BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Complaint Against City of Garden City, Kansas, Respondent, for an Order Declaring that Garden City is Illegally Servicing Conestoga Energy Partners, LLC, in Wheatland Electric Cooperative, Inc.'s Certified Service Territory, and an Order to Cease, by Wheatland Electric Cooperative, Inc., Complainant.	)	Docket No. 17-GDCE-370-COM

ANSWER OF THE CITY OF GARDEN CITY TO THE COMPLAINT BY WHEATLAND ELECTRIC COOPERATIVE, INC.

COMES NOW, the City of Garden City, Kansas ("Garden City" or "Respondent") and, pursuant to K.A.R. 82-1-220(c), files a written answer to the complaint of Wheatland Electric Cooperative, Inc. ("Wheatland" or "Complainant").

I. Introduction

1. On February 9, 2017, Wheatland filed a complaint against Garden City alleging that Garden City is illegally serving a retail electric customer in Wheatland's certified territory (the "Complaint"). Garden City disputes this allegation, as Wheatland ceded the territory at issue to Garden City eleven years ago pursuant to an unconditional oral agreement that must be enforced by the Kansas Corporation Commission ("Commission").

2. The retail customer at issue is Conestoga Energy Partners, LLC ("Conestoga"), which operates an ethanol plant located at 3002 E. Highway 50, Garden City, Kansas. The ethanol plant is within three miles of the corporate city limits of Garden City. Garden City provides service to Conestoga pursuant to an Electric Service Agreement ("ESA") dated June 16, 2006. Garden City has incurred several hundred thousand dollars of expenses to serve Conestoga over the past eleven years, in reliance on its agreement with Wheatland.

3. The Commission has jurisdiction over this matter pursuant to the Retail Electric Suppliers Act ("RESA"), or more precisely, K.S.A. 66-1,174, which states in pertinent part:

> A municipal retail electric supplier shall be subject to regulation by the commission in matters relating to the right to serve in the territory within three miles of the corporate city boundary, except that the commission shall have no jurisdiction concerning such retail electric supplier within its corporate limits.

The Commission does not have jurisdiction over the rates charged by Garden City pursuant to the ESA because Garden City is not operating as a "public utility," as that term is defined by K.S.A. 66-104. That statute states that the term "public utility" shall not apply to "a municipally owned or operated utility, or portion thereof, located within the corporate limits of such municipality or located outside of such corporate limits *but within three miles thereof* except as provided in K.S.A. 66-131a, and amendments thereto." K.S.A. 66-104(c) (emphasis added).[1] Additionally, a certificate of convenience and necessity is required only for that portion of a municipally-owned utility defined as a "public utility" by K.S.A. 66-104. K.S.A. 66-131(a). Because Conestoga is within three miles of the Garden City corporate limits, Garden City is not required to obtain a certificate to serve Conestoga.

4. Although Garden City is not required to file for a certificate or obtain rate approval in order to serve Conestoga, the City acknowledges that the Commission has jurisdiction over "matters relating to the right to serve in the territory within three miles of the corporate city boundary." For reasons explained below, the Commission should find that Garden City has the right to serve the territory at issue.

II. History

5. In or around 2006, when Conestoga was constructing its ethanol plant, Wheatland and Garden City determined that it would be less costly and more efficient for Garden City to

[1] K.S.A. 66-131a was an energy efficiency statute that has been repealed.

serve Conestoga because Garden City's electric facilities were closer and easier to expand to serve the ethanol plant than Wheatland's facilities. Wheatland and Garden City entered into an oral agreement by which Garden City would make the capital investments required to serve Conestoga and Wheatland would cede the service territory necessary for Garden City to do so (the "Agreement"). The Agreement was not conditioned in any way, and in particular, there was no condition that Garden City must remain a member of Wheatland in order to continue serving the ethanol plant. Oral agreements regarding service territory are not uncommon and go both ways (for example, Wheatland is currently serving customers within the Garden City corporate limits without a franchise and without a written agreement to modify Garden City's service territory).[2]

6. On June 16, 2006, Garden City and Conestoga entered into the ESA. The ESA provides that the City will sell and deliver to Conestoga, and Conestoga will receive from the City, electric energy for Conestoga's ethanol plant, up to 5,000 kilowatts. The ESA also provides that Garden City will construct a 34,500 volt to 12,470 volt substation close to the premises of Conestoga's ethanol plant to provide electric energy, contributing a nominal 5,000 kilovolt-amp substation transformer and up to $350,000 towards the substation. Garden City also agreed to provide metering for Conestoga's needs at the 12,470 volt side of the substation. Garden City was required to purchase property from the State of Kansas in the amount of $8,160.00 to construct the necessary substation. This purchase was authorized by the City Commission on October 24, 2006.

