

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

ORDER

On September 30, 2021, Kentucky Broadband and Cable Association (KBCA) filed a motion requesting to intervene in this proceeding. On October 5, 2021, Kenergy Corp. (Kenergy) filed a response objecting to KBCA's intervention. The Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General), did not file a response to KBCA's motion. On October 12, 2021, KBCA filed a reply to Kenergy's response. A formal hearing was held on November 15, 2021, to take evidence in support of KBCA's motion to intervene. This matter now stands submitted for a decision based upon the record.

LEGAL STANDARD

The only person who has a statutory right to intervene in a Commission case is the Attorney General of the Commonwealth of Kentucky (Attorney General), pursuant to KRS 367.150(8)(b). As noted above, the Attorney General is an intervenor in this

proceeding. Intervention by all others is permissive and is within the sole discretion of the Commission.<sup>1</sup>

The statutory standard for permissive intervention, KRS 278.040(2), requires that “the person seeking intervention must have an interest in the ‘rates’ or ‘service’ of a utility, since those are the only two subjects under the jurisdiction of the PSC.”<sup>2</sup>

The regulatory standard for permissive intervention, set forth in 807 KAR 5:001, Section 4, is twofold. Commission regulation 807 KAR 5:001, Section 4(11) requires a person to set forth in the motion to intervene either (1) a special interest in the proceeding that is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

### ARGUMENTS

KBCA, a trade association representing investor-owned cable companies, argued that its special interest that was not adequately represented was to ensure the scope and decisions regarding a Certificate of Public Convenience and Necessity (CPCN) to construct a fiber network complies with KRS 278.5464.<sup>3</sup> KBCA also argued that it had a special interest in preventing Kenergy from subsidizing a nonregulated affiliate, which

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<sup>1</sup> *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1966).

<sup>2</sup> *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 at 3 (Ky. App. Feb. 2, 2007).

<sup>3</sup> KRS 278.5464 authorizes an electric distribution cooperative (Coop) to provide broadband service to unserved and underserved areas by leasing excess capacity on the Coop’s fiber network to an affiliate, who in turn provides the broadband service. Pursuant to KRS 278.5464(2)(b)–(c), underserved areas are areas where a minimum of 25 megabits per second (mps) download speed and 3 mps upload speed are not available, and unserved areas are areas where a minimum of 10 mps download speed and 1 mps upload speed are not available.

would violate KRS 278.2201. KBCA asserted that it would present issues and develop facts that its members offer download speeds higher than 25 mps and upload speeds higher than 3 mps, and thus much of the Kenergy service area does not constitute underserved or unserved areas, as defined by KRS 278.5464(2)(b)–(c).

Kenergy opposed KBCA's intervention, arguing that KBCA was a competitor with pecuniary competitive motives, and that the Commission has found such interests do not meet the legal standard for granting intervention.

In its response, KBCA reiterated its arguments regarding its special interest, and the issues it would present and facts it would develop to assist the Commission in reaching a decision.

At the November 15, 2021 hearing, KBCA acknowledged that it did not have and evidence that Kenergy was subsidizing or planned to subsidize a broadband affiliate.<sup>4</sup> KBCA also acknowledged that it did not have evidence that the Commission was unable to carry out its statutory duties regarding this proceeding.<sup>5</sup> KBCA testified that the Federal Communications Commission (FCC) data regarding underserved and unserved areas was not sufficiently granular and often misleading because the FCC data could find a census block to fall outside the underserved/unserved area definition if at least one residence had broadband service with speeds higher than established in KRS 278.5464. KBCA further testified that KBCA had proprietary maps that would demonstrate that much

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<sup>4</sup> Hearing Video Transcript of the Nov. 15, 2021 Hearing at 09:30:54 and 09:52:53.

<sup>5</sup> *Id.* at 09:48:22.

of the service area that Kenergy proposed to serve through its affiliate was not underserved or unserved.<sup>6</sup>

### DISCUSSION AND FINDINGS

Based on a review of the pleadings at issue and being otherwise sufficient advised, the Commission finds that KBCA failed to demonstrate that it has a special interest not otherwise adequately represented. This is because the only special interest proffered by KBCA was to ensure that the law was followed. This is a generalized interest held by all Kentuckians, and does not rise to the level of a special interest that satisfies the legal standard for intervention.

The Commission further finds 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 without undue complication the proceedings, for the reasons discussed below. However, the only relevant issues and facts that KBCA identified that they can address are related to the maps of underserved and unserved areas. Therefore, the Commission finds that KBCA should be granted intervention, but KBCA is limited to the issue of maps depicting whether the service areas are underserved or unserved.

Kenergy is correct that the Commission has denied intervention to persons whose interest was that of a competitor. However, given that the provisions of KRS 278.5464 are expressly designed to expand broadband service to underserved and unserved areas, the information provided by KBCA will assist the Commission in determining

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<sup>6</sup> See *Id.* at 09:49:12.

whether Kenergy's proposed application complies with the statutory requirements of KRS 278.5464 regarding underserved and unserved areas.

The Commission directs KBCA to the Commission's July 22, 2021 Order in Case No. 2020-00085<sup>7</sup> regarding filings with the Commission.

IT IS HEREBY ORDERED that:

1. The motion of KBCA to intervene is granted.
2. KBCA shall be entitled to the full rights of a party and shall be served with the Commission's Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by parties after the date of this Order.
3. KBCA's intervention is limited to the issue of maps depicting whether the service areas are underserved or unserved.
4. KBCA shall comply with all provisions of the Commission's regulations, 807 KAR 5:001, Section 8, related to the service and electronic filing of documents.
5. KBCA shall adhere to the amended procedural schedule set forth in the Commission's October 22, 2021 Order.
6. Pursuant to 807 KAR 5:001, Section 8(9), within seven days of entry of this Order, KBCA shall file a written statement with the Commission that:
  - a. Certifies that it, or its agent, possesses the facilities to receive electronic transmissions; and
  - b. Sets forth the electronic mail address to which all electronic notices and messages related to this proceeding should be served.

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<sup>7</sup> Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19* (Ky. PSC July 22, 2021), Order (in which the Commission ordered that for case filings made on and after March 16, 2020, filers are NOT required to file the original physical copies of the filings required by 807 KAR 5:001, Section 8).

By the Commission



ATTEST:

  
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