COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENERGY CORP. FOR A GENERAL ADJUSTMENT OF RATES	))	CASE No. 2023-00276

ATTORNEY GENERAL'S FINAL MEMORANDUM BRIEF

The intervenor, the Attorney General of the Commonwealth of Kentucky, through his Office of Rate Intervention ("OAG"), hereby submits his Final Brief in this matter.

I. STATEMENT OF THE CASE

On October 2, 2023, Kenergy Corporation ("Kenergy" or "the Company") tendered its application ("Application") for a general adjustment of its base rates. As stated in the Application, Kenergy is a not-for-profit, member-owned, rural electric distribution cooperative organized under KRS Chapter 279. Kenergy distributes retail electric power to approximately 59,000 members in all or portions of fourteen (14) western Kentucky counties. Kenergy owns approximately 7,200 miles of distribution line in its service territory, and purchases its power requirements from Big Rivers Electric Corporation and Century Marketer, LLC.

Kenergy's rates were last adjusted, via the streamlined procedure, in Case No. 2021-00066. In that case, the Commission granted new revenues of approximately $3.816 million, or 2.94% (excluding the Direct Served Industrials), resulting in a Times Interest Earned Ratio (TIER) of 1.98. Kenergy states that since then, its energy sales have declined, while purchased power and other business costs have increased. As a result, Kenergy states it requires an increase in base rate revenues of $4,869,997, which would yield a TIER of 2.0.[1] Kenergy's test year is the historic twelve-month period ending February 28, 2023. Kenergy also proposes to increase its monthly residential customer charge from $18.20 to $21.95.

On October 3, 2023 the OAG filed his motion to intervene in the instant docket, which the Commission granted on October 9, 2023. The Commission issued its procedural order on October 12, 2023. Kenergy filed its responses to two sets of data requests from the OAG, and four sets of data requests from Commission Staff. After filing the direct testimony of expert witness Mr. Randy Futral on January 3, 2024, the OAG filed responses to data requests from both Kenergy and Commission Staff on January 29, 2024. Kenergy then filed its rebuttal testimony on February 9, 2024. On February 14, 2024, the parties filed their Joint Motion to Waive a Formal Hearing in this matter, and to submit the case for a final decision after the filing of briefs. The Commission granted that Joint Motion by order dated February 26, 2024.

II. OAG'S RECOMMENDED OPERATING EXPENSE ADJUSTMENTS

A. Reduce the Excessive Routine Right-of-Way Maintenance Expense

Kenergy's right-of-way ("ROW") maintenance expense during the historic test year was $6,276,650, which when compared to 2019-2022 data is clearly excessive.[2] When the Company's ROW maintenance expense is broken down between routine and non-routine items, it is clear that the largest portion of this increased expense falls into the routine

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[1] The Company proposes to increase total revenues by $4,876,566, consisting of an increase of $4,869,997 in base rates, $1,997 in special charges, and $4,572 in cable television attachment revenues. *See* Application at Exhibit 5, page 8 of 22.

[2] Direct Testimony of Randy A. Futral ("Futral Direct"), pp. 5-6 and Table 2 (*citing* responses to AG-DR-1-25 [attached to Futral Direct as Exhibit___(RAF-2)] and AG-DR-2-3 [attached to Futral Direct as Exhibit___(RAF-3)].

maintenance category.[3] However, these expenses should be normalized given the degree to which the test year ROW expenses were elevated.

In support of this adjustment, Mr. Futral cited to discovery responses establishing that Kenergy cleared 233 miles in 2022 over and above the normal six-year average of 906 miles in order to maintain its six-year cycle.[4] This equates to a 25.7% increase in routine ROW maintenance expense for that year compared with the annual average. The additional clearing in 2022 represented a catching up of clearing activities in response to the loss of Kenergy's primary routine ROW maintenance contractor in 2019. It should be noted that the test year Kenergy chose in this case contains ten months of 2022 actual expense, as opposed to only two months of 2023 actual expense.

