COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF KENERGY CORP. FOR A WAIVER PURSUANT TO KRS 278.2219	))	**CASE NO. 2020-00215**

KENERGY CORP.'S BRIEF

Applicant, Kenergy Corp. ("Kenergy"), pursuant to the Commission's scheduling order, submits the following Brief.

INTRODUCTION

Applicant seeks a waiver or deviation from the requirements of KRS 278.2201 and KRS 278.2213 in order to pursue broadband opportunities through its wholly owned subsidiary, Kenect, Inc. ("Kenect"). Kenergy submits that its Application, Data Request Responses, Testimony and this Brief are sufficient for the record and no formal hearing is requested.

FACTS

The Rural Electrification Act was created in 1936 to give citizens in rural areas a "fair chance"[1] of obtaining electric service where other utilities had declined to serve.

[1] n the 1930's U. S. Senator **George Norris** of Nebraska was concerned that the descendants of homesteaders and other people living in rural America were not getting a 'fair chance.' Norris lamented that in rural America the men and women were "growing old prematurely; dying before their time; conscious of the great gap between their lives and the lives of those whom the accident of birth or choice placed in towns and cities."

Through low interest loans, cooperatives formed, created a distribution system, obtained power contracts and brought rural America into the twentieth century. Today a farm in Utica, Kentucky has the same safe and reliable electrical power as the busiest street in Utica, New York.

Fast forward eighty years and rural America finds itself in the same plight as to high speed internet service. In large swaths of Kenergy territory, there is no available high speed internet service. In other parts of the territory, only slower speed alternatives, satellite and wireless systems are available.

"The digital divide has been created not for lack of government funding, but because of dependence on traditional recipients of government funding. Over the past five (5) years, the FCC has provided over $300 million in public funds to AT&T and Windstream in Kentucky for rural broadband. [redacted]

In a pre-Covid 19 world, this lack of high speed service was a systemic blight robbing rural Americans of the access to information and entertainment that others took for granted. Post-Covid 19, this lack of adequate high speed service is an economic and educational malignancy. Many forced to work from home desperately need the fast

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Norris and other senators and congressmen believed that access to electricity would revolutionize the rural way of life. Therefore, in 1936 Congress passed the Rural Electrification Act to give rural Americans a 'fair chance.' https://www.nps.gov/home/learn/historyculture/ruralelect.htm internet highway they have become accustomed to in their workplaces. School children forced into non-traditional instruction struggle to connect to their classrooms and assignments in the same way as their city counterparts. *See* plethora of public comment filed herein.[2]

To remedy this, Congress has appropriated over $20 billion dollars of federal subsidies to entities that will develop broadband service into unserved and underserved areas. Rural electric cooperatives are well suited to provide this service to their members. The infrastructure (i.e. poles) are in place, the ability to handle pole attachments and billing are common skills in the electric cooperatives workforce. Further, an electric cooperative has access to low interest loans from the Rural Utility Service to construct the fiber and lease it to its own broadband subsidiary.

In Kentucky providing broadband is not a regulated service. Thus, virtually any entity, including telephone companies, cable companies, and even telephone cooperatives can become broadband providers. Kenergy, on the other hand is an electric cooperative and is prohibited under KRS 279.020(2) from providing broadband itself and can only do so through a nonregulated affiliate. Although other entities can provide broadband service, those other entities have chosen to provide virtually no broadband service in large portions of Kenergy's territory. Kenergy is willing and able to make broadband

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[2] Those in need of broadband services in unserved and underserved areas lack lobbyists and political action committees. They come armed with only their voice and their public comment has been loud and clear. ***Of the four negative public comments, one was by a supporter of a wireless internet provider in parts of Kenergy's territory and the other is by an association of companies that have yet to provide broadband service in large amounts of unserved portions of Kenergy's territory. The referenced wireless provider recently received a Delta Regional Authority grant to upgrade its service.***

available through Kenect but it needs a waiver or deviation from the Commission to be able to do so.

KRS 278.2201, *et seq.* applies to the nonregulated activities of all regulated utilities, because Kenect will be a stand-alone entity. Kenect will need initial support to get up and running. KRS 278.2201 constrains the ability of a regulated electric cooperative to venture into broadband because it prohibits subsidization by the regulated cooperative of a non-regulated affiliate. Likewise, KRS 278.2213 bars the cooperative from exposing its assets to support the creation of the non-regulated subsidiary.

Absent outside investors, Kenect has no ability to obtain the credit support necessary to embark on a broadband venture. If Kenergy is to hold Kenect for the benefit of its members, it must prime the pump for Kenect to become viable. In order to become viable, Kenect must satisfy the provider of government subsidies that the funds provided will be used for the intended purpose. To accomplish this, Kenect must submit a letter of credit for the annual outlay of the subsidies provided.

