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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO


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.)

Case No. 05-376-EL-UNC

MEMORANDUM CONTRA MOTION TO INTERVENE BY GENERAL
ELECTRIC COMPANY, GE ENERGY LLC, BECHTEL CORPORATION, AND
BECHTEL POWER CORPORATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. Introduction

On July 22, 2005, General Electric Company, GE Energy LLC, Bechtel Corporation, and Bechtel Power Corporation ("GE/Bechtel") moved to intervene out of time ("Motion Out of Time") in the above-captioned case "for the purpose of protecting certain confidential information, including ... documents containing extremely sensitive, proprietary information of [GE/Bechtel]...." The documents referred to by GE/Bechtel are among the materials that the Public Utilities Commission of Ohio ("Commission" or "PUCO") ordered released, subject to certain protections, by an Entry dated July 21, 2005 ("July Entry"). These documents were transmitted by the Columbus Southern Power and Ohio Power Companies ("Applicants" or the "Companies") to the Office of the Ohio Consumers' Counsel ("OCC") on July 25, 2005. The OCC is the representative of the 1.2 million Ohio residential consumers in the Applicants' service areas.

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Pursuant to Ohio Adm. Code 4901-1-12, the OCC opposes the GE/Bechtel Motion Out of Time. GE/Bechtel' motion is not timely, they have not shown just cause to support an exception, they have failed to meet any of the criteria that would otherwise support their intervention, and their Motion Out Of Time is moot.

II. Argument

A. The GE/Bechtel "Motion Out Of Time" Is Not Timely

GE/Bechtel fail every statute and rule regarding the required showing to become a party to the instant proceeding. Pursuant to R.C. 4903.221, a person may intervene, provided that a motion is filed "no later than ... [a]ny specific deadline established by order of the commission for purposes of a particular proceeding...." The Commission's rules also require a "timely motion." Ohio Adm. Code 49901-1-11(A). GE/Bechtel "acknowledge that their request to intervene is not timely pursuant to the Attorney Examiner's April 19 Entry." Motion Out of Time at 6. The PUCO ordered that motions to intervene could be filed until July 1, 2005.

In an effort to show "good cause" for making an exception to the deadline for intervention (R.C. 4903.221(A)(1)), the GE/Bechtel Companies aver that their disinterest in intervening during the long opportunity that the PUCO provided is explained by the issuance of the July Entry on July 22, 2005. *Id.* at 6. However, GE/Bechtel has been lurking in the wings from the inception of this case. The GE/Bechtel information that is at issue in discovery shows the involvement of GE/Bechtel in the Applicants' IGCC plans before the Application was filed on March 18, 2005. On July 14, Counsel for the Applicants represented to OCC counsel that "[t]he GE/Bechtel information was not in the room when

you visited [on July 8, 2005] because we did not have clearance from them [GE/Bechtel Companies] to let anyone see it.” See attached e-mail (July 14, 2005). The documents were, in part, responsive to a request made by the Ohio Energy Group’s second set of discovery, served on the Applicants on May 20, 2005 with a response due no later than June 9, 2005. Thus, the GE/Bechtel Companies were aware of discovery issues related to their communications with AEP long before July 22, 2005.

The Motion Out of Time by GE/Bechtel is not timely, and GE/Bechtel have not shown “good cause” to make an exception for their intervention. Their Motion Out Of Time should be denied.

B. The GE/Bechtel Companies Have Not Met The Criteria For Intervention

The presentation provided by the GE/Bechtel Companies regarding the usual criteria for the evaluation of motions to intervene demonstrates the weakness in their case. Ohio Adm. Code 4901-1-11(B) states that a person must show its “real and substantial interest,” but intervention may be denied if “the person’s interest is adequately represented by existing parties.” The Applicants have represented the interests of GE/Bechtel regarding the discovery of information. Indeed, the Applicants opposed the OCC’s pleadings and impeded the OCC’s case preparation while they represented their shared interest with GE/Bechtel. That representation appears to have taken place in consultation with the GE/Bechtel Companies.

The GE/Bechtel Companies take issue with the failure of the Applicants to “move for a protective order,” but the July Entry provides the type of protection that could be provided had the Applicants moved for a protective order. July Entry at (7). GE/Bechtel

state that their intervention will be followed by a motion for a protective order. Motion Out Of Time at 6. This approach to deal with discovery issues has recently been rejected by the Commission. *In re CG&E Distribution Rate Case*, Case No. 05-59-EL-AIR, et al., Entry at 1-2 (June 23, 2005). After working in the background with the Applicants, the GE/Bechtel Companies seek a “second bite at the apple” that should not be permitted under the Commission’s rules.

