

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)	CASE NO.
LEASING OF THE NETWORK'S EXCESS)	2021-00365
CAPACITY TO AN AFFILIATE TO BE ENGAGED)	
IN THE PROVISION OF BROADBAND SERVICE)	
TO UNSERVED AND UNDERSERVED)	
HOUSEHOLDS AND BUSINESSES OF THE)	
COMMONWEALTH)	

ORDER

On July 21, 2022, Kentucky Broadband and Cable Association (KBCA), pursuant to KRS 278.400, filed a motion requesting rehearing of the Commission’s July 1, 2022 Order in this proceeding. On July 25, 2022, Kenergy Corp. (Kenergy) filed a response to KBCA’s motion. On August 1, 2022, KBCA filed a reply to Kenergy’s response. This matter now stands submitted for a decision by the Commission.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits any new evidence on rehearing to evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when “the evidence presented leaves no room for difference of opinion among reasonable

minds.”¹ An order can only be unlawful if it violates a state or federal statute or constitutional provision.²

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order

This matter was filed pursuant to KRS 278.5464, which addresses the provision of broadband services by affiliates of electric distribution cooperatives (Coops), such as Kenergy. KRS 278.5464 was amended during the pendency of this proceeding.³ As discussed in the July 1, 2022 Order, the Commission was required to apply the legal standard in the amended KRS 278.5464, which became effective prior to the conclusion of the procedural events in this proceeding.

Relevant to the issues raised on rehearing, KRS 278.5464(1)(a) states that the provision of broadband service to residential, commercial, and industrial customers is critical to the economic needs and general welfare of Kentuckians. KRS 278.5464(1)(b) states that Coops can access and leverage federal funding to extend and enhance the availability of broadband service to residents who are unserved or underserved. KRS

¹ *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980)

² *Public Service Comm'n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm'n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

³ 2022 Ky. Acts ch. 202, sec 7.

278.5464(2)(a)-(b) defines unserved and underserved areas by upload and download speeds. KRS 278.5464(3)(a) provides that Coops:

may facilitate the operation of an affiliate engaged exclusively in the provision of broadband service to unserved or underserved households and businesses by: (a) Constructing and leasing excess capacity on any fiber optic cable for broadband service which shall not require a certificate of public convenience and necessity under KRS 278.020; however, the construction of fiber optic cable used to support the distribution cooperative's electric distribution system shall require a certificate of public convenience and necessity under KRS 278.020.

PARTIES' ARGUMENTS

In its motion, KBCA requests clarification of two issues: (1) whether the July 1, 2021 Order made a legal finding that Kenergy can construct a fiber network for broadband purposes only; and (2) if so, where Kenergy can construct a fiber network: in the areas unserved/underserved by broadband as defined by KRS 278.5464 or in the entire service area. KBCA argued that these issues needed to be addressed to avoid future disputes between Kenergy and KBCA if Kenergy constructed a broadband-only fiber network. KBCA further argued that clarification was necessary to protect KBCA's right to provide broadband service in Kenergy's service area.

In its response, Kenergy argued that the July 1, 2022 Order was clear and that no clarification was necessary.

In its reply, KBCA modified its request in arguing for clarification that the July 1, 2022 Order "upholds the statute's clear geographic limitations."⁴ KBCA asserted that KRS 278.5464(3)(a) established geographic limitations that had to be met before Kenergy

⁴ KBCA Reply in Support of Motion for Clarification (filed Aug. 1, 2022) at 2.

or any Coop could construct and lease a fiber network to an affiliate without a Certificate of Public Convenience and Necessity (CPCN). Specifically, that a Coop affiliate must be engaged exclusively to providing broadband to unserved and underserved areas.

DISCUSSION AND FINDINGS

For reasons discussed in further detail below, the Commission finds that KBCA failed to meet its burden of proof that the July 1, 2022 Order was unlawful or unreasonable, or that the Order contained a material error or omission.

KBCA failed to identify any portion of the July 1, 2022 Order that was unlawful or unreasonable, or contained a material error or omission. Instead, KBCA seeks to relitigate issues on rehearing that the Commission expressly addressed in the Order. The Commission applied the plain language of KRS 278.5464(3) in the discussion on page 11 of the July 1, 2022 Order:

[T]he Commission's denial of the CPCN does not mean that Kenergy cannot build the fiber network to provide broadband service. As demonstrated by the sufficient evidence of record and supported by public comments, the majority of Kenergy's service territory is unserved or underserved by broadband service. The amended KRS 278.5464 provides that a CPCN is not required, and thus approval by this Commission is not required, when a Coop constructs and leases a fiber network to an affiliate for the provision of broadband service. Thus, Kenergy can facilitate the operation of an affiliate engaged exclusively in the provision of broadband service to unserved and underserved areas by constructing and leasing a fiber network for the provision of broadband service.

KBCA's request to intervene was granted, but the intervention was limited to purposes of providing maps documenting upload/download speeds and the locations, if any, of unserved and underserved areas in Kenergy's service territory. KBCA responded to multiple rounds of discovery, filed witness testimony, and actively

participated in the March 31, 2022 hearing, and filed post-hearing briefs. The July 1, 2022 Order discussed the legal standards applicable to this case, including legal standards defining unserved and underserved areas, and discussed and weighed the evidence of record. After evaluating and weighing the evidence of record, the Commission found that there was sufficient evidence that the majority of Kenergy's service area is unserved/underserved.⁵ As the Commission noted:

KBCA provided evidence that metropolitan areas bordering or slightly within Kenergy's service area likely are served by broadband providers at speeds that exceed the statutory threshold. However, the evidence of record reflects that the majority of Kenergy's service area, which is rural, is unserved or underserved, as defined by KRS 278.5464.⁶

For the reasons discussed above, the Commission finds that KBCA's motion for rehearing should be denied because KBCA failed to meet its burden of proof that the July 1, 2022 Order was unlawful or unreasonable, or contained a material error or omission.

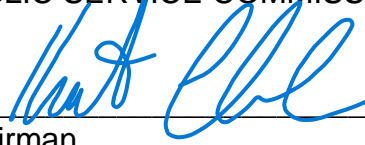
IT IS THEREFORE ORDERED that:

1. KBCA's motion for rehearing is denied.
2. This case is closed and removed from the Commission's docket.

⁵ July 1, 2022 Order at 10–11.

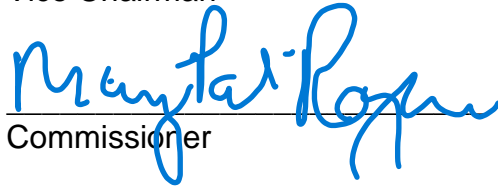
⁶ July 1, 2022 Order at footnote 22.

PUBLIC SERVICE COMMISSION

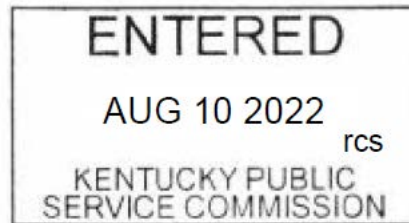


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Commissioner



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