

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Complaint Against)
Kansas City Power and Light Company by) Docket No. 20-KCPE-107-COM
Kevin and Laura Fitzpatrick)

MOTION TO DISMISS OF EVERGY METRO, INC.

Evergy Metro, Inc.¹ (“Evergy Kansas Metro” or “EKM”) submits the following Motion to Dismiss (Motion) the Complaint filed by Mr. and Mrs. Fitzpatrick. In support of its Motion, Evergy Kansas Metro states as follows:

I. INTRODUCTION

1. On or about September 4, 2019, Mr. and Mrs. Fitzpatrick filed their Complaint in this matter. Evergy Kansas Metro was served with the Complaint on October 15, 2019.

2. Mr. and Mrs. Fitzpatrick contend that they experienced flickering lights and power surges several times over the past year that they reported to Evergy Kansas Metro and that they lost the food in their refrigerators and freezers during a power outage on April 21, 2019. They ask that the Commission require Evergy Kansas Metro to pay their claim for lost food and pay a penalty.

3. None of the allegations made by Mr. and Mrs. Fitzpatrick constitute a violation of any law, regulation, or Evergy Kansas Metro’s Electric Tariffs (Tariffs). In fact, Evergy Kansas Metro’s Tariffs make it clear that Evergy Kansas Metro is not liable to customers for loss or damage that occurs from interruptions in electric service or from damage caused by the installation, maintenance or replacement of Evergy Kansas Metro's facilities used to serve

¹ Evergy Metro, Inc. is formerly known as Kansas City Power & Light Company. See Docket No. 20-KCPE-122-CCN.

customer unless such damage is the result of Evergy Kansas Metro's willful misconduct or gross negligence.

4. Section 7.06 of the General Rules and Regulations Applying to Electric Service ("General Rules and Regulations") of Evergy Kansas Metro's Tariffs provides:

The Company will use reasonable diligence to supply continuous electric service to the Customer but does not guarantee the supply of electric service against irregularities and interruptions. Except where due to the Company's willful misconduct or gross negligence, the Company shall not be considered in default of its service agreement and shall not be liable in negligence or otherwise for any claims for loss, expense or damage (including indirect, economic, special or consequential damage) regardless of cause.

5. Section 7.12 of the General Rules and Regulations provides:

Except where due to the Company's willful misconduct or gross negligence, the Company shall not be liable in negligence or otherwise for any claims for loss, expense or damage (including indirect, economic, special or consequential damage) on account of fluctuations, interruption in, or curtailment of electric service; or for any delivery delay, breakdown; or failure of or damage to facilities; or any electric disturbance originating on or transmitted through electric systems with which the Company's system is interconnected, act of God, or public enemy, strike, or other labor disturbance involving the Company or the Customer, civil, military or governmental authority.

6. K.A.R. 82-1-220(b)(1) of the Commission's regulations states that a formal complaint must:

Fully and completely advise each respondent and the commission as to the provisions of law or the regulations or orders of the commission that have been or are being violated by the acts or omissions complained of, or that will be violated by a continuance of acts or omissions.

7. Mr. and Mrs. Fitzpatrick have not met the requirements of the above-cited regulation. They have not demonstrated that Evergy Kansas Metro has violated any provision of any law, regulation, or order. Additionally, even if all of the facts stated by Mr. and Mrs.

Fitzpatrick in their Complaint are assumed to be true, Evergy Kansas Metro has not violated any provision of its Tariffs. Mr. and Mrs. Fitzpatrick do not contend that Evergy Kansas Metro acted willfully or with gross negligence in a way that caused the alleged damage. Instead, they simply state that they lost food from their freezers and refrigerators due to an outage and that they experienced several instances of flickering lights and power surges. However, Evergy Kansas Metro's Tariff makes it clear that Evergy Kansas Metro is not liable for damage occurring as a result of its operations, including fluctuations and interruptions in service, as long as it does not act willfully or with gross negligence.

