

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

Electronic Application of
Kenergy Corp. For a Waiver
Pursuant to KRS 278.2219

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Case No. 2020-00215

**PUBLIC COMMENTS OF THE
KENTUCKY BROADBAND AND CABLE ASSOCIATION**

Pursuant to the Rules of Procedure of the Kentucky Public Service Commission (“Commission”) at 807 KAR 5:001(4)(11)(e),¹ the Kentucky Broadband and Cable Association and its members (“KBCA”) submit these comments regarding the subject matter of this Case No. 2020-00215 initiated by Kenergy Corporation (“Kenergy”). KBCA represents member companies that offer fast, reliable broadband service to nearly two million homes and businesses throughout Kentucky. For the reasons stated below, KBCA opposes the Application submitted by Kenergy pursuant to K.R.S. 278.2219² and urges the Commission to deny it. The application raises important policy issues that are best addressed by (and are under active consideration at) the Kentucky General Assembly. In the alternative, if the Commission decides to grant Kenergy’s waiver application, it should limit the scope of the waiver to the provision of credit support only, and include conditions sufficient to ensure that Kenergy’s action and the precedent it sets will not stifle broadband competition in the Commonwealth. Specifically, any waiver should be accompanied by conditions, outlined in Part II below, to protect Kenergy customers

¹ 807 Ky. Admin. Regs. 5:001(4)(11)(e).

² Kenergy Corporation, Application, *In the Matter of: Electronic Application of Kenergy Corp. for a Waiver Pursuant to KRS 278.2219*, PSC Case No. 2020-00215 (filed Jul. 17, 2020) (“Application”).

and to ensure that Kenergy maintains appropriate separation from Kenect’s operations and does not use its position to disadvantage competing broadband service providers.

COMMENTS

As an electric cooperative subject to the Commission’s jurisdiction, Kenergy acknowledges in its initial Application that it cannot provide “broadband services directly to its customers and instead” will “create an affiliate to provide those services,” to be known as “Kenect.”³ Kenergy also discloses its intent to install a fiber network and “utilize its poles to provide broadband service.”⁴ Kenergy intends to use a portion of this fiber network to “serve intra-system communications” for Kenergy, while the “remaining space on the fiber network will be leased to Kenect so that Kenect can provide home internet access.”⁵ Kenergy specifically proposes to either directly invest “up to \$3 million” of its funds in Kenect or, in the alternative, to guarantee Kenect’s obligations under a letter of credit.⁶

Kenergy admits that Kentucky law precludes this business plan absent a waiver from the Commission. The specific provisions Kenergy seeks to waive are KRS 278.2201, which prohibits Kenergy from subsidizing non-regulated activities, and KRS 278.2213(14), which prohibits Kenergy from entering into financing arrangements that would permit a creditor of an affiliate, upon default, to have recourse to the assets of the utility. The General Assembly codified these statutory provisions based upon the Commission’s code of conduct, which the Commission established to follow the lead of other regulatory commissions that had “dealt with

³ Application at ¶ 9, page 4.

⁴ *Id.*

⁵ *Id.*

⁶ Application at ¶ 1, page 1.

the potential abuses that could occur through related party transactions in a variety of ways.”⁷ One of these risk areas the Commission identified was the creation of “tools and conditions needed to prevent cost shifting and cross-subsidization between regulated and non-regulated operations.”⁸ In codifying these rules, the General Assembly specifically noted that one of their purposes is to protect competition, and observed that “regulated telecommunication providers have expanded into unregulated lines of business, such as the provision of internet and cable television service, which may give them an unfair advantage over existing and new entrants.”⁹ The provisions Kenergy seeks to waive, therefore, exist specifically to ensure that when regulated utilities participate in unregulated markets, they do so within a framework that allows for fair competition and protection of customers.

KBCA members are not averse to competition in the market for broadband internet access services, including from broadband affiliates of electric cooperatives. However, to reliably plan and make investments in building out to new service areas, broadband providers must have assurances that they can make those investments in a fair competitive environment. To that end, several KBCA members have been actively negotiating with several electric cooperatives in recent months regarding a legislative solution that would enable electric cooperatives to provide specified support to broadband affiliates, while containing appropriate guardrails to ensure that such support is provided in a manner that protects electric ratepayers, broadband subscribers, and fair competition. These ongoing legislative efforts, in which Kenergy has itself been involved, would give the Kentucky General Assembly an opportunity to

⁷ *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, Order (Dec. 19, 1997) at 6.

