

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JUN 27 2013

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 ASSETS; (2) APPROVAL OF THE 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

CASE NO. 2012-00578

**Kentucky Power Company's Response In Opposition To
EnerNOC, Inc.'s Motion To Intervene**

Kentucky Power Company opposes EnerNOC, Inc.'s ("EnerNOC") Motion to Intervene ("Motion") filed on June 21, 2013. As both this Commission and the courts have made clear, RFP bidders such as EnerNOC, which are not retail customers of a utility, do not have a special interest in matters within the Commission's jurisdiction, and thus are properly denied intervention. EnerNOC's Motion must be denied.

A. EnerNOC Lacks A Special Interest In This Proceeding Because It is Not A Retail Customer of Kentucky Power.

EnerNOC is not a retail customer of Kentucky Power. Indeed, nowhere in its motion does EnerNOC claim that it is a Kentucky Power customer. EnerNOC identifies its “sole interest in this case ...[as] EnerNOC’s June 10, 2013 response to a Request for Proposals (‘RFP’) by Kentucky Power Company (‘Kentucky Power’).” Motion at 2. EnerNOC’s status as a bidder in the March 28, 2013 RFP fails to satisfy the requirements for intervention before this Commission.

Directly dispositive of EnerNOC’s motion is the Kentucky Court of Appeals decision in *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 Ky. App. Unpub. LEXIS 121 (Ky. App. February 2, 2007). There, EnviroPower, an unsuccessful bidder in an RFP conducted by East Kentucky Power Cooperative, Inc. in connection with East Kentucky’s application for a certificate of public convenience and necessity to construct a 278 MW generating facility, sought twice to intervene in the certificate proceeding. *Id.* at * 3. The Commission denied both motions on the grounds that EnviroPower was not a customer of East Kentucky and thus had no interest in the rates or service of the utility. *Id.* at * 3, 5. On appeal, the Franklin Circuit Court held that EnviroPower lacked a “legally protected interest which would entitle it to intervene in the CON Case, and the PSC did not abuse its discretion in denying intervention.” *Id.* at 7.

The Kentucky Court of Appeals affirmed. Like the Commission, the Court of Appeals concluded that a party seeking intervention must have “an interest in the ‘rates’ or ‘service’ of a utility, since those are the only two subjects under the jurisdiction of the PSC.” *Id.* at * 10. Such a limitation is not only required by KRS 278.040(2), but also by common sense. Otherwise any commercial entity doing business with a utility, or even, as is the case with EnerNOC, only

hoping to do business, would be entitled to intervene in the utility's proceedings before the Commission.

EnerNOC's motion suffers the same flaw that doomed EnviroPower's efforts to intervene in the East Kentucky certificate case. Because it does not pay Kentucky Power's rates, nor does it receive service from the Company, EnerNOC lacks any sort of legally cognizable interest – special or otherwise – within the Commission's statutorily-defined jurisdiction. As such, its motion must be denied.

The Commission continues to cleave to the principles established by it, and affirmed by the Kentucky Court of Appeals, in *EnviroPower*. As recently as last year, the Commission held in a Kentucky Power certificate case that a disappointed supplier seeking to provide the Company with a claimed alternative to the subject of the certificate proceeding lacked a special interest in the case:

The Commission's jurisdiction is limited to regulating the retail rates and service of Kentucky Power. Only retail customers of Kentucky Power pay its rates and receive its service. Thus, only retail customers of Kentucky Power have an interest in its rates or its service.¹

Accordingly, the Commission denied intervention.

Judicial and Commission precedent is clear. Because EnerNOC has not claimed, much less established, that it is a retail customer of Kentucky Power, it lacks a special interest in the rates or service of Kentucky Power, and is not entitled to intervene.

¹ *In the Matter of: 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 Grant of A Certificate of Public Convenience and Necessity of Related Facilities*, Case No. 2011-00401 at 3 (Ky. P.S.C. January 26, 2012).

