

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
 )  
NEW ENERGY CORP., ) CASE NO. 12-33866 HCD  
 ) CHAPTER 11  
 )  
DEBTOR. )

DECISION and ORDER

At South Bend, Indiana, on February 7, 2013.

Before the court is the Motion to Intervene in the Matter of Debtor’s Auction Sale, filed on February 5, 2013, by the City of South Bend, Indiana (“City”), by counsel, pursuant to Federal Rule of Civil Procedure 24(a)(2).<sup>1</sup> *See* R. 194. The City was represented by counsel at the hearing held February 5, 2013, which concerned the debtor’s Motion for Sale of the estate assets of the debtor New Energy Corp. Even though the court did not rule on the City’s Motion to Intervene, which had been filed only fifteen minutes before the hearing, it granted counsel for the City the opportunity to address the court and to present the City’s concerns at the hearing.

In its argument before the court and in its Motion, the City stated that it had filed a proof of claim in the New Energy Corp. bankruptcy case, in the amount of \$117,896.99, which “reflect[ed] the monthly revenue provided by the debtor.” *Id.* ¶ 5. It described the harm that occurred to the City when the debtor shut down its active operations: flooding of residents’ basements, loss of revenue to the City, potential

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<sup>1</sup> Federal Rule 24(a)(2) provides:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

...

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

increase in City customers' sewage bills, potential environmental risks. The City asserted that it would be in its best interest for New Energy Corp. to be sold as a going concern. *See id.* ¶ 7. It then alleged:

To the extent that the auction sale of the Debtor's assets held January 31, 2013 was irregular or improper in any way, the City requests the court to invalidate that sale and to re-conduct it in a manner which would allow a purchaser with a desire to re-operate the facility, such as Natural Chem Holdings LLC, to participate in the sale process openly and equitably.

*Id.* ¶ 8. The City further claimed that its interests in this case were unique and that no party adequately represented its interests. *See id.* ¶ 9. On those grounds it sought intervention.

The City requested leave to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Pursuant to that Rule, it must meet four criteria: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Shea v. Angulo*, 19 F.3d 343, 346 (7th Cir. 1994) (citations omitted). A potential intervenor's inability to satisfy any one of the factors is sufficient ground for denial of the request to intervene. *See Grochocinski v. Mayer Brown Rowe & Maw LLP*, 2011 WL 382737 at \*3 (N.D. Ill. Feb. 3, 2011). "The test for timeliness is essentially one of reasonableness: 'potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly.'" *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (quoting *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994)).

The court finds that the City's motion to intervene, filed after the auction was completed and after it appeared that the successful bidder would not operate New Energy Corp. as a going concern, is untimely. The City did not participate in the auction, did not bring a "going concern" bidder into the process, and only now, as a non-party to the sale, urges the court to invalidate the sale and "to re-conduct [the auction] in a manner which would allow a purchaser . . . such as Natural Chem Holdings LLC, to participate in the sale process openly and equitably." R. 194 ¶ 8. The City, as a non-party to the auction, can offer no evidence of impropriety in the auction proceedings; it simply relies on the position of Natural Chem Holdings – a

party which was given generous latitude in being allowed to bid and to participate in the sale process openly and equitably, the court notes. The court finds that the City is too late in trying to influence the result of the auction sale of the debtor's assets by intervening after the auction. *See, e.g., Federal Deposit Insurance Corp. v. Hanrahan*, 612 F.2d 1051, 1053-54 (7th Cir. 1980) (upholding district court's ruling that post-sale intervention application was untimely). It concludes that intervention of the City is untimely.

In addition, it is clear in this circuit that allowing a party to intervene requires more than an economic interest. *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) (stating that “the fact that you might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit – maybe you’re a creditor of one of them – does not entitle you to intervene in their suit”); *see also In re Stone & Webster, Inc.*, 335 Fed. Appx. 202, 204 (3d Cir. June 1, 2009) (holding that a mere economic interest in the outcome of litigation is insufficient and that “[h]olding otherwise would permit every secured creditor to intervene in its debtor’s litigation”), *cert. denied sub nom. Saudi American Bank v. SWE & C Liquidating Trust*, 130 S. Ct. 1569 (Feb. 22, 2010). The interest held by an intervenor must be significant and direct rather than contingent. *See Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004). In this case, the City favored a particular outcome of the auction, but it lacked any direct interest in it. Its contingent interest in the sale does not justify intervention. *See Flying J, Inc.*, 578 F.3d at 571 (noting that “the effects of a judgment in or a settlement of a lawsuit can ramify throughout the economy, inflicting hurt difficult to prove on countless strangers to the litigation,” and that the remoteness of such injury is “a standard ground for denying a person the rights of a party to a lawsuit”).

The court finds that the City's interests in this case, and its desire that the debtor's business operation continue, are held by many of the debtor's creditors. The court indeed understands the City's position and points out that the creditors' committees were formed to protect the interests of the debtor's creditors as the bankruptcy progressed. Because the City's interest is essentially an economic one, however,

the court determines that it does not have a right to an “intervention of right” in the final sale proceedings of the debtor’s assets.

Accordingly, the City of South Bend’s Motion for Leave to Intervene in the Matter of Debtor’s Auction Sale pursuant to Federal Rule of Civil Procedure 24(a)(2) is denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT