

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF)
KENTUCKY-AMERICAN WATER COMPANY)
FOR AN ORDER APPROVING THE) CASE NO. 2020-00257
ESTABLISHMENT OF A REGULATORY)
ASSET)

ATTORNEY GENERAL'S BRIEF

On July 29, 2020, Kentucky-American Water Company (“Company” or “KAW”) filed an application with the Commission seeking to establish a regulatory asset to account for the effects it experienced and continues to experience as a result of COVID-19 and governmental actions related thereto.¹ KAW is a wholly-owned subsidiary of American Water Works Company, Inc. and is engaged in the distribution and sale of water in KAW’s three divisions: its Central Division, consisting of Bourbon, Clark, Fayette, Franklin, Harrison, Jessamine, Nicholas, Scott and Woodford Counties; its Northern Division, consisting of Gallatin, Owen and Grant Counties; and its Southern Division, consisting of Rockcastle and Jackson Counties.² In those service territories, KAW owns, operates, and maintains potable water production, treatment, storage,

¹ See Application filed by KAW on July 29, 2020 in 2020-00257, *Establishment of a Regulatory Asset*.

² Id. at 1.

transmission, and distribution systems for the purpose of furnishing potable water for residential, commercial, industrial, and governmental users.³

The emergence and spread of COVID-19 resulted in declarations of emergency at the state and federal levels.⁴ In response to the outbreak and related to the declarations of emergency, the Kentucky Public Service Commission (“Commission” or “PSC”) ordered the suspension of utility disconnections due to non-payment and waiver of the assessment of late payment fees.⁵ Additionally, the Commission urged utilities to “implement their tariffs and regulations liberally,” acknowledging that, “[m]ost utilities are provided flexibility in their tariffs to offer payment plans or to waive late fees for non-payment.”⁶ The Commission went on to find that, “[n]othing in this Order should be conveyed as relieving customers from the obligation to pay for service rendered.”⁷

As the global community takes stock of the fallout caused by COVID-19 and the governmental response thereto, regulators are increasingly being forced to answer difficult questions posed by the continuing pandemic. KAW’s petition in this case presents just such a question – whether, how, and to what extent utilities should be compensated for costs and forgone revenues associated with the pandemic.

KAW now requests that the Commission allow it to establish a regulatory asset to account for these costs and defer that asset for future recovery. These costs relate to: (1)

³ Id. at 1-2.

⁴ Id. at 2.

⁵ Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Order of March 16, 2020 at 3.

⁶ Id. at 4.

⁷ Id. at 5.

the disconnection moratorium, (2) the suspension of fees, (3) customer communications, (4) temporary quarantine housing for water treatment plant operators, (5) debt carrying costs, and (6) lost revenue due to lower volumetric sales.⁸ KAW also indirectly requests that the Commission approve, “a flexible strategy for cost recovery including rate case treatment or rider mechanisms...”⁹

The Attorney General agrees that KAW has correctly identified the appropriate authority through which to analyze the request.

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. The reclassification of an expense to a capital item allows the regulated business the opportunity to request recovery in future rates of the amount capitalized. The authority for establishing regulatory assets arises under the Commission's plenary authority to regulate utilities under KRS 278.040 and the Commission's authority to establish a system of accounts under KRS 278.220. Historically, the Commission has exercised its discretion to approve regulatory assets where a utility has incurred: (1) an extraordinary, nonrecurring expense which could not have reasonably been 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 saving that fully offsets the cost.¹⁰

The Attorney General requests that the Commission deny KAW's application, at least in part, because (1) KAW should not be compensated for late fees associated with delinquencies caused by the pandemic, (2) KAW has approved a new “Work From Home” (“WFH”) benefit to employees that may not be reasonably collected from

⁸ Id. at 3.

⁹ Id. at 4.

¹⁰ Case No. 2019-00017, *In the Matter of: Electronic Application of Louisville Gas and Electric Company for an Order Approving the Establishment of a Regulatory Asset*, Order of March 25, 2019.

ratepayers, (3) KAW has failed to take certain measures to control costs, and (4) KAW should not be compensated for an alleged reduction in volumetric charges. If the Commission approves regulatory asset treatment for certain expenses, the Commission should limit that treatment to specific, necessary expenses to avoid unnecessary expenses from being included. Further, any asset which compensates KAW for its expenses related to COVID-19 should represent a shared-sacrifice between ratepayers and shareholders.