⁸ *Id.*

⁹ HB 897, Sec. 11, 2000 Ky. Acts 1770.

carefully balance the policy implications attendant to such support. Kenergy’s application, if granted, would short-circuit that careful legislative process. Moreover, it would do so on a one-off basis, by means of a waiver that would apply only to itself.

The Commission should decline this invitation to use the waiver process to effect an end-run around the affiliate transaction rules, which would undermine ongoing legislative consideration of amendments to the provisions from which Kenergy is seeking a waiver. Granting the application would create premature and uneven standards for the entry of electric cooperatives into the broadband market and set a precedent for future waiver requests that risks undermining broadband competition without adequate safeguards.

I. Kenergy’s Waiver Application Is Not Consistent with the Text or Purpose of KRS 278.2219 and Should Not Be Granted.

Kenergy seeks its waiver pursuant to KRS 278.2219, which provides for waiver in the event “that compliance with the provisions [of Kentucky law] is *impracticable* or *unreasonable*.” KRS 278.2219(3) (emphasis added).¹⁰ Here, the application of these prohibitions is neither impracticable nor unreasonable. Nor is it “impracticable or unreasonable” for Kenergy to defer its planned entry into the broadband market until the General Assembly has an opportunity to address more generally the circumstances under which electric cooperatives should be allowed to engage in affiliate transactions with broadband providers without harming competition or electric ratepayers.

¹⁰ See, also., *In the Matter of: Application of Louisville Gas and Electric Company and Kentucky Utilities Company for A Waiver and Deviation from KRS 278.2213*, Case No. 2010-00482, 2011 WL 770668, at *1 (Mar. 1, 2011) (“In requesting a waiver or deviation, a utility must, among other things, demonstrate the basis for such a waiver or deviation and establish that compliance with the disclaimer requirement is impracticable or unreasonable.”); *In the Matter of: Petition of Duke Energy Kentucky, Inc. and Duke Energy One, Inc. for Authorization to Deviate from 807 KAR 5:080, Section 6 Requirements*, Case No. 2019-00195, 2019 WL 3860365, at *1 (Aug. 13, 2019); *In Re Union Light, Heat and Power Co.*, Case No. 2003-00252, 2006 WL 1520262, at *1-2 (Mar. 15, 2006).

Kenergy argues that the application of the affiliate transaction statutes to its business plans is unreasonable or impracticable because, under either of Kenergy’s proposals, if the affiliate fails then Kenergy will lose its “investment,” which could impact Kenergy’s financial standing and require an increase in rates.¹¹ Not only does this not meet the requirement for a waiver, it is unclear how a waiver would prevent or mitigate this result. The prohibitions that Kenergy seeks to waive are in place in substantial part to protect the utility and its customers from undue risk arising from investments in unregulated operations. The purportedly unreasonable result here—Kenergy’s loss of its investment if Kenect’s business plan is unsuccessful—arises precisely from Kenergy’s plan to subsidize its affiliate with either a direct investment or a guarantee from its regulated electric operations. This exact risk led the Commission and the General Assembly to adopt rules against cross-subsidization and credit support agreements in the first place. Kenergy has not showed that the Commission should waive the statutes that protect electric ratepayers from having to bear this risk. Granting the waiver would not protect Kenergy or its members from the risk of financial harm if Kenect ends up being unsuccessful; it would rather cause Kenergy’s electric ratepayers to bear *more* of the risk associated with Kenect’s broadband operations.

The waiver process is not appropriate for a situation such as this one, in which a provider is seeking relief from restrictions on its ability to enter into a new, unregulated line of business. As KRS 278.2219 suggests by specifically indicating that a utility may provide “documentation regarding the costs and benefits of compliance[,]”, and as the Commission’s decisions related to waiver tend to show,¹² the waiver provision is meant to relieve regulatory requirements where it

¹¹ Kenergy response to Commission’s Data Request of August 20, 2020, Item 5.

