

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

Electronic Emergency Docket Related	)	Case No.
To The Novel Coronavirus COVID-19	)	2020-00085

**MOTION OF KENTUCKY POWER COMPANY FOR REHEARING**

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## MOTION OF KENTUCKY POWER COMPANY FOR REHEARING

### Introduction

Kentucky Power Company (“Kentucky Power” or the “Company”) moves the Public Service Commission of Kentucky (“Commission”) pursuant to KRS 278.400 for rehearing of the Commission’s December 30, 2020 Order (“Order”) in response to the Company’s November 30, 2020 Notice of Accounting Entries (“Notice”), and those complementary portions of the Commission’s December 30, 2020 Order providing guidance to all utilities regarding COVID-19 related items that are not eligible for regulatory asset treatment (“Guidance Order”). The Notice indicated the Company’s intent to make accounting entries to “track and defer foregone late payment fees in conformity with ASC 980-605-25.” It was not the Company’s intent in the Notice to seek approval for the establishment of a net regulatory asset, since the recognition criteria under ASC 980-605-25 have not yet been met, as described in the Company’s Notice. However, in the Order, the Commission directed the Company not to establish a COVID-19 Foregone Late Fee regulatory asset.

Kentucky Power respectfully submits that the Commission’s Order is based upon incorrect assumptions, analyses, or understandings and therefore arrives at certain factual and legal conclusions that are inconsistent with the record in this case, relevant legal authorities, and relevant accounting standards. Specifically:

1. The Commission erred as a matter of law in holding that KRS 278.170(2) authorizes the Commission to prohibit a utility from collecting an approved tariff charge;
2. The effect of the Commission’s Order to deny Kentucky Power recovery of the foregone late fees at issue is unconstitutional and results in confiscatory rates;
3. The Commission erred when it held that Kentucky Power’s request to record accounting entries for tracking purposes should be denied pursuant to GAAP;

4. The Commission erred when it held that ASC 980-605-25-4 requires that it establish a program or mechanism by which Kentucky Power could recover foregone late fees *prior to* approval to record the requested accounting entries for tracking purposes; and
5. The Commission erred when it concluded that Kentucky Power included late payment fees for those customers who are current on payment plans when calculating lost revenue.

The Commission should grant rehearing for the reasons set forth herein.

### Law and Argument

#### A. Standard for Rehearing.

KRS 278.400 authorizes “any party to the proceedings” to apply for rehearing of a Commission order within 20 days of service of the order. The Commission interprets the statute as “provid[ing] closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearings.”<sup>1</sup> The statute requires and the Commission expects “the parties to Commission proceedings to use reasonable diligence in the preparation and presentation of their cases and serves to prevent piecemeal litigation of issues.”<sup>2</sup> The Commission enjoys the discretion to grant rehearing to consider new arguments,<sup>3</sup> particularly where an argument could not reasonably have been raised before. In addition, rehearing will be granted when required to address any errors or omissions in the Commission’s orders.<sup>4</sup> Both of these bases supports rehearing here.

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<sup>1</sup> Order, *In the Matter of: Application Of Kentucky-American Water Company For A Certificate Of Public Convenience And Necessity Authorizing Construction Of The Northern Division Connection*, Case No. 2012-00096 at 4 (Ky. P.S.C. January 23, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> Order, *In the Matter of: America’s Tele-Network Corp.’s Alleged Violation of KRS 278.535*, Case No. 2000-00421 at 2 (Ky. P.S.C. March 23, 2001) (limiting scope of rehearing to new arguments raised in petition).

<sup>4</sup> Order, *In the Matter of: Application of Jessamine-South Elkhorn Water District For A Certificate Of Public Convenience And Necessity To Construct And Finance A Waterworks Improvement Project Pursuant To KRS 278.020 And 278.300*, Case No. 2012-00470 at 11 (Ky. P.S.C. January 3, 2014).

## B. Relevant Procedural and Factual Background.

Kentucky Power's tariffs authorize the Company to collect a delayed payment charge of 5% of the unpaid portion of all accounts not paid in full by the next billing date.<sup>5</sup> On March 13, 2020, the Company proactively suspended disconnections for nonpayment in response to the COVID-19 pandemic in order to ensure service continuity for its customers and to mitigate the social spread of the virus.<sup>6</sup> The Commission subsequently initiated this docket by its March 16, 2020 Order ("March Order") that, in addition to suspending disconnections for nonpayment, also, *inter alia*, suspended the imposition by utilities of late payment fees.<sup>7</sup> The Commission further, and appropriately, made clear that "[n]othing in this Order should be conveyed as relieving customers from the obligation to pay for service rendered."<sup>8</sup>

In addition, the March Order informed utilities:

If utilities believe their tariffs or Commission regulations preclude them from ceasing disconnections, waiving or extending the payment of late fees, or any other action that could relieve the hardship that exists due to COVID-19, this docket is available to provide any and all relief sought by those utilities, should the Commission believe such relief is reasonable and in the public interest.<sup>9</sup>

Given the language in its tariff imposing late payment fees<sup>10</sup> and KRS 278.160, as well the specific direction provided by the Commission in its March Order, the Company filed on March 17, 2020 its Request of Kentucky Power Company to Deviate from Late Payment Charge Tariff Requirements ("Request"). Therein, the Company sought, to the extent required, a deviation

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<sup>5</sup> See e.g. Tariff R. S. Sheet No. 6-1. Kentucky Power's tariffs effective for service rendered from March 2020 through December 2020, which are on file with the Commission, are hereby incorporated by reference as if fully restated herein.

<sup>6</sup> Notice at 2.

<sup>7</sup> Order, *In the Matter of: Electronic Emergency Docket Related To The Novel Coronavirus COVID-19*, Case No. 2020-00085 (Ky. P.S.C. March 16, 2020).

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> See P.S.C. Ky. No. 11 3<sup>rd</sup> Revised Sheet Nos. 6-1, 6-5, 6-6, 6-9, 6-10, 7-1, 7-6, 7-7, 9-1, 9-4, 10-2, 11-2, 12-2, 14-4, 16-1, 26-2, 32-3.

from its tariff provision requiring the imposition of late payment charges for the period of time the Commission's late payment charge directive was in place.<sup>11</sup> It was not the Company's intent to forego its ability to recover the foregone revenue at some later date but, rather, to ensure that it had Commission authorization to deviate from its tariff to the extent required to comply with the Commission's March Order. The requested deviation was granted by Order dated March 19, 2020.<sup>12</sup>

### 1. The Commission's September 21, 2020 Order.

Approximately six months after imposing the service disconnection and late fee moratorium, the Commission issued its September 21, 2020 Order ("September Order") that, among other things, lifted the moratorium on disconnections for nonpayment, subject to certain criteria intended to assist customers with arrearages while balancing other considerations.<sup>13</sup> The Commission's September Order directed utilities to take a number of different measures to continue to assist residential customers, including, but not limited to, establishment of default payment plans for no less than six months in length, continued suspension of residential late payment fees through the end of the year, and delaying disconnection processes.<sup>14</sup> In addition, the September Order permitted the resumption of late payment fees for non-residential customers and encouraged utility flexibility in payment plan offerings.<sup>15</sup> Again, the Commission's

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<sup>11</sup> Request at 2.

<sup>12</sup> Order, *In the Matter of: Electronic Emergency Docket Related To The Novel Coronavirus COVID-19*, Case No. 2020-00085 (Ky. P.S.C. March 19, 2020).

<sup>13</sup> Order, *In the Matter of: Electronic Emergency Docket Related To The Novel Coronavirus COVID-19*, Case No. 2020-00085 (Ky. P.S.C. December 30, 2020).

<sup>14</sup> *Id.* at 6-8.

<sup>15</sup> *Id.* at 8.

September Order made clear “that customers are not relieved of their obligation to pay for the services that they receive.”<sup>16</sup>

The September Order also continued the moratorium on the imposition of late payment fees on residential customers:

[T]he Commission finds good cause to continue its moratorium on the assessment of late payment charges for residential customers only until December 31, 2020. Even though utilities will be unable to assess late fees on bills rendered for service through the end of this year, they should continue to track the “lost revenue” they would have otherwise collected from late fees.<sup>17</sup>

## 2. The Company’s Notice.

The Company tracked the “lost revenue” it otherwise would have collected from late fees in accordance with the Commission’s orders. Through October 30, 2020, the Company had foregone \$1,350,464.75 in late payment fees otherwise due from the Company’s commercial and industrial customers.<sup>18</sup> Through October 30, 2020, Kentucky Power had foregone \$1,875,587.52 in residential late fee revenue,<sup>19</sup> and the Company forecasted it would forego an additional \$606,510.85 in residential late payment fees from October 31, 2020 through December 31, 2020, when the moratorium on the imposition of residential late payment fees was scheduled to expire.<sup>20</sup> As of November 30, 2020, the Company estimated that the total late fee revenue deficiency in foregone late payment fees for residential, commercial, and industrial customers as of December 31, 2020 would be \$3,832,563.12.<sup>21</sup>

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<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 6-7.

<sup>18</sup> Notice at 3.

<sup>19</sup> *Id.* at 2-3.

<sup>20</sup> *Id.* at 3. The total of foregone residential late payment fees through December 31, 2020 is \$2,172,451.23. Affidavit of Brian West (“West Aff.”) ¶ 3.

<sup>21</sup> *Id.* The total of foregone late payment fees for residential, commercial, and industrial customers through December 31, 2020 is \$3,522,915.98. West Aff. ¶ 3.