II. RESPONSE TO FACTUAL ALLEGATIONS

8. Mr. and Mrs. Fitzpatrick allege that they experienced flickering lights and power surges several times over the past year that they reported to Evergy Kansas Metro and that they lost the food in their refrigerators and freezers during a power outage on April 21, 2019. They ask that the Commission require Evergy Kansas Metro to pay their claim for lost food and pay a penalty.

9. Evergy Kansas Central's records demonstrate the following:

- 6/9/18 – EKM records show an outage caused by vegetation.
- 8/5/18 – EKM records show an outage caused by vegetation.
- 1/12/19 – EKM records show an outage caused by vegetation.
- 1/17/19 – An outage was reported via EKM's automated system. EKM pinged the meter, which showed it was active. The ticket was cancelled because there were no other customers out in the area.
- 2/14/19 – An outage was reported via EKM's automated system. EKM pinged the meter, which showed it was active. The ticket was cancelled because there were no other customers out in the area.

- 2/15/19 – An outage was reported via EKM’s automated system. EKM pinged the meter, which showed it was active. The ticket was cancelled because there were no other customers out in the area.
- 4/8/19 – An outage was reported via EKM’s automated system. EKM pinged the meter, which showed it was active. The ticket was cancelled because there were no other customers out in the area.
- 4/9/19 – An outage was reported via EKM’s automated system. EKM pinged the meter, which showed it was active. The ticket was cancelled because there were no other customers out in the area.
- 4/17/19 – An outage was reported via EKM’s automated system. EKM pinged the meter, which showed it was active. The ticket was cancelled because there were no other customers out in the area.
- 4/24/19 – Laura Fitzpatrick reported flickering lights, so an outage ticket was issued. EKM found “bad hot leg connector at pole.” The issue was corrected, and the agent noted that he discussed the issue with the customer.
- 4/25/19 – Mrs. Fitzpatrick called to report that the food in her refrigerator and freezer spoiled due to outage while she was out of town.

10. Evergy Kansas Metro’s records show that Mr. and Mrs. Fitzpatrick called in several power outages via the automated system, but never actually spoke to anyone. In each instance the service operator pinged the meter and found that they had active service up to the meter. There were no other customers in the area reporting an outage, so Evergy Kansas Metro voided the ticket, which is standard procedure. Unfortunately, customers are unable to report blinking lights via the automated system, so they would have had to have spoken to a customer service representative (“CSR”) to have the proper ticket issued. CSRs are available 24 hours per day, so they could have called any time and the issue would have been corrected.

III. THE LIMITATION OF LIABILITY PROVISIONS OF EVERGY KANSAS METRO'S TARIFF ARE ENFORCEABLE AND APPLICABLE TO BAR MR. AND MRS. FITZPATRICK'S CLAIM

11. As indicated above, Sections 7.06 and 7.12 of the Rules and Regulations of Evergy Kansas Metro's Tariff indicates that Evergy Kansas Metro is not responsible for the damage claimed by Mr. and Mrs. Fitzpatrick unless they demonstrate that Evergy Kansas Metro's conduct caused the damage and was willful or constituted gross negligence.

12. Mr. and Mrs. Fitzpatrick make no allegation in their Complaint that Evergy Kansas Metro acted with intent to cause damage or with gross negligence, let alone offer any evidence that would support such a claim. Evergy Kansas Metro would have had no way of knowing that Mr. and Mrs. Fitzpatrick's lights were flickering or that they were experiencing power surges unless they had informed a customer service agent of the conditions they were experiencing. Evergy Kansas Metro followed its standard procedure of checking the meter to confirm it was operating when outages were reporting via the automated system.

13. Furthermore, the provisions of Evergy Kansas Metro's tariff related to responsibility for damages are consistent with Kansas law and have been upheld by the Kansas Supreme Court and Kansas Court of Appeals.

