

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

**IN THE MATTER OF:**

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

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**RESPONSE TO ORDER**

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Come now Clark Energy Cooperative, Inc., and Chris Brewer, Chief Executive Officer of Clark Energy (collectively, “Clark Energy”), by and through counsel, pursuant to the Commission’s August 2, 2023 and September 8, 2023 Orders and do hereby offer the following response:

**BACKGROUND**

The Commission opened this investigation on February 16, 2023 after the completion of Case No. 2022-00298.<sup>1</sup> Clark Energy filed a response to the Commission’s February 16, 2023 Order on March 8, 2023. Commission Staff issued its First Request for Information (“Staff’s First Request”) on March 15, 2023. Clark Energy filed a Motion for Extension of Time on March 16, 2023 and filed responses to the Staff’s First Request on March 31, 2023. The Commission entered an Order on April 11, 2023 granting Clark Energy’s Motion for an Extension of Time and amended the procedural schedule. Clark Energy filed supplemental responses to Staff’s First Request on April 14, 2023. After the time for additional requests for information had ran in the amended procedural schedule, Clark Energy filed a Motion to Submit the case for a decision on the existing

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<sup>1</sup> See, *In the Matter of: Katrina Marie Trusty, Complainant v. Clark Energy Cooperative, Inc., Defendant*, Case No. 2022-00298.

record. The Commission issued an Order on August 2, 2023, to which Clark Energy filed a Motion for Rehearing, Reconsideration and Clarification. Clark Energy also filed a Motion for Extension on August 28, 2023. The Commission issued an Order on September 8, 2023 granting the Motion for Extension and granting in part and denying in part Clark Energy’s Motion for Rehearing, Reconsideration and Clarification.

**KRS 278.990**

The Commission’s August 2, 2023 and September 8, 2023 Orders required Clark Energy to file a response to show cause why it should not be subject to penalties contained in KRS 278.990.

KRS 278.990 states:

Any officer, agent, or employee of a utility, as defined in KRS 278.010, and any other person who *willfully* violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter, or fails to obey any order of the commission from which all rights of appeal have been exhausted, or who procures, aids, or abets a violation by any utility, shall be subject to either a civil penalty to be assessed by the commission not to exceed two thousand five hundred dollars (\$2,500) for each offense or a criminal penalty of imprisonment for not more than six (6) months, or both. If any utility *willfully* violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter, or does any act therein prohibited, or fails to perform any duty imposed upon it under those sections for which no penalty has been provided by law, or fails to obey any order of the commission from which all rights of appeal have been exhausted, the utility shall be subject to a civil penalty to be assessed by the commission for each offense not less than twenty-five dollars (\$25) nor more than two thousand five hundred dollars (\$2,500). Each act, omission, or failure by an officer, agent, or other person acting for or employed by a utility and acting within the scope of his employment shall be deemed to be the act, omission, or failure of the utility. (*emphasis added*)

**ARGUMENT**

Clark Energy denies that any willful violations of KRS 278.160(2) were committed by Clark Energy. KRS 278.160(2) 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.” All of the charges that were charged by Clark Energy were rates for electric service as provided in Clark Energy’s tariff. None of the charges that were charged were for anything other than electric service provided by Clark Energy and any corresponding late fees, which are all tariffed charges. Clark Energy’s transfer of the outstanding balance from one account to another, after receiving documentation that the original account holder was residing at the new service address and receiving the benefit of electric service, was a misinterpretation of the statutes and regulations, not a willful violation of KRS 278.160(2). Clark Energy believes that its interpretation of the regulations and statutes cited throughout this proceeding, and in Case No. 2022-00298, was a reasonable interpretation.

Clearly the statutes and regulations can be interpreted differently. In fact, the Commission’s August 2, 2023 provided a misinterpretation of these same statutes to which Clark Energy had to seek clarification on.<sup>2</sup> The Commission’s August 2, 2023 Order, interpreting 807 KAR 5:006, Section 15(1)(d) and 807 KAR 5:006, Section 15(1)(f), stated that these two regulations “[r]ead together, these regulations allow a utility to require payment on a delinquent balance by a customer before taking service at another service address or require payment for service at a service address *regardless of who is occupying the service address.*”<sup>3</sup> Upon reading the Commission’s Order, Clark Energy believed that this interpretation of the regulations was a far worse result than Clark Energy’s transfer of the delinquent balance to a service address, only after receiving documented proof that the person who incurred the initial debt was residing at the new service address and receiving the benefit of electric service.<sup>4</sup> Under the Commission’s

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<sup>2</sup> See, Commission’s August 2, 2023 Order, pp. 3-4.

