public comment in written or oral form be given. Reasonable restrictions would not contravene that right. To restrict testimony to five minutes per person is not unreasonable in light of the fact that the public hearing lasted almost eight hours, even with the five-minute limit. The allegation that the hearing examiner committed prejudicial error or circumscribed the right to a public hearing by continuing the hearing after the stated termination time of 11:00 p.m. is not persuasive in that the hearing examiner extended the hearing to accommodate more public comment. Moreover, the hearing examiner invited written testimony and imposed no limit whatsoever on the length of such written comment. The restrictions on the public hearing were reasonable and not beyond the discretion of the hearing examiner.

The first assignment of error of Community Protection Association is overruled.

The second assignment of error of Community Protection Association concerns the denial of appellant's objection to the hearing examiner presiding at the adjudication hearing on the basis that he had been employed by the Ohio EPA at the time WTI initially filed its application. However, appellant makes no showing that the hearing examiner was biased or prejudiced. The only evidence on this issue was a letter from Brudzynski, as EPA's legal director, requesting more information from WTI. Prejudice or bias will not be inferred from the letter or because the hearing examiner was previously employed by the Ohio EPA based on this showing, which is not sufficient to overcome a presumption of honesty and integrity. The United States Supreme Court in *Withrow v. Larkin* (1975), 421 U.S. 35, upheld a decision of a medical examining board to temporarily suspend a doctor's license based on charges evolving from its own investigation and made a finding that such action without more was not a denial of due process. The court stated: "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; * * *." *Id.* at 47. Appellant did not carry this burden.

The Community Protection Association's second assignment of error is overruled.

West Virginia presents an additional procedural issue when it questions the board's denial of leave to intervene. R.C. 3734.05(C)(4), as it was in effect at the time of the application, defined parties to an adjudication hearing as:
"(4) The parties to any adjudication hearing before the board upon a completed application shall be:
" * * *
"(d) Any other person who would be aggrieved or adversely affected by the proposed facility and who files a petition to intervene in the adjudication hearing not later than thirty days after the date of publication of the notice required in division (C)(3)(b) of this section, if the petition is granted by the board for good cause shown."
***4** [The statute has since been amended to include the following language: "The board may allow intervention by other aggrieved or adversely affected persons up to fifteen days prior to the date of the adjudication hearing for good cause shown when the intervention would not be unduly burdensome to or cause to delay in the permitting process."]

On its face, the statute appears to require at a minimum both that the intervenor demonstrate that he is adversely affected and that he file a motion to intervene thirty days prior to the adjudication hearing. Furthermore, the statute authorizes the board to grant leave to intervene for good cause shown. Ohio Adm.Code 3734-1-12 reads as follows:
"(A) Any person who would be aggrieved or adversely affected by a proposed hazardous waste facility may file a petition to intervene in an adjudication hearing conducted pursuant to rule 3734-1-09 of the Administrative Code. The petition must set forth the grounds for the proposed intervention and the position and interest in the proceedings of the person filing the petition. The person filing such petition must serve a copy of the petition and supporting pleading upon all other parties in the manner provided in rule 3734-1-11 of the Administrative Code.
"(B) A petition to intervene must ordinarily be filed prior to the date fixed for the first prehearing conference, or, if no prehearing conference is held, thirty days prior to the date fixed for the adjudication hearing. Any petition to intervene not filed in accordance with the foregoing time limits must, in addition to the information required by paragraph (A) of this rule, contain a statement of extraordinary circumstances justify the granting of the petition.
"(C) Leave to intervene may be granted by the hearing examiner upon consideration of the following factors:
"(1) The nature and extent of the petitioner's interest in the subject matter of the hearing and the degree to which the disposition of the hearing may as a practical matter impair or impede his ability to protect that interest;
"(2) The adequacy of the representation of the petitioner's interest by existing parties;
"(3) The relationship of the petitioner's interest to the subject matter of the hearing;
"(4) The avoidance of multiplicity of suits;
"(5) Whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties;
"(6) The contribution the petitioner may make to the just determination of the issues."

Whereas, the statute is expressed in mandatory terms, subsection (B) of the rule provides for discretionary intervention after the thirty-day filing requirement

has expired. The legislature, by imposing a thirty-day filing requirement, contemplated a prompt adjudication with all interested persons participating. The recent amendment of R.C. 3734.05(C)(4), allowing intervention up to fifteen days before the adjudication, indicates that the filing requirement of the statute is mandatory, although the time period is liberalized. The legislature could have but did not amend the language to authorize the discretion assumed by the board in its rule. Ohio Adm.Code 3734-1-12 appears to extend the board's authority for allowing intervention beyond the statute.

*5 West Virginia did not have a right to intervene under the statute. Although they could demonstrate that they were adversely affected, they did not file the motion to intervene thirty days prior to the adjudication hearing. In fact, they did not move to intervene until the day before the hearing was scheduled to begin. Even if the board had discretion under its rule to allow a motion to intervene filed thereafter, the board did not abuse its discretion in disallowing West Virginia's application filed one day before the hearing. West Virginia was not a *de facto* party, although the board graciously permitted them to present evidence and testimony and to cross-examine witnesses, etc. The board authorized West Virginia's participation in the status of *amicus curiae*, although they referred to their participation as "guest." West Virginia cites *Stanton v. LeVeque* (June 10, 1982), No. 82AP-134, unreported (1982 Opinions 1741), as support. *Stanton* is distinguishable because here there was a motion to intervene which was denied and there was a continuing objection to West Virginia's participation. In *Stanton*, there was no motion to intervene filed and no objection was made until appeal. In *Stanton*, the intervenor had been treated and assumed to be a party at the trial and was, therefore, allowed to appeal as a party. Finally, West Virginia argues that R.C. 3734.05(C)(4) is unconstitutional if the statute prevents its intervention. As support, West Virginia cites *Kinney v. Kaiser Aluminum & Chemical Corp.* (1975), 41 Ohio St.2d 120, which relied upon *Vlandis v. Kline* (1973), 412 U.S. 441. These cases are not applicable because they dealt with evidentiary conclusive presumptions; whereas here, the statute imposes a procedural time limit to effectuate prompt permit adjudication.

West Virginia's second assignment of error is overruled.

Substantively, all appellants in their briefs contend that R.C. 3734.05(C)(6) was not fulfilled. More specifically, the two issues which recur in all the briefs is what specificity is required to comply with R.C. 3734.05(C)(6) and the administrative rules promulgated thereunder, and whether there can be issuance of open-ended permit, by imposing conditions on the permit for which compliance can later be assured by the director of the Ohio EPA.

In regard to the specificity issue, an application for a hazardous waste permit should contain enough detailed information to enable the board to make the findings required by statute. If, by the information contained in the application and the evidence at the adjudication, the board can make the requisite determinations, then the required specificity is supplied. Ideally, the board should have the most specific and most detailed information as is possible. The legislature, however, did not want to make it impossible to obtain a hazardous waste facility permit. R.C. 3734.05 contemplates that the threshold examination into specificity and detail will be done by the Ohio EPA when it states:
*6 " * * * [A] person who proposes to establish or operate a hazardous waste facility shall submit an application * * * and accompanying detail plans, specifications, and such information as the director may require to the environmental protection agency, * * *." R.C. 3734.05(B).

The Ohio EPA required WTI to revise and resubmit its application with more detail, and determined that the information submitted was sufficient to enable it to make the determination required of it. As will be discussed later, the information supplied to the Ohio EPA, together with the evidence adduced at the adjudication hearing, was sufficient to enable the board to make its required findings based upon reliable, probative, and substantial evidence.

The next issue is whether there can be any open-ended provisions in the permit. The board placed conditions on the permit in an attempt to ensure compliance in regard to matters that could not yet be proven. Once the permit is issued, the terms of the permit, and not the general performance standards of R.C. 3734.12, are enforceable against individuals operating a hazardous waste facility, which is why the board imposed such conditions as part of the permit. That approach is authorized by the express terms of R.C. 3734.05(C)(6), as amended, which states:
"If the board approves an application for a hazardous waste facility installation and operation permit, it shall, as part of its written order, issue the permit,

upon such terms and conditions as the board finds are necessary to ensure the construction and operation of the hazardous waste facility in accordance with standards of this section."