¹² See, e.g., *In the Matter 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*

would be difficult and unduly costly for a utility to comply with the requirements in carrying out its regulated operations. Here, conversely, Kenergy is not contending that its regulated operations are burdened by the Commission’s rules or statutory requirements governing affiliated transactions. Rather, it is contending that those requirements may frustrate its ability to invest in a new, discretionary line of business—one that invites the exact risks against which the Legislature designed the law to protect.

In support of its request, Kenergy points to a Commission order stating that the blanket application of the Code of Conduct on all utilities “may not be in the best interests of the customers the Code of Conduct is designed to protect.”¹³ However, Kenergy does not make clear that the language quoted related to a Commission decision—under a prior regulatory regime—to *categorically* exempt certain utilities, including cooperatives, from its code of conduct related to affiliates. When the General Assembly later codified these affiliate rules,¹⁴ it did *not* exempt cooperatives from those requirements, reflecting the legislative judgment that electric cooperatives *should* be subject to the same affiliate rules as other utilities.¹⁵ Here, Kenergy wants to fit a square peg into a round hole—it is asking the Commission to use the waiver process to allow it to enter a new unregulated line of business instead of proposing an affiliate relationship that complies with the law. Granting Kenergy’s proposal would require the

Assurance, LLC Subscription Agreement, Case No. 2018-00287, 2018 WL 6161360 at *6 (Nov. 15, 2018) (granting a waiver of the requirement charge market rate for services when the services were unique so there was no market rate); *In the Matter of Duke Energy Kentucky, Inc. and Duke Energy One, Inc.*, Case No. 2019-00195 2019 WL 3860365 at *2-*3 (August 13, 2019) (granting a waiver for the form disclaimer where the utility was operating in multiple states and sought to use one disclaimer that satisfied the requirements of all seven states).

¹³ Application at ¶ 15 & n.4, page 6, citing *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..

¹⁴ See 2000 Ky. Acts 1765.

¹⁵ See KRS 278.2201- 278.2213.

Commission to set aside a number of clearly applicable statutory requirements intended to protect utility customers.¹⁶ To do so would allow market entry in a new unregulated line of business rather than relieve burdens associated with Kenergy's core electric business.

As Kenergy points out in its Application, many Kentuckians lack access to broadband service and expanding broadband availability to those Kentuckians is a critical policy priority. KBCA members agree. This increasing need for broadband service is why the General Assembly passed House Bill 362, An Act for Broadband Deployment,¹⁷ and why KBCA members, electric cooperatives, and other telecommunications providers are actively engaged in discussions about the appropriate baseline rules to protect ratepayers and competition when electric cooperatives enter the broadband market. This important policy requires a consistent, balanced, and carefully considered statewide approach that reflects input from all stakeholders and is generally applicable to all electric cooperatives in the Commonwealth. Using the Commission's waiver process to address such requests on a one-off basis, as requested by Kenergy, is not conducive to such balancing, and risks creating an inconsistent patchwork of rules that varies from provider to provider and from service territory to service territory. The appropriate forum for the promulgation of these rules is the General Assembly, and the Commission should not create a precedent in this proceeding that undercuts the legislative process.

¹⁶ While Kenergy contends that it will comply with KRS 278.2213(11), which provides that a utility shall not provide any type of undue preferential treatment to a nonregulated affiliate to the detriment of a competitor, it is unclear how Kenergy will offer equal treatment to a noncompetitor if only Kenect is permitted to lease this "remaining space" on the fiber network. *See* Kenergy response to Commission's Data Request of August 20, 2020, Item 5.

¹⁷ House Bill 362 amends KRS 224A – Kentucky Infrastructure Authority to create a broadband deployment fund, which will provide assistance to construct infrastructure for deployment of broadband service to underserved and unserved areas of the Commonwealth.

II. If The Commission Grants Kenergy’s Waiver Application, It Should Do So Only on a Limited Basis and Under Conditions That Preserve Broadband Competition in the Commonwealth and Its Benefits to Customers.

