

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

In the Matter of:

**THE ELECTRONIC APPLICATION OF)
KENERGY CORP. FOR A CERTIFICATE)
OF PUBLIC CONVENIENCE AND NECESSITY)
FOR THE CONSTRUCTION OF A HIGH-SPEED) Case No. 2021-00365
FIBER NETWORK AND FOR APPROVAL OF THE)
LEASING OF THE NETWORK’S EXCESS CAPACITY)
TO AN AFFILIATE TO BE ENGAGED IN THE)
PROVISION OF BROADBAND SERVICE TO)
UNSERVED AND UNDERSERVED HOUSEHOLDS)
AND BUSINESSES OF THE COMMONWEALTH)**

**KENERGY CORP.’S RESPONSE TO
KBCA’S POST-HEARING BRIEF**

Kenergy Corp., by counsel, hereby files its Response to Kentucky Broadband and Cable Association’s (“KBCA”) Post-Hearing Brief.

1. KBCA’s Post-Hearing Brief Should be Stricken in its Entirety.

KBCA’s Post-Hearing Brief should be stricken from the record in its entirety because it exceeds the scope of KBCA’s limited intervention granted by the Commission’s December 9, 2021 Order. The Commission explicitly limited KBCA’s intervention “to the issue of maps depicting whether the service areas are underserved or unserved.”¹ KBCA’s Post-Hearing Brief does not provide any maps, but advances a legal conclusion and specifically requests that the Commission deny Kenergy’s application. The legal conclusion advanced by KBCA is the exact special interest previously asserted by KBCA for which the Commission refused to grant intervention.²

¹ Commission’s December 9, 2021 Order Granting KBCA Limited Intervention, at Ordering Paragraph 3, *available at*: https://psc.ky.gov/pscscf/2021%20Cases/2021-00365//20211209_PSC_ORDER.pdf.

² *Id.* at 2, 4 (“KBCA . . . argued its special interest that was not adequately represented was to ensure the scope and decisions . . . complies with KRS 278.5464. . . . [T]he only special interest proffered by KBCA was to ensure that the law was followed. This is a generalized interest held by all Kentuckians, and does not rise to the level of a special interest that satisfies the legal standard for intervention.”).

2. **KBCA's Statutory Interpretation is Incorrect.**

In addition to causing delay by requesting the right to file a post-hearing brief that exceeds the scope of KBCA's intervention, KBCA's statutory interpretation is incorrect.

First, if KBCA's statutory interpretation were accepted it would cause a conflict between KRS 278.5462 and KRS 278.5464. "It is a familiar rule of statutory construction that inconsistent statutory provisions must be harmonized if possible and 'where two constructions of a statute are possible, by one of which the entire act may be made harmonious while the other will create discord between different provisions, the former should be adopted.'" *Schwindel v. Meade County*, 113 S.W.3d 159, 165 (Ky. 2003) (citations omitted); see *Allen v. McClendon*, 967 S.W.2d 1, 3 (Ky. 1998) ("[I]t is the responsibility of this Court to make an interpretation of the law that harmonizes the two . . . so as to give effect to both statutes.").

KRS 278.5462(1) explicitly provides, "The provision of broadband services shall be market-based and not subject to state administrative regulation." Further, "no agency of the state shall impose or implement any requirement upon a broadband service provider with respect to the following: (a) The availability of facilities or equipment used to provide broadband services; or (b) The rates, terms or conditions for, or entry into, the provision of broadband service." KRS 278.5462(1) (emphasis added).

KBCA's interpretation of KRS 278.5464 would create a statutory conflict by not allowing Kenect to engage in the provision of market-based broadband services and by limiting the facilities available to Kenect to provide such services.³ Both of these conflicts are easily avoided by a proper

³ KBCA's Post-Hearing Brief presents internally inconsistent readings of KRS 278.5464. First, KBCA argues that the clause "an affiliate engaged exclusively in the provision of broadband services to unserved or underserved households and businesses" means that Kenergy's affiliate must be "engaged exclusively in providing broadband to unserved and underserved areas." KBCA's Post-Hearing Brief, at 4-5 ("Kenect will not be 'engaged exclusively' in providing broadband to unserved and underserved areas. . ."). Then, in an attempt to circumvent the acknowledgement that broadband services are unregulated, KBCA asserts an entirely different interpretation that completely rewrites the statute so that the word "exclusively" suddenly modifies *how* Kenergy leases the facilities. There are no limits on

reading of the statute. KRS 278.5464 merely provides that if a distribution cooperative desires to engage in the unregulated activity of broadband service, it may do so through the creation of an affiliate engaged “exclusively in the provision of broadband service,”⁴ which serves the General Assembly’s policy goals by ensuring there is a dedicated entity devoted entirely to proliferating broadband in the parts of rural Kentucky served by the cooperative. The word “exclusively” is not intended to and does not modify to whom an affiliate may provide services, which would run counter to KRS 278.546 and 278.5462.