Requiring the Ohio EPA to enforce the conditions is neither burdensome nor a delegation of authority. The facility will continue to be scrutinized for compliance by the Ohio EPA after issuance of the permit. R.C. 3734.05(D)(4) provides that:
"After the issuance of a hazardous waste facility installation and operation permit by the board, each hazardous waste facility shall be subject to the rules and supervision of the director of environmental protection during the period of its operation, closure, and post-closure care, if applicable."

The director of the Ohio EPA is one of five persons comprising the Hazardous Waste Facility Approval Board. Thus, he is familiar with WTI's proposal and is in the position to know where additional assurance of compliance is needed. The Ohio EPA's own regulations reflect that the Ohio EPA will oversee the hazardous waste facility. Ohio Adm.Code 3745-50-44, which concerns the contents of an application, states that if the owners can show that the information cannot be provided to the extent required, then the director can make allowance for submission on a case-by-case basis. For these reasons, placing conditions on the permit not only complies with R.C. 3734.05, but also serves to effectuate the intent of the legislature in providing for the close monitoring of hazardous waste facilities.

*7 Community Protection Association's fourth assignment of error is overruled.

The standard of review by this court of an order of the Hazardous Waste Facility Approval Board is enunciated in R.C. 3734.05(C)(7), which states, in pertinent part:
"The court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. * * * "

To affirm, therefore, the board's order must be supported by reliable, probative, and substantial evidence of the factors listed in R.C. 3734.05(C)(6). An inquiry of this sort involves more than an examination as to whether there is some evidence supporting the board's order. The evidence must be reliable, that is, of some trustworthiness; probative, tending to prove the factors of R.C. 3734.05(C)(6); and substantial, that is, more than some. With this duty in mind, we turn to the substantive requirements of the statute.

In subsection (a) of R.C. 3734.05(C)(6), the board must have determined the nature and volume of the waste to be treated, stored, or disposed at the facility. The Columbiana County Board of Health has asserted in its third assignment of error that the application and evidence was insufficient in that it only constituted a general list of the wastes and a general estimate as to the volume.

The board's order reflected evidence that the maximum volume capacity of waste to be handled is 176,000 tons per year of organic waste and 83,217 tons per year of inorganic waste. The hearing examiner concluded that the nature of the waste was established sufficiently, but that the volume was not detailed. The volume of waste WTI actually will handle is dependent on the amount of business they enjoy and is outside of the control of WTI, except as to the limit of the capacity of the plant. The reason the legislature requires the board to determine the nature and volume of the waste is to be able to judge if the facility has adequate capabilities. WTI has provided the board with its maximum capacity and has further divided that into its capacity for organic as opposed to inorganic waste. In fact, the board found that the capacity for volume was greater than the volume of waste actually proposed to be handled.

Appellant's objection to the nature of the waste is that WTI only listed the types of waste it would handle. This list was composed by considering a 250 mile radius of various industries who are potential customers of WTI. Without specifically knowing WTI's customers, the exact nature of the waste cannot be determined. There was evidence, however, that the facility was adequate to deal with all of the wastes listed. The board found that the rotary kiln incinerator was "particularly suited" to a broad range of organic waste. Furthermore, to ensure that the plant's capacity was not exceeded, a condition was placed on the permit to specify the authorized volume of waste to be handled. This evidence was substantial, reliable, and probative and adequate to support the board's finding that this statutory requirement was met.

*8 Columbiana County Board of Health's third

assignment of error is overruled.

Subsection (b) of R.C. 3734.05(C)(6) requires that the facility comply with the director of the Ohio EPA's hazardous waste standards adopted pursuant to R.C. 3734.12. Appellant Board of Health has asserted that provisions not complied with are the contingency plan, closure plan, personnel training, precautions for ignitable, incompatible, and reactive waste, and arrangements with local authorities. The hearing examiner found that the proposed facility exceeded most of the Ohio EPA's standards, except for the ones which appellant now raises. The board found that, to the extent compliance can be demonstrated in the proposing stage, WTI has provided sufficient information on these items but, as a condition to the permit, provided that the Ohio EPA should be given updated information as it becomes available.

Notwithstanding the additional precaution taken by the board to assure compliance, there was substantial evidence to demonstrate that the Ohio EPA's standards were met. The contingency plan as required under Ohio Adm.Code 3745-54-50 through 54 comprised fifty pages in the application labeled "Spill Prevention Control and Countermeasures," in which various procedures were detailed. For example, an emergency response team will identify the spilled material using five different sources. Surrounding communities will be notified in the event of an unusual occurrence. The plan contains a list of emergency equipment to be kept at the facility and the location of such equipment in the plant. It details evacuation procedures. On-site electrical generators are available in the event of a power outage. Further, discussions with representatives of participating agencies are planned.

The record describes a closure plan in accordance with Ohio Adm.Code 3745-55-01. The information provided tells when and how the facility will be finally closed. The maximum quantity of waste to be stored was estimated for the life of the facility. Closure after ten years was derived for estimating closure costs. The application stated that closure would be completed within 180 days after receiving the final volume of waste. All equipment will be decontaminated. Furthermore, WTI will be required to obtain approval of its updated closure plan at least six months prior to operation of the facility and demonstrate retention of a 3.365 million dollar financial assurance of closure sixty days prior to receipt of any hazardous waste.

With regard to personnel training, Ohio Adm.Code 3745-54-2 illustrates the standards. Employee training programs are required both before and after commencement of the operations. There will be orientation training, specific job related and other special training programs. The content of the programs will include safety precautions, procedures for monitoring the equipment, and for implementing the contingency plan and spill control measures. All employees must know the location of the emergency alarm and safety equipment. Practice drills will be employed. All employees will be trained in emergency shut down procedures, use of emergency equipment, incinerator waste feed cutoff, alarm systems, and responses to fires, explosions, or contamination.

*9 With regard to precautions taken for ignitable, reactive, incompatible waste under Ohio Adm.Code 3745-54-17, the applicant has demonstrated compliance. All potential customers will be interviewed with regard to waste streams. A master sample of waste will be drawn and analyzed. Specific instructions will be developed with regard to packaging, shipping, unloading, handling, accumulation in mixing and treatment of the waste. Upon arrival at the facility, the waste will again be analyzed for verification. Then, there will be actual physical segregation of the ignitable or reactive waste at the facility. All tanks containing combustible waste will be equipped with an inert gas blanketing system which will eliminate any oxygen escaping necessary to start a fire or explosion.

Finally, appellant has suggested that, because WTI does not yet have an agreement with East Liverpool to use its publicly owned treatment works, WTI has not complied with Ohio Adm.Code 3745-54-37, entitled "Agreements with Local Authorities." However, the agreement contemplated under the rules are concerned with educating emergency teams, fire, police, disaster teams, and hospitals in the event their services are needed. Mr. Leedy, a consultant engaged in compiling applications for hazardous waste permits, testified that discussions with all of the above persons had been undertaken, and that some actual training had begun. As far as obtaining an agreement with East Liverpool to use their POTW, obtaining this agreement is an economic in addition to a legal necessity. Not only is such an agreement required as a condition on the permit, but the plant as designed will not be constructed until such time as the agreement to use the treatment work plan is secured.

The fourth assignment of error of the Board of Health of Columbiana County is overruled.

Columbia County Board of Health, in its first assignment of error, and Community Protection Association, in its fifth assignment of error, next asserts that the board erred in finding compliance with R.C. 3734.05(C)(6)(c). Subsection (c) requires the finding that the facility represents the minimum adverse environmental impact when considering the state of available technology and other pertinent considerations. The statute further requires a finding of minimum adverse environmental impact when considering the nature and economics of various alternatives.

