

1 **COMMONWEALTH OF KENTUCKY**
2 **BEFORE THE PUBLIC SERVICE COMMISSION**
3

4 **IN THE MATTER OF:**
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|---|---|-------------------|
| ELECTRONIC |) | |
| APPLICATION OF KENERGY CORP. FOR |) | Case No. |
| A WAIVER PURSUANT |) | 2020-00215 |
| TO KRS 278.2219 |) | |

6
7 **APPLICATION**

8 1. Petitioner, Kenergy Corp. (“*Kenergy*”), pursuant to KRS 278.2219,
9 hereby submits this application to the Kentucky Public Service Commission
10 (“*Commission*”) for request of a waiver under KRS 278.2219 to (i) guarantee a
11 letter of credit to be issued by CoBank on behalf of Kenergy’s wholly-owned
12 subsidiary, Kenect, Inc., with limited start-up capital from Kenergy, or (ii) provide
13 significant start-up funding for Kenect without a parent letter of credit guarantee.
14 Because Kenect will not initially have established its creditworthiness, CoBank is
15 requiring Kenect to either have a parent guarantee or a capital investment before
16 CoBank will issue the letter of credit. As such, Kenergy requests a waiver under
17 KRS 278.2219 allowing Kenergy to guarantee Kenect’s obligations with regard to
18 the letter of credit, or enabling Kenergy to invest up to \$3 million in Kenect.
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20 **Background**

21 2. Kenergy is a nonprofit electric cooperative organized under KRS
22 Chapter 279 and is engaged in the business of distributing retail electric power to

1 member consumers in the Kentucky counties of Daviess, Hancock, Henderson,
2 Hopkins, McLean, Muhlenberg, Ohio, Webster, Breckinridge, Union, Crittenden,
3 Caldwell, Lyon, and Livingston. Kenergy's mailing address is Post Office Box 18,
4 Henderson, Kentucky 42419-018. Kenergy's electronic mail contact for this
5 application is kpsc@kenergycorp.com. Kenergy was incorporated in Kentucky on
6 June 22, 1999. Kenergy attests that it is in good standing in Kentucky.

7 3. Kenect was organized in Kentucky on July 6, 2020, as a for-profit
8 corporation, with the primary goal of providing broadband internet services in and
9 adjacent to Kenergy's certified territory. Kenect is in good standing in Kentucky.

10 4. As the Kentucky General Assembly has recognized, "[s]tate-of-the-art
11 telecommunications [such as broadband] is an essential element to the
12 Commonwealth's initiatives to improve the lives of Kentucky citizens, [and] to
13 create investment, jobs, economic growth...." KRS 278.546(1). Unfortunately,
14 many Kentuckians, especially in western Kentucky, are being left behind.
15 According to 2017 Census data, Kentucky is the 9th most underserved state. See
16 <https://www.census.gov/quickfacts/fact/dashboard/US/INT100218>. And
17 Kentuckians within Kenergy's service territory are in a vacuum, with no telephone
18 cooperatives to provide broadband as they are during in other rural parts of
19 Kentucky.

20 5. Kenergy obtained a feasibility study, including an analysis of the
21 current internet availability within Kenergy's service territory. The study found

1 that the majority of homes and businesses in Kenergy’s service territory are
2 underserved¹ or unserved.

3 6. The recent COVID-19 pandemic has put a spotlight on the need for
4 broadband access in rural areas. As Kentuckians complied with shelter in place
5 guidelines, the need for broadband for work, school, doctor appointments, and
6 other essentially communications was amplified, and the burden faced by the
7 Commonwealth’s underserved and unserved communities became more apparent.
8 The issues Kenergy’s members face include the “digital divide,”² “homework gap,”³
9 and limited access to telemedicine and remote access for work.

10 7. Kenergy’s desire to provide broadband access to its members
11 emanates from the same factors that propelled the Rural Electrification Act into
12 existence. For profit electric utilities had little desire to extend electric service to

¹See <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2015-broadband-progress-report> “Underserved” is a term based on the official FCC definition of fixed “broadband” service as a minimum of 25 Mbps download and 3 Mbps upload. That definition was adopted by the FCC in 2015. Individuals or communities are only considered “served” if they have access to both 25 Mbps download / 3 Mbps upload fixed broadband. “Underserved” includes individuals or communities with dial up, satellite, DSL and some cable modem options available.

² See Lexington Herald Leader “*For College Kids Coming Back to Kentucky Amid COVID-19, the Digital Divide Awaits*” by Shane Fowler, 3/23/2020, <https://www.kentucky.com/opinion/op-ed/article241423246.html>. (Stating: “Digital divide” refers to the growing disparity of access to high-speed internet between under-privileged members of society, specifically those living in rural areas, and wealthier, middle-class Americans living in urban or suburban areas. According to the Federal Communication Commission and Microsoft, Kentucky is one of the worst states for access to high-speed internet and cellular data. But the state is not unique in its short-comings, around 27% of people living in rural America do not have access to minimum speed broadband internet.)

