

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER)
COMPANY FOR (1) A CERTIFICATE OF)
PUBLIC CONVENIENCE AND NECESSITY)
AUTHORIZING THE TRANSFER TO THE)
COMPANY OF AN UNDIVIDED FIFTY)
PERCENT INTEREST IN THE MITCHELL)
GENERATING STATION AND ASSOCIATED) CASE NO.
ASSETS; (2) APPROVAL OF THE) 2012-00578
ASSUMPTION BY KENTUCKY POWER)
COMPANY OF CERTAIN LIABILITIES IN)
CONNECTION WITH THE TRANSFER OF THE)
MITCHELL GENERATING STATION; (3))
DECLARATORY RULINGS; (4) DEFERRAL OF)
COSTS INCURRED IN CONNECTION WITH)
THE COMPANY'S EFFORTS TO MEET)
FEDERAL CLEAN AIR ACT AND RELATED)
REQUIREMENTS; AND (5) ALL OTHER)
REQUIRED APPROVALS AND RELIEF)

ORDER

The matter is before the Commission upon a motion for full intervention filed by EnerNOC, Inc. ("EnerNOC"). The motion states that EnerNOC is located in Boston, Massachusetts, and that its business activities are as follows:

EnerNOC is a leading developer and provider of clean and intelligent energy solutions to commercial, institutional, and industrial end-use customers, as well as electric power grid operators and utilities . . . help[ing] both customers and grid operators optimize the balance of electric supply and demand EnerNOC is the world's largest provider of demand response resources to utilities and grid operators [and] actively manages aggregated demand response resources participating in a broad variety of reliability-based programs, economic price-response programs, and ancillary service markets. EnerNOC is a direct market participant in

wholesale electricity markets . . . - and germane to this proceeding - EnerNOC provides demandside management services through bilateral arrangements with utilities throughout North America, in both investor-owned and public power utility systems In addition, EnerNOC has significant experience delivering energy savings in the industrial market sector.¹

EnerNOC asserts that it has a unique interest to advance and protect in this case arising from a June 10, 2013 bid that it submitted in response to a Request for Proposals ("RFP") by Kentucky Power Company ("KPCO"). The RFP sought proposals for the replacement of approximately 250 MW of generation due to the anticipated retirement of KPCO's Big Sandy 1. EnerNOC states that intervention is being requested to ensure that its bid will be evaluated and analyzed in a reasonable manner. It opines that its request is timely because the Memorandum of Understanding proposing to terminate the RFP and seek authorization to convert Big Sandy 1 from coal to gas was not filed in this case until May 28, 2013 by KPCO and some, but not all, of the parties. Asserting that its bid would provide KPCO's ratepayers a lower cost alternative to converting Big Sandy 1 to gas, EnerNOC claims a special interest in this proceeding.

Further, EnerNOC states that as an intervenor, it will be able to provide the details of the bid it submitted to KPCO and that doing so will assist the Commission, noting that the Commission's Order issued May 28, 2013 requested KPCO to file an analysis of the bids received in response to its RFP. EnerNoc seeks intervention to demonstrate that it has a resource that should be included as a least-cost alternative

¹ EnerNOC's Motion to Intervene at 3-4.

generation resource and asserts that it has a vested interest in its bid and that its interest is not adequately represented by any other party to this case.

KPCO filed a response in objection to EnerNOC's intervention. KPCO notes that EnerNOC is not a customer of KPCO, and its only stated interest arises from the bid it submitted in response to KPCO's RFP. KPCO's response relies heavily on the Kentucky Court of Appeals decision in *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007), a case in which the Court affirmed the Commission's denial of intervention under circumstances almost identical to those presented here. KPCO asserts that the Commission has adopted and followed the *EnviroPower* Court's precedent, citing the 2012 denial of intervention to a potential power supplier in KPCO's prior application for approval of its 2011 Environmental Compliance Plan.²

KPCO also asserts that EnerNOC has no special interest as a bidder because the RFP expressly reserved to KPCO the right to determine how to proceed with the RFP, the disposition of Big Sandy 1, which bidders it would enter into negotiations with, and to select or reject any and all bids. Further, KPCO states that EnerNOC will not present issues or develop facts that will assist the Commission in this proceeding because EnerNOC's bid relates to the replacement of Big Sandy 1, whereas this case is limited to Big Sandy 2, and EnerNOC had no role in either developing the RFP for Big Sandy 1 or evaluating the bids received in response thereto. Finally, KPCO argues that due to EnerNOC's lack of interest in this case, its motion to intervene, having been filed