The board found that the technology proposed by WTI in its practices and systems will be "highly effective and environmentally protective in handling, storing and treating hazardous waste." Dr. Rowe testified that WTI's proposed technology is the best available and that any possible improvements to that technology had not yet met engineering feasibility. The board stated that where the application and the evidence shows that the technology proposed is the most advanced and demonstrated environmentally protected technology, no further examination of other inferior technology is required. Dr. Rowe is an expert and the board was entitled to believe his statement. The board is not required to waste time examining systems testified by a reliable witness to be inferior.

*10 Appellants argue that alternative sites must also be examined. This argument, however, was rejected both by the hearing examiner and by the board and is not persuasive to this court. To require a showing that any chosen site is the best possible location on all criteria would be an impossibility and would completely frustrate the objectives of the legislature in providing environmentally safe facilities for hazardous waste. (It could always be argued that there was another possible site that was not compared.) The board, however, did consider factors about the proposed site. They found that the plant would be located in the heart of a general industrial zone which has been so zoned since 1967. Dr. Rowe testified that risk of injury to the people of East Liverpool is so low that it is negligible for all practical purposes. There was testimony that property values would be severely depressed. The board, however, found that such evidence was not supported by reliable evidence, as the party testifying was not qualified as a real estate expert, which was a reasonable basis for rejecting the credibility of this witness. Furthermore, the board found that direct and indirect economic benefits in the form of tax revenues and additional employment to the area would far outweigh any decline in real estate values.

The Columbiana County Board of Health's first assignment of error and Community Protection's fifth assignment of error are overruled in these respects.

Columbiana County Board of Health's second assignment of error and Community Protection's fifth assignment of error, in part, argues that, under subsection (d) of R.C. 3734.05(C)(6), the facility does not represent the minimum risk of contamination of ground and surface water, the minimum risk of fire or explosion from treatment, storage, or disposal methods, and the minimum risk of an accident during transportation of hazardous waste. The board, however, found that there was a minimum risk of ground and surface water contamination. There is substantial, reliable, and probative evidence to support their decision. For example, the proposed facility will have one-foot high berms and four-inch speed bumps throughout the facility. A lined storm water pond will drain into a storm sewer. Water within this pond will be analyzed and treated if a spill occurs before it is released to the publicly owned treatment works for additional treatment. All water in the active process area will be assumed to be contaminated and will be treated accordingly. The site will be upgraded to a five hundred year level flood plain. Furthermore, the board imposed a condition on the permit that there must be no utility lines under the site or, if they exist, WTI must develop plans to correct this problem before the site elevation work begins. New wells must be located away from the process area. The hearing examiner found that the storm water management plan makes the facility a "virtual fortress" against the contamination of ground and surface water.

*11 The board found that the facility represents the minimum risk of fires or explosions due to improper treatment or storage. The safeguards against explosions are that WTI will have prior knowledge of all waste coming into the facility. Upon arrival, samples will be analyzed. Employees will be carefully trained in procedures for handling the waste. As previously discussed, an inert gas system will be installed in the areas where combustible waste is present to reduce the oxygen needed for fire or explosion. Much of the evidence on this criteria can be found under the discussion of performance standards for ignitible reactive and combustible

materials. There was substantial, reliable, and probative evidence for the board's order.

With regard to the risk of transportation accidents, the board found that WTI complies with the statutory requirements. WTI will send information to generators of waste about handling the hazardous waste, and will direct them to use the safest routes to the facility. WTI plans to share the training of emergency personnel and will provide a twenty-four hour service for chemical identification and spill handling. Physical improvements planned are a new traffic light, a new railroad crossing, and a new road into the facility. Dr. Rowe, an expert risk analyst, testified that the risk of transportation accidents are minimal. A Mr. Allen from Battelle acknowledged that the transportation of hazardous waste is federally regulated and, therefore, that the risk of injury or fatality from an accident is actually less than an ordinary cargo carrier. The board conditioned the permit on the construction of a new traffic signal at Elizabeth and Pennsylvania Avenues. All roadways within the facility will be paved. Discussions were held with the fire department, police department, disaster services, and East Liverpool hospital and some training has been commenced. Thus, there was substantial, reliable, and probative evidence from which the board could conclude that the facility represents the minimum risk of water contamination, fire, and transportation accidents.

The Columbia County Board of Health's second assignment of error and the remainder of Community Protection's fifth assignment of error are overruled.

Community Protection's third assignment of error alleges that the board committed prejudicial error when it overruled the hearing examiner. This assignment of error is not well-taken. The hearing examiner only recommends the decision to the board. R.C. 119.09. The board may accept that recommendation if it is supported, but the board has a duty to reject the examiner's recommendation if it is not supported by reliable, probative, and substantial evidence. The board must state its reason for such disapproval. Ohio Adm.Code 3734-1-18(C) requires that, when the board modifies or disapproves the hearing examiner's recommendation, the final order shall include the reasons of such modification or disapproval. The hearing examiner made two recommendations. The first recommendation urged the board to delay issuing the permit until such time as more information on several areas of concern could be obtained. The second recommendation was that, if the permit was granted, the board should adopt the special terms and conditions recommended by the Ohio EPA and also require that WTI complete the planning process and be required to operate the facility as stated in the application. The board exercised its perogative to reject the first recommendation based upon its findings, all of which were supported by reliable, probative and substantial evidence and in accordance with as previously discussed. On every point for which the board disagreed with the hearing examiner, the board stated its conclusions and reasons therefore. The board, in essence, followed the second recommendation of the hearing examiner. The board fulfilled its duty under Ohio Adm.Code 3734-1-18(C).

*12 The Community Protection's third assignment of error is overruled.

All of the assignments of error are overruled. The decision of the Hazardous Waste Facility Approval Board is affirmed.

Judgment affirmed.

WHITESIDE and LYNCH, JJ., concur.
LYNCH, J., retired, of the Seventh Appellate District, assigned to active duty pursuant to Section 6(C), Article IV, Ohio Constitution.
Ohio App.,1985.
State of West Va. v. State of Ohio
Not Reported in N.E.2d, 1985 WL 4158 (Ohio App. 10 Dist.)

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BEFORE

OHIO POWER SITING BOARD

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Certificate of Environmental Compatibility and Public Need to Construct an Integrated Gasification Combined-Cycle Generation Facility in Meigs County, Ohio.	))))))	Case No. 06-30-EL-BGN

ENTRY

The Administrative Law Judge finds:

(1) On March 24, 2006, Columbus Southern Power Company (CSP) and Ohio Power Company (Ohio Power) (jointly AEP-Ohio) filed with the Ohio Power Siting Board (Board) an application for a certificate of environmental compatibility and public need to construct a 629-megawatt (MW) integrated gasification combined-cycle (IGCC) power plant in Meigs County, Ohio (Great Bend project).

(2) On April 17, 2006, the Industrial Energy Users-Ohio (IEU) filed a motion to intervene and a motion to dismiss, or in the alternative, a request that AEP-Ohio amend its application. IEU states that it is an association of members who purchase significant quantities of electricity and related services from AEP-Ohio. Therefore, IEU argues that its members have an interest in the price, reliability and availability of energy available in the AEP-Ohio service territory. IEU claims that AEP-Ohio's application in this case is deficient to the extent that the application includes only a two-page discussion of the need for the facility. Further, IEU notes that the statement of need discusses other types of generation technologies and the reliability of and access to coal. Significantly, IEU contends that the statement of need fails to state that AEP-Ohio requires additional generation or that additional incremental generation is needed. In addition, IEU argues that it fails to state the total Ohio retail load and existing generation available to meet that load. Furthermore, IEU-Ohio argues that, in Case No. 05-376-EL-UNC, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification*

Combined-Cycle Electric Generating Facility (05-376), (Opinion and Order issued April 10, 2006) the Public Utilities Commission of Ohio (Commission) approved AEP-Ohio's application for a cost recovery mechanism for the pre-construction cost of the Great Bend IGCC project. IEU argues that AEP-Ohio's application for a cost recovery mechanism was unlawful and unreasonable as the Commission lacks the requisite authority over electric generation with the adoption of the statutory amendments enacted as part of Amended Substitute Senate Bill 3. IEU reasons that AEP-Ohio's failure to demonstrate need for the proposed facility while being granted cost recovery for the facility is inconsistent and AEP-Ohio should be required to demonstrate need for the facility as was required under traditional regulatory requirements. Accordingly, IEU argues that AEP-Ohio has failed to demonstrate the basis of need for the proposed Great Bend project and, therefore, the application should be dismissed. In the alternative, IEU requests that the Board direct AEP-Ohio to amend its application to demonstrate that AEP-Ohio needs incremental base load generation to serve its Ohio retail customers as part of its provider of last resort (POLR) obligations.

