

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC ALLEGED FAILURE OF DUKE	)	CASE NO.
ENERGY KENTUCKY, INC. TO COMPLY WITH	)	2024-00114
KRS 278.160(2)	)	

ORDER

This case was opened on June 24, 2024, to investigate whether Duke Energy Kentucky, Inc. (Duke Kentucky) failed to comply with KRS 278.160(2) in any additional instances similar to the facts in Case No. 2022-00289,<sup>1</sup> in which Duke Kentucky billed a customer incorrectly under the terms contained in its gas and electric Annual Budget Billing (ABB) tariff sheets. The case was also opened to determine whether civil penalties should be assessed to Duke Kentucky. Duke Kentucky responded to one data request from Commission Staff and on November 26, 2024 requested that the matter be submitted for decision based upon the existing evidentiary record.

LEGAL STANDARD

The Commission has exclusive jurisdiction over the rates and service of utilities and is charged with enforcing the provisions of KRS Chapter 278.<sup>2</sup> KRS 278.260 provides that the Commission, on its own motion or after receiving a complaint, may investigate whether “any regulation, measurement, practice or act affecting or relating to the service

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<sup>1</sup> Case No. 2022-00289, *Elizabeth L. Eichelberger v. Duke Energy Kentucky, Inc.* (Ky. PSC Apr. 19, 2024), Order.

<sup>2</sup> See KRS 278.040(1)-(2).

of the utility or any service in connection therewith is unreasonable.” KRS 278.990(1) states

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.

Although this statutory provision is not completely clear as to whether “willfully” applies to each clause, the Kentucky Court of Appeals expressed that willfulness was a prerequisite to assessment of a civil penalty.<sup>3</sup> Regardless, “willfully” clearly applies to utilities and their officers, agents, or employees violating specific statutes or regulations. This interpretation was supported by a recent Commission decision, which stated that “the Commission must also determine whether these violations are willful before any penalties may be assessed under KRS 278.990” and defined willful behavior as follows:

A willful violation has been defined as an act that is committed intentionally, not accidentally or involuntarily. It has also been stated that a willful violation does not necessarily and solely entail an intention to do wrong and inflict injury but may include conduct which reflects an indifference to its natural consequences. For civil and administrative proceedings, a willful violation has been explained as one which is intentional,

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<sup>3</sup> *Public Service Com'n v. Jackson County Rural Elec. Co-op., Inc.*, 50 S.W.3d 764, 769 (Ky. App. 2000).

knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law.<sup>4</sup>

### BACKGROUND

Duke Kentucky's gas tariff in effect at all relevant times sets out the following

Annual Budget Billing Plan procedures:

#### Budget Billing Plan Description:

Annual Plan:

- The Annual Plan provides 12 months of equal payments by using 12 months of customer's usage, dividing the usage by 12, and using the result to calculate the bill. Month 12 is a settle-up month between the billed amounts and customer bills based on actual usage[.]
- A bill message is sent after 3, 6, and 9 months with a new bill amount if the budget bill amounts compared to the actual bill amounts exceeds a Company set threshold.
- The budget bill amount is also changed as needed after the 12 month review.<sup>5</sup>

Duke Kentucky's electric tariff in effect at all relevant times sets out the following

Annual Budget Billing Plan procedures:

#### Budget Billing Plan Description:

Annual Plan:

- The Annual Plan provides 11 months of equal payments by using 12 months of customer's usage, dividing the usage by 11, and using the result to calculate the bill.
- Month 12 is a settle-up month between the billed amounts and customer bills based on actual usage.
- A bill message is sent after 6 months with a suggested new bill amount if the budget bill amounts compared to the actual bill amounts exceeds a Company set threshold; however, Customer must contact Company to change the amount.

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<sup>4</sup> Case No. 2021-00339, *Electronic Alleged Failure of North Manchester Water Association, Inc., Its Officers, Steve Davis, Bill Hurd, Carl Gregory Hoskins, Bobby Wolfe, Henry Smith, Ted Woods, Carl David Crawford, and Its Manager, Jerry Rice, to Comply with KRS 278.140, KRS 278.230, 807 KAR 5:006, Sec. 4, and KRS 278.990* (Ky. PSC Mar. 7, 2023), Order at 6 (citations omitted).

<sup>5</sup> Ky. P.S.C. Gas No. 2, Seventh Revised Sheet No. 25 (issued Oct. 27, 2023), effective Oct. 13, 2023. This language was in place beginning with the Fifth version of Sheet No. 25, effective January 4, 2022, and ending with Duke Kentucky filing Ky. P.S.C. Gas No. 2, Eighth Revised Sheet No. 25 (issued Sept. 13, 2024), effective Oct. 14, 2024.