² Case No. 2011-00401, *Application of Kentucky Power Company for Approval of Its 2011 Environmental Compliance Plan, For Approval of Its Amended Environmental Cost Recovery Surcharge Tariff, and for the Grant of a Certificate of Public Convenience and Necessity for the Construction and Acquisition of Related Facilities* (Ky. PSC Jan. 26, 2012).

over six months after this case was filed, is untimely, and its intervention will result in delay and disruption to this proceeding. EnerNOC then filed a reply to KPCO's response, arguing that the issue of its intervention is within the sound discretion of the Commission, and that EnerNOC has an interest in presenting what it asserts is a lower cost supply alternative.

In analyzing the EnerNOC motion to intervene, the Commission finds that the only person that has a statutory right to intervene is the Attorney General ("AG"), pursuant to KRS 367.150(8)(b). Intervention by all others is permissive and is within the sound discretion of the Commission. As KPCO correctly notes in its response, the issue of intervention was definitively addressed in the unreported case of *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007). In that case, the Court of Appeals ruled that this Commission retains power in its discretion to grant or deny a motion for intervention but that discretion is not unlimited. The appellate court then enumerated the statutory and regulatory limits on the Commission's discretion in ruling on motions for intervention. The statutory limitation, KRS 278.040(2), requires that the person seeking intervention have an interest in the rates or service of a utility, as those are the only two subjects under the jurisdiction of the Commission. The regulatory limitation of 807 KAR 5:001, Section 4(11), requires that a person demonstrate a special interest in the proceeding which is not otherwise adequately represented or that intervention is likely to present issues or develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

Based on a review of EnerNOC's motion and being otherwise sufficiently advised, the Commission finds that the facts and legal issues presented here are almost identical to those before the Court in the EnviroPower case. There, EnviroPower was an unsuccessful bidder in an RFP for power that had been issued by East Kentucky Power Cooperative, Inc. ("EKPC"). EnviroPower subsequently requested to intervene in EKPC's application for authority to construct a new generating facility which EKPC had proposed to construct in lieu of accepting the bid that EnviroPower had submitted in response to the RFP. The Commission denied EnviroPower's intervention and the Court of Appeals affirmed the denial of intervention, also holding that as a mere bidder in response to an RFP, EnviroPower had no vested interest that would entitle it to intervene in the Commission's proceeding.

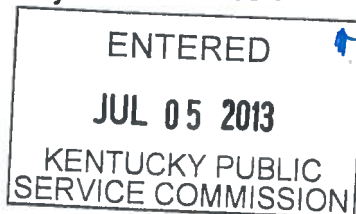
We find that EnerNOC has made no claim that it had any role in developing the KPCO RFP or in evaluating the bids that KPCO received. As a mere bidder on an issue that is tangential at best to this proceeding, EnerNOC has no vested or special interest in any issue before the Commission in this proceeding, and it is not likely to present issues or develop facts that would assist the Commission in this proceeding. For these reasons, we deny EnerNOC's motion to intervene.

EnerNOC will have ample opportunity to participate in this proceeding even though it is not granted intervenor status. It can review all documents filed in this case and monitor the proceedings via the Commission's website at the following web address: [http://psc.ky.gov/Home/Library?type=Cases&folder=2012 cases/2012-00578](http://psc.ky.gov/Home/Library?type=Cases&folder=2012%20cases/2012-00578).

EnerNOC may also file comments as frequently as it chooses, and those comments will be entered into the record of this case. Finally, the Commission will provide EnerNOC an opportunity, if it so chooses, to present any information that it wishes for the Commission to consider in this matter at the beginning of the formal evidentiary hearing when it is resumed at 10:00 a.m. Eastern Daylight Time, on July 10, 2013 at our offices in Frankfort, Kentucky.

IT IS THEREFORE ORDERED that EnerNOC's motion to intervene is denied.

By the Commission



ATTEST:



Executive Director

Case No. 2012-00578

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