(3) On April 24, 2006, Ohio Energy Group (OEG) filed a motion to intervene. OEG, an association of large industrial and commercial customers, states that its interest may be directly affected by the outcome of this proceeding and that its interest cannot adequately be represented by any other party. Accordingly, OEG request intervention in this proceeding.

(4) On May 2, 2006 and May 8, 2006, AEP-Ohio filed memoranda contra the motions to intervene and to IEU's motion to dismiss or amend the application. In regards to the motions to intervene, AEP-Ohio argues that neither IEU nor OEG has presented just cause to be granted intervention. More specifically, AEP-Ohio contends that OEG has merely stated a generic interest in the proceeding as a customer of CSP or Ohio Power and, likewise, IEU's interests are economic. Further, AEP-Ohio claims that IEU's concerns are identical to the issues IEU raised to the Commission in 05-376. AEP-Ohio states that this Board application involves the environmental impact of the proposed generation facility, while the Commission is vested with economic regulation of public

utilities. AEP-Ohio concludes that OEG's and IEU's arguments for intervention relate to 05-376, a case which is pending before the Commission, but such arguments fail to translate into good cause for intervention in this proceeding. Therefore, AEP-Ohio states OEG's and IEU's motions for intervention are inappropriate and should be denied.

(5) As to IEU's request for dismissal or amendment of the application, AEP-Ohio argues that IEU is improperly attempting to challenge the Commission's decision in 05-376 in this proceeding. AEP-Ohio states that IEU's basis for the motion to dismiss or amend the application, an alleged insufficient statement of need, is not a requirement for certification pursuant to Section 4906.10(A)(1), Revised Code. Further, AEP-Ohio states that not only does IEU's request for re-implementation of the need requirement conflict with the statute, but would result in overlapping jurisdiction between the Board and the Commission. AEP-Ohio posits that the Board, as a creature of statute, has only the jurisdiction bestowed upon it by the General Assembly and, as such, the Board's jurisdiction cannot be altered at the request of IEU. For these reasons, AEP-Ohio contends that IEU's motion to dismiss or amend the application for a certificate must be denied.

(6) OEG filed a reply to AEP-Ohio's memorandum contra on May 23, 2006. OEG argues that AEP-Ohio is mistaken that the Board's review of the application is limited to an evaluation of environmental impacts. OEG notes that the Board must find that the proposed facility will serve the public interest, convenience and necessity pursuant to Section 4906.10(A)(6), Revised Code. OEG, like IEU, argues that AEP-Ohio has not demonstrated in 05-376 that the additional generating capacity of the Great Bend project is necessary for the company to meet its POLR obligations or to provide ancillary services. OEG claims that it will establish that AEP-Ohio's application is not in the public interest.

(7) IEU and OEG have not claimed that any of their respective members is a property owner adjacent to or within the general vicinity of the site of the proposed Great Bend project. The nature and extent of OEG's and IEU's interest in this application, as stated in their respective motions, is as

customers of AEP-Ohio in regard to the need for the proposed facility and, as claimed by OEG, the "public interest, convenience and necessity" of the proposed Great Bend project.

The purpose of this Board proceeding is to evaluate the likely environmental effects of the construction, operation and maintenance of the proposed Great Bend project on the immediately surrounding community. As required by Section 4906.10(A)(6), Revised Code, the Board evaluates the "public interest, convenience and necessity" of the proposed facility. As a part of this requirement, the Board considers the effect the construction, operation and maintenance of the proposed generation project will have on noise levels, aesthetics, health and safety of the immediately surrounding community. IEU and OEG have expressed an interest in this application primarily as customers of AEP-Ohio in regards to the need for the proposed facility and the "public interest, convenience and necessity" of the proposed Great Bend project. IEU's and OEG's interest is more than adequately addressed in the 05-376 Commission proceeding, in which both IEU and OEG are already intervenors. The Administrative Law Judge notes that the Order issued by the Commission in 05-376 specifically directs AEP-Ohio to present evidence in the next phase of the 05-376 proceeding regarding the details of how the output of the proposed facility will flow to the benefit of Ohio customers (Order at 21). IEU and OEG have not demonstrate a vested interest in the environmental decisions to be made in this Board proceeding. See accord, *In the Matter of the Application of the Cincinnati Gas & Electric Company for a Certificate: Woodsdale Generating Station*, Case No. 88-1447-EL-BGN, Entry on Interlocutory Appeal (September 8, 1989). The Administrative Law Judge finds that cause to grant IEU's and OEG's motions to intervene in this Board proceeding has not been demonstrated and, therefore, IEU's and OEG's requests for intervention in this matter should be denied.

(8) IEU's motion to dismiss will be dismissed because IEU is not being granted intervention. In any event, completeness of the certificate application is still under review (as explained below).

(9) Within 60 days of receipt of an application for a certificate, the chairman must determine if the application meets the minimum content requirements, including the adequacy of the need statement. Upon such determination, the chairman will inform the applicant of the status of the application in accordance with Rule 4906-5-05, Ohio Administrative Code. In this case, the sixtieth day after the application was filed was May 23, 2006.

(10) On May 22, 2006, AEP-Ohio filed a request for a 90-day extension of time to permit AEP-Ohio to complete its investigation of the cultural artifacts and resources found at the preferred site of the Great Bend project. AEP-Ohio requests additional time be added to the completeness review period to allow the companies to supplement the application with additional information from the investigation.

(11) AEP-Ohio's motion for an extension of time to supplement the application is reasonable and should be granted. Accordingly, the Board's completeness review of the application is extended for 90 days. Ninety days following the initial completeness review period ends on August 21, 2006.

It is, therefore,

ORDERED, That IEU's and OEG's motions for intervention are denied. It is, further,

ORDERED, That IEU's motion to dismiss the application is dismissed. It is, further,

ORDERED, That AEP-Ohio's request for a 90-day extension of time to supplement the application is granted. Accordingly, the completeness review period is extended for 90 days, which ends on August 21, 2006. It is, further,

ORDERED, That a copy of this entry be served upon AEP-Ohio and its counsel, IEU, OEG, and all other interested persons of record in this case.

THE OHIO POWER SITING BOARD

By: Greta See
Administrative Law Judge

/vrm

Entered in the Journal

JUN 14 2006

Reneé J. Jenkins
Secretary

Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio
Ohio, 1982.

Supreme Court of Ohio.
TOLEDO COALITION FOR SAFE ENERGY, Appellant,
v.
PUBLIC UTILITIES COMMISSION OF OHIO et al., Appellees.
No. 81-161.

March 3, 1982.

Nonprofit corporation, whose membership consisted of residential customers of electric company, appealed from decision of the Public Utilities Commission denying its petition for leave to intervene in rate base and operating income proceeding. The Supreme Court held that Public Utilities Commission lawfully exercised its discretion in deciding that position of nonprofit corporation on rate base and operating expense issues did not differ from that of and would be adequately represented by office of consumers' counsel and thus in denying intervention where, although corporation contended that nuclear power plant be totally excluded from rate base while consumers' counsel only sought reductions in rate base and operating income figures due to plant's low availability, both were seeking establishment of rates which reflected nuclear power ·ant's lack of operational availability and nonprofit ·tion had made no specific showing as to what ·· information it would have offered in ·fore Commission that consumers'

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considerations, it may best proceed to manage and expedite orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort. R.C. § 4901.13.

