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 REPLY BRIEF

The Kentucky Broadband and Cable Association ("KBCA") submits its Reply 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

The Commission admitted KBCA as an intervenor in this proceeding "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[.]"[1] KBCA's Opening Brief did exactly that. It "develop[ed] facts" regarding areas within Kenergy's proposed fiber lease area where broadband service is already available, and it "present[ed] issues" regarding those areas by explaining the

[1] December 9, 2021 Order at 4.

significance of that uncontroverted record evidence to the Commission's consideration of the matter. Kenergy's procedural objections to KBCA's post-trial brief are unmerited and its analysis of the statute under which Kenergy brought its application, KRS 278.5464, contradicts the statutory text and policy. Notwithstanding Kenergy's efforts to frame this proceeding as turning upon where *Kenect* may provide broadband service, the matter before the Commission is whether and how *Kenergy* can leverage its regulated and ratepayer-subsidized assets in the market for broadband services—specifically, whether it should be allowed, in direct contravention of KRS 278.5464, to construct and then lease fiber for purposes of providing broadband service in areas that are uncontrovertibly "served." The Commission should deny the application for the reasons set forth in KBCA's Opening Brief.

II. KBCA'S POST-TRIAL BRIEF PRESENTS ISSUES SQUARELY WITHIN THE SCOPE OF ITS INTERVENTION

KBCA's Opening Brief pointed to evidence in the record firmly establishing that Kenergy's proposed fiber lease to its affiliate Kenect will, if approved without modification, overlap substantial areas within Kenergy's electric distribution footprint within which KBCA member Charter already offers gigabit broadband service. Kenergy's Response Brief does not dispute the key evidentiary point demonstrated by KBCA's evidence: that its proposed fiber lease is not exclusively for Kenergy's use to provide broadband in unserved and underserved areas.

Lacking an *evidentiary* response to KBCA's testimony and briefing, Kenergy interposes a *procedural* objection: that KBCA should not be able to point out these facts at all, because KBCA's post-trial brief purportedly exceeds the scope of its intervention.[2] Specifically, Kenergy objects that "KBCA's Post-Hearing Brief does not provide any maps, but advances a legal conclusion and

[2] Kenergy Response Brief at 1.

specifically requests that the Commission deny Kenergy's application."[3] This objection is unfounded. KBCA's Opening Brief "does not provide any maps" only in the sense that those that maps are *already* in the record due to KBCA's intervention. And those maps, showing areas within Kenergy's proposed fiber lease area that are not "underserved and unserved areas," are the focal point of KBCA's post-trial brief. The Commission admitted KBCA based on the Commission's determination 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[.]"[4] KBCA's post-trial brief emphasizes that KBCA has placed this uncontroverted broadband mapping information into the record, and that Kenergy has failed to make any use of the information provided by KBCA to tailor the scope of its application or its proposed lease.

Kenergy's argument seems to be that KBCA is limited *only* to providing maps, but is prohibited from explaining what those maps show or why they matter. But the Commission specifically authorized a schedule in this proceeding that affords KBCA an opportunity to submit *briefing*, which necessarily contemplates that KBCA's participation encompasses assisting the Commission's interpretation of its maps by contextualizing and explaining how they are pertinent to the matters before the Commission. And in any event, the Commission's decision to allow KBCA's participation in this proceeding was based not solely on KBCA's submission of broadband maps alone, but also on its conclusion that KBCA would "*present issues* … regarding underserved and unserved areas in Kenergy's service territory that will assist the Commission in considering this matter[.]"[5]

[3] *Id*.
[4] December 9, 2021 Order at 4.
[5] *Id*.

Kenergy's limited view that the Commission should disregard KBCA's submission also makes no sense for another reason: nothing about the analysis provided by KBCA is dependent upon its intervenor status. The Commission can receive comment from the public generally regarding matters before it, and here, KBCA's brief provides analysis pertinent to the record that the Commission could equally receive and consider from public comment irrespective of party status. KBCA respectfully believes that the analysis set forth in its Opening Brief will assist the Commission's consideration of the application, and Kenergy's calls for the Commission to simply disregard that analysis are unjustified.