The Company's Notice indicated that, in accordance with the Company's understanding of the September Order, Kentucky Power intended to track the amount of the revenue deficiency associated with foregone late payment fees by making the following accounting entries:

(a) The Company would debit Regulatory Asset and credit Revenue in the amount of the foregone late fee revenues to create the COVID-19 Foregone Late Fee regulatory asset; and

(b) Pursuant to ASC 980-605-25, the Company would immediately provision the COVID-19 Foregone Late Fee regulatory asset by debiting Revenue and crediting a Contra Regulatory Asset since the standard for revenue recognition under GAAP has not yet been met.<sup>22</sup>

The Company also explained that ASC 980-605-25 establishes alternative revenue recognition requirements<sup>23</sup> and provided for the Company's accounting entries for foregone revenues in response to the Commission's September Order and "broad external factors."<sup>24</sup> The Company further indicated that the COVID-19 pandemic, the ensuing economic dislocations and disruptions, and the Commission's March 16, 2020 and September 21, 2020 Orders constituted the "broad external factors" encompassed by Type A alternative revenue programs under ASC 980-605-25.<sup>25</sup>

The Company also proposed, in a future regulatory proceeding, to seek approval to recover the COVID-19 Foregone Late Fee regulatory asset from customers.<sup>26</sup> Upon the future satisfaction of the three conditions for recognition of alternative revenue established by ASC 980-605-25-4 (listed below), the Company explained that it would reverse the Contra Regulatory

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<sup>22</sup> Notice at 3.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*



Asset and recognize the foregone late fee revenues, consistent with generally accepted accounting principles:<sup>27</sup>

Once the specific events permitting billing of the additional revenues under Type A...programs have been completed, the regulated utility shall recognize the additional revenues if all of the following conditions are met:

a. The program is established by an order of the utility's regulatory commission that allows for automatic adjustment of future rates. Verification of the adjustment to future rates by the regulator would not preclude the adjustment from being considered automatic.

b. The amount of additional revenues for the period is objectively determinable and is probable of recovery.

c. The additional revenues will be collected within 24 months following the end of the annual period in which they are recognized.<sup>28</sup>

Concluding the Notice, the Company requested that the Commission confirm that the September Order authorized the Company to make the above-described accounting entries in connection with its tracking of foregone late payment fees.<sup>29</sup>

### **3. The Commission's December 30, 2020 Order.**

The Commission issued its Order in response to Kentucky Power's Notice ordering that the Company "shall not establish the COVID-19 Foregone Late Fee regulatory asset."<sup>30</sup>

#### **C. Kentucky Power's Motion For Rehearing.**

The Company respectfully avers that the Commission erred in certain of its findings, as described below, which were based upon incorrect assumptions, analyses, or understandings which produced factual and legal conclusions that are inconsistent with the record in this case, relevant legal authorities, and relevant accounting standards. Most fundamentally, the

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; ASC 980-605-25-4

<sup>29</sup> Notice at 4.

<sup>30</sup> Order, *In the Matter of: Electronic Emergency Docket Related To The Novel Coronavirus COVID-19*, Case No. 2020-00085 (Ky. P.S.C. December 30, 2020) ("Order").

Commission acted outside its constitutional and statutory authority when ordering the Company to waive and forego late payment fees, and it misunderstood the nature of the Company's request in the Notice. It was not the Company's intent to seek approval to establish a net regulatory asset via the Notice, since the recognition criteria had not yet been met; yet, the Commission's Order nonetheless directed the Company not to establish a COVID-19 Foregone Late Fee regulatory asset. As a result of the Commission's misunderstandings and unconstitutional exercise of authority, the Commission's Order constitutes a denial of recovery of the foregone late fees, which is unconstitutional and results in confiscatory rates. By this Motion for Rehearing, the Company will show that its request to record accounting entries was consistent with the FERC Uniform System of Accounts, GAAP, and by extension, KRS 278.220.

For the reasons set forth below, the Commission should grant rehearing and approve Kentucky Power's request to make accounting entries related to the COVID-19 Foregone Late Fee regulatory asset as described in the Company's Notice.

- 1. The Commission erred in holding that KRS 278.170(2) confers upon the Commission the authority to prohibit collection and recovery of a tariff charge.**

By its Order, the Commission ordered that the Company should not establish a COVID-19 Foregone Late Fee regulatory asset because, in part, the Commission had previously ordered that the late payment fees be "waived."<sup>31</sup> "In directing late payment fees to be waived, the Commission was directing utilities to *forego* collecting late payment fees..."<sup>32</sup> The Commission thereby has effectively denied recovery of the late payment fees, which are provided for in the Company's published tariffs. Although the Commission states that it has the statutory authority

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<sup>31</sup> Order at 9.

<sup>32</sup> *Id.* (emphasis added).

to take such action under KRS 278.170(2), respectfully, the plain language of that statute does not confer upon the Commission the authority it claims.