In order to address the excess routine ROW maintenance expense Kenergy seeks to recover, Mr. Futral proposes that the Company be allowed to recover that level of cost based on: (a) the actual average cost of $5,052.16 / circuit mile in 2023; and (b) the assumption that 906 miles will be trimmed. This will maintain Kenergy's six-year cycle, comprising a total of 5,438 circuit miles to be trimmed, which matches the actual and expected circuit miles to be trimmed for the six-year period 2019-2024.[5] Mr. Futral's proposed adjustment is identical with one the Commission adopted in a recent RECC case, Case No. 2023-00158, in which the Commission normalized ROW expense based on the 2022 expense per mile and the five-year

[3] *Id.*, Table 2 at p. 6.
[4] Futral Direct at 7-9 (*citing* the Company's response to AG-DR-2-2).
[5] *Id*. at 9-11.

average circuit miles cleared.[6] The effect of Mr. Futral's adjustment is a reduction of $813,283 in the requested base revenue requirement after gross-up for Commission assessment fees.[7]

B. Remove Vegetation Management Expense Associated with Broadband Internet Service Construction Project

Kenergy's wholly-owned unregulated subsidiary, Kenect, Inc., is continuing to construct approximately 7,200 miles of high-speed fiber optic cable throughout Kenergy's service territory.[8] Regarding the Kenect fiber-optic network, the Company's application states: (a) all assets related thereto will be recorded as non-utility property; and (b) all related revenues and expenses will be recorded in various account 417 subaccounts, and those amounts will be reflected as non-operating income and expenses in Kenergy's Statement of Operations.[9]

Although the Company provided a proforma adjustment that purported to "remove[] the test year amounts associated with broadband, which are unrelated to the provision of electric service,"[10] this is not the case. In fact, Kenergy failed to remove certain ROW vegetation management expenses associated with Kenect's broadband fiber construction project. This will result in Kenergy customers subsidizing the broadband project, in violation of KRS 278.2201, unless the Commission precludes recovery of these improper costs.[11]

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[6] *See, In Re:* Electronic Application Of Farmers Rural Electric Cooperative Corporation For A General Adjustment Of Rates Pursuant To Streamlined Procedure Pilot Program Established In Case No. 2018-00407, Case No. 2023-00158, Order dated Oct. 3, 2023, at 11-12.

[7] Futral Direct at 10-11.

[8] *See, e.g.,* application, at p.6, in Case No. 2021-00365, *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.* Note: during the pendency of Case No. 2021-00365, the Legislature enacted certain changes to KRS 278.5464 that removed Commission jurisdiction governing CPCNs for broadband internet projects; however, as set forth in KRS 278.5464 (4), cooperatives must still adhere to affiliate cost allocation requirements set forth in KRS Ch. 278.

[9] Application, Exhibit 25 at 2.

[10] Direct Testimony of John Wolfram at 12; *see also* Application at Reference Schedule 1.09.

[11] Futral Direct at 14-18.

Kenergy began incurring unusual ROW vegetation expenses associated with the Kenect broadband project in December of 2022. These services were performed entirely by Asplundh Tree Expert, LLC ("Asplundh"). In fact, Asplundh did not perform any services for Kenergy during the test year that were not associated with the broadband project. These expenses, which were recorded as ROW vegetation management expenses in account 593.300 under sub code 434 ("Vegetation Management – Job Orders")[12] totaled $122,178, beginning in December 2022 through the end of the test year.[13] As Mr. Futral pointed out, sub code 434 ". . . has traditionally been used to reflect specified ROW maintenance projects not performed as part of the more routine activities."[14] In fact, the Company acknowledged in response to discovery, *all* of the Asplundh expense recorded in sub code 434 went toward vegetation management associated with the broadband construction project.[15] The Asplundh costs would not have been incurred but for the Kenect broadband project. The sub code 434 expenses started increasing significantly at the end of 2022, coinciding with the Asplundh ROW maintenance expenses performed for the Kenect broadband project.[16]

Kenergy, in its rebuttal testimony argued that the broadband project installation is on the existing Kenergy system which includes the electric distribution lines.[17] Because of this, Kenergy opined that the required broadband project trimming simply advances the trimming schedule and not as much trimming would be required later.[18] It should be noted, however, that Kenergy did not propose a reduction in routine ROW maintenance as an offset related to