[2] Garden City acknowledges that such oral agreements are contrary to K.S.A. 66-1,175. As discussed in more detail below, Garden City and Wheatland are equally culpable for the failure to file such agreements with the Commission. Going forward, Garden City commits to filing all territorial agreements with the Commission pursuant to K.S.A. 66-1,175.

7. Garden City constructed the substation and related facilities and began serving construction power to the ethanol plant in June, 2006. Garden City spent $336,109.74 in order to construct the substation to serve the ethanol plant. Garden City also spent $309,850.08 for the substation transformer replacement when the original unit failed on February 17, 2010 and $114,362.59 in December, 2011 for additional substation modifications. Garden City also purchased a 34.5 kV padmount transformer from Wheatland for $6,375.00 in June, 2006. The permanent office facility transformer was purchased in June, 2007 for $8,896.86. Garden City has continuously served Conestoga's electrical needs for the past eleven years and continues to do so today.

8. Prior to December 31, 2013, Garden City was a member of Wheatland and obtained wholesale power from Wheatland. After conducting a competitive bidding process, in which Wheatland was invited to participate, Garden City determined that its best interests would be served by terminating its membership with Wheatland and activating the services provided by Kansas Municipal Energy Agency ("KMEA"), of which Garden City had been a member since November 4, 2001.

9. The first time that Wheatland attempted to terminate its Agreement with Garden City was March 30, 2015—nine years after the Agreement took effect and fifteen months after Garden City left Wheatland. Wheatland's Complaint wasn't filed at the Commission until eleven years after the Agreement took effect and over three years after Garden City left Wheatland.

III. Answer

10. In response to Wheatland's "Factual Allegations," Garden City responds as follows:

a. Garden City does not dispute the allegations contained in Paragraphs 3-6.

b. Garden City does not dispute the allegation contained in Paragraph 7, but notes that Commission approval of the ESA is not required.

c. Garden City denies the allegations in Paragraphs 8-9, as Wheatland ceded the service territory containing Conestoga to Garden City pursuant to the Agreement.

d. Garden City does not dispute the allegation contained in Paragraph 10.

e. In response to the allegation in Paragraph 11, Garden City denies that the Agreement was merely an "understanding" and denies any suggestion that the Agreement is no longer valid, as further explained below.

f. In response to the allegation in Paragraph 12, Garden City does not dispute that it ceased being a member of Wheatland in 2013, but denies that Wheatland has any authority to terminate the Agreement, as further explained below.

g. Garden City does not dispute the allegations contained in Paragraphs 13-14.

11. The Commission should enforce the oral agreement between Garden City and Wheatland for three major reasons: (1) the doctrine of laches bars Wheatland's Complaint because Garden City took detrimental actions in reliance upon the Agreement; (2) Wheatland is equally, if not more so, in violation of filing requirements; and (3) continued service by Garden City is in the public interest.

a. The doctrine of laches applies because Garden City took detrimental actions in reliance upon its agreement with Wheatland

12. Wheatland's claim that Garden City is illegally serving a retail customer in its service territory is a decade too late. Wheatland's delay is contrary to public policy and a common sense understanding of justice. Courts have recognized this common sense understanding of justice through the doctrine of laches. The Kansas Supreme Court describes the doctrine of laches as follows:

> If a party sleeps on his rights or unnecessarily delays action until the rights of others have intervened, or conditions have been changed so that it would be inequitable to enforce the right asserted, relief will be denied on the ground of laches. If the plaintiff stands by and remains passive while the adverse party incurs risks, enters into obligations and makes large expenditures, so that by reason of the changed conditions disadvantage and great loss will result to the adverse party which might have been avoided if the plaintiff had asserted his claim with reasonable promptitude, there are grounds for declining to grant the relief. *Dutoit v. Board of County Commissioners of Johnson County*, 233 Kan. 995, 1001-02 (1983) (quoting *Kirsch v. City of Abilene*, 120 Kan. 749, 751-52 (1926)).

In this case, the Complainant slept on its rights and remained passive while Garden City incurred risk, entered into obligations and made large expenditures.

13. The facts of this case are remarkably similar to a Kansas Supreme Court case that applied the doctrine of laches to the creation and enlargement of a sewer district. In *Dutoit v. Board of County Commissioners of Johnson County* (*Dutoit*), property owners challenged a special tax assessment related to a sewer district, claiming that statutory notice procedures were not followed by the Board of County Commissioners of Johnson County (the "County") when it was considering expansion of the sewer district. *Dutoit*, 233 Kan. at 996-97. The sewer district was initially created in June, 1978 and expanded by resolution of the County in July, 1979, after notice had been mailed to the effected property owners and published in a local newspaper. *Id.* at 996. The law suit was filed in January, 1982, three and a half years after the sewer district was created and two and a half years after expansion. *Id.* at 997. The Supreme Court applied the doctrine of laches, noting the passage of time and the County's reliance on its resolution when it constructed and installed the sewer lines. *Id.* at 1001-02. Thus, the doctrine of laches may prohibit punishment of an entity for violating a statute, when that violation has gone unchallenged for a significant period of time.