Second, “[i]t is a well established principle of constitutional law and statutory construction that if a statute is reasonably susceptible to two constructions, one of which renders it unconstitutional, the court must adopt the construction which sustains the constitutionality of the statute.” *See, e.g., Yanero v. Davis*, 65 S.W.3d 510, 525 (Ky. 2001). Accepting KBCA’s reading of KRS 278.5464 would subject KRS 278.5464 to being held invalid on multiple fronts including on federal preemption grounds,⁵ violation of the Commerce Clause, the Equal Protection Clause, claims of anticompetitive behavior, and violation of Sections 2 and 26 of the Kentucky Constitution, just to name a few. This can be avoided by reading KRS 278.5464 to allow Kenect to engage in the market-based provision of broadband services. *See Pearce v. Univ. of Louisville*, 448 S.W.3d 746, 749 (Ky. 2014) (recognizing the Court must “read the statute as a whole, and

Kenergy’s ability to lease fiber to an affiliate. *See* KRS 278.5464(3)(a)(1) (“A distribution cooperative may facilitate the operation of an affiliate . . . by leasing excess capacity on any fiber optic cable used to support the distribution cooperative’s distribution system.”). Under KBCA’s tortured and alternative reading of the statute, KRS 278.5464 would be read to say that “a distribution cooperative may only lease excess capacity *exclusively* for broadband services provided to unserved or underserved households.” That is plainly not what is included in KRS 278.5464.

⁴ *See In the Matter of: Electronic Application of Kenergy Corp. for a Waiver Pursuant to KRS 278.2219*, PSC Case No. 2020-00215, Final Order (Oct. 22, 2020), at 7, 24 (“The provision of broadband services is a nonregulated activity in Kentucky. Therefore, if Kenergy desires to provide broadband service to the public, it must do so through an affiliate. . . [I]t would be appropriate for the General Assembly to review the statutes at issue in this Order to provide guidance regarding the Commonwealth’s policy with respect to a cooperative corporation’s involvement in broadband expansion.” (emphasis added)).

⁵ *See* “Lifeline Program Changes Take Effect Today,” Kentucky Public Service Commission News Release, Dec. 2, 2016, *available at*: 1202_r01.pdf (ky.gov) (“Because the PSC does not regulate broadband the \$3.50 state subsidy is not available for broadband-only service in Kentucky.”).

with other parts of the law of the Commonwealth, to ensure that our interpretation is logical in context”).

Finally, reading KRS 278.5464 so that it does not prevent competition in the broadband market and allows for proliferation of broadband to benefit all Kentucky consumers comports with the General Assembly’s stated policy goals – yet another required rule of statutory construction.⁶ Here, the General Assembly’s stated policy goals are clear – to drive proliferation of a competitive, market-based broadband industry throughout the entirety of the Commonwealth. *See* KRS 278.546(2), (4); KRS 278.5464(1).

CONCLUSION

For the foregoing reasons, the Commission should strike KBCA’s post-hearing brief and grant Kenergy’s application as presented.

Respectfully submitted,

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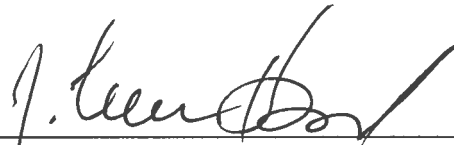
By _____


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⁶ *See* KRS 446.080(1) (“All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . .”); *Benningfield v. Zinsmeister*, 367 S.W.3d 561, 565 (Ky. 2012) (“By enacting the statute, the legislature has proclaimed the public policy of this state, and this Court is bound to interpret the statute to effectuate that policy.”); *see also Goodpaster v. U.S. Mortg. Bond. Co.*, 192 S.W.35, 37-38 (Ky. 1917) (“Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. . . . This is done sometimes . . . of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give true intention.”).

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, and James W. Gardner and M. Todd Osterloh, Sturgill, Turner, Barker & Maloney, PLLC, 333 W. Vine St., Suite 1500, Lexington, KY 40507, on this 15th day of April, 2022.



J. Christopher Hopgood