COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC EMERGENCY DOCKET RELATED TO THE NOVEL CORONAVIRUS COVID-19	)))	CASE NO. 2020-00085

O R D E R

On January 18, 2021, Kentucky Power Company (Kentucky Power) filed a motion for a rehearing in this proceeding. Specifically, Kentucky Power seeks rehearing of the Commission's December 30, 2020 Order in which the Commission found that Kentucky Power could not establish a regulatory asset to recover lost revenues due to not collecting late fees for the greater part of 2020.

On December 30, 2020, the Commission entered an Order in which it found that Kentucky Power could not establish a regulatory asset for foregone late fees.[1] The primary basis for the Commission's finding was that ASC 980, GAAP, and Commission precedent, did not allow for a utility to establish a regulatory asset for lost revenues, regardless of Kentucky Power's interpretation of ASC 980-605-25-4.[2] Additionally, the

[1] On November 30, 2020, Kentucky Power filed with the Commission a document in which it informed the Commission of Kentucky Power's intent to track and defer foregone late fees in conformity with ASC 980-605-25. Kentucky Power alleged that, by establishing this regulatory asset, Kentucky Power is also conforming with the Commission's September 21, 2020 Order entered in this matter. Kentucky Power requested that the Commission confirm that the proposed accounting entries in order to later establish a regulatory asset were correct.

Kentucky Power stated that it planned to track the amount of the revenue deficiency associated with foregone late fees by making the following accounting entries: (1) debiting a Regulatory Asset and crediting Revenue in the amount of the foregone late fee revenues to create the "COVID-19 Forgone Late Fee regulatory asset;" and (2) pursuant to ASC 980-605-25, immediately provisioning, the "COVID-19 Forgone Late Fee regulatory asset," by debiting Revenue and crediting a Contra Regulatory Asset because the standard for revenue recognition under GAAP has not yet been met.

[2] Order (Ky. PSC Dec. 30, 2020) at 3-7.

Commission found that: (1) the proposed regulatory asset did not meet the criteria under ASC 980-605-25-4 because the Commission had not created a program or mechanism for the recovery of the lost revenue;[3] and (2) that utilizing the Commission's plenary power, the Commission had required the waiver of late fees, similar to as provided for in KRS 278.170(2).[4] The Commission also noted that Kentucky Power, in a previous motion requesting deviation from its tariff requiring the assessment of late penalties, had not mentioned that Kentucky Power might subsequently seek recovery of the late fees.

Kentucky Powers argues that it should be granted rehearing of the December 30, 2020 Order on six separate grounds: (1) the Commission erred in finding that KRS 278.170(2) allows the Commission to prohibit a utility from charging and collecting a tariffed rate; (2) denying recovery of late fees is unconstitutional and confiscatory; (3) the Commission erred when it found that GAAP prevented establishing a regulatory asset; (4) the Commission erred by finding that ASC 980-605-25-4 required the Commission to establish a program to recover lost revenues prior to establishing a regulatory asset; (5) the Commission erred when it concluded that Kentucky Power included late payment fees for those customers who were current on a payment plan; and (6) Kentucky Power never waived its right to collect late fees.[5]

Kentucky Power asserts that its notice to the Commission was intended to clarify if Kentucky Power's intent to track the lost revenues from late fees in order to eventually create a regulatory asset to recover the approximately $3.8 million that it has allegedly foregone in late fees was consistent with the Commission's September 21, 2020 Order in

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[3] *Id.* at 7-8.

[4] *Id.* at 9.

[5] Motion of Kentucky Power Company for Rehearing (filed Jan. 18, 2021) (Motion for Rehearing) at 1-2.

this proceeding. Kentucky Power states that it was not its intention to seek approval to establish a net regulatory asset because the recognition criteria had not been met.

