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 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	)	CASE NO. 2021-00365

KBCA'S POST-HEARING BRIEF

The Kentucky Broadband and Cable Association ("KBCA") submits its initial brief to the Kentucky Public Service Commission ("Commission"), in accordance with Section 10 of the Commission's Rules of Procedure, 807 KAR 5:001, and the briefing schedule established in this proceeding.

I. Introduction

Kenergy Corp. ("Kenergy") seeks Commission authorization to construct a fiber optic system and to lease excess capacity to an affiliate, Kenect Inc. ("Kenect"), pursuant to KRS 278.5464. KRS 278.5464 provides that a distribution cooperative "may facilitate the operation of an affiliate engaged exclusively in the provision of broadband service to unserved or underserved households and businesses[.]" KRS 278.5464(3)(a). In order to assist the Commission in applying this standard, KBCA participated in this proceeding to provide information identifying areas within the footprint of Kenergy's proposed fiber optic distribution system where broadband service is already commercially available, and has provided such information for the Commission's consideration.

The record in this docket indicates that, as presently structured, Kenergy's proposed fiber lease to Kenect would result in Kenergy leasing its fiber optic network to facilitate the provision of broadband to households and businesses that are *not* exclusively unserved or underserved. Rather, portions of the proposed system would be used to facilitate Kenect's provision of broadband service (either directly, or through a sublease) to households and businesses that already have access to broadband service today. Kenergy's proposal, therefore, in the form presented to the Commission, should not be approved, as it does not comply with KRS 278.5464. In order for the Commission to make any finding that the proposal meets the public interest requirement of KRS 278.5464(3)(b), Kenergy would first need to modify the scope of the lease to conform to the limits in KRS 278.5464(3)(a) by limiting the leased fiber capacity to the specific geographic areas in its footprint that the record indicates are unserved or underserved. Kenergy has not done so.

II. Undisputed Evidence Demonstrates that Kenergy's Proposed Fiber Lease Area Is Not Entirely Unserved or Underserved.

The statute at issue in this proceeding defines an "underserved area" as "any project area where broadband service with a minimum twenty-five (25) megabits per second downstream and three (3) megabits per second upstream is not available" and "unserved area" as "any project area where broadband service with a minimum ten (10) megabits per second downstream and one (1) megabit per second upstream is not available." KRS 278.5464(2)(b)-(c). The record demonstrates that, under this definition, not all areas within Kenergy's proposed fiber optic lease project area are "unserved" or "underserved," as some are currently served by KBCA member entity Charter Communications ("Charter").

In granting KBCA's Petition to Intervene, the Commission found that "KBCA is likely to present issues or develop facts regarding underserved and unserved areas in Kenergy's service territory that will assist the Commission in considering this matter[.]" December 9, 2021 Order at 4. KBCA has done so. KBCA provided granular, proprietary maps that showed the areas within Kenergy's proposed fiber optic lease area where Charter already offers high-speed broadband service. *See* Keller Direct Testimony, Exhibits 1 and 2. KBCA notes that the proprietary maps it submitted for the Commission's consideration are beneficial to the Commission's consideration of which areas are "unserved" or "underserved" because they contain a greater level of geographic detail than what is otherwise publicly available. The Federal Communications Commission ("FCC")'s publicly available fixed broadband deployment map identifies whether or not broadband service is available within each census block (and, if so, the provider and the maximum advertised speeds), but does not provide a ready way to distinguish between census blocks where service is available to every home and business and census blocks where broadband is available to some homes and businesses but not all of them. *See* Keller Dir., 5:10-6:8. The more granular maps submitted by KBCA for the Commission's consideration, by contrast, show the actual geographical boundaries of Charter's service areas, and therefore provide Kenergy the information necessary to tailor its fiber lease to the specific areas that qualify as unserved or underserved as defined by KRS 278.5464.

In addition to the maps showing the areas served by Charter, KBCA provided screenshots confirming the availability of broadband service in those areas. *See* KBCA Response to Staff Request for Information 1, Exhibit 2. KBCA further provided commercially available speed test data from Ookla, which provides independent third-party confirmation that the service provided by Charter in these areas is well in excess of the upload and download speeds used to define underserved areas and unserved areas in KRS 278.5464(2)(b). *See* KBCA Response to Staff Request for Information 1, Exhibit 3.

