

**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 REPLY IN SUPPORT OF ITS
MOTION TO INTERVENE**

The Kentucky Broadband and Cable Association and its members (“KBCA”), timely filed a Motion to Intervene on September 30, 2021. Kenergy Corporation (“Kenergy”) filed its Response on October 5, 2021. KBCA respectfully submits this Reply in support of its Motion to Intervene.

I. Kenergy does not question the appropriateness of KBCA intervening based on the standard set forth in 807 KAR 5:001, Section 4(11).

Intervention before the Commission is governed by the standard in 807 KAR 5:001, Section 4(11)(b), which states:

The commission shall grant a person leave to intervene if the commission finds that he or she has made a timely motion for intervention and that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.

KBCA’s Motion to Intervene articulated why it meets both of the two alternative bases for

intervention under the regulation. KBCA’s motion identified both (1) the special interests KBCA has in this case that are not otherwise adequately represented; and (2) two issues¹ on which KBCA’s participation will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.²

Kenergy’s Response does not challenge KBCA’s satisfaction of both the prongs of 807 KAR 5:001, Section 4(11)(b). Indeed, Kenergy does not address the second alternative prong—the likelihood that KBCA’s intervention will assist the Commission’s consideration of the issues raised by KBCA—at all. Based on the clear language of the regulation and Kenergy’s lack of opposition on these elements, the Commission should grant intervention.

II. Kenergy’s argument that the Commission should deny KBCA intervention because KBCA members are competitors of Kenergy is not supported by Kentucky law.

The only argument Kenergy presents in opposition to KBCA’s intervention is that the KBCA’s interest in the proceeding is as a putative competitor and therefore not cognizable under the Commission’s precedents. This argument does not present a basis to deny intervention for several reasons.

First, as set forth in Part I above, this argument relates only to the first prong of the standard under 807 KAR 5:001, Section 4(11)(b)—whether KBCA has a “special interest” in the proceeding not otherwise represented. Because KBCA’s motion to intervene readily satisfies the second prong—raising and developing issues in its intervention that will assist the Commission’s full consideration of the application—the Commission need not reach a decision on Kenergy’s

¹ Specifically, the two issues identified by KBCA relate to whether (1) Kenergy’s proposed project is appropriately tailored to unserved and underserved areas and (2) the project will result in Kenergy’s electric ratepayers subsidizing its broadband offerings.

² KBCA is further demonstrating its ability to participate in this matter without unduly complicating or disrupting the proceeding by contemporaneously submitting data requests that are narrowly tailored to the issues KBCA seeks to address. KBCA is submitting these requests in advance of a Commission ruling on its motion to intervene to ensure that its proposed intervention does not delay the docket.

objection.

Second, the interest that KBCA is intervening to protect differs in kind from the competitive interests previously deemed insufficient by the Commission. Here, KBCA is intervening not merely as a putative commercial competitor to the broadband services that would be offered by Kenect and its sublessees. Rather, it is intervening to vindicate a statutory interest under KRS 278.5464 that existing broadband providers should not have to face ratepayer-subsidized competition from electric cooperatives acting under authority of a statute designed to authorize their provision of broadband services only in areas that otherwise lack adequate broadband service. In addition to establishing this competitive interest, by limiting electric cooperatives to only provide broadband service to unserved or underserved households and businesses, KRS 278.5464 expressly puts before the Commission the question of whether competition exists in the areas Kenegy and its affiliate seek to serve. Enforcement of KRS 278.5464 is clearly within the Commission’s jurisdiction, as is the interest asserted by KBCA under that statute.

Third, KBCA’s competitive interest is a cognizable basis to establish the “special interest” prong for intervention under 807 KAR 5:001, Section 4(11)(b). KBCA acknowledges that there have been earlier decisions in which the Commission has denied intervention to competitors, some of which are referenced in Kenegy’s Response. However, those decisions predate the recent decision of the Court of Appeals in *Biddle v. Public Service Commission*, ___ S.W.3d ___, Case No. 2018-CA-1686-MR available at 2021 WL 4343656 (Ky. App. Sept 22, 2021).³ *Biddle* confirms that it does not matter whether an intervenor is a competitor because the Commission need not look beyond the two prongs identified in the administrative regulation. *Id.* at *10 (“When

³ Pursuant to CR 76.30(2), this appellate court opinion is not yet final as of the date of this filing.

either prong of 807 KAR 5:001 Section 4(11)(b) is established, the Commission ‘shall’ grant the person leave to intervene.”).

Kenergy’s argument to contrary rests on the mistaken assertion that competitive interests lie beyond the Commission’s jurisdiction. *See* Response at 2. Prior Commission decisions denying intervention by competitors of the applicant utility frequently rely on the unpublished decision⁴ in *EnviroPower, LLC v. Public Service Com'n of Kentucky*, 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007), which suggested that KRS 278.040(2) would require a person seeking intervention to have an interest in the “rates” or “service” of the utility because those are the only two subjects under the jurisdiction of the PSC. *Id.* at *4. As noted above, the Commission clearly has jurisdiction to enforce KRS 278.5464 and KBCA’s interest in ensuring that the statute is followed is therefore comfortably within both the Commission’s jurisdiction and the permissible bases for intervention. Even on its own terms, however, Kenergy’s objection overstates the limits on the Commission’s ability to entertain motions to intervene.

