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JUL 02 2013

PUBLIC SERVICE
COMMISSION

July 2, 2013

Mr. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602

Re: Case No. 2012-00578
EnerNOC, Inc.'s Reply in Support of its Motion for Leave to Intervene

Dear Mr. Derouen:

Enclosed please find the original and ten (10) copies of EnerNOC, Inc.'s Reply in Support of its Motion for Leave to Intervene in the above referenced proceeding, for filing in your office.

If you have any questions or require additional information, please do not hesitate to contact me at (502) 779-8129. Thank you for your assistance.

Sincerely,

*Jeremiah Byrne / au
with permission*

Jeremiah A. Byrne

Enclosure

cc: John R. McCall

Mr. Jeff Derouen

July 2, 2013

Page 2

Joe Childers (w/ enclosure)
Shannon Fisk (w/ enclosure)
Hector Garcia (w/ enclosure)
Kenneth J. Gish, Jr. (w/ enclosure)
Jennifer B. Hans (w/ enclosure)
Kristin Henry (w/ enclosure)
Robb W. Kapla (w/ enclosure)
Michael L. Kurtz (w/ enclosure)
Mark R. Overstreet (w/ enclosure)
Ranie Wohnhas (w/ enclosure)
Michael T. Hogan (w/ enclosure)

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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 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 THE FEDERAL CLEAN AIR ACT AND RELATED REQUIREMENTS; AND (5) ALL OTHER REQUIRED APPROVALS AND RELIEF

CASE NO. 2012-00578

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Motion for Leave to Intervene

Intervention into proceedings before this Commission is permissive and rests within the sound discretion of the Commission. Although statutory limitations confine the Commission's jurisdiction to "the regulation of rates and service," nowhere is there a requirement that an intervening party be a ratepayer or service recipient. In addition, EnerNOC's participation will provide the Commission with pertinent information regarding viable options for alternative long-term generation that are now relevant to this proceeding. For these reasons, and because EnerNOC, Inc.'s ("EnerNOC") interests are not being adequately protected by current parties to

this proceeding, EnerNOC should be permitted to intervene to advance and protect its unique interests.

A. Intervention is permissive and is within the sound discretion of the Public Service Commission for all parties, including parties that are not ratepayers.

The Public Service Commission (the “Commission”) retains the power in its discretion to grant or deny a motion for intervention. 807 KAR 5:001, Section 4(11). Two limitations restrict the Commission’s discretion on a motion to intervene: one arising under statute, the other arising under regulation. The statutory limitation, KRS 278.040(2), requires only that “the person seeking intervention must have an interest in the ‘rates’ or ‘service’ of a utility.” The regulatory limitation, set forth in 807 KAR 5:001, Section 3(8), requires an intervening party to demonstrate either (1) a special interest in the proceeding which is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. EnerNOC clearly has an interest in the ‘service’ undertaken by Kentucky Power to the extent that such ‘service’ includes the selection of least-cost resources to meet the needs of its customers. The utility proposes to exclude EnerNOC’s offering, which if considered, might well be found to be least-cost.

The Commission has discretion to allow those with special interests to intervene, irrespective of the intervening party’s status as a utility customer. In this regard, Kentucky Power’s reliance on *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. Ct. App. Feb. 2, 2007) is misplaced. Far from acting as an absolute ban on intervention by non-rate payers, the *EnviroPower* decision reaffirms the Commission’s discretion to grant or deny a motion for intervention. *See* September 12, 2012 Order *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of*

its Electric and Gas Rates, A Certificate of Public Convenience and Necessity, Approval of Ownership of Gas Service Lines and Risers, and a Gas Line Surcharge, Case No. 2012-0222 (granting intervention to a non-customer).

EnerNOC's intervention in this case will assist the Commission in meeting its statutory obligation to evaluate low-cost energy options. As a leading developer and provider of clean and intelligent energy solutions, EnerNOC can provide expertise that will assist the Commission in fully considering the pricing and availability of alternative long-term generation resources. In addition, EnerNOC's proposal will bring economic development value throughout the Kentucky Power Company service territory by providing revenue to the commercial, industrial, and institutional customers who can participate in demand response programs through aggregation. EnerNOC seeks only a limited intervention in this Proceeding to advance its limited interest in establishing that it can be a reliable alternative resource for either Big Sandy Unit 1 or Big Sandy Unit 2. This will provide economic development dollars back to the communities served by Kentucky Power Company.

B. Being a rate payer is not a prerequisite for intervention.

For its Response, Kentucky Power Company maintains that EnerNOC must pay Kentucky Power's rates or receive service from Kentucky Power in order to have a cognizable interest within the Commission's statutorily defined jurisdiction. (Kentucky Power's Resp. Opp'n 3.) Again, Kentucky Power relies on the Kentucky Court of Appeals' *EnviroPower* opinion in support of its contention that an intervening party must be a customer of the utility. (*Id.*) However, the *EnviroPower* opinion is distinguishable from the set of facts presented in this proceeding. First, *EnviroPower* is an unpublished opinion and therefore is not binding authority in the Courts of Kentucky. See Ky. R. Civ. P. 76.28. Second, nowhere in the *EnviroPower*

decision is there set forth a statutory requirement that an intervening party be a utility customer; rather, *EnviroPower* merely reasserts the statutorily-defined jurisdiction of the Commission, requiring that a party seeking intervention must have an interest in the “rates” or “service” of a utility. *Id.* at *4.