³ *Id.* (Stating: As Kentucky schools extend their mandated shutdown, the “homework gap”, a term describing the barriers students face when working on homework assignments without a reliable internet source, widens. Students without high-speed internet access may be unable to access essential learning materials or supplemental instructional videos and tutorials. This is disruptive to a child’s formative education. Importantly, for older students, it may reduce their performance on college admission exams.)

1 sparsely populated areas, and as a result, Congress passed the Rural
2 Electrification Act to provide loans so cooperatives could form and distribute
3 electricity to unserved areas. The nation's broadband providers have followed
4 the same path. They have had the opportunity to serve rural areas but largely
5 neglected to do so. As a result, significant portions of Kenergy's territory are left
6 in the dark as to broadband as they were to electricity 80 years ago.

7 8. If grants are available to remedy the rural lack-of-access problem by
8 providing financial stimulus to entities that desire to provide broadband services
9 to unserved and underserved areas, Kenergy desires to be in a position to pursue
10 such funding.

11 9. Kenergy is well-positioned to take advantage of available
12 opportunities. It already has in place the infrastructure necessary to provide the
13 backbone upon which broadband can be extended to tens of thousands of unserved
14 or underserved household and businesses. However, KRS 279.020(2) prevents
15 Kenergy from providing broadband services directly to its customers and instead
16 requires Kenergy to create an affiliate to provide those services. To accomplish
17 this, Kenergy intends to utilize its poles to provide broadband service. A portion
18 will serve intra-system communications for Kenergy, more fully discussed in the
19 Direct Testimony of Jeffrey Hohn, which attached to this Application as Exhibit 1.
20 The remaining space on the fiber network will be leased to Kenect so that Kenect
21 can provide home internet access.

1 10. Kenect will utilize the funds it receives from grants and broadband
2 subscribers to make the lease payments, which will reimburse Kenergy for the
3 investment required to install the fiber network. Kenergy anticipates recouping
4 its investment in 3 to 5 years or less, depending on the amount of funding Kenect
5 receives.

6
7 **The CoBank Letter of Credit**

8 11. Kenect must verify that, it can provide a letter of credit to ensure that
9 it will properly develop broadband. Kenect needs a guarantor for its letter of credit
10 and Kenect must be able to represent that it has the ability to obtain a letter of
11 credit. No letter of credit is needed at this time. Kenergy only needs to represent
12 that it can obtain one. However, Kenergy should not make that representation
13 absent Commission approval.

14 12. As noted above, before CoBank will issue a letter of credit on behalf
15 of Kenect, CoBank is requiring Kenergy to either guarantee Kenect’s obligations
16 with regard to the letter of credit or provide \$3 million in start-up capital for
17 Kenect. If Kenect does not pursue the opportunity, the \$3,000,000 will be returned
18 to Kenergy.

19
20 **Request for a Waiver Pursuant to KRS 278.2219**

21 13. KRS 278.2201 prohibits Kenergy from subsidizing non-regulated
22 activities, and KRS 278.2213 prevents Kenergy from “enter[ing] into any
23 arrangements for financing nonregulated activities through an affiliate that would

1 permit a creditor upon default to have recourse to the assets of the utility.”
2 Because Kenergy initially may utilize its credit to guarantee Kenect’s obligations
3 with regard to the letter of credit, and will provide start-up funds for its subsidiary,
4 Kenergy requests a waiver under KRS 278.2219, to the extent required, from KRS
5 278.2201 and KRS 278.2213(14), and to the extent necessary, a waiver of the
6 affiliate transaction rules.

7 14. KRS 278.2219 expressly grants the Commission the authority to grant
8 such waivers:

9 The commission shall grant a waiver or deviation if the
10 commission finds that compliance with the provisions of KRS
11 278.2201 to 278.2213 is impracticable or unreasonable. The
12 findings of the commission shall be a final appealable order.

13
14 KRS 278.2219(3).

15 15. The Commission recognized that blanket imposition of the related Code
16 of Conduct established in Administrative Case No. 369 on all utilities “may not be in
17 the best interests of the customers the Code of Conduct is designed to protect.”⁴
18 Allowing the provisions of KRS 278.2201 to KRS 278.2213, or the related Code of
19 Conduct rules, to prevent Kenergy from extending broadband access to unserved and
20 underserved customers would not be reasonable and would not be in the best interest
21 of its customers.

22 16. If Kenergy were to guarantee Kenect’s obligations with respect to the
23 letter of credit, the benefits to Kenergy’s customers of expanded access to broadband

⁴ See *In the Matter of: An Investigation Into the Need for Affiliate Transaction Rules and Cost Allocation Requirements for All Jurisdictional Utilities*, Administrative Case No. 369, Final Order (Feb. 18, 2000) at 2.

1 would far outweigh the minimal risk to Kenergy. Under this approach, Kenergy
2 would provide minimal start-up capital to Kenect and would only be responsible for
3 the amount guaranteed under the letter of credit if Kenect defaults on its obligations.
4 Because Kenect is a subsidiary of Kenergy, Kenergy's control of the Kenect project
5 minimizes this risk to Kenergy's members.