[2] Public Utilities 317A 163

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(B) Proceedings Before Commissions
317Ak163 k. Parties. Most Cited Cases
(Formerly 317Ak13)
Necessary concomitant of Public Utilities Commission's authority to regulate manner and mode of its hearings is its discretionary power to permit or deny intervention in its proceedings. R.C. § 4901.13.

[3] Public Utilities 317A 163

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(B) Proceedings Before Commissions
317Ak163 k. Parties. Most Cited Cases
(Formerly 317Ak13)
As matter of appellate review, factors which Supreme Court deems legally significant in assessing Public Utilities Commission's discretionary decision on permissive intervention include, inter alia, nature and extent of prospective intervenor's interest, legal position advanced by prospective intervenor and its probable relation to merits of case, whether prospective intervenor's interests are adequately represented by parties, whether intervention will prolong or unduly delay case, and whether party seeking intervention will significantly contribute to full development and equitable resolution of underlying factual issues in case. R.C. § 4901.13.

[4] Public Utilities 317A 163

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(B) Proceedings Before Commissions
317Ak163 k. Parties. Most Cited Cases
(Formerly 317Ak13)
Difference in tactics or strategy is insufficient to demonstrate inadequate representation for intervention purposes in rate base and operating income proceeding of Public Utilities Commission. R.C. § 4901.13.

[5] Public Utilities 317A ⚿163

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(B) Proceedings Before Commissions
317Ak163 k. Parties. Most Cited Cases
(Formerly 317Ak13)
When interests of party and prospective intervenor in Public Utilities Commission's rate base and operating income proceeding are virtually identical, prospective intervenor, as one prerequisite to intervention, must make compelling showing that party already participating in proceeding cannot or will not adequately represent prospective intervenor's interest. R.C. § 4901.13.

[6] Electricity 145 ⚿11.3(6)

145 Electricity
145k11.3 Regulation of Charges
145k11.3(6) k. Proceedings Before Commissions. Most Cited Cases
Public Utilities Commission lawfully exercised its discretion in deciding that position of nonprofit corporation, whose membership consisted of residential customers of electric company, on rate base and operating expense issues did not differ from that of and would be adequately represented by office of consumers' counsel and thus in denying intervention where, although corporation contended that nuclear power plant be totally excluded from rate base while consumers' counsel only sought reductions in rate base and operating income figures due to plant's low availability, both were seeking establishment of rates which reflected nuclear power plant's lack of operational availability and nonprofit corporation had made no specific showing as to what evidence or information it would have offered in proceedings before Commission that consumers' counsel overlooked. R.C. § 4901.13, 4911.01 et seq.; Rules Civ.Proc., Rule 24.

****213 *559** The Toledo Coalition for Safe Energy, appellant herein, is a non-profit Ohio Corporation which has a membership of over 200 residential customers of the Toledo Edison Company (Toledo Edison), intervening appellee herein.

In August 1980, appellant petitioned the Public Utilities Commission (the commission), appellee herein, for leave to intervene in a rate increase proceeding initiated by Toledo Edison, notwithstanding the fact that the commission had already granted the Office of Consumers' Counsel leave to intervene on behalf of the residential customers in Toledo Edison's service area in the same rate increase proceeding.[FN1]

> FN1 Pursuant to R.C. 4911.01 et seq., the Office of Consumers' Counsel is charged with the responsibility of representing residential customers in proceedings before the commission when an application is filed by a public utility for a change of rates.

Subsequent to the filing of the petition for leave to intervene, the commission required appellant to submit a memorandum specifying how appellant's interest differed from that of, and would not be adequately represented by, Consumers' Counsel. Appellant contended [FN2] that it advocated total exclusion of Toledo Edison's Davis-Besse nuclear power plant from the rate base on the grounds that the plant, during the first half of the test year, was non-operational more than one-half of the time and, during the second half of the test year, ***560** was shut down by the Nuclear Regulatory Commission for lengthy periods of time. According to appellant, Consumers' Counsel, on the other hand, argued that Davis-Besse was includable in the rate base, but that the rate base and operating income figures should be selectively reduced due to the plant's lack of operational availability.

> FN2 Clearly, the pivotal intervention issue in this case pertains to the methodology of including Davis-Besse in the rate base and operating expense figures based on its availability. Appellant also contended that, unlike Consumers' Counsel, it advocated excluding civil fines imposed against Toledo Edison by the Nuclear Regulatory Commission from operating expenses. The commission states that the civil fines complained of by appellant, however, were never included in Toledo Edison's test year operating expenses or rate application, were not an issue in the rate proceeding and were not included as part of operating expenses in the commission's final order.

On November 19, 1980, the commission denied appellant's petition for leave to intervene for the reason that the resolution of the issues which appellant would pursue would not "affect subgroups of residential customers differently" and that

appellant's interests were adequately represented by Consumers' Counsel. The commission also denied appellant's request for a rehearing.

The cause is now before this court on an appeal as of right.

Terry J. Lodge, Toledo, for appellant.
William J. Brown, Atty. Gen., Marvin I. Resnik and David M. Neubauer, Columbus, for appellee.
Paul M. Smart and Fred J. Lange, Jr., Toledo, for intervening appellee.
****214** PER CURIAM.
[1] It is well-settled that pursuant to R.C. 4901.13,[FN3] the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort. Sanders Transfer, Inc., v. Pub. Util. Comm. (1979), 58 Ohio St.2d 21, 387 N.E.2d 1370;Consumers' Counsel v. Pub. Util. Comm. (1978), 56 Ohio St.2d 220, 383 N.E.2d 593.

FN3. *R.C. 4901.13 provides:*
"The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public."

[2] A necessary concomitant of the commission's authority to regulate the manner and mode of its hearings is its discretionary power to permit or deny intervention in its proceedings. Consumers' Counsel v. Pub. Util. Comm., supra;Dworken v. Pub. Util. Comm. (1938), 133 Ohio St. 208, 12 N.E.2d 490. Indeed, we recently and unanimously rejected the concept of an unlimited right of intervention beyond the procedural control of ***561** the commission.Consumers' Counsel v. Pub. Util. Comm., supra, 56 Ohio St.2d at pages 223-224, fn. 3, 383 N.E.2d 593.

As previously indicated, the commission denied appellant's petition for leave to intervene because; (1) the resolution of issues which appellant would pursue would not "affect subgroups of residential customers differently" and (2) appellant's interests were adequately represented by Consumers' Counsel.

In evaluating the exercise of the commission's discretion in this case, we note, preliminarily, that, unlike a rate design case,[FN4] the rate base and operating income proceeding at bar does not present issues of competing, limited, identifiable interests which differentiate prospective intervenors, like appellant, from ordinary members of the public. Rather, as the commission indicated in its order denying appellant's petition for leave to intervene, the resolution of the rate base and operating income issues would similarly affect all residential customers.

FN4. "Rate design" refers to the process of determining the proportion of the granted rate increase which will be shouldered by the various classes of customers, i.e. residential, low income residential, commercial, industrial, etc. Thus, in rate design cases, some groups of customers may have specific interests which they wish to pursue that might be in conflict with that of the residential class as a whole. For example, low income residential customers may have a special interest in a particular rate which Consumer's Counsel, representing a broader spectrum of residential customers, does not choose to advocate. Thus, due to the competing interests in a rate design proceeding, the commission frequently allows groups of residential customers to intervene-even when Consumers' Counsel has already been granted intervenor status.
For a representative sampling of cases where the commission has granted multiple group intervention in rate design cases, see paragraph six of the commission's order (case No. 80-377-EL-AIR) denying appellant's petition for leave to intervene.

[3] As a matter of appellate review, the factors which we deem legally significant in assessing the commission's discretionary decision on permissive intervention include, inter alia; the nature and extent of the prospective intervenor's interest; the legal position advanced by the prospective intervenor and its probable relation to the merits of the case; whether the prospective intervenor's interests are adequately represented by the parties; whether intervention will prolong or unduly delay the case; and whether the party seeking intervention will significantly contribute to full development and equitable resolution of the underlying factual issues in the case.