Kentucky Power first argues that KRS 278.170(2) does not confer authority in the Commission to require Kentucky Power to forego later recovery of uncollected late penalties. Kentucky Power states that the plain language of KRS 278.170(2) refutes the Commission's assertion. Kentucky Power asserts that the plain language of the statute shows that a utility may choose to offer free or reduced service, but that authority does not lie with the Commission. Kentucky Power asserts that the Kentucky Supreme Court, in *Public Service Com'n of Kentucky v. Commonwealth*, 320 S.W.3d 660 (Ky. 2010), held that KRS 278.170 should be interpreted according to its plain language.[6] Kentucky Power argues that nowhere in the statute is authority given to the Commission to require reduced or fee rates. According to Kentucky Power, KRS 278.170(2) does not vest the Commission with the authority to require a utility to provide free or reduced service. Kentucky Power asserts that the Commission's decision is unsupported by Commission precedent in that the Commission has never before interpreted that KRS 278.170(2) gives to the Commission the authority to order a utility to provide free or reduced service. Kentucky Power also asserts that no case law supports the Commission's new interpretation and that KRS 278.160(2), requires Kentucky Power to charge and collect the rates listed in its tariff.

The second ground on which Kentucky Power argues the Commission's Order should be overturned is that the because the Order effectively denies recovery of over

[6] "The Kentucky General Assembly has used plain language which, logically interpreted, leaves no doubt that while utilities are statutorily entitled to offer reduced rates to the persons and entities identified in KRS 278.170(2) and (3), those utilities may also offer other customers reduced rates subject to PSC approval and compliance with general statutory guidelines regarding reasonableness." *Public Service Com'n of Kentucky v. Commonwealth*, 320 S.W.3d 660, 667 (Ky. 2010).

$3.5 million, it materially lowers the rates that Kentucky Power collects, resulting in confiscatory rates. Kentucky Power states that the uncollected late fees are material, as they represent 0.6 percent of total operating revenues and 7.3 percent of adjusted net operating income as approved by the Commission in 2018, which included a return on equity (ROE) of 9.7 percent.[7]

Kentucky Power points to the evidence in Case No. 2020-00174, where Kentucky Power asserted its actual ROE was 4.5 percent, and asserts that continuing at this ROE is insufficient to enable Kentucky Power to effectively operate or attract capital. Kentucky Power argues that foregoing the $3.5 million in late fees permanently reduced the accumulated net income reflected in retained earnings and is thus confiscatory. Kentucky Power argues that the Commission must act within constitutional bounds when establishing rates that are fair, just and reasonable, and nonconfiscatory. By requiring Kentucky Power to forego collection of the late fees, Kentucky Power argues that the Commission's Order produces unconstitutional confiscatory rates.[8]

Kentucky Power asserts that under KRS 278.220 the Commission adopted the Federal Energy Regulatory Commission's (FERC) Uniform System of Accounting (USoA). According to Kentucky Power, the foregone late fee regulatory asset is permissible for deferral accounting under FERC accounting rules and the offsetting contra regulatory asset results in a net zero regulatory asset until the alternative recognition criteria in ASC-980-605-25 are met.[9] Kentucky Power states that FERC USoA Definition 31 defines a regulatory asset as follows.

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[7] Motion for Rehearing at 14.

[8] *Id.* at 15.

[9] *Id.* at 16.

> Regulatory Assets and Liabilities are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determination in one period under the general requirements of the Uniform System of Accounts but for it being probable:
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> A. that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or
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> B. in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required.

Based on this definition, Kentucky Power argues that the proposed regulatory asset is permissible for deferral under FERC USoA and KRS 278.220.[10] Kentucky Power states that because the "standard revenue recognition" under GAAP had not been met when Kentucky Power filed its notice, it requested to record a Contra Regulatory Asset which results in a net zero regulatory asset. Kentucky Power concludes that the Commission's Order forbidding the establishment of a regulatory asset is "based on an incorrect interpretation of relevant accounting standards…."[11]

Kentucky Power states that the Commission was incorrect to assume that Kentucky Power had proposed including late fees from customers who were current on payment plans. Kentucky Power stated that it interpreted the September 21, 2020 Order, which require utilities to track "lost revenue" from uncollected late fees, would exclude customers that were current on payment plans. Kentucky Power request that the Commission grant rehearing to correct this finding.[12]

[10] *Id.* at 16.

[11] *Id.* at 17.

[12] *Id.* at 19-20.

