

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC ALLEGED FAILURE OF CLARK)	CASE NO.
ENERGY COOPERATIVE, INC. TO COMPLY)	2023-00005
WITH KRS 278.160(2))	

ORDER

On August 22, 2023, Clark Energy Cooperative, Inc. (Clark Energy) filed a motion for rehearing, reconsideration and clarification (Motion) of the Commission’s August 2, 2023 Order finding that Clark Energy had violated KRS 278.160(2) 45 times during the five-year period preceding the opening of this investigation, was required to refund or credit affected customers, and was required to show cause why it should not be subject to civil penalties. In an Order issued on September 8, 2023, the Commission granted the Motion in part, clarifying the August 2, 2023 Order and granting rehearing on three issues: (1) whether a customer that Clark Energy alleged was already credited was entitled to a credit, (2) whether a customer that Clark Energy alleged was a joint account holder was entitled to a credit or refund, and (3) the effect of application of Low-Income Home Energy Assistance Program (LIHEAP) funds on refunds or credits. The Commission must also resolve the issue of whether Clark Energy should be assessed civil penalties for its violations.

LEGAL STANDARD

KRS 278.990(1) allows the Commission to assess a civil penalty of up to \$2,500 against any utility for each offense that willfully violates the provisions of KRS Chapter

278, Commission regulations, or any order of the Commission from which all rights of appeal have been exhausted.

Under KRS 278.160(2) a “utility shall not 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.”

BACKGROUND

This case arises out of Case No. 2022-00298, in which Clark Energy was found to have violated KRS 278.160(2),¹ which states that a “utility shall not 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.” In that case, the undisputed record showed as follows. Geneva Trusty’s service was disconnected by Clark Energy for nonpayment. Her daughter, Katrina Trusty, applied for new service at a different service address from Geneva Trusty, which was approved by Clark Energy. Clark Energy subsequently transferred Geneva Trusty’s outstanding balance to Katrina Trusty’s account, on the basis that Geneva Trusty was living with Katrina Trusty and a LIHEAP voucher issued to Geneva Trusty was submitted to Clark Energy for Katrina Trusty’s account. The Commission found that Clark Energy’s actions were not permitted by any tariff or provision of law² and that Clark Energy violated KRS 278.160(2) by

¹ Case No. 2022-00298, *Katrina Marie Trusty v. Clark Energy Cooperative, Inc.* (Ky. PSC Jan. 20, 2023), Order at 2.

² Under 807 KAR 5:041, Section 9(2), a utility is required to “regard each point of delivery as an independent customer and meter the power delivered at each point.” Termination or refusal of service is permitted only for reasons set out in 807 KAR 5:006, Section 15(1), none of which applied to Case No. 2022-00298.

attempting to collect from Katrina Trusty greater compensation than what was filed in Clark Energy's applicable tariff.

The Commission ordered³ that Clark Energy be prohibited from collecting from Katrina Trusty any sums assessed from Geneva Trusty's account, that Clark Energy remove any such charges, and barred Clark Energy from terminating Katrina Trusty's service for nonpayment of Geneva Trusty's balance. In the present case, the Commission ordered Clark Energy to file a response to the opening Order and Commission Staff issued one set of data requests. In response to those requests, Clark Energy provided a list of all instances in which balances were transferred from one account to another in the previous five years. The list included whether the account was transferred to a different individual and a different address, the amount of the balance transferred, whether the balance had been paid, and in most instances, the reason for the transfer. Excluding Katrina Trusty, the list showed that in the prior five years, Clark Energy had transferred balances from one customer's account to another customer's account at a different service address 44 times.⁴

After granting partial rehearing to Clark Energy, information requests were issued pertaining to the issues for which rehearing was granted. Clark Energy provided more detailed information about the customer that allegedly was already credited and the customer that allegedly was a joint account holder.

Clark Energy also provided information about how it handles refunds and credits when LIHEAP funding is involved. Clark Energy supplied a copy of its agreement with

³ Case No. 2022-00298, Jan. 20, 2023 Order at 5.

⁴ Order (Ky PSC Aug. 2, 2023) at Appendix 1.

LIHEAP for Clark Energy's administration of LIHEAP funds, which are directly provided to Clark Energy for disbursement to customer accounts.⁵ This agreement includes a provision requiring "return to the CAA [Community Action Council for Lexington-Fayette, Bourbon, Harrison, and Nicholas Counties, Inc. (LIHEAP administrator)] any/all credits on client accounts from the LIHEAP program, not used by the client for any reason, within 45 days from the date the program closed."⁶ Clark Energy indicated that it did not know how to handle credits or refunds when LIHEAP funds had been applied to accounts that were now closed or if the customer's check was returned.⁷ Clark Energy stated:

In many instances, a member's final balance on their account is a credit balance. This results in a refund check being issued to the member. However, many times members discontinue service with Clark after recently receiving LIHEAP assistance on their account. This may create a scenario in which the member has a credit on their account due to the LIHEAP funds being applied or the credit is increased due to LIHEAP funds. If the LIHEAP assistance creates the credit balance on a members account the entire refund will be returned to the LIHEAP administrator, per the contract between the LIHEAP administrator and Clark Energy. If the LIHEAP funds increase the credit balance, the LIHEAP administrator is refunded the assistance provided to the account and the member is refunded their portion. Clark Energy can only determine that a credit is due to a LIHEAP administrator if the assistance is received around the approximate time the member discontinues service, or if the member has received assistance over consecutive months.⁸

⁵ Clark Energy's Response to Commission Staff's First Rehearing Request for Information (Staff's First Rehearing Request), Item 1b (Agreement).