KRS 278.170(2) states, in its entirety:

*(2) Any utility may grant free or reduced rate service to its officers, agents, or employees, and may exchange free or reduced rate service with other utilities for the benefit of the officers, agents, and employees of both utilities. Any utility may grant free or reduced rate service to the United States, to charitable and eleemosynary institutions, and to persons engaged in charitable and eleemosynary work, and may grant free or reduced rate service for the purpose of providing relief in case of flood, epidemic, pestilence, or other calamity. The terms “officers” and “employees,” as used in this subsection, include furloughed, pensioned, and superannuated officers and employees, and persons who have become disabled or infirm in the service of the utility. Notice must be given to the commission and its agreement obtained for such reduced rate service except in case of an emergency, in which case the commission shall be notified at least five (5) days after the service is rendered.*<sup>33</sup>

Thus, the statute plainly provides that a *utility may* voluntarily choose to grant free or discounted service for the purpose of providing relief in the event of “flood, epidemic, pestilence, or other calamity” provided the utility gives the Commission notice and receives its approval as stated in that subsection. The Kentucky Supreme Court has confirmed the statute is to be interpreted in accordance with the plain language employed by the legislature: “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.”<sup>34</sup> Nowhere in that subsection, or in the remainder of the statute, has the General Assembly

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<sup>33</sup> (emphasis added.)

<sup>34</sup> *PSC of Ky. v. Commonwealth*, 320 S.W.3d 660, 667 (Ky. 2010).

authorized the Commission to order a utility to provide free or discounted service in any event. Nor is such authorization implied.

**a. The September Order contravenes the Kentucky Constitution and exceeds the Commission’s statutory authority.**

Under Kentucky’s Constitution, the wall between the three coordinate branches of government is higher and less easily breached than that in other states and the federal system.<sup>35</sup>

In *Sibert v. Garrett*, for example, the Court explained:

Perhaps no state forming a part of the national government of the United States has a constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does ... [the Kentucky ] Constitution.<sup>36</sup>

The Kentucky Constitution establishes three distinct branches of government—the executive, legislative, and judicial branches—and prohibits any “person or collection of persons” in one of the three branches of government from exercising “any power properly belonging to either of the others,” unless expressly authorized by the Constitution.<sup>37</sup> The Kentucky Supreme Court has characterized the Kentucky Constitution’s separation of powers provisions as a “double-barreled, positive negative approach.”<sup>38</sup> That is, “our present constitution contains explicit provisions which, on the one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the others.”<sup>39</sup>

The division under Kentucky’s 1891 Constitution of governmental power among three separate and equal branches is not a formality to be observed only in its breach. Rather, it is to

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<sup>35</sup> *Legislative Research Commission v. Brown*, Ky., 664 S.W.2d 907, 912-913 (1984).

<sup>36</sup> 246 S.W. 455, 457 (1922).

<sup>37</sup> Ky. Const. §§ 27, 28.

<sup>38</sup> *LRC v. Brown*, Ky., 664 S.W.2d at 912.

be “strictly construed.”<sup>40</sup> Thus, separation of powers is not only “fundamental to Kentucky’s tripartite system of government,” but its observance, “is, to a very great extent, the measure of ... [a people’s] ability to self-govern.”<sup>41</sup>

The Commission, as part of the Executive Branch, is strictly prohibited from exercising the authority of Legislative Branch. The General Assembly alone is authorized to enact laws under the Kentucky Constitution. Administrative agencies are statutory creatures,<sup>42</sup> and as such, any exercise of authority by an agency must be grounded in statute, and specifically as to the Commission, the “legislative grant of power to regulate rates will be strictly construed and will neither be interpreted by implication nor inference.”<sup>43</sup> Administrative bodies may not add to or pare from the statutory grant of authority,<sup>44</sup> and the agency is “authorized only to administer the law as written.”<sup>45</sup> Because the Commission’s Order construing KRS 278.170 adds to and modifies the statute, the Order contravenes Sections 27 and 28 of the Kentucky Constitution.

Further, the Commission’s September Order exceeds its statutory authority. “[The Public Service Commission] is not a lawmaking body. Its powers and duties are administrative only.”<sup>46</sup> And, “[a]dministrative authorities must strictly adhere to the standards, policies, and limitations provided in the statutes vesting power in them.”<sup>47</sup>

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<sup>39</sup> *Id.* (emphasis in original).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 911.

<sup>42</sup> *Dep’t for Natural Resources and Env’tl. Protection v Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978).

<sup>43</sup> *South Cent. Bell Telephone Co. v. Utility Regulatory Comm’n*, 637 S.W.2d 649, 653 (Ky. 1982).