See, *562 generally, Shapiro, Some Thoughts On Intervention Before Courts, Agencies and Arbitrators, 81 Harv.L.Rev. 721.See, also, Pierson v. United States (D.Del.1976), 71 F.R.D. 75;United States v. IBM (S.D.N.Y.1974), 62 F.R.D. 530,certiorari denied, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774;State, ex rel. Brown, v. Bd. of County Commrs. (1977), 52 Ohio St.2d 24, 368 N.E.2d 299 (intervention properly denied when the prospective intervenor **215 failed to show a lack of adequate representation).[FN5]

> FN5. We believe that cases construing Rule 24 of both the Federal and Ohio Rules of Civil Procedure are useful, by way of analogy, in evaluating the intervention arguments advanced by the litigants at bar.

We find that, as a practical matter, the interest and objective of appellant and Consumers' Counsel are essentially identical, not antithetical. Both appellant and Consumers' Counsel are seeking the establishment of rates which reflect Davis-Besse's lack of operational availability. As previously noted, appellant contended that Davis-Besse be totally excluded from the rate base. Consumers' Counsel, though, argued that Davis-Besse was includable in the rate base, but sought reductions in the rate base and operating income figures due to the plant's low availability. This difference in strategy should not obscure the fact that the goal of appellant and Consumers' Counsel was identical-rates reflecting Davis-Besse's low availability.

[4] Furthermore, we have carefully reviewed the record in this case and conclude that appellant has utterly failed to make any showing that its interests were not adequately represented by the expertise and experience of Consumers' Counsel. Appellant has made no specific showing as to what evidence or information it would have offered in the proceedings before the commission that Consumers' Counsel overlooked. A difference in tactics or strategy is insufficient to demonstrate inadequate representation. Pierson v. United States, supra.

[5] When the interest of a party and prospective intervenor are virtually identical, we believe that the prospective intervenor, as one prerequisite to intervention, must make a compelling showing that the party already participating in the proceeding can not or will not adequately represent the prospective intervenor's interest. This is a showing that appellant has failed to make-even after the commission gave appellant *563 the additional opportunity of demonstrating, in a memorandum, (1) its different interests or (2) the inadequacy of the Consumers' Counsel representation.

This court, in Krupp v. Poor (1970), 24 Ohio St.2d 123, 265 N.E.2d 268, paragraph two of the syllabus, defined judicial discretion in the following fashion:

"Judicial discretion is the option which a judge may exercise between the doing and not doing of a thing which cannot be demanded as an absolute legal right, guided by the spirit, principles and analogies of the law, and founded upon the reason and conscience of the judge, to a just result in light of the particular circumstances of the case."See, also, State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (abuse of discretion "connotes more than error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.")

[6] Thus, applying the aforementioned definitions of discretion and abuse of discretion to the facts at bar, we conclude that the commission correctly and lawfully exercised its discretion in deciding that appellant's position on the rate base and operating expense issues did not differ from that of and would be adequately represented by Consumers' Counsel.

For all the foregoing reasons, therefore, the commission's order denying appellant's petition for leave to intervene is affirmed.

Order affirmed.

FRANK D. CELEBREZZE, C. J., and WILLIAM B. BROWN, SWEENEY, HOLMES, CLIFFORD F. BROWN and KRUPANSKY, JJ., concur.
LOCHER, J., concurs in the judgment.
Ohio, 1982.
Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio
69 Ohio St.2d 559, 433 N.E.2d 212, 23 O.O.3d 474

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO
and THE OHIO POWER SITING BOARD

In the Matter of the Inquiry into the 1989 Long-Term Forecast Report of the Cincinnati Gas & Electric Company.	))))	Case No. 89-569-EL-FOR IIA#0079
In the Matter of the Application of the Cincinnati Gas & Electric Company for a Certificate: Woodsdale Generating Station.	))))	Case No. 88-1447-EL-BGN - IIA #0081

ENTRY

The attorney examiner finds:

1) On August 29 1989, the Ohio Chapter of the Sierra Club filed a request to intervene in the 1989 Long-Term Forecast Report (LTFR) proceeding of the Cincinnati Gas and Electric Company (CG&E). The Sierra Club states that some of its members are customers of CG&E and that its members are concerned about preservation and protection of the environment and the adequacy of the information contained in CG&E's LTFR.

2) In forecasting proceedings, Rule 4901-1-11, Ohio Administrative Code, requires a petition to intervene be filed at least five days prior to the scheduled hearing, unless extraordinary circumstances can be shown, and show that the person has a real and substantial interest in the proceeding.

3) The public hearing in this proceeding commenced on August 28, 1989, making the Sierra Club's request untimely. The Sierra Club has not shown extraordinary circumstances to grant its request. Accordingly, the Sierra Club's request should be denied. The attorney examiner also notes that from the pleading filed by Mr. Ned Ford on behalf of the Sierra Club, it does not appear that the Sierra Club is represented by an attorney which would have been necessary for the Sierra Club to have become a party to this proceeding. Although the Sierra Club's intervention as a party to the LTFR proceeding is being denied, it is welcome to attend the hearing to gain informa-

tion on CG&E's LTFR and the company's proposed Woodsdale Generating Plant.

It is, therefore,

ORDERED, That the request for intervention filed by the Ohio Chapter of the Sierra Club is hereby denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: R. Russell Gooden
Attorney Examiner

;kag

Entered in the Journal
SEP 5 1989
A True Copy
Gary E. Vigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO
and THE OHIO POWER SITING BOARD

In the Matter of the Inquiry into the 1989 Long-Term Forecast Report of the Cincinnati Gas & Electric Company.	))))	Case No. 89-559-EL-FOR
In the Matter of the Application of the Cincinnati Gas & Electric Company for a Certificate: Woodsdale Generating Station.	))))	Case No. 88-1447-EL-BGN

050

ENTRY

The administrative law judge finds:

1) On August 3, 1989, PG&E Enterprises (PG&EE), a subsidiary of the Pacific Gas & Electric Company that is engaged in the development of electric generation facilities, filed a petition to intervene in the above-captioned cases. In support of its petition, PG&EE states that it is developing a cogeneration facility at General Electric Corporation's Evendale, Ohio plant which will provide process steam to General Electric, and electric capacity and energy to Cincinnati Gas & Electric Company (CG&E). PG&EE states that it has a substantial interest in these proceedings because the avoided cost payments that its project should receive from CG&E pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) are in part a function of the type of additional capacity that CG&E needs and the time at which that capacity is needed. Therefore, PG&EE contends that CG&E's load forecast and need for the Woodsdale Generating Station, or alternative capacity, will have a substantial impact on PG&EE. PG&EE also states that the reason it did not file its motion to intervene in the power siting proceeding within thirty days of publication as required by Rule 4906-7-4(A)(2)(b), Ohio Administrative Code (O.A.C.), is because it was not aware that these proceedings were set for hearing until five days before the July 30, 1989 deadline for timely intervention.

2) Accompanying PG&EE's motion to intervene is a motion of Russell S. Frye, an attorney ad-

mitted to practice in the state of Ohio, requesting that Robert F. Shapiro and Lynne E. Gedanken, counsel for PG&EE and admitted to the practice of law in the state of Maryland, be permitted to appear before the Commission and the Board in the above-captioned proceedings.

3) On August 15,1989, CG&E filed a memorandum in opposition to PG&EE's motion to intervene. CG&E asserts that PG&EE's proposed 47 megawatt cogeneration facility is speculative and would have no discernible impact upon CG&E's supply plan or the need for the Woodsdale station. Further, CG&E states that to the extent that PG&EE's interest concerns CG&E's load forecast and the need for the Woodsdale station, or alternative capacity, this interest is already adequately represented by both the forecasting and power siting staff. CG&E submits that PG&EE is using this process merely to further its own agenda, and that intervention, if granted, would be merely a subterfuge permitting PG&EE to engage in discovery of data pertaining to the discussions concerning the avoided cost rate and to gain leverage with CG&E in those discussions. CG&E does not believe that the Commission and the Board should permit any vendor who may potentially have some interest in constructing a generating facility in CG&E's service territory to intervene. Lastly, CG&E argues that PG&EE has not shown extraordinary circumstances nor good cause to grant an untimely motion to intervene in the power siting proceeding.