On March 17, 2020, Kentucky Power filed a motion to request a deviation from its tariff to the extent that the tariff required it to charge late fees. In the December 30, 2020 Order addressing the notification of accounting entries, the Commission noted that in filing this request Kentucky Power did not mention trying to recover these fees elsewhere. Kentucky Power states that the Commission's March 16, 2020 Order did not mention that a request for a deviation from its tariff was a waiver of ever recovering the lost revenue. Kentucky Power states that the Commission's interpretation of the March 16, 2020 Order presents Kentucky Power with a "Hobson's Choice" in that Kentucky Power could violate the Commission's March 16, 2020 Order or violate its tariff/filed rate doctrine. Kentucky Power states that its request did not operate as a waiver of the relief that it seeks in the Notice it filed with the Commission. Kentucky Power requests that the Commission grant rehearing on this issue or take additional evidence on the issue.[13]

DISCUSSION

Kentucky Power's November 30, 2020 Notice of Accounting Entries, requested that the Commission confirm that Kentucky Power was making the correct accounting entries to track and defer foregone late payment fees so that, when certain conditions were met, Kentucky Power would establish a regulatory asset. The Commission's December 30, 2020 Order answered the ultimate question: lost revenues from forgone late payment fees do not meet the criteria to establish in a regulatory asset. Thus, it was inconsequential whether Kentucky Power's proposed accounting entries were correct. As discussed below, while the Commission will grant rehearing on many of the issues Kentucky Power raised in its Motion for Rehearing, Kentucky Power's proposal to eventually establish a regulatory asset for foregone late payment fees is improper.

[13] *Id.* at 20-21.

The Commission will grant rehearing on the issue of the Commission's reliance on KRS 278.170(2) in the December 30, 2020 Order in support of the Commission's decision to waive the assessment of late fees. KRS 278.170(2) provides only for the utility's voluntary reduction of rates or offering of free service, with Commission approval. As neither of those occurred, the Commission hereby clarifies the December 30, 2020 Order to reflect that the Commission does not rely upon KRS 278.170 to support its conclusion that foregone late fees cannot be placed in a regulatory asset.

The Commission will grant rehearing on Kentucky Power's contention that the Commission erred when it concluded that Kentucky Power included late fees from customers that were current on payment plans. The Commission makes no specific finding on whether these late fees were included in the balance Kentucky Power sought to eventually place in a regulatory asset as the exclusion or inclusion of these fees is inconsequential to the Commission's ultimate conclusion regarding the proposed regulatory asset.

The Commission will also grant rehearing on Kentucky Power's contention that its March 17, 2020 motion for a deviation from its tariff did not constitute a waiver of the ability to ever attempt to recover the foregone late fees. The Commission, upon reconsideration of the March 17, 2020 motion, agrees with Kentucky Power that it did not constitute a waiver and grants rehearing on this issue.

The Commission, however, will not grant rehearing with regard to whether Kentucky Power may recover lost revenues through the establishment of a regulatory asset. As discussed in the December 30, 2020 Order, a utility must obtain Commission approval for accounting adjustments before establishing any **expense** as a new regulatory asset. The Commission has not allowed the establishment of a regulatory asset for lost revenue.

The Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 71, Accounting for the Effects of Certain Types of Regulation, which was codified as ASC 980, Regulated Operations, provides the criteria for recognition of a regulatory asset.[14] Supplemental to GAAP, longstanding Commission precedent provides that regulatory assets may be established when a utility incurs: (1) an extraordinary, nonrecurring expense that could not have been reasonably anticipated or included in the utility's planning; (2) an expense resulting from a statutory or administrative directive; (3) an expense in relation to an industry-sponsored initiative; or (4) an extraordinary or nonrecurring expense that, over time, will result in a savings that fully offsets the cost.[15]

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[14] ASC 980-340-25-1 provides, in full, as follows:

> 25-1 Rate actions of a regulator can provide reasonable assurance of the existence of an asset. An entity shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met:
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> a. It is probable (as defined in Topic 450) that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes.
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> b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate-adjustment clause, this criterion requires that the regulator's intent clearly be to permit recovery of the previously incurred cost.
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> A cost that does not meet these asset recognition criteria at the date the cost is incurred shall be recognized as a regulatory asset when it does meet those criteria at a later date.

[15] *See* Case No. 2008-00436, *The Application of East Kentucky Power Cooperative, Inc. for an Order Approving Accounting Practices to Establish a Regulatory Asset Related to Certain Replacement Power Costs Resulting From Generation Forced Outages* (Ky. PSC Dec. 23, 2008).