⁶ Agreement, Section 5(d).

⁷ Motion at 4.

⁸ Clark Energy's Response to Staff's First Rehearing Request, Item 1a.

Clark Energy was also concerned that customers may have received more benefits as a result of Clark Energy including delinquent balances in other customers' accounts.⁹

DISCUSSION AND FINDINGS

First, Clark Energy has provided sufficient evidence indicating that the two customers identified confidentially in its Motion are not entitled to credits or refunds. One customer was already credited, and the other was a joint account holder who was jointly responsible for the delinquent balance. The Commission finds that the refund or credit requirement for these two customers set out in the Commission's August 2, 2023 Order should be vacated.

Second, the issue of how to administer refunds when LIHEAP funds have been applied to accounts can be resolved without causing Clark Energy to breach its contract with the LIHEAP administrator. The agreement requires Clark Energy return only LIHEAP funds that are "not used by the client." Based on Clark Energy's information request responses and this agreement language, refunds or credits would not affect LIHEAP funds applied to currently open accounts. If a customer account receiving LIHEAP funds was refunded or credited, any credit balance would carry forward to future billing periods and the LIHEAP funds would have been used. Regarding closed accounts, Clark Energy stated that its regular practice is that "[i]f the LIHEAP funds increase the credit balance, the LIHEAP administrator is refunded the assistance provided to the account and the member is refunded their portion." While the Commission agrees that this is a proper application of refunds or credits, the Commission disagrees with the statement that "Clark Energy can only determine that a credit is due to a LIHEAP administrator if the assistance

⁹ Clark Energy's Response to Staff's First Rehearing Request, Item 1c.

is received around the approximate time the member discontinues service, or if the member has received assistance over consecutive months.” This comment seems to indicate that Clark Energy is refunding the LIHEAP administrator for funds applied to accounts in previous billing periods or even when the customer makes subsequent payments. This practice would not be practical or reasonable and is not required by a plain reading of the agreement between Clark Energy and the LIHEAP administrator. If a customer is deemed eligible for LIHEAP funds, those funds are applied to the account, and if no credit balance remains, those funds were used, regardless of whether future credit balances accrue. The Commission finds that the most reasonable method of refunding or crediting closed accounts is to first refund to whomever last paid on the account. The last-in, first-out method (LIFO) method for refunding prevents situations where customers would be refunded unused LIHEAP funds while recognizing that customers who made payments after LIHEAP funds were applied to their accounts were found eligible for those funds at the time they were applied.

Clark Energy questioned the effect of returned checks on this process. If a customer tenders a check that is dishonored, that does not count as payment. Clark Energy also questioned how it should address the issue of whether it must account for customers possibly receiving more LIHEAP benefits than they would have been eligible for had Clark Energy not applied delinquent balances to other accounts. As between the customer and Clark Energy, which violated KRS 278.160(2), Clark Energy should bear the cost of any overpayment of LIHEAP funds that the LIHEAP administrator requires to be repaid. Likewise, if Clark Energy is unable to determine whether the customer or LIHEAP administrator last paid on an account, Clark Energy should assume that the

customer paid last, as Clark Energy should bear the possible cost if its lack of recordkeeping caused any uncertainty.

Lastly, regarding the imposition of civil penalties, Clark Energy stated that it has ceased transferring the delinquent balances at issue, that it has incurred costs responding to and reviewing materials for this matter, and that only 0.02 percent of its accounts were affected. Clark Energy further stated that its actions were not a willful violation but a reasonable interpretation of 807 KAR 5:006, Section 15(1)(d), which states that “a utility shall not be required to furnish new service to a person contracting for service who is indebted to the utility for service furnished or other tariffed charges until that person contracting for service has paid his indebtedness.” Clark Energy also indicated that its actions to attempt to collect delinquent balances were intended for the benefit of other ratepayers who would otherwise bear the cost.¹⁰

The Commission finds that Clark Energy’s violations of KRS 278,160(2) were willful. Clark Energy clearly demanded compensation from customers, such as Katrina Trusty, that was for more than filed rates for services rendered to the customer. Clark Energy had already furnished new service to these customers, so Clark Energy could not reasonably have interpreted 807 KAR 5:006, Section 15(1)(d), to allow Clark Energy to threaten disconnection for failing to pay the debt of another. Furthermore, the concept of unilaterally requiring a customer to pay the debt of another is antithetical to basic contract law.

Pursuant to KRS 278.990(1), the Commission is authorized to impose civil penalties up to \$2,500 per violation. Eliminating the two violations discussed above, Clark

¹⁰ Motion at 5–6.

Energy committed 43 such violations. The Commission finds that a civil penalty of \$25,000.00 should be imposed. However, the Commission will suspend this penalty conditioned upon Clark Energy not willfully violating any statutes, regulations, orders, or tariffs within the next three years.

IT IS THEREFORE ORDERED that:

1. Clark Energy shall not be required to refund or credit the two accounts identified by number on page 3 of its Motion.
2. Clark Energy shall refund or credit customers and the LIHEAP administrator according to the LIFO method described herein.
3. Clark Energy shall be assessed a civil penalty of \$25,000, the payment of which shall be suspended conditioned upon Clark Energy not willfully violating any statutes, regulations, orders, or tariffs within the next three years from the date of service of this order.
4. This case is closed and shall be removed from the Commission's docket.


PUBLIC SERVICE COMMISSION



Chairman



Vice Chairman



Commissioner



ATTEST:



Executive Director

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