

**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>)	

MOTION TO INTERVENE

The Kentucky Broadband and Cable Association and its members (“KBCA” or “Association”), respectfully request that the Public Service Commission of Kentucky (the “Commission”) grant this motion for intervention (“Motion”) in the above-captioned proceeding.

This Motion is made pursuant to 807 KAR 5:001, Section 4(11), KRS 278.310, and the Commission’s Order entered in this proceeding on September 22, 2021.

In support of this Motion, KBCA states as follows:

1. KBCA is the trade association that represents Kentucky’s investor-owned cable companies. KBCA member companies offer fast, reliable broadband service to nearly two million homes and businesses throughout the Commonwealth. Its mailing address is 1617 Foxhaven Drive, Richmond, Kentucky 40475.

2. Intervention in Commission proceedings is governed by 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.

3. Intervention in Commission cases should be freely given. As the Court of Appeals recently stated:

[T]he Commission used to favor intervention by interested parties, readily granting intervention with little to no analysis. . . .

There is no change in the relevant statutes or regulations to justify such a shift away from allowing interventions. It is inappropriate for the Commission to simply “rubber stamp” all requests for a CPCN through a streamlined process that might be possible when requests for intervention are habitually denied without appropriate consideration.¹

4. KBCA meets these criteria for intervention. First, this motion for intervention is timely. Pursuant to the Commission’s Order entered on September 22, 2021, establishing the procedural schedule, a motion for intervention is deemed timely in this case if filed prior to September 30, 2021. KBCA will accept and abide by the procedural schedule, including the filing of any Intervenor testimony and response to any data requests from any party, so that there is no prejudice to the applicant or other parties from the grant of full intervenor status to Movants at this time.

5. Second, KBCA has special interests in this case to ensure that the scope such CPCN complies with Kentucky law. KBCA members are not averse to competition in the market for broadband internet access services, including from broadband affiliates of electric cooperatives. However, to reliably plan and make investments in building out to new service areas, broadband

¹ *Biddle v. Public Service Comm’n*, ___ S.W.3d ___, Case No. 2018-CA-1686-MR available at 2021 WL 4343656 (Ky. App. Sept 22, 2021). Pursuant to CR 76.30(2), this appellate court opinion is not yet final as of the date of this filing.

providers must have assurances that they can make those investments in a fair competitive environment. Kentucky law has set forth various provisions to ensure a fair competitive environment.

a. KRS 278.5464, enacted by the General Assembly in 2021, authorizes an electric distribution cooperative to provide service to unserved and underserved areas, where broadband service with a minimum 25 megabits per second downstream and 3 megabits per second upstream is not available. KBCA's members continue to make available broadband service well in excess of 25 megabits per second downstream and 3 megabits per second upstream in territory that substantially overlaps with Kenergy's facilities, and KBCA therefore has important insight into which areas are eligible for broadband deployment by electric cooperatives under KRS 278.5464, as well as a special interest in ensuring that any CPCN for Kenergy's project approved by the Commission is appropriately tailored to such areas.²

b. KRS 278.2201 prohibits a regulated utility from subsidizing a nonregulated activity provided by an affiliate or by the utility itself. The statute is designed to prevent cross-subsidization that could potentially give an unfair competitive advantage to the nonregulated activity. KBCA has a special interest to ensure that the project will not result in Kenergy's electric ratepayers subsidizing its broadband offerings.

6. KBCA's special interests that are not otherwise adequately represented in this case.

The only other party seeking intervention is the Attorney General, who is statutorily granted the right to intervention to represent consumers' interests. KBCA's interests are focused on the provider of services to ensure a level playing field.

² Consistent with *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885 (Ky. 1952), Kenergy must demonstrate that its proposed project will not create a waste.

7. Even if the Commission were to determine that KBCA does not present special interests that are not otherwise adequately represented,³ intervention is still proper because KBCA will present issues and develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. As discussed above, KBCA will focus on issues related to compliance with Kentucky law. It has industry-specific specialization that will undoubtedly present issues and develop facts to benefit the Commission. Equally important, KBCA will not unduly complicate or disrupt the proceedings.

8. Attorneys for KBCA listed below possess the facilities to receive electronic transmission of all notices and messages related to this proceeding at the electronic mailing addresses listed below. All correspondence to KBCA should be sent to the attorneys' addresses or email addresses listed below.

James W. Gardner
M. Todd Osterloh
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
Phone: (859) 255-8581
E-mail: jgardner@sturgillturner.com
E-mail: tosterloh@sturgillturner.com

9. For the reasons set forth above, KBCA respectfully submits that it meets the qualifications, as set forth in 807 KAR 5:001, Section 4(11), to intervene and become a party to this proceeding. KBCA has a special interest that is not adequately represented in this proceeding. In addition, KBCA's participation will assist the Commission in fully considering Kenergy's proposed project without unduly complicating or disrupting this proceeding.

WHEREFORE, KBCA requests leave to intervene as a party to this proceeding with full

³ 807 KAR 5:001, Section 4(11)(b) uses the disjunctive "or" to confirm that intervention shall be granted if either of the two elements are present.

rights of intervention, including rights to engage in discovery, to have notice of and appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel on briefs and at oral argument.

RESPECTFULLY SUBMITTED this 30th day of September 2021.

KENTUCKY BROADBAND AND CABLE
ASSOCIATION



James W. Gardner
M. Todd Osterloh
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
Phone: (859) 255-8581
E-mail: jgardner@sturgillturner.com
E-mail: tosterloh@sturgillturner.com

Counsel for KBCA