

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENERGY CORP. ) Case No. 2020-00215  
FOR A WAIVER PURSUANT TO KRS 278.2219 )

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**ATTORNEY GENERAL'S BRIEF**

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The intervenor in this proceeding, the Attorney General of the Commonwealth of Kentucky by and through his Office of Rate Intervention ("Attorney General"), submits the following Brief in the above-styled matter. This Brief is filed pursuant to the Public Service Commission's ("Commission") Order of September 28, 2020. The Attorney General submits that this matter may be decided on the record.

Kenergy Corp. ("Kenergy," or "the Company"), based in the city of Henderson, is a non-profit electric distribution cooperative that sells electricity to members in at least fourteen Western Kentucky counties. On July 6, 2020, the directors of Kenergy organized Kenect, Inc. ("Kenect"), a for-profit corporation to be engaged in the sale of broadband services. Kenergy and Kenect propose to build and operate a broadband network in Kenergy's service area. Kenergy estimates total costs of \$165,922,423 for the project.<sup>1</sup>

This application represents a procedural step toward making that proposal a reality. With this application, Kenergy requests authority to guarantee a letter of credit

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<sup>1</sup> See Response to AG DR 2-8.

to be issued by CoBank on behalf of Kenect. Alternatively, Kenergy seeks authority to provide, “significant start-up funding for Kenect without a parent letter of credit guarantee.”<sup>2</sup> However, KRS 278.2201 states that, “a utility shall not subsidize a nonregulated activity provided by an affiliate or by the utility itself.” Further, 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 acknowledges that these provisions preclude the relief it requests. Thus, it seeks a waiver of those provisions pursuant to KRS 278.2219, which states:

- (1) Notwithstanding any provisions in KRS 278.2201 to the contrary, a utility may apply to the commission for a waiver or deviation from any or all provisions of KRS 278.2201 to 278.2213.
- (2) The utility's application to the commission shall:
  - (a) Demonstrate the basis of the utility's need to be granted a waiver or deviation; and
  - (b) Contain, if appropriate, documentation regarding the costs and benefits of compliance with the provisions of KRS 278.2201 to 278.2213.
- (3) The commission shall grant a waiver or deviation if the commission finds that compliance with the provisions of KRS 278.2201 to 278.2213 is impracticable or unreasonable. The findings of the commission shall be a final appealable order.

Therefore, the issue presented to the Commission is whether Kenergy’s requests to guarantee the obligations of Kenect or, alternatively, provide start-up funding for Kenect, render the prohibitions recited above impractical or unreasonable.

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<sup>2</sup> See Application at 1.



As most have become all-too-aware over the course of the COVID-19 pandemic, individuals with access to high speed internet have better options to work remotely, and are better able to access education for their children. In short, an extensive system of high-speed internet provides for more choice, more opportunity, and for a freer society. When legal tools provide for the expansion of those systems without undue risk, such pursuits should be encouraged.

**2. The Commission has the discretion to issue a waiver of, or deviate from, provisions which prohibit a regulated utility from subsidizing a nonregulated activity or securing the activities of an affiliate.**

The provision, which allows a utility to seek a waiver of, or deviation from, KRS 278.2201 to KRS 278.2213, plainly states that the waiver or deviation may be sought of or from, “any or all provisions,” of those statutes.<sup>5</sup> To advocate that the General Assembly did not mean to allow a utility to seek waiver of the subsidy prohibition would be to render the language of KRS 278.2219 surplusage and nullify the General Assembly’s intent. Statutes are to be construed as a whole, for all parts to have meaning, and to harmonize with the related statutes.<sup>6</sup> Had the General Assembly intended that a utility could never subsidize a nonregulated activity or secure the activities of an affiliate, those provisions would have been excluded from the scope of KRS 278.2219. Inasmuch as the General Assembly subjected those provisions to the Commission’s waiver and deviation authority, utilities may appropriately seek Commission approval to operate outside of those constraints.

