

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

In the Matter of:)	
)	
ELECTRONIC APPLICATION OF KENERGY)	
CORP. FOR A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY FOR THE)	
CONSTRUCTION OF A HIGH-SPEED FIBER)	CASE NO.
NETWORK AND FOR APPROVAL OF THE)	2021-00365
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)	
<u>BUSINESSES OF THE COMMONWEALTH</u>)	

KBCA’S PETITION FOR CLARIFICATION

The Kentucky Broadband and Cable Association (“KBCA”), by counsel and pursuant to KRS 278.400, respectfully requests rehearing for the Public Service Commission to provide clarification related to its Order dated July 1, 2022, ruling on the application filed by Kenergy Corp. (“Kenergy”) for a Certificate of Public Convenience and Necessity (“CPCN”), pursuant to KRS 278.020 and KRS 278.5464, for a fiber network to facilitate its intra-system communications and approval to lease excess capacity of that fiber network to an unregulated affiliate to provide broadband service in Kenergy’s service territory. Specifically, KBCA seeks clarification as to (1) whether the Public Service Commission’s Order constitutes a holding that Kenergy may proceed with constructing a fiber network for broadband purposes only; and, if so, (2) *where* Kenergy can do so, *i.e.*, whether that approval encompasses Kenergy’s construction of a fiber network in the unserved and underserved portions of its service territory only, or whether it encompasses all

locations set forth in Kenergy’s original application, which included certain areas where KBCA members already offer broadband service today.

Absent clarification on these points, the Order could unnecessarily generate future disputes between Kenergy and KBCA should Kenergy proceed to construct a broadband-only fiber network in lieu of the dual-use network for which the Order denied a CPCN. It also leaves unclear whether KBCA—in order to protect its rights against Kenergy’s future construction of a fiber network into any KBCA member’s service territory—would be required to seek judicial review of the July 1 Order.

In support of this motion, KBCA states as follows:

The Commission’s July 1, 2022 Order denies Kenergy’s application for a CPCN “to construct a fiber network to serve its electric utility distribution system, with plans to lease excess capacity for the provision of broadband service.” Order at 10. The Order denying the CPCN, however, contains the following passage:

Regardless, the Commission’s denial of the CPCN does not mean that Kenergy cannot build the fiber network to provide broadband service. As demonstrated by the sufficient evidence of record and supported by public comments, the majority of Kenergy’s service territory is unserved or underserved by broadband service. The amended KRS 278.5464 provides that a CPCN is not required, and thus approval by this Commission is not required, when a Coop constructs and leases a fiber network to an affiliate for the provision of broadband service. Thus, Kenergy can facilitate the operation of an affiliate engaged exclusively in the provision of broadband service to unserved and underserved areas by constructing and leasing a fiber network for the provision of broadband service.

Order at 11 (emphasis in original).

KBCA requests that the Commission clarify two important aspects of this passage.

First, KBCA requests that the Commission clarify whether (a) the above-cited passage on page 11 of the Order represents a *holding* by the Commission that Kenergy may construct a fiber network for purposes of providing broadband service only; or (b) the Commission was merely

commenting on matters beyond the immediate scope of its decision by observing that, notwithstanding the Commission's denial of Kenergy's requested CPCN, Kenergy could still pursue the alternative available under the amended KRS 278.5464.

The Order is unclear on this point. On the one hand, the Order's permissive language ("...Kenergy can facilitate") could be read as expressing a holding by the Commission that Kenergy may now proceed to construct and lease a fiber network without further review, as long as it uses the network for broadband only and not to support electric distribution. On the other hand, however, no discussion of the permissibility of a broadband-only network appears in the Order's ordering clauses, and no question regarding the permissibility of a hypothetical, broadband-only network was pending before the Commission. The only question before the Commission was whether to grant Kenergy's requested CPCN to construct the specific, dual-use network set forth in the application. This ambiguity leaves unclear whether the Order reached a holding on this subject, or was simply commenting on the implications of its denial of Kenergy's requested CPCN.