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[12] Futral Direct at 15 (*citing* response to AG-DR-2-4, a portion of which is attached to Mr. Futral's testimony as Exhibit__(RAF-7)).
[13] *Id.* (*citing* response to AG-DR-2-3 (c), attached to Mr. Futral's testimony as Exhibit__(RAF-3)).
[14] *Id*. at 15. The response to AG-DR-2-3 (a), attached to Mr. Futral's testimony as Exhibit__(RAF-3) shows that the higher level of routine ROW maintenance activities each year are performed using sub code 428, while sub code 434 is designated as the code for specific job orders.
[15] *See* response to AG-DR-2-4 (c), attached to Futral Direct as Exhibit___(RAF-7).
[16] Futral Direct at 17-18 and Table 4.
[17] Wolfram Rebuttal at 5.
[18] *Id.*

the additional broadband project trimming. Thus, the overall test year costs are unduly elevated due to the additional trimming required only as the result of the broadband project.

The Commission should require Kenergy to reflect the $122,178 worth of Asplundh expenses as an Account 417 non-utility expense, and remove them from the revenue requirement.

C. Remove Payroll and Overhead Expense for Vacant Positions

Kenergy submitted a proforma adjustment to increase actual test year labor expenses by $311,009 to reflect wage increases in 2023, as well as for the future hiring of five positions which, as of the end of the test year, remained vacant.[19] Although Kenergy reduced its overall number of full-time positions from 131 in its prior rate case to 128 in this case,[20] Mr. Futral's testimony established that it did not have 128 employees throughout most of the test year.[21] The average number of employees during the test year was only 125, and in fact fell to 124 for the last seven (7) months of the test year.[22] Moreover, given that the level of full-time employees remained below the par of 128 for two months even *beyond* the end of the test year, the Company cannot guarantee that it will not experience at least some vacancies going forward. It was not until May, 2023 that the 128 par level was restored.[23] The five positions filled in April and May of 2023 were entry-level, carrying an average hourly pay rate of $26.45 / hour.[24] Mr. Futral's testimony assumed that the five positions had been added at the average cost of $41.10 per hour for every employee as of the end of the test year. The application at

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[19] *Id*. at 19 (citing Application at Reference Sch. 1.13).
[20] Direct testimony of Timothy Lindahl at 10.
[21] Futral Direct at 20, and Table 5 at 20 (*citing* Kenergy's response to AG-DR-1-36, attached to his testimony as Exhibit__(RAF-9)).
[22] *Id.* at 20-21.
[23] *Id.* at 20.
[24] *Id*. at 21.

Reference Schedule 1.13 utilized an average rate of $41.10 per employee for its proforma adjustment, and this was the stated average rate as of the end of the test year according to Kenergy's response to discovery.[25] The Company had not provided a copy of its workpaper that was used to calculate the $41.10 average hourly rate prior to the filing of Mr. Futral's testimony. Kenergy later provided the supporting workpaper in response to Staff-DR-4-5. That workpaper indicated that the $41.10 average rate was computed, based in part, on the employee changes and actual pay rates for each of the vacant positions filled after the end of the test year. Thus, the level of Mr. Futral's recommended adjustment should be reduced to only reflect the actual pay rates for the five vacant positions, which averaged only $26.45 / hour as opposed to the $41.10 / hour used in his direct testimony calculation. The recommended reduction in the revenue requirement should be a reduction of $281,400, as summarized below, and Mr. Futral's direct testimony alternative recommendation is no longer applicable.

Vacant Positions as of End of Test Year	5
Annual Hours Per Employee	2,080
Total Annual Hours for 5 Vacant Positions	10,400
Average Hourly Pay for Each Employee ($/Hr)	$ 26.45
Increase in Regular Payroll Costs Due to Vacant Positions	$ 275,080
Percentage of Regular Payroll Costs Expensed	71.0522%
Reduction in Payroll Expense to Remove 5 Vacant Positions	$ (195,450)
Overhead Expense to Add to Adjustment (43.76%)	$ (85,528)
Reduction in Payroll and Overhead Expense to Remove 5 Vacant Positions	$ (280,978)
PSC Fee Gross Up Factor	1.001502
Reduction in Revenue Requirement to Remove 5 Vacant Positions	$ (281,400)

[25] Futral Direct at 19 (*citing* response to Staff 1-22, attached to Mr. Futral's testimony as Exhibit__(RAF-8)).