- The budget bill amount is changed as needed after the 12 month review.<sup>6</sup>

In Case No. 2022-00289, the Commission found for complainant that Duke Kentucky had violated KRS 278.160(2), which states that a “utility may not charge, demand, collect, or receive from any person greater or less compensation than what is filed in that utility’s applicable tariff” as follows:<sup>7</sup> (1) Duke Kentucky applied gas ABB changes prior to the annual settle-up month, resulting in customers not having “12 months of equal payments” as intended and as promised in bill language;<sup>8</sup> (2) Duke Kentucky also changed gas and electric ABB from being based on average usage multiplied by rate in effect at the time of the settle-up to calculating based on average bills; (3) Duke Kentucky calculated electric ABB by dividing usage by 12 instead of 11; and (4) Duke Kentucky changed electric ABB amounts unilaterally.

Duke Kentucky argued that violation (1) should not be considered willful because it represented a good-faith interpretation of how to apply new tariff provisions to existing ABB plans.<sup>9</sup> Regarding violation (2), Duke Kentucky stated that it inadvertently made an error in responding to data requests in Case No. 2022-00289,<sup>10</sup> and actually did generate

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<sup>6</sup> Ky. P.S.C. Electric No. 2, Sixth Revised Sheet No. 25 (issued Mar. 18, 2022), effective Apr. 18, 2023. This language was in place beginning with Third version of Sheet No. 25, effective April 14, 2018 and ending with Duke Kentucky filing Ky. P.S.C. Electric No. 2, Eighth Revised Sheet No. 25 (issued Sept. 13, 2024), effective Oct. 14, 2024.

<sup>7</sup> Case No. 2022-00289, Apr. 19, 2024 Order at 5-9.

<sup>8</sup> Case No. 2022-00289, Duke Kentucky’s Response to Commission Staff’s Second Request for Information (filed Feb. 10, 2023), Item 1, Attachment at 18. Duke Kentucky’s bills to Ms. Eichelberger stated “[y]our Annual Budget Billing Plan keeps your monthly charge steady throughout the year, even as your usage goes up or down. The gas ABB tariff states the ABB plan “provides 11 months of equal payments.”

<sup>9</sup> Duke Kentucky’s Response (filed July 15, 2024) at 7.

<sup>10</sup> See Case No. 2022-00289, Duke Kentucky’s Supplemental Response to Commission Staff’s Third Request for Information (filed Aug. 3, 2023), Item 3, Attachment.

ABB bill amounts based on usage multiplied by rate in effect at the time of the settle-up.<sup>11</sup> Violations (3) and (4) were caused by Duke Kentucky intending to file a revised electric ABB tariff at the same time as the revised gas ABB tariff, failing to do so, but administering the electric ABB tariff under the gas ABB tariff language. In its response to the opening Order in the present case, Duke Kentucky stated that this was an inadvertent error but acknowledged the error and stated that it would “remedy with a tariff update, since its electric base rate case has concluded.”<sup>12</sup> On September 13, 2024, Duke Kentucky filed revision to its gas and electric ABB tariffs, with the ABB language matching between the two and quarterly changes removed.<sup>13</sup>

Duke Kentucky supplied the following information in data request responses, updated as of November 26, 2024:<sup>14</sup> 637 active customers were affected by changes to gas ABB made prior to the settle-up month. Since Duke Kentucky claimed it incorrectly stated in Case No. 2022-00289 that it had used average bills to determine gas and electric ABB, no customers were affected: 7,123 active customers were affected by using the incorrect divisor for electric ABB; 3,509 active customers were affected by changes to

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<sup>11</sup> Duke Kentucky’s Response at 4-5.

<sup>12</sup> Duke Kentucky’s Response at 6.

<sup>13</sup> Ky. P.S.C. Gas No. 2, Eighth Revised Sheet No. 25 (issued Sept. 13, 2024), effective Oct. 14, 2024; Ky. P.S.C. Electric No. 2, Eighth Revised Sheet No. 25 (issued Sept. 13, 2024), effective Oct. 14, 2024.

<sup>14</sup> Duke Kentucky’s Second Supplemental Response to Commission Staff’s First Request for Information (filed Nov. 26, 2024), Item 3. Since Duke Kentucky had not filed a new electric ABB tariff sheet at the time the opening Order was issued, Commission Staff asked Duke Kentucky to supplement the record by updating the number of customers affected by each violation so the record would be updated to reflect any customers who might be subsequently billed incorrectly. Although the data requests did not limit the request for numbers of affected customers to active customers, Duke Kentucky only supplied numbers of active customers.

electric ABB made prior to the settle-up month. All of these customers were also affected by the electric ABB divisor issue.<sup>15</sup>

### DISCUSSION AND FINDINGS

Regarding violation (1), the Commission finds that Duke Kentucky violated KRS 278.160(2) by applying gas ABB tariff changes prior to the annual settle-up month at least 638 times.<sup>16</sup> However, the Commission agrees with Duke Kentucky that these violations should not be considered willful because it represented a good-faith interpretation of how to apply new tariff provisions to existing ABB plans. Therefore, no civil penalty should be assessed for these violations.