<sup>44</sup> *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000) (“the agency can not by its rules and regulations, amend, alter, enlarge or limit the terms of legislative enactment.”); *GTE v. Revenue Cabinet*, 889 S.W.2d 788, 792 (Ky. 1994); *Portwood v. Falls City Brewing Co.*, 318 S.W.2d 535, 537 (Ky. 1958); *Robertson v. Schein*, 204 S.W.2d 954, 957-58 (Ky. 1947).

<sup>45</sup> *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960).

<sup>46</sup> *Smith v. Raceland*, 80 S.W.2d 827, 828 (Ky. 1935).

<sup>47</sup> *Henry v. Parrish*, 211 S.W.2d 418, 422 (Ky. 1948).

Specifically as to the powers of the Public Service Commission, the Kentucky Supreme

Court has made clear:

[I]t is clear that the legislative grant of power to regulate rates will be strictly construed and will neither be interpreted by implication nor inference. It will be strictly construed. 73 C.J.S., Public Utilities, § 41, p. 1080. In fixing rates, the Commission *must* give effect to all factors which are prescribed by the legislative body, but may not act on a matter which the legislature has not established, *id.*, Sec. 41, (c)(aa) p. 1093. We have held that the Commission's powers are purely statutory. *City of Olive Hill v. Public Service Commission*, 305 Ky. 249, 203 S.W.2d 68 (1947). When a statute prescribes a precise procedure, an administrative agency may not add to such provision. *Union Light, Heat & Power Co. v. Public Service Commission*, Ky., 271 S.W.2d 361 (1954).<sup>48</sup>

The statute clearly vests the decision to provide free or discounted service in certain instances in *a utility*, subject to Commission approval. The statute does not vest the Commission with the authority to order a utility to provide free or discounted service, and the Commission may not add or read-in such authority. Any attempt to create or exercise such power exceeds the Commission's statutory grant of authority. Further, it is "Kentucky's longstanding rule that, where reasonable doubt exists concerning the proper scope of an administrative agency's authority, it should be resolved against the agency."<sup>49</sup> The courts "have the ultimate responsibility in matters of statutory construction and the reviewing court is not bound by an administrative body's interpretation of a statute."<sup>50</sup>

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<sup>48</sup> *S. Cent. Bell Tel. Co. v. Util. Regulatory Com.*, 637 S.W.2d 649, 653 (Ky. 1982) (emphasis original).

<sup>49</sup> *Bullitt Fiscal Court v. Bullitt Cty. Bd. of Health*, 434 S.W.3d 29, 39 (Ky. 2014) (citing *Parrish*, 211 S.W.2d at 422 citing *Bd. of Educ. of City of Newport v. Scott*, 224 S.W. 680, 681 (Ky. 1920)); *United Sign, Ltd. v. Commonwealth*, 44 S.W.3d 794, 798 (Ky. Ct. App. 2000).

<sup>50</sup> *Commonwealth v. RiverValley Behavioral Health*, 465 S.W.3d 460, 468 (Ky. Ct. App. 2014) (citing *Board of Educ. of Fayette County v. Hurley-Richards*, 396 S.W.3d 879, 885-886 (Ky. 2013) and *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14, 20 (Ky. 1985)).

**b. The Commission’s interpretation of KRS 278.170(2) is unsupported by Commission precedent and Kentucky case law.**

The Commission’s novel interpretation of KRS 278.170(2) in this case also is unsupported by Commission and judicial precedent. The Commission has never before interpreted KRS 278.170(2) to grant it the authority it now claims. Instead, as the statute’s plain language contemplates, the Commission has limited its review to determining whether a *utility’s* notice to provide such free or discounted service is consistent with the requisite conditions for the same contained in the statute.<sup>51</sup> Similarly, there is no judicial authority interpreting KRS 278.170(2) to grant the Commission the authority it claims here.<sup>52</sup>

KRS 278.160(2) mandates that “[n]o utility shall charge, demand, collect, or receive from any person a greater *or less* compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.”<sup>53</sup> Thus, in the absence of any statutory or regulatory authority for the Commission to order a utility not to recover a tariff charge, the Commission must allow the utility to “demand, collect, and receive” its tariff charges, which include the late payment fees at issue here. Respectfully, the Commission’s Order is based upon an incorrect interpretation of KRS 278.170(2), and the Commission should grant rehearing to correct its error.

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<sup>51</sup> See e.g. Order, *In the Matter of: Request Of Bronston Water Association, Inc. To Provide Free Water Service To Churches Pursuant To KRS 278.170(2)*, Case No. 2005-00060 (Ky. P.S.C. October 12, 2005); Order, *In the Matter of: Request Of Grayson County Water District To Provide A One-Time Billing Reduction Pursuant To KRS 278.170(2) Due To The Ice Storm*, Case No. 2009-00090 (Ky. P.S.C. April 2, 2009); Order, *In the Matter of: Adjustment Of The Rates Of Kentucky-American Water Company*, Case No. 2004-00103 (Ky. P.S.C. February 28, 2005); but see Order, *In the Matter of: Sanctuary Church, Complainant, v. Louisville Gas And Electric Company, Defendant*, Case No. 2018-00181 (Ky. P.S.C. July 5, 2018) (In this case, the Complainant sought to use KRS 278.170(2) to force LG&E to provide it free or discounted service, however, the Complaint was withdrawn before the substantive issue of whether the statute permitted such action was addressed.).