Ohio Adm. Code 4901-1-11(B) states that the Commission may consider (1) the “nature of the person’s interest,” (2) the “extent to which the person’s interest is represented,” (3) whether the intervention “would unduly delay the proceeding,” and (4) the person’s “contribution to a just and expeditious resolution of the issues.” These factors are also stated, in principal part, in the criteria set forth in R.C. 4903.221(B) for the Commission’s consideration in deciding whether to grant a request for intervention:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

GE/Bechtel also fail to support their Motion Out Of Time regarding these criteria. The GE/Bechtel Motion Out Of Time fails the legal standards for intervention and interposes an undue delay related to OCC’s case preparation.

The GE/Bechtel Companies have not supported their dire claims regarding the nature of their interest. The GE/Bechtel Companies state that release of the documents “could allow such competitors to replicate the technology” and “could destroy the entire basis of revenue for GE (USA)’s gasification business.” Motion Out Of Time at 5. The

OCC has inspected the documents in dispute and arrives at a completely different conclusion. The PUCO arrived at a different conclusion in its July Entry. The GE/Bechtel interest in the subject documents has been more than adequately protected in the July Entry.

The Motion Out Of Time does not explain the legal position of the GE/Bechtel Companies. The July Entry provides protections for the GE/Bechtel documents. Neither the Applicants nor the GE/Bechtel Companies have ever stated, let alone demonstrated, that the GE/Bechtel documents are privileged or irrelevant to this proceeding. Thus, pursuant to Ohio Adm. Code 4901-1-16, the documents are discoverable. GE/Bechtel have failed to present a legal position that supports its intervention.

GE/Bechtel fail to show that their entry into this case will avoid undue delay, as that topic was taken up by the July Entry. The July Entry granted the untimely motion of American Municipal Power -- Ohio ("AMP"). July Entry at (2). The July Entry, taking up the untimely motion of American Municipal Power -- Ohio ("AMP"), stated that the AMP intervention "will not cause undue delay nor prejudice the other parties, as AMP has agreed to participate on a going forward basis only." *Id.* In contrast, the GE/Bechtel Motion Out Of Time is directed at delay to revisit the July Entry.

Finally, the GE/Bechtel Companies are not interested in the "full development and equitable resolution of the factual issues" in this case. Instead, they have already delayed the transmittal of information to the OCC through their consultations with the Applicants. Unlike the situation involving AMP, the OCC has been prejudiced by the interference of the GE/Bechtel Companies. The prejudice will increase the more time and resources the OCC must commit to dealing with discovery issues rather than the substantive issues involved in this proceeding.

The Motion Out Of Time presents a rare glimpse at a motion to intervene that is completely unsupported by the criteria used to evaluate such motions. The Motion Out Of Time should be denied.

C. The Motion Out Of Time Is Moot.

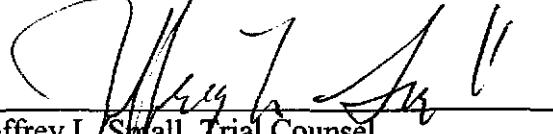
The GE/Bechtel Motion is directed toward the discovery issues that the PUCO resolved in its July Entry. Unfortunately for GE/Bechtel, the horse has left the barn. On July 25, 2005, pursuant to the July Entry, the Applicants provided OCC with the documents under arrangements ordered by the Attorney Examiners. Moreover, the OCC and the Applicants resolved other issues regarding documents that were owed to the OCC. The movants to intervene are just too late, in every respect.

III. Conclusion

The Commission should have before it the information needed to carefully scrutinize the Companies' Application. The disputes between the parties regarding discovery have been argued. The July Entry lays out the obligations of the parties regarding the treatment of documents. The Motion Out Of Time should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing pleading was served via electronic and regular U.S. Mail, this 26th day of July, 2006.



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Date: 7/14/05 5:59PM
Subject: Re: Protective Agreement

The Critical Energy Infrastructure Information was not in the room. This is the material I referenced in my fax to you this afternoon regarding OCC's RFP #1. The GE/Bechtel information was not in the room when you visited because we did not have clearance from them to let anyone see it. The GE/Bechtel information, as well as the last of the responsive materials (some confidential) to Ohio Energy Groups' 2nd set of discovery, became available yesterday.

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07/14/2005 04:58
PM

Date: 07/14/2005 04:58:25 PM
From: "JEFF SMALL"

To: <miresnik@aep.com>
cc:
Subject: Re: Protective Agreement

Before replying in substance, I have a question. The materials that you mention in your e-mail did not appear to be in the room when I inspected the materials produced. Can you confirm this observation?

Jeff

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