4) On August 22, 1989, PG&EE filed a reply memorandum to CG&E's memorandum in opposition restating its interest in these proceedings and stating that determinations in these proceedings are likely to serve as a basis for determining avoided cost payments and may impair its interest in receiving the full payment to which it is entitled by PURPA.

5) Under Section 4906.10(A)(3), Revised Code, any person may intervene in power siting proceedings if the petition to intervene shows good cause. Rule 4906-7-04(C), O.A.C., also sets forth that, if intervention in Board proceedings is not timely requested, the administrative law judge (ALJ) may grant intervention in extraordinary circumstances and upon the

understanding that the intervenor agrees to be bound by the agreements, arrangements, and other matters previously made in the proceedings. With regard to forecasting proceedings, Rule 4901-1-11, O.A.C., requires a petition to intervene, filed at least five days prior to the scheduled hearing, show that the person has a real and substantial interest in the proceeding.

PG&EE's petition to intervene shows neither good cause nor a real and substantial interest related to the issues the Commission and the Board are to consider in making their determinations set forth in Sections 4935.04(F) and 4906.10(A), Revised Code. The ALJ does not believe that consideration of avoided cost payments to PG&EE's cogeneration facility, which is still in the planning stages, is an issue within the scope of the instant proceedings. The crux of PG&EE's argument for intervention is that determinations as to future peak loads and capacity requirements to be considered in these proceedings may serve as a basis for determining avoided cost payments to PG&EE either in subsequent negotiations with CG&E or in Commission proceedings to resolve the matter. Allegations that PG&EE may be affected by determinations made with regard to CG&E's forecasted load and capacity needs do not in and of themselves give PG&EE standing to intervene in these proceedings. See In the Matter of the Establishment of a Permanent Rate for the Sale of Energy From Montgomery County's Energy-From-Waste Facility to The Dayton Power and Light Company, Case No. 88-339-EL-UNC, Entry dated May 4, 1988. PG&EE is not a customer of CG&E to be concerned about CG&E maintaining reliable service at reasonable costs nor has PG&EE shown a stake in environmental determinations to be made. Although cogenerating facilities may be considered in forecasting and power siting proceedings, avoided cost payments to cogenerators are not a matter for consideration in such proceedings. If PG&EE is having difficulties in negotiating avoided cost payments with CG&E, it should avail itself of the procedures set out by the Commission in its Opinion and Order in Case No. 80-836-EL-ORD dated November 17, 1982. Accordingly, PG&EE's motion to intervene should be denied. Based on above findings, the motion of Russell S. Frye is moot.

It is, therefore,

ORDERED, That the petition for intervention filed by PG&E Enterprises and the motion of Russell S. Frye are hereby denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO
and THE OHIO POWER SITING BOARD

By: R. Russell Gooden
Administrative Law Judge

mjb
:keg

Entered in the Journal
AUG 2 4 1988

A True Copy

Gary E. Vigorito
Secretary

Briarfield of Courtland, Inc. v. State Certificate of Need Review Bd.
Ohio App. 10 Dist.,1993.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio, Tenth District, Franklin County.
BRIARFIELD OF CORTLAND, INC., dba Faber Nursing Home et al., Appellants-Appellants,
v.
STATE CERTIFICATE OF NEED REVIEW BOARD et al., Appellees-Appellees.
No. 92AP-1611.

Aug. 17, 1993.

APPEAL from the Certificate of Need Review Board.
WHITESIDE
*1 Briarfield of Cortland, Inc., dba Faber Nursing Home ("Faber"), and Meadowbrook Manor of Hartford ("Meadowbrook"), appeal from a decision of the State Certificate of Need Review Board ("CONRB") and raise a single assignment of error, as follows:
"The October 27, 1992, order issued by appellee The State Certificate of Need Review Board ('CONRB') granting appellee Liberty Health Care ('Liberty') a certificate of need for a one hundred (100) bed facility composed of fifty (50) long-term care nursing home beds and fifty (50) rest home beds is erroneous and not supported by reliable, probative, or substantial evidence, and is otherwise not in accordance with law."

This appeal involves a certificate of need ("CON") sought by appellee Liberty Health Care Center ("Liberty").[FN1] The Ohio Department of Health denied Liberty's application for a CON. At about the same time, the Department of Health granted a CON to Faber Nursing Home operated by appellant. Liberty appealed both the denial of its CON and the granting of the Faber CON to the CONRB. Liberty's application was for a new one hundred bed nursing-home facility.

FN1. Liberty is an unincorporated proprietorship owned by John Masternick, Sr., who also applied for CONs with respect to facilities in other counties, which are not *pertinent to this appeal.*

Just prior to a scheduled adjudicatory hearing before the CONRB, Liberty voluntarily withdrew its appeal of the granting of Faber's CON application. The next day, on September 11, 1992, the hearing upon Liberty's appeal from the denial of its application for a CON was rescheduled to September 18, 1992. Three days prior to this hearing, appellant, acting through its facilities, Faber and Meadowbrook, filed a motion to intervene. Following a telephone conference on the same date, the hearing officer filed a ruling denying the motion to intervene for failure of Faber and Meadowbrook to follow statutory requirements set forth in R.C. 3702.60 and the requirements set forth in Ohio Adm.Code 3702-2-13(A).

On October 2, 1982, Liberty and the Director of the Department of Health filed agreed stipulations and proposed conclusions of law requesting the CONRB to grant the D & M Realty Company [FN2] a CON for a one hundred bed facility composed of fifty nursing-home beds and fifty rest-home beds. The matter was reviewed by the board, which, on October 22, 1992, ordered the chairman to adopt the stipulations of fact and execute a board order embodying the conclusions of the board. The chairman did so and entered an order stating in part that:

FN2. *Stipulation 12 states that* "[t]he proposed operator of the facility is Windor House, Inc., an affiliate of D & M Realty Co." No issue has been raised on appeal relative to the operator.

"[B]ased upon the stipulations of testimony and evidence filed jointly by the Director and the Appellant in the matter of Liberty Health Care Center, Case No. 92-CON-18 [*sic*], D & M Realty Company is GRANTED a CON pursuant to the terms of the settlement as filed with the board."
This order is dated October 27,.1992, and sets forth the essential findings recited above. It is from this order that appellants appeal.

The parties have filed several motions, including motions by both Briarfield and Liberty to strike matter *dehors* the record attached to the other party's brief. Both motions are well-taken and sustained, this court being confined to the record as it was before the CONRB, with no new material being added. In any event, even if matters *dehors* the record is attached to the briefs of a party, this court determines the appeal based upon the certified record from the CONRB and not the attachments to any party's brief. Also, appellees Liberty and Ohio Department of Health have filed a motion to dismiss this appeal upon the ground that this appeal is frivolous, and Liberty has sought attorney fees, pursuant to R.C. 3702.60(E)(4).

*2 As to the merits of the appeal, Briarfield first contends that the order of the CONRB is improper because the settlement was not effected in accordance with Ohio Adm.Code 3702-2-18, which provides in pertinent part:
"(A) If all parties agree, settlement will be allowed at any stage of the proceedings prior to a final order of adjudication of the board.
"(B) In all cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the terms of such settlement shall be remanded to the director of health who shall issue an order incorporating the terms of the settlement. A copy of the terms of the settlement agreement shall be filed at the board office.
"(C) Any 'affected person,' as defined in division (A) of section 3702.58 of the Revised Code may request an adjudication hearing before the certificate of need review board based upon the order issued pursuant to paragraph (B) of this rule."

Briarfield contends that the order herein granting the CON is improper because the above-quoted rule would require that the matter be remanded to the Director of the Department of Health for issuance of such an order. However, the rule provides that such procedure shall be followed only when "a proceeding is sought to be terminated by the parties as a result of a settlement agreement." Here, the settlement did not call for a termination of the proceedings but, instead, for the granting of a CON. The rule is unclear as to the meaning of the word "terminated," but ordinarily the use of such word would connote that the proceedings will be terminated and the settlement agreement would then be incorporated into an order. That was not the procedure followed here, although it is similar. Rather, the parties, Ohio Department of Health and D & M Realty Company, dba Liberty Health Care Center, entered into a stipulation, "in lieu of the presentation of additional evidence or testimony," to the facts stated in the stipulations.