<sup>52</sup> See *PSC of Ky.*, 320 S.W.3d at 667 (Ky. 2010); *Commonwealth v. PSC of Ky.*, No. 2006-CA-001652-MR, 2008 Ky. App. LEXIS 29 (Ky. App. Feb. 1, 2008) (*rev’d on other grounds by PSC of Ky.*, 320 S.W.3d 660).

<sup>53</sup> KRS § 278.160(2) (emphasis added).

**2. The Commission's Order constitutes a denial of recovery of the foregone late fees, which is unconstitutional and results in confiscatory rates.**

The effect of the Order is to deny any future recovery of the foregone late fees because the Commission ordered the fees “waived” and ordered the Company to “forego collecting” the late payment fees.<sup>54</sup> The Order therefore effectively denies recovery of \$3,522,915.98<sup>55</sup> in late payment charges the Company otherwise would have been able to collect and recover absent the Commission's Order.

The \$3,522,915.98 in unassessed late payment fees are material, as they represent 0.6% of Total Operating Revenues and 7.3% of Adjusted Net Operating Income authorized in the Commission's January 18, 2018 Order in the Company's last base rate case.<sup>56</sup> By that same order, the Commission set the Company's approved ROE at 9.70%.<sup>57</sup> However, for the 12 months ended November 30, 2020, the Company's actual ROE was 4.50%,<sup>58</sup> and the Company testified more specifically as to its current financial situation during the hearing in its most recent base rate case.<sup>59</sup> Continuing, as the Company has, over time to earn an ROE that is far below that which the Commission has authorized, is insufficient to enable Kentucky Power to operate successfully, maintain its financial integrity, attract capital, or compensate its investors for the risks assumed by investing in the Company.<sup>60</sup> The Order forecloses the Company's ability to

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<sup>54</sup> Order at 9 (emphasis added).

<sup>55</sup> West Aff. at ¶ 3.

<sup>56</sup> Order, *In the Matter of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets And Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2018-00179, at 27 (Ky. P.S.C. January 18, 2018).

<sup>57</sup> *Id.* at 27; West Aff. at ¶ 6.

<sup>58</sup> West Aff. at ¶ 5.

<sup>59</sup> The Company hereby requests that the Commission take administrative notice of the record in the Company's most recent base rate case, Case No. 2020-00174.

<sup>60</sup> West Aff. at ¶ 7.



obtain future recovery of material forgone late fees, permanently reducing the Company's accumulated net income reflected in its retained earnings.<sup>61</sup> As a result, the Commission's Order lowers the Company's rates so significantly as to render them confiscatory.

Stated succinctly by the Kentucky Supreme Court:

The federal and state constitutions protect against the confiscation of property, not against a mere reduction of revenue. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 256 La. 497, 236 So.2d 813 (1970). A confiscatory rate is one that is unjust and unreasonable. Rates are non-confiscatory, just and reasonable so long as they enable the utility to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for the risks assumed even though they might produce only a meager return on the so-called "fair value" rate base. *Federal Power Commission v. Hope Natural Gas Co.* 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1943). By long standing usage in the field of rate regulation the "lowest reasonable rate" is one which is not confiscatory in the constitutional sense. Assuming that there is a zone of reasonableness within which the legislature or its designee is free to fix a rate varying in amount and higher than a confiscatory rate it is also free to decrease any rate which is not the "lowest reasonable rate". *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S. Ct. 736, 86 L. Ed. 1037 (1942).<sup>62</sup>

The Commission is charged with regulating the Company's rates and ensuring that the Company "receive[s] fair, just and reasonable rates for the services rendered or to be rendered by it to any person."<sup>63</sup> The Commission must therefore act within constitutional bounds when setting the Company's rates. Those rates must be fair, just, and reasonable, and must not be confiscatory. The Commission's Order to waive and forego the late payment fees produces unconstitutional confiscatory rates. The Company therefore respectfully requests that the Commission grant rehearing and allow Kentucky Power to make the accounting entries as requested.

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<sup>61</sup> West Aff. at ¶ 6.

<sup>62</sup> *Commonwealth ex rel. Stephens v. S. Cent. Bell Tel. Co.*, 545 S.W.2d 927, 930-31 (Ky. 1976).

<sup>63</sup> KRS § 278.030(1).