Balancing the interests described above is best achieved through a legislative process of general application. However, if the Commission is inclined to grant Kenergy’s waiver request, it should limit the scope of the waiver to the provision of credit support only, and should impose conditions to ensure that this waiver does not undermine protections for electric ratepayers or for free and fair competition.

One of the purposes of the affiliate transaction rules is to protect the ratepayers for regulated services from having to bear undue risk or cost of an unregulated affiliate’s operations. Where, as here, a not-for-profit electric cooperative seeks to invest customer funds in a for-profit unregulated affiliate,¹⁸ the Commission should carefully consider how that investment could affect Kenergy’s members, as well as Kenect’s potential broadband customers. The Commission should ensure that the benefits to customers are not imbalanced, and that any profits generated by the affiliate that are returned to members are returned in an equitable fashion. Further, the Commission should consider whether it is in the interests of Kenergy and Kenect customers to establish a structure for the provision of broadband service before the General Assembly sets out rules for the entry of cooperatives into the market.

Another purpose of the affiliate transaction rules is to ensure that a regulated service provider does not use the advantages of its regulated operations—such as guaranteed rate recovery on certain investments, control of essential facilities used in both the provision of regulated and unregulated services, and access to confidential information obtained through its control of essential facilities or by virtue of being a monopoly provider of regulated services—to

¹⁸ Application at ¶ 2-3, pages 1-2.

disadvantage free and fair competition in the market for the *unregulated* service. Doing so risks deterring third-party investment in the competitive market and harming customers in the long run. The Commission has previously recognized the importance of protecting competitive markets in its affiliate transaction waiver precedents. For instance, it has granted a waiver in circumstances where the pertinent affiliates of the utility were not offering competitive products or services, but ordered that the waiver would no longer apply if the affiliates began offering competitive services or products.¹⁹

Support by electric providers for broadband affiliates raises precisely such competitive concerns. Electric providers' access to unique advantages arising from their provision of regulated electric services, such as exclusive ownership and control of utility pole infrastructure, rights-of-way and easements, and access to customer data can be used to frustrate fair competition for broadband service. Because an electric provider with a financial stake in the broadband market will face inevitable incentives to use those advantages to the detriment of competitive broadband providers, careful consideration is needed to ensure that adequate protections for competition accompany any entry by electric cooperatives into the broadband market. Indeed, the precise scope of those protections is precisely what is currently under discussion, through the legislative process, by numerous electric and communications provider stakeholders.

These protections are best addressed in a context generally applicable to all electric cooperatives in Kentucky rather than through a one-off waiver, as discussed in Part I above. However, if the Commission is inclined to grant Kenergy's request, it should, at minimum,

¹⁹ *In the Matter of: Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2010-00482 (March 1, 2011) (permitting waiver of disclaimer requirement for use of brands, trademarks, and logos, but ordering the utilities to seek Commission approval of a disclaimer if the affiliates begin to offer competitive services or products).

narrow the scope of the waiver to the provision of credit support only, and condition that limited waiver upon measures to ensure that it does not compromise competition in the retail market for broadband services. The Commission should reject Kenergy's request to directly subsidize Kenect with a \$3,000,000 investment, and should condition any grant of waiver allowing Kenergy to provide a guarantee to Kenect under a letter of credit with the conditions set forth below.

First, the Commission should expressly confirm that any waiver is limited only to the specific request set forth in Kenergy's application to provide credit support for Kenect, and confirm that Kenergy otherwise remains subject to all other affiliate transaction rules in KRS 278.2201-278.2219 with respect to the affiliate relationship. These include, among others, requirements governing the allocation of costs (and requiring a cost allocation manual); requiring any services provided to Kenect to be priced at Kenergy's tariffed rate or at its fully distributed cost, but in no event less than market; requiring separate accounting; and compliance with provisions regarding prohibited business practices and confidentiality requirements. These further include the seventeen subparts of KRS 278.2213 from which Kenergy has *not* sought a waiver, which contain, among other requirements, prohibitions against sharing confidential customer information with the utility's affiliates and vice versa,²⁰ providing any type of undue preferential treatment to a nonregulated affiliate to the detriment of a competitor,²¹ solicitation of business for the affiliate,²² and use of the utility's name, trademark, brand, or logo without a pre-

²⁰ KRS 278.2213(5), KRS 278.2213(10).