Kenergy has not disputed the factual accuracy of any of this evidence. All Kenergy has done is point out that only a portion of its proposed fiber lease area is implicated. Kenergy's witness Robert Stumph testified that "[t]he vast majority of alleged overlap between Kenergy's service territory and the areas where Charter alleges it provides broadband service is concentrated around the cities of Owensboro and Henderson" and that other areas have "minimal overlap." Stumph Reb., 2:11-22. KBCA does not disagree that only a portion of Kenergy's proposed fiber lease area is already served by Charter today, but the fact that such overlap exists is not in dispute.

III. Kenergy's Proposal, As Presently Before the Commission, Does Not Meet the Requirements of KRS 278.5464.

The proposed fiber lease from Kenergy to Kenect, as explained above, will include some areas that are not unserved or underserved. And Kenergy has stated that its broadband affiliate Kenect, through this lease arrangement, will use the leased fiber to offer broadband services to any location within Kenergy's service area that requests broadband service, "even if some may already have broadband access." Horn Reb., 11:15-19; *see also* Kenergy Response to KBCA Data Request 11(f), ("[t]o the extent that the pursuit of this goal results in some competition with an existing broadband provider in the isolated areas of Kenergy's territory that do have access to broadband service, Kenect intends to provide broadband service to those members.").

Application of the statutory requirements to this fact pattern, therefore, is simple. The plain language of KRS 278.5464(3)(a) allows a distribution cooperative to "facilitate the operation of an affiliate engaged *exclusively* in the provision of broadband service to unserved or underserved households and businesses[]" by, *inter alia*, leasing excess capacity on its fiber network. KRS 278.5464(3)(a) (emphasis added). As the proposed lease is currently structured, Kenect will not be "engaged exclusively" in providing broadband to unserved and underserved areas, because some of its service area facilitated by the lease is already served and it will offer service to those areas. The proposed lease is accordingly not eligible for approval under KRS 278.5464(3)(b) in its present form, and accordingly should not be approved by the Commission.[1]

While Kenergy states that it disagrees with KBCA's interpretation of the statute, *cf.* Horn Reb., 11:22-12:4, it has articulated no theory of statutory interpretation under which the proposed fiber lease would satisfy the statutory requirement to facilitate an affiliate engaged "exclusively" in the provision of broadband to unserved and underserved areas. Under Kentucky law, "[a]ll words and phrases" in a statute "shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." KRS 446.080(4). The term "exclusively" has a common and approved usage, and is not a technical term.

Kentucky law is also clear that "where the language of a statute is clear and unambiguous on its face, [the courts] are not free to construe it otherwise even though such construction might be more in keeping with the statute's apparent purpose." *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009) (citing *Whittaker v. McClure*, 891 S.W.2d 80, 83 (Ky. 1995)). Further, it is well-established that "statutes should be construed so that no part is meaningless or ineffectual." *Flege v. Commonwealth*, 556 S.W.3d 38, 40-41 (Ky. App. 2018) (internal quotations omitted, citing *Commonwealth v. Andrews*, 448 S.W.3d 773, 779 (Ky. 2014)). The language of KRS 278.5464 is clear and unambiguous: there is no way to construe the word "exclusively" other

[1] The same outcome results under 278.5464(3)(a)(3), which empowers a distribution cooperative to pledge its assets for collateral for a loan entered into by the broadband affiliate. This statutory provision is likewise secondary to the threshold requirement that the affiliate must be engaged "exclusively" in the provision of broadband service to unserved or underserved households and businesses.

than as a limitation that a distribution cooperative can only facilitate the operation of a broadband affiliate by leasing fiber facilities if the affiliate's activities being facilitated by the lease are limited to connecting unserved and underserved homes and businesses. Here, due to the inclusion of already-served areas within the fiber lease area, they are not. Any other reading would render the word "exclusively" meaningless.