The credit support can be provided one of two ways. Kenergy can guarantee the Kenect letter of credit or Kenergy can make an initial investment of $3,000,000 into Kenect which will support the initial letter of credit. This second alternative is only a short-term mechanism. If Kenergy is able to build the fiber network and lease the fiber to Kenect, then Kenergy becomes the party responsible to the provider of the subsidy to ensure that the fiber network is actually constructed with the funds provided.

Although Kenergy stated in its Application that the preferred path to this goal was to provide the $3,000,000 in capital, upon further reflection, the parent guarantee approach is preferable. Because the CoBank approach will require additional capital investment in the future, Kenergy would prefer to start with and stay with the parent guarantee approach. Simply, the $3,000,000 investment is only a stopgap short term approach and Kenergy would prefer to start with and stay with the parent guarantee option.

However, under either scenario, KRS 278.2201 and KRS 278.2213 stand in the way. KRS 278.2201 bars the subsidy of a non-regulated venture by a regulated utility. Thus, a waiver or deviation from the statutory requirement is sought to allow Kenergy to invest funds in Kenect. Likewise, KRS 278.2213 states that "[a] utility shall not enter into any arrangements for financing nonregulated activities through an affiliate that would permit a creditor upon default to have recourse to the assets of the utility." Kenergy needs a waiver from this statute in order to guarantee Kenect's letter of credit. Kenergy's assets are necessary to support the parent letter of credit guarantee. A waiver or deviation is necessary to allow Kenergy's assets to support the guarantee.

It is important to state what the Application in this matter is not. Kenergy does not seek at this stage a Certificate of Public Convenience and Necessity to build the fiber. That filing is for another day. It is premature to combine that request with this filing due to the unknowns of the amount of subsidy, if any. However, in order to seek the subsidy, Kenergy/Kenect must have the relief granted. Nevertheless, it is important to recognize that once the sought subsidy is awarded, it must be used to avoid financial penalties.

ARGUMENT

Both KRS 278.2201 and KRS 278.2213 are impractical and unreasonable obstacles to Kenergy providing broadband service through a subsidiary. In order for Kenect to become viable, Kenergy must prime the pump with either a cash infusion or by using Kenergy's financial wherewithal to enable Kenect to obtain the credit support it needs to obtain government subsidies. Depending upon the success of Kenect, the subsidy might not be long term, but there is no practical way to establish a subsidiary without either infusing cash (a subsidy) or guaranteeing a letter of credit (both a subsidy and placing the assets of Kenergy subject to recourse). Per KRS 278.2219(1), the need for the waiver or deviation is that there is no practical or reasonable way for Kenect to develop the broadband project without Kenergy's initial assistance.

The costs and benefits of Kenergy's compliance under KRS 278.2219(2) support granting the requested waiver or deviation. The cost of strict compliance with KRS 278.2201 and 278.2213 is the loss of the opportunity to obtain significant subsidies, supply needed broadband service and stabilize and enhance Kenergy's regulated business of providing power at reasonably low rates. Kenergy does not believe it can explore broadband through a subsidiary in compliance with KRS 278.2201and KRS 278.2213; consequently, there is no benefit to compliance. The benefit to the waiver or deviation is stated in these responses and in the abundant public comments received in support of the Application.

The cost/benefit analysis of the broadband venture greatly weigh in favor of approving the project. The entire cost of building the fiber and leasing it to Kenect is to be paid by Kenect. The testimony of Jonathan Chambers and his accompanying confidential study demonstrates that without subsidy, the Kenect venture will be profitable. The greater the subsidy the quicker Kenect reaches profitability and stand alone status. Further, so long as Kenect stays solely owned by Kenergy, the entire profit enures to the benefit of Kenergy's members thereby easing rate pressures.

The testimony of Jonathan Chambers that incorporates his report demonstrates the price of the broadband services to be offered and the anticipated take rates all of which support the profitability analysis. This analysis is not some untested thesis. It finds its basis in fact in dozens of other similar projects. [redacted]. Further, the Chambers analysis is based on the comparative history of cooperatives in Arkansas, Tennessee and Missouri with a rural socioeconomic base similar to Kentucky's [redacted] Risk mitigation is summarized by the following Chambers comment, [redacted]

Finally, there is an exit strategy should Kenergy no longer desire to continue with the project. [redacted]

Neither "deviation" nor "waiver"[3] are defined terms in KRS Chapter 278. To the extent a deviation is more appropriate than a waiver, then Kenergy requests a deviation as an alternative plea of relief. There are no case annotations to KRS 278.2219. However, the Commission has granted deviations or waivers in the past involving matters with affiliates. In *ELECTRONIC APPLICATION OF KENTUCKY POWER COMPANY FOR 1) AUTHORITY UNDER KRS 278.2207(2) AND KRS 278.2219 TO THE EXTENT REQUIRED TO ENABLE THE COMPANY TO PAY FEES AND COSTS IMPOSED BY THE GRID ASSURANCE, LLC SUBSCRIPTION AGREEMENT; 2) THE GRANT OF ALL OTHER REQUIRED APPROVALS AND RELIEF,* Case No. 2018-00287, the Commission granted a deviation from KRS 278.2207 to enable Kentucky Power to enter into a Grid Assurance Subscription Agreement and purchase equipment from Grid Assurance and granted Kentucky Power leave to apply for a deviation for specific purchase transactions.