**3. The Commission erred when it held that Kentucky Power's request to record accounting entries for tracking purposes should be denied pursuant to GAAP.**

The Commission erred when it held that Kentucky Power's request to record accounting entries for tracking purposes should be denied pursuant to GAAP, since (a) the forgone revenues underlying the COVID-19 Forgone Late Fee regulatory asset are permissible for deferral in accordance with the Federal Energy Regulatory Commission ("FERC") Uniform System of Accounts ("USoA"), and therefore KRS 278.220, and, (b) the offsetting Contra Regulatory Asset results a net zero regulatory asset on Kentucky Power's books until alternative revenue recognition criteria specified in ASC-980-605-25 are met, in compliance with GAAP.

Under KRS 278.220, the Commission is required to conform to the system of accounts adopted or approved by the FERC. FERC USoA Definition 31 of regulatory assets provides,

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:

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

B. in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required.<sup>64</sup>

Therefore, the COVID-19 Forgone Late Fee regulatory asset is permissible for deferral in accordance with the FERC USoA and by extension KRS 278.220.

However, since the standard for revenue recognition under GAAP had not yet been met at the time of the Company's Notice, the Company also requested to record a Contra Regulatory Asset. The result of recording the Contra Regulatory Asset is a net zero regulatory asset on

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<sup>64</sup> See 18 CFR Ch. I, Subch. C, Pt. 101.

Kentucky Power's books until alternative revenue recognition criteria specified in ASC-980-605-25 are met, in compliance with GAAP.

Therefore, taken together, the accounting entries proposed by the Company in its Notice comply with FERC USoA, GAAP, and by extension, KRS 278.220. The Commission's Order prohibiting the accounting entries described in the Company's Notice is based on an incorrect interpretation of relevant accounting standards, and the Commission should grant rehearing and allow the accounting entries as described in the Company's Notice and above.

4. **The Commission erred when it held that ASC 980-605-25-4 requires that it establish a program or mechanism by which Kentucky Power could recover foregone late fees *prior to approval to record the requested accounting entries for tracking purposes.***

Although the Company has not yet requested Commission approval of a net regulatory asset, the Commission's holding that ASC 980-605-25-4 requires establishment of a program or mechanism by which Kentucky Power could recover foregone late fees *prior to approval to record the requested accounting entries for tracking purposes* is incorrect.

ASC 980-605-25 applies only to alternative revenue programs ("ARP"). ASC 980-605-25 identifies two types of ARPs to which the guidance applies:

Type A programs adjust billings for the effects of weather abnormalities or *broad external factors* or to compensate the utility for demand-side management initiatives...

Type B programs provide for additional billings (incentive awards) if the utility achieves certain objectives, such as reducing costs reaching specified milestones, or demonstratively improving customer service.<sup>65</sup>

The COVID-19 pandemic, the ensuing economic dislocations and disruptions, and the Commission's March 16, 2020 and September 21, 2020 orders in this docket constitute "broad external factors" contemplated by the Type A alternative revenue program under ASC 980-605-

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<sup>65</sup> ASC 980-605-25-2 (emphasis added).

25-2.<sup>66</sup> As the Commission observed, to recognize revenues under an ASC 980-605-25 alternative revenue program, a utility must have a mechanism that permits automatic adjustments of future rates and under that mechanism, additional revenues must be recovered within 24 months following the end of the annual period in which they were recognized. Then:

Once the specific events permitting billing of the additional revenues under Type A...programs have been completed, the regulated utility shall recognize the additional revenues if all of the following conditions are met:

- a. The program is established by an order of the utility's regulatory commission that allows for automatic adjustment of future rates. Verification of the adjustment to future rates by the regulator would not preclude the adjustment from being considered automatic.
- b. The amount of additional revenues for the period is objectively determinable and is probable of recovery.
- c. The additional revenues will be collected within 24 months following the end of the annual period in which they are recognized.<sup>67</sup>

However, ASC 980-605-25 does not require that the mechanism be established by the Commission *prior to* approval of the requested accounting entries for tracking purposes. The Commission erroneously reads this requirement into the standard. The Commission could, under the FERC USoA and ASC guidelines previously described, authorize accounting entries to record the COVID-19 Foregone Late Fee regulatory asset and offsetting Contra Regulatory Asset, and later establish a mechanism that permits automatic adjustment of future rates consistent with ASC 980-605-25-4. As the Company explained in its Notice, revenue recognition would not occur through reversal of the Contra Regulatory Asset until that future mechanism is established;<sup>68</sup> however, the existence of the mechanism *is not necessary* as a

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<sup>66</sup> See Notice at 4.

<sup>67</sup> ASC 980-605-25-4.

<sup>68</sup> Notice at 4.

matter of GAAP for the Commission to approve the Company's request to make the accounting entries detailed in the Notice.