A regulatory asset is created when a rate-regulated business is authorized by its regulatory authority to capitalize an expenditure that, under traditional accounting rules, would be recorded as a current expense. Lost revenues are not incurred costs that would otherwise be charged as an expense, and therefore do not meet the criteria under ASC 980-340-25-1 for recognition of a regulatory asset.[16] To meet the recognition criteria, these amounts would need to qualify as an alternative revenue program, for which there are specific requirements under ASC 980-605 related to accounting recognition as revenues and a regulatory asset. ASC 980-605-25-1 and 25-2 segregate the major alternative revenue programs into two categories, Type A and Type B. As ASC 980-605-25-2 explains:

• "Type A programs adjust billings for the effects of weather abnormalities or broad external factors or to compensate the [rate-regulated] utility for demand-side management initiatives." Examples include no-growth plans and similar conservation efforts.

• "Type B programs provide for additional billings (incentive awards) if the [rate-regulated] utility achieves certain objectives, such as reducing costs, reaching specified milestones, or demonstratively improving customer service."[17]

The Uniform System of Accounts for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act[18] requires late fees to be recorded as Other Operating revenues in Account No. 450-Forfeited Discounts. The Commission concludes

[16] https://www2.deloitte.com/content/dam/Deloitte/us/Documents/energy-resources/pur-covid-update-september2020.pdf

[17] https://www2.deloitte.com/content/dam/Deloitte/us/Documents/energy-resources/us-er-power-utilities-accounting-financial-reporting-and-tax-research-guide.pdf

[18] 18 C.F.R. Part 101 *et. seq.*

that Kentucky Power's claimed lost revenues are not an expense, do not met the requirements that would allow for GAAP recognition as a regulatory asset and, therefore, Kentucky Power's request to establish its lost revenues from forfeited late fees as a regulatory asset should be denied.

With regard to whether forgone late fee may be placed in a regulatory asset as allowed under GAAP and ASC-980-605-24-4, the Commission concludes that Kentucky Power has not rebutted the Commission's initial finding that lost revenues cannot be included in a regulatory assets. Kentucky Power still has not rebutted that ASC 980-340-25-1 (which is the GAAP regulation for regulatory asset recognition) specifies that regulatory assets are for costs that would otherwise be expensed. The FERC USoA definition lumps asset and liability together, therefore it is inconsequential that it states "revenues, expenses, gains, or losses." The revenues and gains would be deferred to a regulatory liability and the expenses and losses to a regulatory asset. Additionally, the FERC USoA description of Account 182.3 Other regulatory assets specifies "charges" (The amounts recorded in this account are generally to be charged, concurrently with the recovery of the amounts in rates, to the same account that would have been charged if included in income when incurred). Those are all words relating to expenses. Based on this, Kentucky Power's argument does not state a ground on which rehearing can be granted. Because Kentucky Power cannot surmount this first hurdle to establish a regulatory asset, Kentucky Power cannot rely upon ASC-980-605-24-4 for the accounting entries necessary to eventually establish a regulatory asset for foregone late payment fees.

IT IS THEREFORE ORDERED that

1. Kentucky Power's motion for rehearing granted in part and denied in part.

2. The Commission grants rehearing on the issue of the Commission reliance on KRS 278.170(2) in the December 30, 2020, and clarifies it does not rely upon KRS 278.170(2) to support its conclusion that foregone late payment fees may not be included in a regulatory asset;

3. The Commission grants rehearing on the issue of Kentucky Power's contention that the Commission erred when it concluded that Kentucky Power included late fees from customers that were current on payment plans and the Commission clarifies that it makes no such finding.

4. The Commission grants rehearing on Kentucky Power's contention that its March 17, 2020 motion for a deviation from its tariff did not constitute a waiver of the ability to ever attempt to recover the foregone late fees and the Commission finds that the March 17, 2020 did not constitute a waiver.

5. The Commission denies rehearing of all other issues raised in Kentucky Power's Motion for Rehearing.

By the Commission

ENTERED

FEB 05 2021

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KENTUCKY PUBLIC
SERVICE COMMISSION

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