Further, *In the Matter of Duke Energy Kentucky, Inc. and Duke Energy One, Inc.*, Case No. 2019-00195, there was no showing of impracticality or unreasonable application of the affiliated transaction rules on Duke Energy Kentucky, Inc.'s *regulated* activity. The inconvenience was to the wholly owned unregulated subsidiary. "Allowing DEOne to develop a single disclaimer that it can use in all jurisdictions provides … DEOne with administrative efficiencies so it does not have to maintain multiple disclaimers throughout the country. It will allow DEOne to avoid

[3] "The term waiver is one of the words of indefinite connotation in which our legal literature abounds, like a cloak, it covers a multitude of sins." William R. Anson, Principles of the Law of Contract 419 (Arthur L. Corbin ed., 3d Am.ed 1919)

unnecessary expense and ensure the conformity of the disclaimer across all jurisdictions." Duke Application, page 4.

The Kentucky Broadband and Cable Association (KCBA) elected to provide public comment opposing or limiting the relief requested in the Application. It is interesting to note the failure by the KCBA to intervene in this matter is most certainly due to its desire to avoid answering data requests as to the large amount of unserved areas juxtaposed against the amount of subsidies its members have received. The KCBA's position demonstrates the need for the waiver. The KCBA would have the residents in Kenergy's territory wait for legislation and miss the opportunity for the upcoming subsidy opportunity. Rather than compete for the subsidy, the KCBA would rather simply leave Kenergy's territory in the dark.

The description of Kenergy's application as a "one off" is a misnomer. The fact that legislation has not been enacted to specifically authorize electric cooperatives to offer broadband through an affiliate demonstrates the need for the waiver. If the legislation never comes about, this Application will set the precedent for how to proceed. If the legislation comes about then approval of this Application is simply a stopgap to allow Kenergy to move forward in seeking federal subsidy for broadband development.

The KCBA's assertion at page 6 of its public comment that Kenergy wants the Commission to approve its entry into a new unregulated line of business is simply wrong. Kenergy has created an affiliate that will carry on the retail broadband service and comply with the law. However, Kenect cannot do anything in its embryonic stage without initial assistance from Kenergy. Once, Kenect is up and running, it will be fully compliant and a separate and distinct business from Kenergy.

The KCBA references KRS 224A.1121 but fails to cite the amount of funding currently available in a state strapped with pension obligations and COVID fiscal challenges. However, what Kenergy seeks in this Application supports KRS 224A.1121 because in the statute, the applicant's match funding cannot count the applicant's federal agency grant or subsidy. KRS 224A.1121(10). Thus, by obtaining federal funds, Kenergy would find no benefit in this state program leaving that program's state funds for those unable to obtain federal funds.

Yet, the KCBA agrees that what Kenergy is seeking is the limit of the relief that should be granted. All Kenergy needs to move forward is the ability to provide credit support to Kenect. Once Kenergy and Kenect are granted the right to move forward, there is plenty of opportunity to be heard in a future application for a Certificate of Public Convenience and Necessity.

Speculation by the KCBA as to the effect on Kenergy's rate base is unfounded and premature. Guaranteeing the letter of credit will not in and of itself affect Kenergy's rate base. As indicated herein, the matter of construction of the fiber is the subject of a future CPCN filing in which many matters raised by the KCBA may be raised.

A waiver is needed because the written law can be harsh and unyielding. Were it to be unassailable, there would be no provision for a waiver. Strict enforcement of the statutes at issue barring Kenergy from initially supporting Kenect is a disservice to a much needed practical opportunity for growth and development in Kenergy's territory - an area that has technologically been left behind.

This Application is one of first impression. There does not appear to be a deviation or waiver matter involving a start-up affiliate. Kenergy submits that this may be refined to a cost/benefit analysis. The risk to Kenergy's assets in approving the Application is remote[4]. The benefit to Kenergy's members from such approval is great because large portions of Kenergy's territory have heretofore been denied high speed internet. The growth in electric usage from economic growth directly benefits Kenergy's members.

As in the REA, the support of the federal government exists. The support of the public exists. What lies ahead is a new technological frontier in the lands of an old one. The waiver or deviation sought should be granted.

Respectfully submitted,

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[4] Kenergy's Board controls Kenect as a wholly owned subsidiary thereby removing any organizational control risk.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by electronic filing to the Kentucky Public Service Commission, 211 Sower Blvd., Frankfort, KY 40602 with a copy served electronically to the Kentucky Attorney General, Office of Rate Intervention, 700 Capital Avenue, Suite 20, Frankfort, KY 40601-8204, on this 8th day of October, 2020.

Counsel for Kenergy Corp.