The Commission's Order prohibiting the accounting entries described in the Company's Notice is based on an incorrect interpretation of relevant accounting standards, and the Commission should grant rehearing and allow the accounting entries as described in the Company's Notice and above. The Commission should grant rehearing and allow the accounting entries as described in the Company's Notice and above.

**5. The Commission erred when it concluded that Kentucky Power included late payment fees for those customers who are current on payment plans when calculating lost revenue.**

As further grounds for denial of the Company's Notice, the Commission stated: "Even if Kentucky Power could defer the 'lost revenues' resulting from late fees as a regulatory asset, the Commission would not approve recovery under the facts presented"<sup>69</sup> because there was "no evidence that Kentucky Power calculated its 'lost revenue' by *including* those customer accounts that are deemed current pursuant to the Commission's [September 21, 2020] Order."<sup>70</sup> Kentucky Power understood the September 21, 2020 Order to require utilities to calculate "lost revenue" from foregone late fees by *excluding* those customer accounts that were deemed current pursuant to the Commission's Order.<sup>71</sup>

To the extent that the Commission intended to use the word 'excluding' instead of 'including,' then the Commission's assumption that Kentucky Power included late payment fees for those customers who are current on payment plans when calculating lost revenue is factually incorrect. The Company did not include customer accounts that were deemed current pursuant

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<sup>69</sup> Order at 8.

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> See September 21, 2020 Order at 18, ¶ 5.

to Commission Order in its calculation of lost revenue resulting from foregone late fees.<sup>72</sup>

Therefore, the Commission should grant rehearing to correct this finding and, if it deems necessary, to take additional evidence on this issue.

**6. The Company's March 17, 2020 Request did not operate as a waiver of collection of late payment charges.**

Finally, the Commission's Order "points out that, on March 17, 2020, in this docket, Kentucky Power requested deviation from its tariff to the extent that Kentucky Power believed that its tariff required it to charge late payment fees."<sup>73</sup> The Commission appears to rely on the Company's Request as an additional ground for rejecting the Company's Notice, stating that in the Request, the Company "made no mention of seeking to subsequently recover the late fees or asked for Commission direction in accounting treatment for 'lost revenue' from forfeited late fees."<sup>74</sup> Respectfully, nothing in the Commission's March 16, 2020 Order indicated that a request for deviation constituted a waiver of the right to recover the tariffed charges absent an express reservation. More fundamentally, the Commission's Order seemingly interprets its March 16, 2020 Order as presenting utilities with a Hobson's Choice:

(a) Violate the Commission's March 16, 2020 Order by continuing to collect late payment fees in conformity with its filed tariffs; or

(b) Violate KRS 278.160 by "charg[ing], demand[ing] ... [and] receiv[ing] ... less compensation for any service rendered or to be rendered than that prescribed in its filed schedules...."

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<sup>72</sup> West Aff. at ¶ 4.

<sup>73</sup> Order at 10.

<sup>74</sup> *Id.* at 10-11.

Kentucky Power's Request was not intended to be, and it does not operate as, a waiver of the relief it sought in the Notice, as the Commission suggests. Instead, the Company filed the Request promptly and in direct response to the Commission's guidance in the March Order that:

If utilities believe their tariffs or Commission regulations preclude them from ceasing disconnections, waiving or extending the payment of late fees, or any other action that could relieve the hardship that exists due to COVID-19, this docket is available to provide any and all relief sought by those utilities, should the Commission believe such relief is reasonable and in the public interest.<sup>75</sup>

Therefore, the Commission should grant rehearing to correct this finding and, if it deems necessary, to take additional evidence on this issue.

### Conclusion

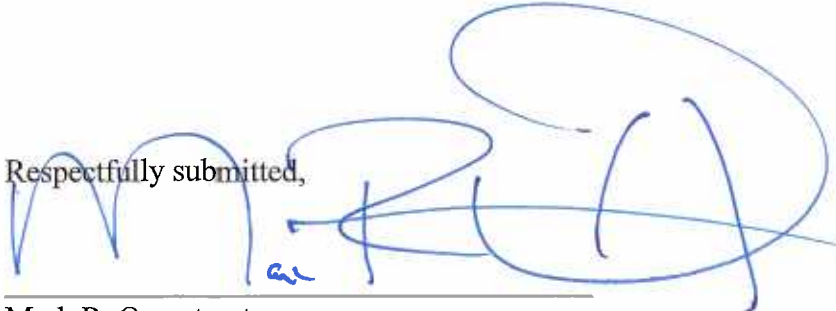
For the foregoing reasons, Kentucky Power respectfully requests that the Commission enter an Order granting rehearing:

- (1) Granting the requested approval to make the accounting entries as described in the Company's Notice;
- (2) Permitting the Company to present evidence and provide argument, to the extent necessary, on the issues identified above; and
- (3) Granting all further relief to which Kentucky Power may be entitled.

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<sup>75</sup> *Id.* at 4.

Respectfully submitted,



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