In the *Farmers RECC* case decided just a few months ago, the Commission refused to allow costs for vacant positions filled after the end of a test year to be included within the revenue requirement.[26] Clearly, the Company cannot be granted an increase in test year labor expense when the number of positions during the test year was never reached. Mr. Futral's recommended adjustment reduces payroll expense to remove the sums associated with the five vacant positions as of the end of the test year, and that the Commission reduce related payroll overhead expenses attributable to the five employees for all benefits and payroll tax amounts allocated to expense.[27]

D. <u>Remove Credit Card Processing Fees</u>

As the Commission can take administrative notice, Kentucky still has a poverty rate higher than the national average.[28] Many people who earn less than $50,000 annually lack credit cards.[29] Rather than requiring customers who opt to pay their bills via credit card to pay the credit card convenience fee charged by financial institutions, Kenergy instead socializes the convenience fee expense among the entire customer case.[30] This includes customers who do not have credit cards, many of whom have incomes near or below the poverty rate. Although Kenergy also socializes transaction costs associated with other payment methods (e.g., cash, checks, bank drafts, and the Prepay Service Rider), those transaction costs are far

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[26] Case No. 2023-00158, *In Re*: Electronic Application of Farmers Rural Electric Cooperative Corporation for a General Adjustment of Rates Pursuant to Streamlined Procedure Pilot Program Established in Case No. 2018-00407*,* Order dated October 3, 2023, at 10.
[27] Futral Direct at 22. Mr. Futral noted that Kenergy included total proforma payroll overhead costs expensed of $3,921,729 associated with the total proforma payroll costs expensed of $8,962,024, which means that payroll overhead costs constitute 43.76% of total payroll expenses. *Id.*
[28] The national poverty rate is 11.5% (https://www.census.gov/library/publications/2023/demo/p60-280.html), while Kentucky's poverty rate is 16.5% (https://www.statista.com/statistics/205468/poverty-rate-in-kentucky/).
[29] Futral Direct at 24, footnote 46.
[30] Approximately one-third of Kenergy's customers pay their bills via credit card (Futral Direct at 25, *citing* responses to AG-DR-1-26 [attached thereto as Exhibit___(RAF-14)], and Application at 1.

less than credit card transaction fees.[31] Given that approximately 33% of Kenergy's customers pay via credit card, this means that approximately 66% of the residential customer base is subsidizing the transaction costs that the remaining 33% incur for the convenience of paying their utility bill via credit cards.

In a recent base rate case involving Duke Energy Kentucky Inc., the Commission denied base rate recovery of credit card processing fee expenses.[32] The practice of socializing these costs among the entire customer base, especially when two-thirds of customers do not pay via credit card, is unreasonable and unfair. The Attorney General therefore respectfully urges the Commission to order Kenergy to require customers opting to pay via credit card to pay all convenience fees. The effect of Mr. Futral's adjustment in this regard reduces the base revenue requirement by $309,014, after gross-up for Commission assessment fees.

WHEREFORE, the OAG respectfully requests that the Commission modify Kenergy's revenue requirement in accordance with Mr. Futral's testimony and as outlined in this brief.

Respectfully submitted,
RUSSELL COLEMAN
ATTORNEY GENERAL

LAWRENCE W. COOK
J. MICHAEL WEST
ANGELA M. GOAD
JOHN G. HORNE II
ASSISTANT ATTORNEYS GENERAL
1024 CAPITAL CENTER DR., STE. 200
FRANKFORT, KY 40601
(502) 696-5453
FAX: (502) 564-2698
Larry.Cook@ky.gov

[31] *Id*. at 25.

[32] *See, In Re:* Electronic Application of Duke Energy Kentucky, Inc. for 1) An Adjustment of the Electric Rates; 2) Approval of New Tariffs;3) Approval of Accounting Practices to Establish Regulatory Assets; and 4) All Other Required Approvals and Relief, Case No. 2019-00271, Order dated April 27, 2020 at 19-21.

Michael.West@ky.gov
Angela.Goad@ky.gov
John.Horne@ky.gov

Certificate of Service

Pursuant to the Commission's Orders in Case No. 2020-00085, and in accord with all other applicable law, Counsel certifies that an electronic copy of the forgoing was served and filed by e-mail to the parties of record.

This 6th day of March, 2024

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Assistant Attorney General