Intervention before the Commission by a non-customer is not unprecedented in this context. The 2012 case *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates, A Certificate of Public Convenience and Necessity, Approval of Ownership of Gas Service Lines and Risers, and a Gas Line Surcharge*, (Case No. 2012-0222, September 14, 2012 Order) is more on point to the facts in this case than the holding in *EnviroPower*. In that case, the utility company involved (Louisville Gas and Electric Company “LG&E”) advanced the very same objections to intervention raised by Kentucky Power’s Response in Opposition to EnerNOC’s Motion to Intervene. Specifically, LG&E argued that intervention was improper because the putative intervenor, Stand Energy Corporation, was not a utility company, but a private gas marketer whose interest was solely competitive. *Id.* at 3. Similar to the current Proceeding, the only topic relevant to the proceeding in *In the Matter of Application of Louisville Gas and Electric Company* were the interests of LG&E’s customers and their duly designated representatives, including the Attorney General. *Id.*

In response to LG&E’s objections, the Commission reiterated that intervention by parties other than the Attorney General is permissive and within its sound discretion. *Id.* Analyzing the reasoning set forth in *EnviroPower* and the exact same objections raised by Kentucky Power here, the Commission flatly rejected the utility’s oppositions to intervention, granting Stand Energy Corporation limited intervention to participate in the issues relevant to its interest. *Id.* at

4. The Commission reasoned that Stand Energy was likely to present issues or develop facts that would assist the Commission in its investigation of the issues in that case. *Id.*

EnerNOC's interests in intervention can further be distinguished from the putative intervenor in *EnviroPower* in several regards. Unlike the putative intervenor in *EnviroPower*, EnerNOC will be able to present issues and develop facts helpful to the Commission in this proceeding. *See EnviroPower*, 2007 WL 289328 at *4 (Ky. Ct. App. 2007). The Commission itself has stated that responses to Kentucky Power's RFP would "provide useful information regarding the current availability and pricing of long-term generation, and will assist the Commission in investigating the reasonableness of Kentucky Power's proposed purchase of 50 percent of the Mitchell Generation Station." (*See* May 28 KPSC Order at 3).

Likewise, in *EnviroPower*, the Commission found that other parties to the proceeding were adequately protecting the putative intervenor's interests. *Id.* In this case, EnerNOC's interests are not adequately protected by any other party, as EnerNOC's responsive bid has not even been presented by Kentucky Power or by any of the current intervenors. Indeed, Kentucky Power and other parties to this proceeding have submitted a "Memorandum of Understanding" that advances positions contrary to EnerNOC's interests, by virtue of completely ignoring the option presented by EnerNOC's bid.

Finally, in *EnviroPower* the utility company issued its RFP prior to the commencement of the proceedings before the Commission. *Id.* at *1. In this case, Kentucky Power initiated the Proceeding, indicated that it would subsequently issue an RFP, and then later exercised its option to withdraw that RFP. Thus, unlike the situation in *EnviroPower*, the RFP here was not a part of the proceeding itself. This distinction demonstrates that EnerNOC has a greater interest in the proceeding than did the RFP bidder in *EnviroPower*.

Even following Kentucky Power's logic that an intervening party must be a rate-payer, EnerNOC's participation in this proceeding would not substantively change were EnerNOC's customers able to participate. EnerNOC seeks a limited intervention in this proceeding in order to advance its contention that it can be a reliable alternative resource for either Big Sandy Unit 1 or Big Sandy Unit 2, and because EnerNOC believes that it can give economic development dollars back to the communities served by Kentucky Power. The expertise that EnerNOC can provide in these proceedings in no way changes based on whether or not EnerNOC has customers. Moreover, requiring EnerNOC to have customers in order to intervene puts the cart before the horse: EnerNOC does not currently have any customer ratepayers because third party demand response and energy efficiency providers are not yet permitted to sign-up customers. Thus, EnerNOC should be allowed to present lower-cost alternatives to the Commission in order to later have customer ratepayers.

C. EnerNOC presents viable alternative long-term generation options and EnerNOC should be permitted to support its proposals.

EnerNOC's intervention is necessary to allow the Commission to fully consider EnerNOC's proposed solutions and the availability of alternative long-term energy generation resources. Kentucky Power suggests that EnerNOC has no special interest in this case or in any potential settlement thereof because, under the terms of the RFP, 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. (Kentucky Power's Resp. Opp'n 4.) While the language of the RFP speaks for itself, the role of the RFP in this proceeding is fluid.

According to the terms of the May 28, 2013 Memorandum of Understanding Kentucky Power exercised its right to terminate the RFP and disregard any alternative generation options received. It was the Commission's order that brought relevance back to the RFP submittals –

and provided a larger role for the proposals: “bids submitted in response to [the RFP] should provide useful information regarding the current availability and pricing of long-term generation, *and will assist the Commission in investigating the reasonableness of Kentucky Power’s proposed purchase of 50 percent of the Mitchell Generation Station.*” (See May 28 KPSC Order at 3 (emphasis added)).


In addition, the Commission ordered Kentucky Power to provide it with “an analysis of the net present value revenue requirements” of the bids received in response to the RFP, including EnerNOC’s bid. (*See id.* at 3-4). However, Kentucky Power’s June 28 analysis is redacted and does not allow full examination of the information provided to the Commission unless intervention is granted.

* * * * *

For the reasons set forth above and in EnerNOC’s Motion to Intervene, the Commission should grant its Motion to Intervene.

Respectfully submitted,

FROST BROWN TODD LLC

 / *aw w/ permission*
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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 2nd day of July 2013.

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