First, any regulatory asset approved by the Commission should not compensate KAW for foregone late fees that KAW has waived, or should have waived, during the pandemic. The company should certainly be compensated for the basic customer charge and variable volumetric charges allowed under the applicable tariff. As the Commission determined in its Order of March 16, 2020 in Case No. 2020-00085 (“the Disconnection Moratorium”), customers should not be relieved of the obligation to pay for services rendered.¹¹ However, “services rendered” is reasonably interpreted as simply the fixed and variable rates charged of customers in order to compensate the company for the provision of service. KAW should not be compensated for late payment fees and other ancillary charges which could have been waived under the terms of the applicable tariff. In this case, late payment fees total at least \$628,277.00.¹² Any request to recover these fees, and similar fees accrued after the application was filed, should be rejected.

It is foreseeable that KAW or a similarly situated company could argue that a requirement to waive late fees constitutes an attack on the filed-rate doctrine.¹³ In fact,

¹¹ See *supra* at Page 2 and Footnote 7.

¹² See Notice of Supplement KAW_N_ATT_102820.xlsx at Incremental Operating Expenses.

¹³ KRS 278.160(2).

KAW has defended pursuit of the late fees as being consistent with the “Company’s approved tariff.”¹⁴ However, the late fees at issue are only a part of the Company’s approved tariff because KAW failed to pursue amendment of its tariff as suggested by the Commission. The Commission’s Disconnection Moratorium provided that, if utilities had concerns that waiver of fees ran afoul of approved tariffs, they should request amendment of those tariffs in Case No. 2020-00085.

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. If, due to the current state of emergency, a utility finds it necessary to deviate from its tariff or Commission regulations, the utility should file its request with the Commission in this docket.¹⁵

KAW’s failure to avail itself of the process should not constitute the basis for it to continue to collect late fees, which should have been waived. Therefore, the Commission is within its authority to disallow regulatory asset treatment to KAW.

KAW asserts that, “[w]ithout the ability to collect these fees, KAW is not provided a proper opportunity to earn its allowed rate of return.”¹⁶ This argument fails because KAW’s revenue requirement was calculated based on a lower percentage of customers paying late fees during a time when a global pandemic was not occurring. Inasmuch as the pandemic has changed the underlying assumptions on which KAW’s revenue requirement was calculated, there is no evidence to support an assertion that the

¹⁴ See Response to AG Data Request 5 at KAW_R_AGDR1_111220 at 5.

¹⁵ Case No. 2020-00085, Electronic Emergency Docket Related to the Novel Coronavirus COVID-19, Order of March 16, 2020 at 4.

¹⁶ See Response to AG Data Request 5 at KAW_R_AGDR1_111220 at 5.

company will not achieve its allowed rate of return if it is unable to charge late fees.¹⁷ In fact, it is just as likely that charging these late fees could result in a windfall profit to the company. In order to determine whether a late charge fairly compensates the utility for its costs during a time of abnormally high delinquent bills, a detailed analysis would be required. KAW has not provided that detailed analysis. In the absence of that analysis, the Commission should assume that the late fees at issue could result in a windfall profit to the company. KAW shareholders should not receive a windfall profit to the detriment of consumers of a public utility during a time of global emergency.

Therefore, the Commission should reject KAW's attempts to be compensated for the late fees the Commission suggested it waive.

Further and significantly, the Commission determined that the discontinuation of disconnections, as opposed to imposing additional costs on utilities, actually presented an opportunity for conservation of resources. The Commission stated that, "[g]iven the pressing need to ensure continuity, and thus adequacy, of service in this time of emergency, the Commission finds that *disconnections for non-payment are a waste of valuable resources and pose a significant risk.*"¹⁸ The Commission's finding was prefaced by the finding that, "[d]isconnection processes ordinarily lead to in-person contact and, as such, pose a significant health risk due to the potential for transmission of COVID-19."¹⁹ Thus, the risks of transmission and the costs associated with those risks,

¹⁷ The amount of debt KAW ends up collecting is unknown, and the availability of relief programs to customers may cause additional payments.

¹⁸ *Id.* at 3 (emphasis added).

¹⁹ *Id.*

accrue not only to the utility customer, but to the utility employee and utility as well. Thus, the Disconnection Moratorium determined that utilities would achieve indiscrete cost savings by discontinuing disconnections.

Second, the Commission should reject the request for regulatory asset treatment for expenses related to the WFH stipend. KAW's parent company made the business decision to pay each of its employees a \$50 stipend, "to cover reasonable expenses related to working remotely."²⁰ KAW's allocated expense related to this cost is 4.19% of at least \$58,150.00.²¹ There is no evidence in the record to substantiate the necessity of this benefit. Presumably this stipend covers an employee's internet service. However, many employees likely already had internet, and the stipend does not take into account savings associated with working from home such as reduced transportation costs. The Commission should view any new employee benefits approved during this global pandemic skeptically.