<sup>3</sup> *Id.*

<sup>4</sup> See, Motion for Rehearing, Reconsideration and Clarification, p. 2, (August 22, 2023).

original interpretation, the delinquent amount would follow the service address and a person moving into the service address would be responsible for paying the debt of another person, to whom they may have no ties to. After Clark Energy sought clarification of this interpretation, the Commission changed its interpretation in its September 8, 2023 Order. In that Order, the Commission stated, “The Commission finds that the only fair and reasonable way for these two provisions not to conflict and to maintain their intent is to interpret ‘new service’ in Section 1(d) to mean service at a different point of service.”<sup>5</sup> As you can see, the Commission’s September 8, 2023, changed its interpretation of the statutes and regulations, the same statutes and regulations that the Commission states Clark Energy misinterpreted. Clearly, these statutes have been and continue to be interpreted in different ways. For the Commission to misinterpret the regulations, and then say that Clark Energy’s interpretation of these same statutes and regulations is not reasonable, does not seem reasonable.

Clark Energy did not willfully violate KRS 278.160(2). A misinterpretation of a statute or regulation cannot be considered willful, especially when there are conflicting interpretations contained in Commission Orders in this proceeding.

*Black's Law Dictionary* defines a “willful” act as:

Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

Kentucky’s Court of Appeals has defined “willful” as “intentional”.<sup>6</sup> Although KRS Chapter 278 does not contain a definition for “willful”, KRS 383.545(17) defines “willful” as

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<sup>5</sup> See, Commission’s September 2, 2023 Order, p. 4.

<sup>6</sup> *Gatewood v. Com.*, 285 S.W. 193, 194 (Ky. App, 1926).

“with deliberate intention, not accidentally or inadvertently, and done according to a purpose.” When dealing with an Open Records violation, Kentucky’s highest court found that “a public agency’s mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of Open Records Act, as would render records custodian liable for costs and attorney fees.”<sup>7</sup> Clark Energy did not act willfully in its interpretation of the statutes and regulations that are the subject of this proceeding. In fact, Clark Energy had discussed this issue throughout the years, with staff from the Commission’s Consumer Complaints Department. Although these conversations were mostly verbal conversations, Clark Energy was under the impression, based on information provided, that as long as there was proof of the debtor receiving the benefit of service, that Clark Energy’s transfer of these accounts was within its rights. In fact, during the pendency of Case No. 2022-00298, the Commission’s Consumer Complaint Department emailed Clark Energy regarding a member that was contained in the Appendix A of the Commission’s August 2, 2023 Order. The email correspondence is attached to this Response as Exhibit A. Clark Energy was told to simply inform the member.<sup>8</sup>

In addition, Clark Energy states that it has provided evidence throughout this proceeding and the prior complaint proceeding to support that any violations that may have occurred were not willful. Clark Energy only completed transfers of these balances after receiving documentation or confirmation that the original debtor was residing at the service address, and in most cases was receiving assistance vouchers in their name for a different service address than the one where the

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<sup>7</sup> *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W. 3d, 333, 343 (Ky. 2005).

<sup>8</sup> *See*, Exhibit A.

debt was incurred. Clark Energy did not believe that it was fair to its membership to allow a person with a delinquent account, to assist another member in paying for electric service, while the membership would have to incur that person's original debt. Punishing the entire membership of Clark Energy for the bad acting of a few of its members did not seem like the right thing to do to Clark Energy.

WHEREFORE, based on the foregoing, Clark Energy respectfully requests the Commission to find that it did not willfully violate any of the Commission's statutes or regulations regarding the transfer of delinquent accounts and that it should not be subject to the penalties contained in KRS 278.990.

Dated this 6<sup>th</sup> day of October, 2023.

Respectfully submitted,



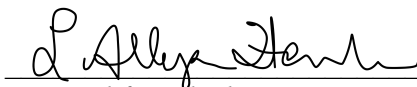
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*Counsel for Clark Energy Cooperative, Inc.*

**CERTIFICATE OF SERVICE**

This is to certify that foregoing was submitted electronically to the Commission on October 6, 2023 and that there are no parties that have been excused from electronic filing. Pursuant to prior Commission orders, no paper copies of this filing will be submitted.



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*Counsel for Clark Energy Cooperative, Inc.*

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**From:** [REDACTED] (PSC) [REDACTED]  
**Sent:** Friday, October 21, 2022 12:47 PM  
**To:** Brian Frasure [REDACTED]  
**Subject:** RE: [REDACTED] - complaint

**\*\*\* This is an EXTERNAL email. BEWARE of Links or Attachments! \*\*\***

Thanks Brian. Have a good weekend!