The closest Kenergy has come to articulating an argument for the permissibility of the proposed lease is its statement that "[l]ike all other broadband providers who are free from conditions or restraints in the provision of broadband service under both state and federal law, it is anticipated that Kenect will provide broadband service to all who request such services within Kenergy's service area." Horn Rebuttal, 11:19-22. But Kenergy's insistence that its broadband affiliate Kenect is "free from conditions or restraints in the provision of broadband service" misapprehends the issue before the Commission. The question in this proceeding is not where *Kenect* may offer broadband service, but rather how *Kenergy* may facilitate Kenect's offering of those services. Kenect, as an unregulated broadband provider, is of course free to construct or lease facilities and offer service anywhere it can obtain the necessary licenses and rights-of-way. Kenergy, however, is only empowered to lease its fiber facilities to Kenect in accordance with KRS 278.5464, one of the conditions of which is that Kenect be "engaged *exclusively* in the provision of broadband service to unserved or underserved households and businesses[.]" (emphasis added).

IV. Kenergy Would Need to Modify the Proposed Fiber Lease Prior to Any Approval, and Has Not Done So.

Kenergy seeks approval for authority to lease its excess capacity to Kenect as provided for by KRS 278.5464(3)(a)(1), and to pledge assets to Kenect under KRS 278.5464(3)(a)(3). Kenergy states that the Commission shall grant approval of the lease and the pledging of assets "upon a finding the proposal is in the public interest." KRS 278.5464(3)(b).[2]

Here, the Commission cannot reach the public interest inquiry under KRS 278.5464(3)(b), much less conclude that the application satisfies the public interest requirement, because the application does not satisfy the threshold requirements of KRS 278.5464(3)(a). As discussed above, KRS 278.5464(3)(a) is unambiguous, and applies only to the facilitation of an "affiliate engaged exclusively in the provision of broadband service to unserved or underserved households and businesses[.]" And in any event, even if it were to conclude that the proposed fiber network would otherwise bring benefits to Kenergy's electric customers or the proposed lease would bring benefits to unserved households and businesses in Kenergy's distribution footprint, the Commission cannot find Kenergy's application in the public interest unless the proposed use of the network is lawful, *i.e.*, unless Kenect is engaged exclusively in the provision of service to unserved and underserved homes and businesses. Kenergy could readily achieve this result by limiting the geographical scope of its fiber lease to Kenect to the portions of its electric footprint where broadband service is unavailable today. The mapping information provided by KBCA, which identifies areas within Kenergy's electric service area where broadband service is already available, will enable Kenergy and the Commission to conform the fiber lease to these unserved and underserved areas. Kenergy, however, has chosen not to do so.

KBCA notes that, while Kenergy has objected to the scheduling impact of KBCA's participation in this proceeding, the ability to conform its proposed fiber lease to KRS

[2] KBCA notes that recent legislation delivered to the Governor, if signed in its presented form, would amend KRS 278.5464 in a manner that alters certain procedural aspects of the Commission's approval process. *See* HB 315. In the event the statute is amended during the pendency of this proceeding, supplemental briefing may be required to address the impact, if any, of the changed statutory text.

278.5464(3)(a) has always been completely within Kenergy's power. KBCA further notes that, had KBCA not intervened in this proceeding, Kenergy would not have had the benefit of KBCA's detailed mapping information. In order to comply with KRS 278.5464(3)(a), therefore, Kenergy would (absent the detailed mapping information from KBCA) likely have needed to narrow its proposed fiber lease to the fully unserved census blocks within its electric footprint. With the benefit of KBCA's mapping information, however, Kenergy could have chosen to also include within the fiber lease the portions of its electric footprint that fall within the unserved portions of partially served census blocks, thereby enabling Kenect to use these leased facilities to offer service in a larger geographic area. Instead of modifying its proposal in the manner enabled by KBCA's mapping information, however, Kenergy is requesting approval for an application that does not satisfy the statutory requirements.

V. Conclusion

For the foregoing reasons, the Commission should not approve Kenergy's application as presently written.

RESPECTFULLY SUBMITTED,

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