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<sup>5</sup> KRS 278.2219(1).

<sup>6</sup> *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

3. Customers will benefit from access to broadband service if the proposal is successfully implemented and risks are appropriately mitigated.

[REDACTED]

Kenergy's first proposal requires Kenergy to provide a parent guarantee for the operations of Kenect. If the Commission were to grant Kenergy the authority to guarantee a letter of credit issued by CoBank, Kenergy would not be required to provide start-up capital to Kenect. Kenergy acknowledges that this proposal involves risk. "The first alternative involves placing Kenergy's assets at risk to support the letter of credit guarantee... While no assets are affected by the guarantee, in the worst case scenario, then Kenergy must be prepared to satisfy the letter of credit should Kenect fail."<sup>7</sup>

Kenergy's second proposal requires Kenergy to provide capital to Kenect on an annual basis, initially in the amount of \$3,000,000.<sup>8</sup> If the Commission were to grant Kenergy the authority to invest \$3,000,000 in start-up capital in Kenect, CoBank would supply the initial letter of credit without a parent guarantee. At this time, Kenergy only seeks permission to invest \$3,000,000.<sup>9</sup> However, if the project were to progress, Kenergy

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<sup>7</sup> See Response to Staff DR 1-5.

<sup>8</sup> Kenergy asserts that this is its preferred approach. See testimony of Jeffrey Hohn at Exhibit 2, page 2-3, to the Application.

<sup>9</sup> See Response to Staff DR 1-7.

would be required to maintain a 50% equity position in Kenect.<sup>10</sup> To meet this requirement, Kenergy would be required to make larger equity investments in subsequent years, including investments of approximately \$8,000,000 at the end of year one and \$18,000,000 at the end of year two. Kenergy admits that, “this option is not viable for Kenergy without outside equity investors.”<sup>11</sup> This proposal presents a risk to Kenergy’s equity ratio.<sup>12</sup> Kenergy characterizes this risk as, “theoretical,” and states that it, “fully expects to recoup its investment...”<sup>13</sup>

Under both proposals, Kenergy proposes to construct the broadband system and lease that system to Kenect.<sup>14</sup> After funding from various sources, Kenergy estimates that liabilities related to this project would peak at \$118,444,845 in year 6.<sup>15</sup> However, it expects that its investment will be fully recouped [REDACTED]

In support of its application for waiver, Kenergy suggests that the statutory provisions that preclude its subsidy of Kenect are impractical and unreasonable obstacles, because, “there is no practical or reasonable way for Kenect to develop a broadband project without Kenergy’s initial assistance.”<sup>17</sup> Kenergy goes on to reframe the issue by stating that the costs of compliance with the prohibition of subsidies vastly outweigh the

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<sup>10</sup> See Response to AG DR 1-1b.

<sup>11</sup> See Response to AG DR 1-4.

<sup>12</sup> See Response to Staff SR 1-5.

<sup>13</sup> See Response to Staff DR 1-5 and supplement.

<sup>14</sup> See Application at 4.

<sup>15</sup> See Response to AG DR 2-9.

<sup>16</sup> See Response to Staff DR 1-1 and 1-3 supplement.

<sup>17</sup> See Response to Staff DR 1-5 supplement.

benefits of those provisions. To strictly adhere to those provisions would require Kenergy to forgo all opportunities to obtain significant subsidies.<sup>18</sup> Further, Kenergy suggests that its control over Kenect ensures that the risk of loss or default is minimal. If funds are transferred from Kenergy to Kenect, Kenergy's member-owners maintain those funds derivatively given that Kenergy is the sole shareholder of Kenect, and the board members are common to both entities.<sup>19</sup> Kenergy's control over Kenect mitigates risk.<sup>20</sup> Further, Kenergy has procured an expert on broadband system expansion, Conexon, that has studied the feasibility of the Kenect proposal.

