

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PHELPS GAS COMPANY, INC.)	
)	
_____)	CASE NO. 91-204
)	
ALLEGED VIOLATION OF KRS 278.160)	

O R D E R

The Commission initiated this proceeding to determine whether Phelps Gas Company, Inc. ("Phelps") was charging rates for service in excess of those set forth in its published rate schedules. As Phelps admits charging unauthorized rates, the only issue before the Commission is whether it willfully violated KRS 278.160(2).¹ We find that Phelps did and should be assessed a penalty of \$300 for its willful violation.

Phelps is a Kentucky corporation which owns, operates and manages facilities used in connection with the distribution and sale of natural gas to the public for compensation. It serves approximately 184 customers in portions of Pike County, Kentucky.

¹ "No 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."

On June 26, 1991, the Commission ordered Phelps to show cause why it should not be penalized pursuant to KRS 278.990(1) for its alleged violations of KRS 278.160(2). This action followed the Commission's receipt of a Commission Staff Report which alleged that Phelps was charging rates for service which exceeded its published rate schedules. A hearing on the alleged violations was held on September 27, 1991.² Following the hearing, Phelps submitted a written brief.

Phelps does not dispute allegations that it violated KRS 278.160(2). Phelps Vice-President Daniel C. Greer testified that, from March 1, 1991 until April 31, 1991, Phelps charged rates which exceeded its published rate by 2.91 cents per 1,000 cubic feet (Mcf) of natural gas.³ Approximately \$74.93 in excess of authorized rates was collected.⁴

KRS 278.990(1) authorizes the Commission to assess a civil penalty from any utility which "willfully violates" any provision of KRS Chapter 278. Phelps contends that the assessment of a penalty is not appropriate in this instance as its violation was not willful. It asserts that a willful violation must be "with a

² At the hearing, Phelps Vice-President Daniel C. Greer and Jordan Neel, a member of Commission Staff, testified.

³ Transcript of Evidence ("T.E.") at 92-93, 106-107. See also Response of Phelps to Commission Order dated July 29, 1991, Item 5.

⁴ T.E. at 106-107.

bad purpose, an evil purpose, without ground for believing the act to be lawful, or with an evil intent without justifiable excuse."⁵ Phelps' position is contrary to existing legal precedent. For civil and administrative proceedings "willful conduct is most often defined simply as that which is intentional, rather than inadvertent or accident." Hager v. District of Columbia Dept. of Consumer and Regulatory Affairs, 475 A.2d 367, 368 (D.C. App. 1984). In Woods v. Corsey, 200 P.2d 208 (Cal. Dist. Ct. App. 1948), which involved a civil violation of the Emergency Price Control Act, the California Court of Appeals found that a willful violation was "one which is intentional, knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law." Id. at 211. Similarly, in Nugar v. State Insurance Commissioner, 207 A.2d 619 (Md. 1965), which involved an appeal of an administrative agency's revocation of two insurance agents' licenses for willfully violating an insurance statute, the Maryland Court of Appeals declared "willful violation" to mean "an intentional act of omission or commission." Id. at 625.

In Kentucky, "[t]he word 'willful' in its general acceptation means intentionally, not accidentally nor involuntarily." Muncy v. Commonwealth, 97 S.W.2d 606, 609, 265 Ky. 730, 736 (1936). Proof of ill will is not a requisite element of willfulness. Louisville & N. R. Co. v. George, 129 S.W.2d 986, 989, 279 Ky. 24 (1939).

⁵ Brief of Phelps, 9.

Consequently, no evidence of ill will, evil intent, or malice is necessary to prove that an act was willfully performed.⁶

The record clearly shows that Phelps knowingly violated KRS 278.160(2). The utility has filed several rate adjustments in recent years and is familiar with the statutory framework for changing its rates.⁷ Although the utility knew that customers could be charged only authorized rates, it charged rates which differed from its filed effective rates.⁸ It continued charging these unauthorized rates until discovered.⁹

Effective March 1, 1991, Phelps' natural gas supplier, Columbia Gas of Kentucky ("Columbia"), increased its rates for service. Phelps sought and was granted a purchased gas adjustment ("PGA") to reflect this increase in the cost of its purchased gas.¹⁰ This PGA did not include a component for recovery of line loss. To ensure recovery of line loss, Phelps on March 28, 1991 applied for Commission approval to amend the PGA clause of its tariff to permit such recovery.¹¹ Although the proposed effective

6 See, e.g., Case No. 90-172, Kentucky Utilities Company, Order dated December 4, 1990.

7 T.E. at 118.

8 Id. at 92-97.

9 Id. at 97-98.

10 Case No. 90-078-B, Notice of Purchased Gas Adjustment Filing of Phelps Gas Company, Inc., Order dated March 1, 1991.

11 Case No. 91-135, Tariff Filing of Phelps Gas Company to Revise the Purchased Gas Adjustment Clause.

date of its amended PGA clause was May 1, 1991 and although the Commission suspended the operation of this clause until September 30, 1991,¹² Phelps began charging its customers rates based upon this clause for service received on and after March 1, 1991. It did so until Commission Staff advised it to cease.¹³

The Commission cannot accept the argument that Phelps was only collecting what it was entitled to collect - rates sufficient to recover the total cost of purchased gas. KRS Chapter 278 sets forth the procedures for seeking a rate adjustment. A utility may not ignore these statutory procedures nor will expedience excuse compliance with them. Failure to penalize Phelps for its conduct will only encourage other utilities to act in a similar fashion. The resulting chaos would undermine all efforts at the orderly regulation of utility rates.

After review of the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. From March 1 through April 30, 1991, Phelps assessed and collected rates in excess of those set forth in its filed tariffs. A total of \$74.93 in excess of authorized rates was collected during this period.

2. Phelps willfully violated KRS 278.160(2) by assessing and collecting unauthorized rates.

¹² Case No. 91-135, supra, Order dated May 1, 1991.

¹³ T.E. at 98-99.

3. Phelps should be assessed a penalty of \$300 for its willful violation of KRS 278.160(2).

4. All amounts collected in excess of authorized rates should be refunded.¹⁴

IT IS THEREFORE ORDERED that:

1. A penalty in the amount of \$300 is assessed against Phelps for its failure to comply with KRS 278.160(2).

2. Phelps shall pay the assessed penalty within 20 days of the date of this Order by certified or cashier's check made payable to "Treasurer, Commonwealth of Kentucky." Said check shall be delivered to Office of General Counsel, Public Service Commission of Kentucky, 730 Schenkel Lane, P. O. Box 615, Frankfort, Kentucky 40602.


3. Within 60 days of the date of this Order, Phelps shall refund all amounts collected in excess of its filed rates. This refund shall be made by either direct payment or bill credit.

4. Within 30 days of the completion of the refund, Phelps shall file with the Commission a summary statement showing a reconciliation of customer billings and the amount refunded.

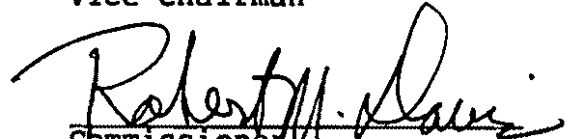
¹⁴ While the payment of interest on all funds improperly collected is ordinarily appropriate, the Commission has refrained from requiring it in this case because interest on the amounts involved would be de minimis.

Done at Frankfort, Kentucky, this 19th day of December, 1991.

PUBLIC SERVICE COMMISSION


Chairman

Vice Chairman


Commissioner

ATTEST:


Executive Director