Third, the Company admittedly has not taken certain measures to control costs.²² First with regard to cost controls, KAW has not instituted a wage freeze. The Attorney General is not suggesting, as insinuated by the Company, that utility employees should be terminated. This could have a negative impact on essential services. However, this is not a time for wage increases, and the Company has failed to institute a policy that keeps wages at current levels. Second with regard to cost controls, KAW has not modified its capital investment program. Again, the Company shouldn't delay necessary projects,

²⁰ Response to Commission Staff 6 at KAW_R_PSCDR1_NUM0001_11120 at 8.

²¹ See Notice of Supplement KAW_N_ATT_102820.xlsx at Incremental Operating Expenses.

²² See Response to AG Data Request 21 at KAW_R_AGDR1_111220 at 21.

but it should review project proposals and timelines to determine whether the benefits of projects outweigh the costs of those projects given the changed economy. Third with regard to cost controls, KAW has not modified charitable contributions or sponsorships. Targeted programs aimed at helping needy families afford utilities certainly should not be curtailed at this time, but the Commission should review KAW's other sponsorships and contributions to determine whether those are justified during this time of changed economic dynamics. The Attorney General suggests that the Commission require the Company to look inward for cost savings before automatically passing costs along to customers during this time of shared sacrifice.

Fourth, the Company should not be compensated for an alleged reduction in volumetric charges. KAW suggests that it should be allowed to accumulate and defer losses, "due to lower volumetric sales to customers in various customer classes as well [as] from customers that will close their doors or go out of business."²³ First with regard to compensation for volumetric changes, compensating KAW for losses due to shifting demand patterns within the economy would be tantamount to retroactive ratemaking. The Company simply cannot have it both ways. It cannot argue for strict application of the existing tariffs when those tariffs increase its bottom line, as in the case of late fees, and then, in the same application, ask the Commission to effectively disregard those tariffs when those tariffs benefit the ratepayer through lower rates. Second with regard to compensation for volumetric changes, the record fails to support that the Company

²³ See Application filed by KAW on July 29, 2020 in 2020-00257, Establishment of a Regulatory Asset, at 3.

has incurred any losses due to changes in volumetric usage. Certain classes of ratepayers may have used less water during the pandemic; others likely have increased their usage (e.g. residential). Further, the classes where usage has increased may be more profitable to the company than those where volumetric usage has decreased. Finally, businesses that close do not represent lost revenues; because the demand never materialized, both the costs and revenues associated with it were avoided. The Company's request to be compensated by other ratepayers due to pandemic-related business failings is tone-deaf and unacceptable. This request is not consistent with a principal of shared sacrifice which should guide the Commission's pandemic response. The Commission should reject KAW's request to track and accrue expenses allegedly associated with volumetric changes.

If the Commission approves certain charges as regulatory assets, the Commission should specify precisely which charges are to be included in the regulatory asset. This will minimize doubt about whether a particular cost is to be included. If the Commission approves expenses to be included in a regulatory asset, it is conceivable and likely that the utility will include all expenses that arguably meet the parameters laid out by the Commission. As such, the Commission should take great care to define and limit the items for which regulatory asset treatment is allowed.

In closing and as the guiding principle to which the Attorney General alluded *supra*, any regulatory asset approved by the Commission related to COVID-19 should represent a shared sacrifice between shareholders and ratepayers. During these difficult economic times, we have all been forced to adapt to a changed economic environment.

KAW's proposal would have you believe that KAW shareholders' investments should be left wholly uninfluenced by the global pandemic that has wrought economic turmoil on many Kentucky families. However, times have changed for everyone, and the Commission is not a guarantor of a utility's revenue stream. KAW should be compensated fully and fairly, and with a required rate of return, for meeting its obligations to provide quality utility service to its customers, but any regulatory asset established should be limited to only those expenses which are allowable and necessary under the law.

Respectfully submitted,

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Certificate of Service and Filing

Pursuant to the Commission's Orders dated March 16, 2020 and March 24, 2020 in Case No. 2020-00085, and in accord with all other applicable law, Counsel certifies that, on December 9, 2020, an electronic copy of the forgoing was served by e-mail to the following. A physical copy of the filing will be submitted to the Commission once the State of Emergency has ceased.

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this 9th day of December, 2020



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