One need look no further than the public comment docket for this matter to see that many residents within the Kenergy footprint support the effort to bring broadband service to the area. However, support for the proposal is not complete, and opponents of the proposal raise valid questions.<sup>21</sup>

The Attorney General's appearance in this matter is by virtue of his power to appear for the Commission to, "represent ... consumers' interests."<sup>22</sup> The proposal presents not only an exciting opportunity, but also increased potential liability and risk for the rate-paying customers of Kenergy. On the other hand, some of those rate-payers are also supporters and would-be customers of Kenect. Thus, the consumer interests do not clearly require a precise course of action. For that reason, the Attorney General

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<sup>18</sup> *Id.*

<sup>19</sup> See Responses to AG DR 1-4 and AG DR 1-24.

<sup>20</sup> See Supplemental Testimony of Jeffrey Hohn at page 5.

<sup>21</sup> See September 10, 2020 Comment filed by Daviess County Judge Executive Al Mattingly. See also October 5, 2020 Comment of Kentucky Broadband and Cable Association.

<sup>22</sup> KRS 367.150(8)(a).

recommends that the Commission should, in its discretion, conditionally grant the application while exercising aggressive and continuing oversight to ensure that the public's trust in this venture is not misplaced.

Specifically, the Commission should consider the following limitations. The Commission should allow the transfer of limited funds for the purpose of [REDACTED]

[REDACTED] The Commission should explicitly state that the approval of this application does not guarantee the approval of future transfers of funds, all of which will be required to be submitted to the Commission for review and public participation. The Commission should require thorough reporting related to the maintenance of the funds and the accrual of costs, expenses, and liabilities related to this project. If, at any time, the project appears to have become financially infeasible or wasteful, the Commission should require the transfer of funds back to Kenergy and withhold approval of additional fund transfers. The Commission should consider the penalties associated with failure to meet the requirements of any grant programs when determining whether the risks presented by the proposal are undue. The Commission should require Kenect to pay pole attachment fees to Kenergy and comply with other requirements that result in Kenect being treated similarly to potential competitors. Perhaps most importantly, the Commission should not grant any approval, such as a parent guarantee, if such guarantee is without a reasonable maximum limit of liability.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In sum, the potential benefits to future Kenect customers, who are also Kenergy ratepayers, likely outweigh the risk of loss, if those risks are appropriately mitigated.

Therefore, Kenergy should be granted conditional approval [REDACTED]

[REDACTED]

**4. The General Assembly could clarify public policy with respect to broadband expansion by cooperatives.**

The statutes at issue were enacted in the 2000 legislative session. Since that time, significant technological changes have reshaped the ways people work and live. Shaping public policy is the exclusive domain of the General Assembly.<sup>23</sup> As such, it would be appropriate for the General Assembly to review the statutes at issue in order to provide guidance regarding the Commonwealth's policy with respect to a cooperative's involvement in broadband expansion.

CONCLUSION

For the foregoing reasons, the Attorney General requests that the Commission conditionally approve the application [REDACTED]

[REDACTED], if and only if the approval is appropriately conditioned to mitigate the threat of losses to Kenergy member-ratepayers.

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<sup>23</sup> *Caneyville Volunteer Fire Dept. v. Green's Motor Salvage, Inc.*, 286 S.W.3d 790, 807 (Ky. 2009).

Respectfully submitted,

DANIEL J. CAMERON  
ATTORNEY GENERAL



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*Certificate of Service and Filing*

Pursuant to the Commission's Orders dated March 16, 2020 and March 24, 2020 in Case No. 2020-00085, and in accord with all other applicable law, Counsel certifies that, on October 8, 2020, an electronic copy of the forgoing was served by e-mail to the following. A physical copy of the filing will be submitted to the Commission once the State of Emergency has ceased.

J. Christopher Hopgood  
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this 8th day of October, 2020



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Assistant Attorney General