III. KENERGY'S STATUTORY INTERPRETATION OF KRS 278.5464 IS IMPLAUSIBLE AND CONTRARY TO THE PLAIN TEXT OF THE LAW

The Commission's decision to admit KBCA as a party implicitly recognized, correctly, that it would "assist the Commission in considering this matter" to "to present issues or develop facts regarding underserved and unserved areas in Kenergy's service territory …"[6] Lacking any evidentiary response to the broadband mapping evidence that is now in the record, Kenergy takes a new tack: arguing that establishing which areas in its service territory are served, underserved, or unserved, will *not* assist the Commission in applying the law to the record in this matter. Specifically, Kenergy advances a reading of KRS 278.5464 that would render irrelevant whether it is proposing to lease its fiber network so that its affiliate can offer broadband service in an unserved area, an underserved area, or an area that already has gigabit internet service. Kenergy's results-oriented interpretation of the statute is contrary to both its plain text and its policy objective.

KRS 278.5464 is not ambiguous. It empowers an electric distribution cooperative to facilitate the operation of a broadband affiliate if, and only if, that affiliate is involved "exclusively

[6] December 9, 2021 Order at 4.

in the provision of service to unserved and underserved households and businesses…."[7] Kenergy invokes various canons of statutory construction in support of its argument that KRS 278.5464 permits the proposed lease, but since there is no ambiguity in the phrase "exclusively in the provision of broadband service to unserved or underserved households and businesses" to resolve, there is no need to invoke other canons of statutory construction. Kentucky law is 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).

Kenergy's initial argument is that reading KRS 278.5464(3)(a) to limit distribution cooperatives to leasing fiber to affiliates that only provide broadband to unserved and underserved areas "would cause a conflict between KRS 278.5462 and KRS 278.5464."[8] Kenergy's reasoning is that since KRS 278.5462(1) precludes state regulation of the provision of broadband service or "the availability of facilities or equipment used to provide broadband service," it would create a conflict to read KRS 278.5464(3)(a) as limiting the areas within which a distribution cooperative's broadband affiliate can offer service.[9] No such conflict exists. KRS 278.5462(1) prohibits

[7] Kenergy claims that KBCA's positions are inconsistent, because KBCA argues both (a) that Kenergy may not support Kenect's provision of broadband service unless Kenergy limits its service to unserved/underserved areas; and (b) that Kenergy must limit its contributions to Kenect to actions that facilitate only the provision of broadband service in unserved and underserved areas. Kenergy Response Brief at 2, n.3. However, there is no tension to resolve. If Kenergy directly assists Kenect to offer broadband in already-served areas, Kenect would not be an affiliate engaged exclusively in the provision of broadband service to unserved and underserved homes and businesses; and if Kenergy *does* limit its fiber lease to such areas, Kenect will (as a factual matter, given the particular circumstances in this proceeding) be the type of broadband affiliate whose operations Kenergy can support consistent with KRS 278.5464 because it will be engaged exclusively in offering service in those areas.

[8] Kenergy Response Brief at 2.

[9] *Id.*

regulations "*upon a broadband service provider*" that restrict or regulate its services or facilities.[10] KRS 278.5464(a)(3) is not a restriction on *Kenect's* facilities or services at all. Kenect—Kenergy's broadband affiliate—is free to offer service anywhere it can obtain the necessary rights-of-way access, licenses, and facilities. KRS 278.5464 limits *electric distribution cooperatives*. It is a limitation on their ability to leverage their regulated, ratepayer-supported utility assets to support unregulated affiliates.[11] Nothing in the plain-text reading of the statute articulated by KBCA is in tension, much less conflict, with KRS 278.5462.