B. The Plain Language of the RFP Also Demonstrates That EnerNOC has No Special Interest in this Case.

Even if EnerNOC claimed interest as an RFP bidder were otherwise sufficient to establish a special interest warranting intervention, its motion fails because EnerNOC ignores the plain language of the RFP. EnerNOC claims that it “has a special interest in ensuring its responsive bid is evaluated, analyzed, and considered...” Motion at 4. EnerNOC believes that its intervention is necessary “to present its response to Kentucky Power’s RFP, ensure its bid response is considered for inclusion in any settlement of this proceeding, and seek clarification of its rights.” Motion at 5. EnerNOC asserts that the decisions relating to the disposition of Big Sandy Unit 1 embodied in the Memorandum of Understanding filed by Kentucky Power and two of the current intervenors in this case – Kentucky Industrial Utility Customers, Inc. (“KIUC”) and Sierra Club – threaten its interests.

However, EnerNOC has no special interest in this case, or in any potential settlement thereof because, as the RFP makes clear, Kentucky Power has sole discretion vis-à-vis parties submitting responses to the RFP on how it will proceed with the RFP and the disposition of Big Sandy Unit 1. The Background Section of the RFP states:

The evaluation of the RFP and BS1 Conversion is not a commitment to convert (BS1 Conversion) or purchase (RFP) and shall not bind the Company or any affiliates of the Company in any manner. The Company *in its sole discretion* will determine which direction, *if any*, it wishes to take with respect to replacing the Big Sandy Unit 1 coal fired generation capacity, energy, and ancillary services.

RFP at 3 (emphasis supplied). Additionally, the RFP gives the Company sole discretion to determine which bidders it will enter into negotiations with:

2.9. This RFP is not a commitment to purchase and shall not bind the Company or any affiliates of the Company in any manner. The Company *in their sole discretion* will determine which Seller(s), *if any*, it wishes to engage in negotiations that may lead to a binding contract.

RFP at 5 (emphasis supplied). Finally, the RFP makes clear that Kentucky Power can reject any or all submissions:

9.1. The Company *reserves the right, without qualification*, to select or reject any or all Proposals and to waive any formality, technicality, requirement, or irregularity in the Proposals received...

9.4. Sellers who submit Proposals do so *without recourse against the Company* for either rejection by the Company or failure to execute an agreement for purchase of Capacity and/or energy for any reason.

RFP at 10-11 (emphasis supplied).

Under the terms of the RFP, EnerNOC never had a right to the review and evaluation of its bid that it now claims as a basis for intervention in this case. Kentucky Power always had the ability to make the decisions it felt were appropriate regarding the disposition of Big Sandy Unit 1. This includes the course proposed by the parties to the Memorandum of Understanding.

Even if it were able to overcome the Commission's clear precedent that intervention is limited to retail customers, the RFP upon which it premises its motion makes clear EnerNOC lacks any cognizable interest in this case.

C. EnerNOC Will Not Present Issues Or Develop Facts That Will Aid The Commission In This Proceeding.

EnerNOC's argument that it "seeks to intervene in this proceeding simply to demonstrate that it has resources that should be included as a least-cost alternative generation resource for the benefit of a greater number of Kentucky Power's ratepayers" fails in three respects. Motion at 6. First, EnerNOC's bid was provided in connection with the Company's investigation of the disposition of Big Sandy Unit 1. The disposition of Big Sandy Unit 2 – not Big Sandy Unit 1 – is the subject of this proceeding. As EnerNOC's motion makes clear, the Company is not seeking a certificate of public convenience and necessity for Big Sandy Unit 1 in this case. Motion at 7.

Moreover, nothing in the filed Memorandum of Understanding, or a Commission order

approving a settlement agreement based on the memorandum, would allow Kentucky Power to proceed with the conversion of Big Sandy Unit 1 without first seeking in a separate proceeding a certificate of public convenience and necessity for the conversion of Big Sandy Unit 1.

Second, even if this proceeding directly related to Big Sandy Unit 1, and it does not, EnerNOC as a respondent to an RFP is unlikely to present issues or develop facts that would aid the Commission's in fully considering a Big Sandy Unit 1 certificate. As the *EnviroPower* court explained in affirming the Commission's decision denying a disappointed bidder's motion to intervene in an East Kentucky certificate proceeding:

The PSC properly found that since 'EnviroPower has no role in either the development of EKPC's bidding procedures or the evaluation of the bids received,' and its intervention was not likely to present issues or develop facts to assist the PSC in fully considering the CON case.