Second, if the Commission intended the discussion on page 11 of the Order to function as a holding that Kenergy is permitted by the amended KRS 278.5464 to construct and lease a broadband-only fiber network, KBCA requests clarification as to the scope of that permission. Specifically, the Order is unclear as to *where* Kenergy may build a broadband-only network without a CPCN: (a) in the unserved and underserved portions of its service territory, or (b) in all of the locations in which it originally proposed the dual-use network described in its application.

KRS 278.5464, as amended, "recognizes and declares" that "[d]istribution cooperatives are able to access and leverage federal funding to extend and enhance the availability of broadband service to Kentucky residents *who are currently unserved or underserved,*" and authorizes

distribution cooperatives to facilitate “the operation of an affiliate engaged exclusively in the provision of broadband service to unserved or underserved households and businesses...” by constructing and leasing a fiber network without the need to obtain a CPCN. KRS 278.5464(1)(b) & (3)(a) (emphasis added). Therefore, if Kenergy were to construct and lease a broadband-only fiber network, as contemplated on Page 11 of the Order, the permissibility of that construction and lease under KRS 278.5464 would turn on whether Kenergy is using it to facilitate an affiliate engaged “exclusively in the provision of broadband service to unserved or underserved households and businesses....”

KBCA believes that the most natural reading of the Order on this point is that it acknowledges that Kenergy has proved that there are ample unserved and underserved locations within its service territory, and that it may (without a CPCN) build and lease a broadband network to an affiliate to extend service *in those areas*. The Order notes, for instance, that “the majority of Kenergy’s service, area, which is rural, is unserved or underserved” but that some areas within its service area are not, as “KBCA provided evidence that metropolitan areas bordering or slightly within Kenergy’s service area likely are served by broadband providers at speeds that exceed the statutory threshold.” Order at 10 n.22. And in summarizing Kenergy’s options following the denial of the CPCN, the Order restates the limitation in KRS 278.5464 by observing that “Kenergy can facilitate the operation of an affiliate engaged *exclusively* in the provision of broadband service *to unserved and underserved areas* by constructing and leasing a fiber network for the provision of broadband service.” Order at 11 (emphasis added).

However, KBCA is concerned that the Order is not entirely clear on this point, and that Kenergy may treat it as providing authorization to build and lease a broadband-only network in *all* locations in which it had originally proposed a dual-use fiber network. In particular, Kenergy may

seize upon the Order's statement that "Kenergy also provided sufficient evidence regarding areas unserved and underserved by broadband in its service area," Order at 10, and interpret that statement as a holding that all of the locations in which Kenergy proposed to deploy a dual-use fiber network, including those that KBCA demonstrated are already served by KBCA members, satisfy the statutory standard under KRS 278.5464.

Because the statutory standard under KRS 278.5464 that allows a distribution cooperative to build and lease a fiberoptic network without a CPCN requires that the network support an affiliate "engaged exclusively" in providing service to unserved and underserved locations, rather than an affiliate providing service to a "majority" of unserved and underserved locations, it would be odd to read the Order as granting Kenergy permission to build and lease a broadband-only fiberoptic network anywhere in its service territory without regard to the presence of existing broadband service. However, because the Order is not absolute on this point, it has the potential to lead to disagreement between Kenergy and KBCA in the future if Kenergy chooses to treat the Order as authorizing it to proceed with such a network. In addition, if the Commission did in fact intend its Order to sweep so broadly as to allow Kenergy to build and lease a broadband-only network in all of the locations in which Kenergy had originally proposed a dual-use network, including areas that the record reflects are already served with broadband by KBCA members, KBCA may wish to seek judicial review of that interpretation, and a court exercising review of the Commission's decision would benefit from a more clear statement of the Commission's holding.

For these reasons, KBCA respectfully requests that the Commission provide clarification related to its June 1, 2022, Order as set forth herein.

RESPECTFULLY SUBMITTED,

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