[REDACTED]  
*KY Public Service Commission*  
*Consumer Services*  
*(502) 782-2574*

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**From:** Brian Frasure [REDACTED]  
**Sent:** Friday, October 21, 2022 12:35 PM  
**To:** [REDACTED] (PSC) [REDACTED]  
**Subject:** RE: [REDACTED] - complaint

[REDACTED]  
I was getting ready to email and let you know that we haven't heard anything from [REDACTED] regarding the complaint. If he were to contact us I will let you know.

Thanks,

*Brian Frasure, CPA*

Vice President of Finance & Office Services



2640 Iron Works Road  
P.O. Box 748  
Winchester, KY 40392-0748

EXHIBIT A

Direct: 859-901-9218  
Toll Free: 800-992-3269  
Fax: 859-744-4218

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**From:** [REDACTED] (PSC) [REDACTED]  
**Sent:** Friday, October 21, 2022 11:08 AM  
**To:** Brian Frasure [REDACTED]  
**Subject:** RE: [REDACTED] - complaint

**\*\*\* This is an EXTERNAL email. BEWARE of Links or Attachments! \*\*\***

Brian,

Just wanted you to know that I am closing this complaint as [REDACTED] has been unreachable. Please let me know if he contacts you in the future.

Thanks.

[REDACTED]  
*KY Public Service Commission*  
*Consumer Services*  
*(502) 782-2574*

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**From:** Brian Frasure <[REDACTED]>  
**Sent:** Wednesday, October 19, 2022 12:18 PM  
**To:** [REDACTED] (PSC) [REDACTED]>  
**Subject:** RE: [REDACTED] - complaint

[REDACTED]

Wanted to follow up and let you know that we attempted to contact [REDACTED] yesterday. A lady answered the phone and we ask that [REDACTED] contact us. We haven't heard anything from him.

Thanks,

Brian

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**From:** [REDACTED] (PSC) <[REDACTED]>  
**Sent:** Tuesday, October 18, 2022 3:33 PM



**To:** Brian Frasure <[REDACTED]>  
**Subject:** RE: [REDACTED] - complaint

**\*\*\* This is an EXTERNAL email. BEWARE of Links or Attachments! \*\*\***

Brian,

Thanks for the detailed information. Since he filed a complaint with us you need to contact him with this information. Once you speak with him let me know and I can close the complaint.

Thank you.

[REDACTED]  
*KY Public Service Commission*  
*Consumer Services*  
*(502) 782-2574*

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**From:** Brian Frasure [REDACTED]  
**Sent:** Tuesday, October 18, 2022 3:24 PM  
**To:** [REDACTED] (PSC) [REDACTED]  
**Subject:** RE: [REDACTED] - complaint

[REDACTED]

The first complaint made here is that Clark transferred a balance from an account that was in [REDACTED] name to [REDACTED] account. This statement is correct. The account included [REDACTED] and [REDACTED] as authorized to conduct any business needed with Clark on the account. Clark transferred the balance to [REDACTED] account for a couple reasons:

1. On April 26, 2022 [REDACTED] called and stated to multiple staff members of Clark that his mother, [REDACTED], lived at the service location and he did not. He stated he wanted the account out of his name. At [REDACTED] request, Clark processed the disconnect service order and final billed the account. [REDACTED] called back on April 27, 2022 and wanted the account reinstated in his name. [REDACTED] stated he lives at the service address and his mother does not.
2. On April 27, 2022 Clark received an assistance voucher in [REDACTED] name for the account in [REDACTED] name. Upon research, Clark staff discovered a second assistance voucher that had been received in 2021 in [REDACTED] name on [REDACTED] account. This voucher was issued to pay the initial deposit required for service on the account.

The amount that was transferred was \$227.22. The transfer took place on April 27, 2022 and the balance was paid on April 27, 2022.

The statements in the complaint that Clark Energy employees have retaliated against [REDACTED] or [REDACTED] in any way, or hate them are false.

Regarding the disconnection complaint. [REDACTED] account was disconnected on August 30, 2022 for

breaking a payment arrangement he entered into at Clark's Frenchburg office location on August 22, 2022.

The terms of the arrangement [REDACTED] entered into required that he pay \$291.43 on August 26, 2022. The payment was not received, as was agreed to, but the disconnect did not occur until August 30, 2022. This allowed four additional days for the payment to be received. The \$291.43 balance was paid on August 30 after service was disconnected, and Clark restored the service the same day.

If you need any additional information, just let me know.

Thanks,

Brian

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**From:** [REDACTED] (PSC) [REDACTED]  
**Sent:** Thursday, October 13, 2022 7:59 AM  
**To:** Brian Frasure [REDACTED]  
**Subject:** [REDACTED] - complaint

**\*\*\* This is an EXTERNAL email. BEWARE of Links or Attachments! \*\*\***