One of the factual stipulations is that "[t]he proposed construction of the 100 bed facility is consistent with criteria contained in Sections 3701-12-20, 3701-12-23, and 3701-12-231 of the Ohio Administrative Code."In addition, the parties stipulated that:
"5. The applicant has an option to purchase a site of approximately 4.03 acres * * *.
"6. The 100 bed facility would be developed in 35,000 gross square feet of new construction at an average cost of approximately $69.25 per square foot. Parking is to be provided at the ratio of one space for three beds. The proposed facility is of a construction Type A * * * fully protected by sprinklers, slab on grade with roof supported by wood trusses.
"7. The proposed facility would exceed the 50 bed minimum for new facilities.
" * * *
"9. Service area-The proposed facility is to be in Trumbull County approximately two miles north of the Mahoning County line. * * *
"10. The long-term care bed need formula reflects a need for additional nursing facility beds in Trumbull County sufficient to warrant granting the 50 beds requested in this certificate of need application. No adverse impact is anticipated on any other nursing facility. There is only one other nursing facility in Liberty Township.
*3 "11. The projected nursing facility occupancy rates for Liberty Health Care Center are 1994 48.9%, 1995-69.5%, 1996 76.9%."

Other stipulations indicate that the project is financially viable and that the proposed operator has a record of providing nursing and health care services to underserved groups. In paragraph 19, the stipulation states:"The Department of Health has had an adequate opportunity to review the documentation and materials submitted by the applicant in relation to the certificate of need application as proposed and set forth above. The application meets the general and special review criteria applicable to this type of a certificate of need application and is consistent with those criteria. There is an adequate bed need in Trumbull County to support the granting of this certificate of need application."

The parties also stipulated to proposed conclusions of law for consideration of the hearing examiner, who adopted them as her conclusions of law and recommendation, the recommendation stating:"It is the recommendation of the Hearing Examiner based

upon the stipulations of testimony and evidence filed jointly by the Department of Health and the Appellant that the Certificate of Need Review Board should grant the Appellant D & M Realty Company a certificate of need for a 100 bed facility composed of fifty nursing home beds and 50 rest home beds with a total project cost of $3,500,000.00 as is otherwise detailed in the stipulations of fact."

Notwithstanding their motion to intervene having been denied, Briarfield, on behalf of two homes it operates, Faber and Meadowbrook, submitted objections to the hearing examiner's conclusions of law and recommendation, making the very argument raised herein, namely, that the "settlement" procedure was in violation of the rule, and that the matter should be remanded to the Director of the Department of Health, because to do otherwise would be circumvention of appellants' due process rights.

We find no infirmity in the procedure followed by the CONRB in this case. Although in a broad sense of the word there was a "settlement," we do not find that the CONRB necessarily was required to remand the matter to the Director of the Department of Health. Rather, in this case, the parties entered into a stipulation of fact as to the salient facts, rather than presenting evidence establishing those facts. They then also presented an agreed statement of the conclusions of law for consideration by the hearing examiner for recommendation to the CONRB, such conclusions being predicated upon the stipulated facts, and the record certified to the CONRB by the director. Rather than "terminate" the proceedings as a result of the settlement agreement, the parties here sought that the proceedings continue predicated upon the findings of fact agreed to through the "settlement agreement." Even assuming that the CONRB in this instance could have followed the procedure set forth in Ohio Adm.Code 3702-2-18(B), we find no abuse of discretion on the part of the CONRB in proceeding in the manner that it did.

***4** Appellants also contend that they were denied due process rights by not being permitted to intervene in the proceedings before the CONRB. However, Ohio Adm.Code 3702-2-13(A) provides, as follows:
"Any affected person may intervene, as a matter of right, in an adjudication hearing by filing notice of intervention with the Certificate of Need Review Board within twenty-one calendar days after expiration of the time for requesting an adjudication hearing. Failure to file a timely notice of intervention shall constitute a waiver of the right to intervene. * * * "

It is undisputed here that Briarfield did not file a timely motion to intervene on behalf of either Faber or Meadowbrook. Accordingly, not having filed a timely motion to intervene, the right to intervene was waived. However, Ohio Adm.Code 3702-2-13(B) provides that:"Any affected person who fails to file a timely notice of intervention may file a motion to intervene with the hearing examiner. The assigned hearing examiner shall grant the motion to intervene only upon a showing of extraordinary circumstances and upon a finding that the intervention will not otherwise delay the proceedings."

In denying the motion to intervene, the hearing examiner noted that Faber had knowledge of the appeal and the beds at issue since July 16, 1992, through being a party to Liberty's appeal from the CON granted to Faber and a prehearing conference held on August 6, 1992, upon both matters. Meadowbrook, being under the same ownership, had knowledge of the pendency of the appeal, which necessarily included the possibility that a CON would be granted to Liberty either through reversal of the director's decision by the board or through a settlement. The hearing examiner further found that the dismissal by Liberty of its appeal from the issuance of a CON to Faber does not constitute extraordinary circumstances justifying intervention by Faber in Liberty's appeal from denial of its CON application. We find no abuse of discretion with respect to these findings and, thus, the denial of the motion to intervene.

As indicated above, appellants also contend that the CONRB erred because it did not remand the matter to the Director of the Department of Health pursuant to Ohio Adm.Code 3702-2-18(B), which provides that:
"In all cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the terms of such settlement shall be remanded to the director of health who shall issue an order incorporating the terms of the settlement. A copy of the terms of the settlement agreement shall be filed at the board office."

Although perhaps of similar effect, what Liberty and the director filed was not a settlement agreement but, rather, agreed stipulations, together with proposed conclusions of law. Ohio Adm.Code 3702-2-06(C) provides that no hearing is necessary "when the parties stipulate all the essential facts and agree to the submission of the case to the board." Furthermore, Ohio Adm.Code 3702-2-08, with respect to a prehearing conference, states one of the purposes as

being "discussing possible admissions or stipulations regarding the issues of fact or the authenticity of documents." Similarly, Ohio Adm.Code 3702-2-09(D) states in pertinent part that:*5 "The parties to the proceeding may enter into a written or oral stipulation concerning fact * * *.
" * * *
"(3) The hearing examiner shall accept a stipulation unless such stipulation is vague or contrary to law, or would justify a court of law in refusing to accept a stipulation."

The parties did enter into stipulations of fact in accordance with the rules. This was a separate document from the proposed conclusions of law, which the parties also jointly filed and submitted to the hearing examiner for consideration.

Acceptance of the proposed conclusions of law by the hearing examiner does not translate into a settlement agreement which should be remanded to the director for implementation such as is contended by appellants. The conclusions of law are supported by the stipulated facts. The CONRB did not err, nor act contrary to law in proceeding upon the stipulated facts, the proposed conclusions of law and recommendation as approved by the hearing examiner. Rather, the CONRB reviewed the matter and adopted the stipulations of fact jointly filed by the director and Liberty and, based thereon, granted a CON. The language that the CON was "pursuant to the terms of the settlement as filed with the board," does not procedurally detract from the action being upon stipulations of fact rather than merely upon a settlement agreement. Appellant has not demonstrated that the granting of the CON is either contrary to law or unsupported by reliable, probative and substantial evidence. The assignment of error is not well-taken.

However, appellants have presented justiciable issues, and the motions to dismiss the appeal as frivolous and for attorney fees are overruled.

For the foregoing reasons, the assignment of error is overruled, and the decision of the Certificate of Need Review Board is affirmed.

Decision affirmed.

TYACK and KERNS, JJ., concur.
KERNS, J., retired, of the Second Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.
Ohio App. 10 Dist.,1993.

Briarfield of Courtland, Inc. v. State Certificate of Need Review Bd.
Not Reported in N.E.2d, 1993 WL 317236 (Ohio App. 10 Dist.)

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