²¹ KRS 278.2213(11).

²² KRS 278.2213(8).

approved disclaimer.²³ These statutory requirements further require all dealings between a utility and a nonregulated affiliate to be at arm's length; the Commission should therefore further make clear that Kenergy may not provide discounted electric service to Kenect.²⁴

Second, the Commission should also include specific conditions to effectuate the meaning and purpose of these affiliate transaction rules as applied to the particular context of broadband services. KBCA recommends that the Commission condition any waiver upon the following conditions:

(1) Prohibit Kenergy from requiring its customers to purchase broadband services from Kenect or disconnecting electric service to customers for failure to pay a Kenect bill. Such safeguards would serve the essential purpose of ensuring that customers are protected from any misuse of the affiliate relationship. This would complement the existing customer protections in KRS 278.2213 from which Kenergy is not seeking a waiver, such as the prohibition on offering rebates or discounts on tariffed services to persuade customers to do business with the affiliate.²⁵ To the extent not already clear under existing Commission rules, the Commission should also clarify that Kenergy and Kenect must separately bill customers for their respective services, and not engage in joint marketing or billing.

(2) Impose conditions prohibiting Kenergy from discriminating against broadband providers who are non-affiliates. These conditions should include, at minimum:

(a) a requirement to provide access to poles, ducts and conduits to broadband providers on a nondiscriminatory basis and at just, reasonable, and nondiscriminatory rates;

²³ KRS 278.2213(13).

²⁴ KRS 278.2213(6).

²⁵ KRS 278.2213(3).

(b) a requirement not to deny access to poles, ducts and conduits except for reasons of safety, reliability and generally applicable engineering purposes that cannot be remedied by replacement, modification, or expansion of Kenergy's facilities;

(c) a prohibition against providing Kenect with preferential treatment in offering expansions of pole capacity, such as pole replacements, on terms more favorable than those offered to competing broadband providers;

(d) a prohibition against requiring non-affiliated broadband providers to bear costs associated with or caused by the attachment of facilities used to provide Kenect's services, such as the costs of make-ready to rearrange the non-affiliated broadband provider's facilities;

(e) a requirement to adhere to specific, identified timelines established in advance to process pole attachment applications by unaffiliated communications service providers and perform make-ready work to accommodate attachments by such providers;²⁶ and

(f) a requirement to make all Kenergy easements in its service territory available to non-affiliate broadband providers.

(3) Prohibit Kenergy from sharing personal information about its electric customers, obtained through the provision of electric services, with Kenect for marketing purposes.

(4) Prohibit Kenergy from using information it learns in its capacity as a pole owner, through receiving pole attachment applications from non-affiliated broadband providers, to inform Kenect about the locations in which competing broadband providers are planning to expand their networks, as well as prohibiting the use of such information for marketing purposes.

²⁶ The Commission is considering defining such timelines for all Kentucky pole owners in connection with its proposed pole attachment rules. KCTA proposes that, in connection with any waiver, Kenergy be required in the interim to comply with the application-processing and make-ready timelines set forth in 47 C.F.R. § 1.1411 until such time as the Commission issues final rules in its pole attachment proceeding.

(5) Clarify that Kenect may only operate within Kenergy's electric cooperative service area.

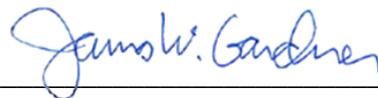
The Commission should also make clear that any waiver granted to Kenergy in this proceeding is applicable only in this specific instance, does not entitle other electric cooperatives to provide support for their broadband affiliates on the same terms, and does not govern the terms of any future waiver applications by any other electric provider. A waiver that may be interpreted as generally applicable may cause confusion or potentially undermine rules promulgated by the General Assembly in the future.

CONCLUSION

KBCA appreciates the opportunity to publicly comment on the subject matter of this Case No. 2020-00215 and respectfully requests that the Commission deny, or limit and condition, Kenergy's waiver application for the reasons detailed above.

Respectfully submitted,

KENTUCKY BROADBAND AND CABLE
ASSOCIATION



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