2007 Ky. App. Unpub. LEXIS 121 at * 10. EnerNOC had no role, and claims no role, in the development of the March 28, 2013 RFP related to the retirement of Big Sandy Unit 1, or the evaluation of the responses received. As such, it is no differently situated than EnviroPower, and its intervention is no more likely to aid the Commission's resolution of the issues in this proceeding.

Third, there is no harm to EnerNOC if its Motion is denied. Intervention is not necessary for EnerNOC's underlying interest (that the Company considers the resources described in EnerNOC's bid) to be adequately protected. In fact, by submitting its bid to the Company, EnerNOC has already made the Company aware of resources EnerNOC may be interested in offering, and which the Company can evaluate in its resource planning in the future. Beyond that, EnerNOC's interest in possibly offering resources is not cognizable in this case, as explained above, and does not need to be further protected.

EnerNOC's motion must be denied.

D. The May 28, 2013 Memorandum Of Understanding And EnerNOC's Subsequent Response Did Not Transform EnerNOC's Untimely Response Into A Timely One.

Faced with explaining how its motion, which was filed six months and three days after the Company filed its application, and less than three weeks before the date of the twice-rescheduled hearing, could be considered timely, EnerNOC argues that “[t]his Motion became timely because EnerNOC’s interest arose once the Memorandum of Understanding was submitted by the parties to this proceeding on May 28, 2013, and EnerNOC submitted its response to the RFP on June 10, 2013 just 11 days ago. But if the Memorandum of Understanding and EnerNOC’s submission of a response to the Company’s Big Sandy Unit 1 RFP do not give EnerNOC an interest in this matter, and this Commission and the courts have made clear they do not, they certainly did not restart the clock for measuring the timeliness of EnerNOC’s motion. EnerNOC can no more hang its timeliness argument on a non-existent interest than a cap can be placed on non-existent peg.

E. EnerNOC's Intervention will Unduly Complicate and Disrupt the Proceeding.

EnerNOC states, without specifics, that its intervention will not cause a delay nor complicate or disrupt the proceedings. Motion at 8. It certainly nowhere hazards an explanation of how its cross-examination of some or all the more than a dozen witnesses in this proceeding concerning EnerNOC’s legally non-cognizable interests will not delay and disrupt the hearing in this matter. Also left unanswered is why the Commission should allow EnerNOC to squander the Commission’s limited resources by pursuing matters which lie outside the Commission’s exclusive jurisdiction over Kentucky Power’s rates and service, or in support of EnerNOC’s efforts to seek a clarification of its purported rights (which do not exist under the RFP) in connection with an RFP issued in connection with the disposition of a unit that is not the subject of this proceeding. The Company’s application in this case is ripe for decision, and there is little

enough time in the scheduled hearing to address the matters properly before the Commission.

EnerNOC should not be permitted to make the Commission's already difficult task an impossible one.

For the reasons set forth hereinabove, Kentucky Power respectfully requests that the Commission deny EnerNOC's last minute efforts to intervene.

Respectfully submitted,



Mark R. Overstreet
R. Benjamin Crittenden
STITES & HARBISON PLLC
421 West Main Street
P. O. Box 634
Frankfort, Kentucky 40602-0634
Telephone: (502) 223-3477

Kenneth J. Gish, Jr.
STITES & HARBISON PLLC
250 West Main Street, Suite 2300
Lexington, Kentucky 40507
Telephone: (859) 226-2300

COUNSEL FOR KENTUCKY POWER
COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, upon the following parties of record, this 27th day of June, 2013.

Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowry
Suite 1510
36 East Seventh Street
Cincinnati, OH 45202

Joe F. Childers
Joe F. Childers & Associates
300 The Lexington Building
201 West Short Street
Lexington, KY 40507

Jennifer Black Hans
Dennis G. Howard II
Lawrence W. Cook
Assistant Attorney General
Office for Rate Intervention
P.O. Box 2000
Frankfort, KY 40602-2000

Robb Kapla
Sierra Club
85 Second Street
San Francisco, CA 94105

Hon. Michael T. Hogan
Lawrence County Attorney
122 South Main Cross Street
Louisa, KY 41230

Shannon Fisk
Earthjustice
1617 JFK Boulevard, Suite 1675
Philadelphia, PA 19103

John R. McCall
Jeremiah A. Byrne
Frost Brown Todd LLC
400 West Market Street, 32nd Floor
Louisville, Kentucky 40202



Mark R. Overstreet