KRS 278.040(4) states, in part, that the Commission “shall have exclusive jurisdiction over the regulation of rates and service of utilities.” This statute defines the subject-matter jurisdiction of the Commission. It does not narrow the scope of who may intervene in a Commission case when the Commission has jurisdiction over the issues presented to it. Accordingly, nothing in KRS 278.040(2) limits intervention to customers of the utility. Further, Kenergy seeks approval of its lease with Kenect under KRS 278.5464(3), which provides the Commission with authority to approve a lease to an affiliate “engaged *exclusively* in the provision of broadband service to unserved or underserved households and businesses[.]” (emphasis added). The question of whether those residences and business are already served, therefore, is within the PSC’s jurisdiction even

⁴ The Commission has recently recognized that unpublished opinions are not binding. *Frankfort Electric & Water Plant Board*, Case No. 2020-00269, 2020 WL 7684140, at *2 (Ky. PSC Dec. 22, 2020).

though it does not relate to Kenergy's rates or service.

Once the Commission has jurisdiction over a proceeding because it relates to the rates and service of a utility, the Commission "shall" grant intervention if a timely movant meets either of the two prongs found in 807 KAR 5:001 Section 4(11)(b). In this case, no one can question the Commission's jurisdiction over Kenergy's request for a certificate of public convenience and necessity (CPCN) because KRS 278.020 confirms that a CPCN case relates to a utility's rates and services. The propriety of KBCA's intervention, therefore, turns on its satisfaction of the Commission's intervention rule, addressed in Part I above.

Biddle confirms that the appropriate touchstone under the Commission's rules is the nature of the intervenor's interest, and not whether the intervenor is a customer or putative customer of the utility. In *Biddle*, landowners attempted to intervene in a Commission case evaluating whether a cell tower should be located on a neighboring property. *EnviroPower*, 2007 WL 289328 at *1. There was no suggestion that the landowners were customers of the applicant or had any interest in their rates or services. Rather, the landowners contended that the proposed tower would negatively impact their property values. *Id.*⁵

Whether the landowners were customers of the applicant did not factor into the Court of Appeals' decision at all—rather, it held that the Commission, in considering a motion to intervene, must consider both prongs set forth in 807 KAR 5:001 Section 4(11)(b), and grant intervention if either is established. *Id.* at *7-10. In the present case, KBCA has explained why it meets both of

⁵ There are two additional noteworthy items from the *Biddle* decision. First, citing four Commission cases from 2003-2009, the Court observed that "the Commission used to favor intervention by interested parties, readily granting intervention with little to no analysis." *Biddle*, 2021 WL 4343656 at *10. This simplified method for granting intervention is not relegated to the distant past. See *Duke Energy Kentucky, Inc.*, Case No. 2021-00245, 2021 WL 4463790 (Ky. PSC Sept. 24, 2021) (granting intervention to the Sierra Club); *Big Rivers Elec. Corp.*, Case No. 2021-00289, 2021 WL 3550076 (Ky. PSC Aug. 6, 2021) (granting intervention to Kimberly-Clark Corporation). Second, these recent Commission decisions are consistent with the Court's recognition that "[t]here is no change in the relevant statutes or regulations to justify such a shift away from allowing interventions." *Biddle*, 2021 WL 4343656 at *10.

the regulatory elements for intervention. Accordingly, the Commission should grant KBCA intervention in this matter.

III. Kenegy opposes KBCA’s intervention despite its prior statements that issues raised by KBCA would be appropriately addressed in this case.

Finally, KBCA notes that Kenegy’s opposition to KBCA’s intervention is in tension with its position in Case No. 2020-00215, where Kenegy criticized KBCA for *not* intervening. In Case No. 2020-00215, KBCA raised concerns regarding a proposed affiliate agreement between Kenegy and Kenect. In response, Kenegy criticized KBCA for “elect[ing] to provide public comment opposing or limiting the relief requested in the Application” instead of intervening, and asserted that “the failure by the KCBA [sic] to intervene in this matter is most certainly due to its desire to avoid answering data requests”⁶ Indeed, Kenegy not only criticized KBCA’s decision not to intervene, but seemingly welcomed KBCA’s intervention in future matters. It acknowledged that KBCA would have “plenty of opportunity to be heard in a future application for a Certificate of Public Convenience and Necessity.”⁷ In addition, Kenegy confirmed that KBCA’s discussion of Kenegy’s possible construction of a fiber-optic network “is the subject of a future CPCN filing in which many matters raised by the KCBA [sic] may be raised.”⁸

In this case, KBCA has now done exactly what Kenegy criticized it for not doing in 2020-00215: seek intervenor status. In response, Kenegy now objects that “KCBA [sic] fails to show why intervention is necessary when it has the option of filing public comment in this action.”⁹ The Commission should take this tactical reversal with a grain of salt. KBCA’s Motion does exactly

⁶ Kenegy Corp.’s Brief, *Kenegy Corp.*, Case No. 2020-00215 at 9 (filed Oct. 8, 2020), available at https://psc.ky.gov/pscecf/2020-00215/chopgood%40dkgnlaw.com/10082020111823/Brief_signed_10-8-20.pdf.

⁷ Kenegy Corp.’s Brief, *Kenegy Corp.*, Case No. 2020-00215 at 10.

⁸ *Id.*

⁹ Kenegy’s Response to Motion to Intervene, *Kenegy Corp.*, Case No. 2021-00365 (filed Oct. 5, 2021) available at https://psc.ky.gov/pscecf/2021-00365/chopgood%40dkgnlaw.com/10052021103348/Response_to_Motion_to_Intervene_10-5-21..pdf.

what Kenergy claims it should: demonstrate why intervention is appropriate under the Commission's rules.

IV. Conclusion

KBCA has filed a timely motion that articulates why it has special interests that are not otherwise adequately represented in this case and why it will present issues and develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Kenergy has not challenged KBCA's position on both of these two regulatory prongs. As discussed in the *Biddle* decision, the Commission need not look past these issues in determining whether intervention is appropriate, and therefore, the Commission should grant KBCA's Motion to Intervene.

RESPECTFULLY SUBMITTED this 12th day of October 2021.

KENTUCKY BROADBAND AND CABLE
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