The Commission finds that based on Duke Kentucky's explanation regarding violation (2) that it incorrectly reported the way it had calculated ABB bills in Case No. 2022-00289, Duke Kentucky did not use average bills to calculate ABB bills in violation of tariff.

Regarding violations (3) and (4), the Commission finds that Duke Kentucky violated KRS 278.160(2) by using the incorrect divisor for electric ABB at least 7,767 times,<sup>17</sup> and by changing electric ABB amounts unilaterally before the settle-up month at least 4,907 times.<sup>18</sup> Duke Kentucky indicated that all of the customers affected by changing electric ABB amounts unilaterally were also charged using the incorrect

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<sup>15</sup> Duke Kentucky's Response to Commission Staff's First Request for Information (Staff's First Request) (filed Aug. 23, 2024), Item 2.

<sup>16</sup> Duke Kentucky's Response at 5. More customers may have been affected since Duke Kentucky only included active customers in its responses.

<sup>17</sup> Duke Kentucky's Response at 6. More customers may have been affected since Duke Kentucky only included active customers in its responses.

<sup>18</sup> Duke Kentucky's Response at 6. More customers may have been affected since Duke Kentucky only included active customers in its responses.

divisor.<sup>19</sup> Since a violation of KRS 278.160(2) in this context consists of billing a customer the wrong amount, committing two errors on the same bill only results in a single violation. Since a violation occurs for each improperly calculated bill, each of the 7,767 customers' bills issued can be considered a separate violation. However, the time necessary for Duke Kentucky and Commission Staff to review the number of actual bills is unnecessary to support the recommended civil penalty set forth below. The Commission finds that these violations were willful because Duke Kentucky disregarded the clear language of the tariff. Duke Kentucky also did not change the way it calculated electric ABB after acknowledging it was aware of the discrepancy.<sup>20</sup> The Commission may assess civil penalties of up to \$2,500 per violation pursuant to KRS 278.990, which for 7,767 violations would allow a maximum of \$19,417,500. The Commission previously assessed a \$2,500 penalty against Duke Kentucky for a single billing error.<sup>21</sup> The Commission shall assess a civil penalty of \$112,000 upon Duke Kentucky for its violations of KRS 278.160(2). This figure was calculated using approximately the same assessment per billing violation used by the Public Utilities Commission of Ohio assessing penalties for Duke Kentucky affiliate Duke Energy Ohio, Inc. arising from April 2023 billing violations.<sup>22</sup>

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<sup>19</sup> Duke Kentucky's Response to Staff's First Request, Item 2.

<sup>20</sup> Duke Kentucky's Response at 6; Duke Kentucky's Response to Staff's First Request, Item 3(b).

<sup>21</sup> Case No. 2022-00391, *Electronic Alleged Failure of Duke Energy Kentucky, Inc. to Comply with KRS 278.466 and 807 KAR 5:006, Section 7* (Ky. PSC Apr. 19, 2024), Order at 8.

<sup>22</sup> Case No. 24-297-GE-UNC, *In the Matter of the Commission's Consideration of a Settlement Agreement Between Duke Energy Ohio, Inc. and the Commission's Staff*. (Ohio PUC, Aug. 24, 2024), Order at 4. The civil penalty was the result of a settlement which as of the issuance of the present Order is not final.

IT IS THEREFORE ORDERED that:

1. Duke Kentucky violated KRS 278.160(2) by applying gas ABB tariff changes prior to the annual settle-up month at least 638 times; however, no civil penalty is assessed because Duke Kentucky's actions were not willful.

2. Duke Kentucky did not use average bills to calculate ABB bills in violation of tariff.

3. Duke Kentucky violated KRS 278.160(2) by using the incorrect divisor for electric ABB at least 7,767 times, and by changing electric ABB amounts unilaterally before the settle-up month at least 4,907 times, constituting a total of 7,767 separate violations of KRS 278.160(2). These violations constitute willful conduct by Duke Kentucky.

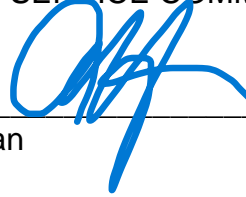
4. Duke Kentucky is assessed a civil penalty of \$112,000 pursuant to KRS 278.990(1) for the violations set out in paragraph 3 above.


5. Duke Kentucky shall pay the assessed \$112,000 civil penalty within 30 days of the service of this Order. Payment shall be made by certified check or money order made payable to Kentucky State Treasurer and shall be mailed or delivered to the Office of General Counsel, Kentucky Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky, 40602-0615.

6. This case will be closed and removed from the Commission's docket.



PUBLIC SERVICE COMMISSION

  
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Chairman

  
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Commissioner

  
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Commissioner

ATTEST:

  
\_\_\_\_\_  
Executive Director

ENTERED  
FEB 07 2025 AH  
KENTUCKY PUBLIC  
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