14. Evergy Kansas Metro's Tariff contains "those terms and conditions which govern the relationship between a utility and its customers. Tariffs may be, and usually are, the handiwork of the regulated utility but when duly filed with the KCC they generally bind both the utility and the customer." *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 765 (1999); *see also Shehi v. Southwestern Bell Telephone Co.*, 382 F.2d 627, 629 (10th Cir. 1967) ("Under Kansas law the telephone company is compelled to file with the State Corporation Commission certain tariffs which set forth the terms and conditions of the

relationship between the company and its customers . . . A tariff so filed is more than a mere contract – it is the Law”).

15. Clauses contained in a Tariff limiting a utility’s liability for negligence are valid and enforceable in Kansas. In *Danisco*, the Kansas Supreme Court upheld the limitation of liability contained in Kansas City Power & Light Company’s (KCPL) Tariff. 267 Kan. 760. KCPL’s Tariff purported to eliminate its liability for all acts related to the provision of service to a customer, including negligent, wanton, and willful acts. The Court determined that the portion of the clause related to willful and wanton conduct was unreasonable but upheld the limitation of liability for negligence. *Id.* The Court explained that “reasonable limitations of liability provided for in a tariff are authorized in Kansas as an integral part of the rate-making process . . . The responsibility for insuring reasonable rates and thus passing upon the propriety of liability limitations within approved tariffs lies with the KCC.” *Id.* at 767-768. The “theory underlying the enforcement of liability limitations is that because a public utility is strictly regulated its liability should be defined and limited so that it may be able to provide service at reasonable rates.” *Id.* at 769. The Court concluded that:

A public utili[ty’s] liability exposure has a direct effect on its rates, and this court, as well as the majority of jurisdictions addressing the question of such a liability limitation, has concluded that it is reasonable to allow some limitation on liability such as that for ordinary negligence in connection with the delivery of the services.

Id. at 771.

16. In *Midwest Energy, Inc. v. Stoidi 2, Inc.*, the Court of Appeals addressed the question of whether “the liability limitation provisions of the KCC tariff prevent the defendant from recovering damages for plaintiff’s ordinary negligence in maintaining the proper electrical connections on the defendant’s lease property.” 85 P.3d 228, 2004 WL 421990, at *2 (Kan. Ct.

App. 2004). The Court concluded that “the liability limitation provisions within the plaintiff’s tariff insulate the plaintiff from ordinary negligence of this kind.” *Id.* at *3.

17. A number of courts in other states have found clauses in a utility’s tariff that limit the utility’s liability for negligence to be valid and fully enforceable. *See, e.g., Computer Tool & Engineering, Inc. v. Northern States Power Co.*, 453 N.W.2d 569 (Minn. Ct. App. 1990) (“liability limitations contained in the rate tariff of a public utility are binding on rate payers regardless of knowledge or assent because the rate, which includes the limitation of liability, is the only lawfully established rate”); *Southwestern Electric Power Co. v. Grant*, 73 S.W.3d 211 (Tx. 2002) (“a regulatory agency’s rate-making authority authorizes it to approve a tariff’s provision limiting liability, because a limitation on liability is an inherent part of the rate the utility charges for its services . . . because regulatory agencies have this authority, we have applied the filed-rate doctrine to hold that a tariff provision that limits liability for economic damages arising from a utility’s negligence is reasonable”).

18. Mr. and Mrs. Fitzpatrick have provided no basis for the Commission to disregard the liability provisions of Evergy Kansas Metro’s Tariff or this well-established case law.

19. Therefore, the Complaint should be dismissed for failure to state a claim.

WHEREFORE, Evergy Kansas Metro having fully responded to the Complaint respectfully requests that the Commission dismiss the Complaint for failure to state a claim and for such further relief as may be appropriate.

Respectfully submitted,

/s/ Cathryn J. Dinges

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2019, the foregoing **Motion to Dismiss** was electronically filed with the Kansas Corporation Commission and electronically served on all parties on the service list as follows:

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