Kenergy then contends that this non-existent conflict can be resolved by reading the word "exclusively" in KRS 278.5464(3)(a) to require an electric distribution cooperative to participate in broadband market only through an affiliate "exclusively" engaged in the broadband business.[12] But this approach is contrary to the plain language of the law, which requires a broadband affiliate not merely to be involved exclusively in the broadband business (as opposed to the electric distribution business), but "exclusively in the provision of broadband to *unserved and underserved homes and businesses*."[13] Kenergy's proposed reading conflicts with the basic pillar of statutory interpretation that "statutes should be construed so that no part is meaningless or ineffectual." *Flege v. Commonwealth*, 556 S.W.3d 38, 40-41 (Ky. Ct. App. 2018) (internal quotations omitted, citing *Commonwealth v. Andrews*, 448 S.W.3d 773, 779 (Ky. 2014)).

Second, Kenergy argues that interpreting KRS 278.5464(3)(a) in the manner KBCA advocates would result in supposed conflicts with other laws that would "render it

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[10] KRS 278.5462(1) (emphasis added).

[11] While KRS 278.5462 also mentions the "availability of facilities or equipment," it still does so in the context of regulations "upon a broadband service provider," *i.e.*, it prohibits rules that require *broadband providers* to make their facilities and equipment available to third parties, such as open-access requirements.

[12] Kenergy Response Brief at 3.

[13] KRS 278.5464(3)(a) (emphasis added).

unconstitutional,"[14] followed by an expansive laundry list of purported conflicts comprising "federal preemption grounds, violation of the Commerce Clause, the Equal Protection Claims, claims of anticompetitive behavior, and violation of Section 2 and 26 of the Kentucky Constitution, just to name a few."[15] Kenergy's unexplained invocation of these numerous purported sources of unconstitutionality contains no analysis, and no citations other than to the unremarkable proposition that the Commission's does not regulate broadband, as evidenced by the fact that the Kentucky Lifeline discount is not available for broadband-only services.

None of these supposed conflicts exist. While federal law does preclude state regulators from regulating the terms and conditions of retail broadband service or from prohibiting competitive entry to the broadband market (and Kentucky law mirrors this same deregulatory posture towards broadband providers), nothing about KRS 278.5464(3)(a), as explained above, regulates Kenect at all. Enforcing KRS 278.5464(3)(a) against Kenergy as written would not involve any regulation by the Commission of Kenect's broadband services or the markets it can serve. The question in this proceeding is not how or where *Kenect* may provide broadband service, but rather whether and how *Kenergy* can leverage its regulated and ratepayer-subsidized assets in the market for broadband services.

Rules that limit regulated utilities such as Kenergy from leveraging regulated utility assets to compete in unregulated markets are commonplace. Such rules do not constitute regulation of the unregulated service provider, nor do they violate federal constitutional requirements, as utility regulators have well-recognized and valid interests in ensuring that regulated ratepayer assets are

[14] Kenergy Br. at 3.
[15] *Id*.

not used to distort competitive markets.[16] Kenergy points to nothing in federal or state law that would preempt the Commission from applying KRS 278.5464(3)(a) in the manner in which it is written.

Finally, Kenergy argues that interpreting KRS 278.5464 as set forth in KBCA's brief would be contrary to the Legislature's policy objective of supporting broadband competition.[17] At the outset, Kenergy's argument again asks the Commission to do exactly what the rules of statutory interpretation prohibit, and to disregard unambiguous statutory text. But Kenergy's argument does not even engage with the legislative policies inherent in the statute itself. The plain text of KRS 278.5464 evidences a policy of promoting broadband not by encouraging electric distribution cooperatives to leverage their ratepayer assets to compete against existing providers in markets where service is already commercially available, but rather to promote and focus on broadband connectivity in unserved and underserved areas. The statute's *title* is "Provision of broadband service *to unserved and underserved households and businesses* -- Facilitation by distribution cooperative."[18] Indeed, the statute defines "unserved area" and "underserved area," neither of which definitions would be necessary unless they had some relevance to the authority that the statute vests in electric distribution cooperatives.[19] This further confirms the General Assembly's intent that the statute be enforced exactly as it is written.

[16] Indeed, the federal courts have expressly struck down the FCC when it has tried to preempt states from imposing restrictions on municipal utilities related to their provision of broadband service (*See Tennessee vs. FCC*, 832 F.3d 597 (6th Cir. 2016)).
[17] Kenergy Br. at 4.
[18] KRS 278.5464 (emphasis added).
[19] KRS 278.5464(2)(b) & (2)(c).