6 17. On the other hand, the benefits of being able to provide broadband
7 access to unserved and underserved Kentuckians are substantial. No authority is
8 needed for the proposition that rural America is in decline. Attached as Exhibit 2
9 are the historical demographic population counts for each county in Kenergy's
10 territory. The only reason the numbers are not worse is that Owensboro,
11 Henderson, and Madisonville are within the population counts. Contrast these
12 figures to the growth of the United States as a whole and it is obvious that steps
13 are needed to stabilize rural populations. As explained in a recent on-line news
14 article:

15 The digital divide affects the long-term economic health and
16 vitality of rural America, while also creating quality-of-life
17 issues. Rural areas defined by the USDA as counties outside
18 cities and suburbs, have weathered six consecutive years of
19 population losses. Meanwhile, cities have grown.”⁵

20 18. Providing broadband services will also support the electrical service
21 by enabling rural areas to grow and generate the continued need for electrical
22 services. Simply, broadband is the shot in the arm that rural electric cooperatives
23 need to remain viable.

⁵ See <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/01/11/state-laws-slow-down-high-speed-internet-for-rural-america>.

1 19. Likewise, the benefit to Kenergy's customers if Kenergy were to instead
2 invest the \$3 million in Kenect required for CoBank to issue the letter of credit
3 without a parent guarantee would far outweigh the risks. Kenergy has sufficient
4 cash reserves to make the investment. Kenergy has traditionally retired capital
5 credits annually. This is necessary to keep Kenergy's equity ratio under 40%. Rather
6 than issuing capital credit retirements in 2020, Kenergy would redirect the capital
7 credit retirement funds to Kenect. This investment would be shown on Kenergy's
8 books as an investment in a subsidiary.

9 20. There would be little to no cost associated with the direct investment
10 approach aside from the initial investment. Because the investment would otherwise
11 be used to fund capital credits, there is no loss of interest income. The advantage to
12 this approach is that the risk is a one time investment of an amount that is
13 significantly less than the reduction in available credit that would result from having
14 a potential obligation for an annual letter of credit.

15 21. Finally, because the letter of credit will be for a one-year term, no
16 Commission approval under KRS 278.300 is required for Kenergy to guarantee
17 Kenect's obligations with regard to the letter of credit, and any renewals thereof
18 up to an aggregate of 6 years. *See* KRS 278.300(8). Kenergy anticipates that
19 within that 6-year limit, Kenect will have established its own creditworthiness
20 and will no longer require Kenergy's guarantee for further extensions of the letter
21 of credit. If the Commission disagrees that no approval is required under KRS

1 278.300, then Kenergy additionally requests that the Commission approve
2 Kenergy's guarantee under KRS 278.300.

3
4 WHEREFORE, Kenergy respectfully requests that the Commission:

- 5 a) Grant, to the extent required, a waiver from the provisions of KRS 278.2201
6 and KRS 278.2213(14), to enable Kenergy to guarantee Kenect's obligations
7 with respect to the CoBank letter of credit and to provide up to \$3 million
8 in start-up capital to Kenect;
- 9 b) Find that no approval is required under KRS 278.300, or alternatively,
10 grant that approval; and
- 11 c) Grant any other relief to which Kenergy may be entitled. On this the 17th
12 day of July, 2020.

13 Respectfully submitted,

14 DORSEY, GRAY, NORMENT & HOPGOOD
15 318 Second Street
16 Henderson, KY 42420
17 Telephone (270) 826-3965
18 Telefax (270) 826-6672
19 Attorneys for Kenergy Corp.

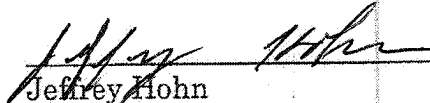
20 By J. Christopher Hopgood
21
22 J. Christopher Hopgood
23 chopgood@dkgnlaw.com
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25
26 **VERIFICATION**
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28 I, Jeffrey Hohn, hereby state that I have read the foregoing Application and
29 that the statements contained therein are true and correct to the best of my
30 knowledge and belief, on this 17th day of July, 2020.
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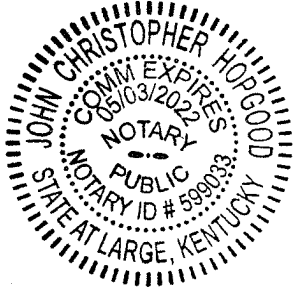
I, Jeffrey Hohn, hereby state that I have read the foregoing Application and that the statements contained therein are true and correct to the best of my knowledge and belief, on this 17th day of July, 2020.




Jeffrey Hohn
President & CEO
Kenergy Corp.

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

The foregoing verification statement was SUBSCRIBED AND SWORN to before me by Jeffrey Hohn, as President and CEO for Kenergy Corp. on this the 17th day of July, 2020.





Notary Public, Ky. State at Large
My commission expires: 5-3-2022
Notary ID: 599033