IV. RECENT AMENDMENTS TO KRS 278.5464 DO NOT CURE THE DEFECTS IN KENERGY'S APPLICATION

In its initial brief filed on April 11, 2022, KBCA noted "that 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."[20] It further stated that "[i]n 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."[21] These amendments have taken effect since KBCA filed its opening brief. On April 11, 2022, the Governor issued a line-item veto on HB 315's "emergency clause." On April 13, 2022, a majority of both houses of the General Assembly voted to override that veto, thereby making HB 315 effective immediately.

Kenergy's Response Brief did not address whether the newly enacted legislation impacted this proceeding. Seeking to be mindful of the usual practice that reply briefs respond to the arguments presented in the initial briefing, rather than raising new issues, KBCA filed on April 19, 2022, a procedural motion proposing that the Commission set a supplemental briefing schedule for the parties to address the impact, if any, of HB 315.[22] As of the filing date of this Reply Brief, the Commission has not yet acted on this motion for supplemental briefing. However, Kenergy on April 21, 2022, filed a response to KBCA's procedural motion, opposing supplemental briefing as unnecessary based upon its position that HB 315 "has no impact on the outcome of this proceeding."[23] Given Kenergy's position that HB 315 does not affect the outcome of the matters

[20] *See* KBCA Post-Hearing Brief at 7 n. 2.
[21] *Id.*
[22] *See* Motion for Leave to File Supplemental Briefing on newly enacted House Bill 315 and for a Briefing Schedule (April 19, 2022).
[23] Kenergy Corp. Response to KBCA's Motion to File Supplemental Briefing (Apr. 21, 2022) at 1.

before the Commission, KBCA will withdraw its motion for supplemental briefing, and will briefly address the new law here.

KBCA agrees with Kenergy that HB 315 does not have any effect on the outcome of this proceeding. The bill, as enacted, leaves unchanged the statutory text in KRS 278.5464(3)(a) containing the central limitation at issue here: that a distribution cooperative may only facilitate (through a lease of capacity on its fiber network) the operation of an affiliate engaged *exclusively* in the provision of broadband service to underserved and unserved households and businesses. While the bill removes the *procedural* requirement that a distribution cooperative obtain from the Commission a certificate of public convenience and necessity prior to entering into such a lease, nothing about the *substantive* rule, which defines the authority of distribution cooperative to enter into such a lease in the first instance, has changed.

HB 315 also explicitly leaves in place the requirement that a distribution cooperative must obtain a Certificate of Public Convenience and Necessity from the Commission in order to *construct* a fiber network that will then be the object of a lease pursuant to KRS 278.5464(3)(a). Therefore, while Kenergy may no longer need the Commission specifically to approve its proposed lease terms, the Commission still must review and decide whether to approve, in the first instance, whether Kenergy's construction of that proposed fiber network is in the "public interest."

The Commission cannot make that finding on the record in this proceeding. That is because Kenergy has already specifically admitted to the Commission that it intends to construct and lease the proposed fiber network in a manner that is contrary to the law, *i.e.*, to facilitate its affiliate's Kenect's provision of broadband service in areas that are, in meaningful part, already served with commercially available broadband options. While HB 315 may have dispensed with the pre-approval requirements under KRS 278.5464(3)(b), Kenergy's announced plans for its proposed

fiber network cannot be reconciled with the text of KRS 278.5464(3)(b). The Commission has broad jurisdiction and authority over public utilities operating in Kentucky, which includes the power to "investigate the methods and practices of utilities to require them to conform to the laws of this state…"[24] In considering Kenergy's pending application for a CPCN, therefore, it can and should take into account that Kenergy's announced intent is to operate the proposed fiber network in a manner directly contrary to KRS 278.5464(3)(a)—an intent that should preclude any finding that the construction of the network for this purpose is in the public interest.

V. CONCLUSION

For the foregoing reasons and those set forth in KBCA's initial brief, the Commission should not approve Kenergy's application.

RESPECTFULLY SUBMITTED,

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[24] KRS 278.040(2) & (3).