14. Garden City's detrimental reliance on its Agreement with Wheatland is similar to Johnson County's detrimental reliance on its resolution to expand the sewer district. Garden City, in reliance on the Agreement, spent $344,269.74 constructing a substation and another $15,271.86 on transformers to serve Conestoga. Over eleven years, Garden City has also spent at least $424,212.67 on maintenance of the facilities serving Conestoga. Just as in *Dutoit*, the facilities have already been constructed and installed. Additionally, the passage of time in this case is longer than the passage of time in *Dutoit* (eleven years here, compared to two and a half years in *Dutoit*). Finally—but perhaps most notably—Wheatland actually *agreed* to the transfer of territory at issue in this case, in contrast to property owners in *Dutoit* who never explicitly agreed to become members of the sewer district. Accordingly, the equities weigh even more heavily in favor of Garden City than they did for Johnson County.

b. Wheatland is equally, if not more so, in violation of filing requirements

15. Wheatland's Complaint implies that Garden City has violated K.S.A. 66-131, 66-136, and 66-1,175. However, of those statutes, Garden City is only subject to K.S.A. 66-1,175, which states:

> Notwithstanding the exclusive right of retail electric suppliers to provide service within the certified territories established pursuant to this act, a retail electric supplier may enter into an agreement with another retail electric supplier for the establishment of boundaries between territories other than the boundaries established pursuant to this act or providing electric service to electric consuming facilities as between such retail electric suppliers. Any agreement entered into pursuant to this section shall be subject to approval by the corporation commission. If so approved, the commission shall issue certificates accordingly.

Both Garden City and Wheatland are "retail electric suppliers," as defined by RESA. Garden City and Wheatland "entered into an agreement for the establishment of boundaries between territories other than the boundaries established pursuant to [RESA]" as contemplated by K.S.A.

66-1,175. Agreements under K.S.A. 66-1,175 are not time-limited or otherwise conditioned. A transfer of territory under K.S.A. 66-1,175 continues in perpetuity.

16. Garden City acknowledges that its Agreement with Wheatland was never filed with or approved by the Commission. Garden City regrets this violation of K.S.A. 66-1,175 and going forward, commits to filing all territorial agreements with the Commission. However, the statute does not indicate which party is responsible for filing territorial agreements,[3] so both Garden City and Wheatland are equally at fault for the failure to file. Despite its unclean hands, Wheatland asks the Commission to disproportionately punish Garden City and reward Wheatland for failure to file the Agreement. Once again, this is contrary to public policy and a common sense understanding of justice. Additionally, as recognized in the *Dutoit* case, it is inappropriate to punish a party for violation of a statute, when that violation has gone unchallenged for an extended period of time and parties have made investments accordingly.

17. As discussed above, Garden City is not a "public utility" as that term is defined by K.S.A. 66-104. K.S.A. 66-131 requires public utilities to obtain a certificate of convenience and necessity before transacting the business of a public utility in the State of Kansas. However, the statute explicitly exempts that portion of municipally-owned utilities that fall outside the definition of public utility under K.S.A. 66-104.

18. K.S.A. 66-136 requires any "public utility governed by the provisions of this act" to obtain Commission approval before assigning, transferring or leasing a franchise or certificate. The statute also requires such public utilities to obtain approval of contracts and agreements "with reference to or affecting such franchise or certificate of convenience and

[3] It is also worth noting that the statute does not put a time limit on approval of territorial agreements, but merely makes them "subject to approval." Therefore, the Commission may approve the Agreement in this case, despite the passage of time.

necessity or right thereunder." Garden City is not a public utility governed by the provisions of K.S.A. 66-131 or 66-136.

19. Wheatland, on the other hand, is a "public utility" for the purposes of K.S.A. 66-131 and 66-136.[4] Therefore, Wheatland is potentially in violation of multiple statutes, while Garden City has only violated K.S.A. 66-1,175 to the same extent as Wheatland.

c. Continued service by Garden City is in the public interest

20. K.S.A. 66-1,171 requires the Commission to consider the public interest, which includes avoiding wasteful duplication of facilities, avoiding unnecessary encumbrance of the landscape, preventing waste of materials and natural resources, facilitating the public convenience and necessity, and minimizing disputes. The Agreement between Garden City and Wheatland furthers those objectives. In fact, the initial motivation for the contract was because Garden City's electric facilities were closer to Conestoga and could be more easily expanded, while service by Wheatland would have resulted in wasteful duplication, unnecessary encumbrance of the landscape, waste, and inconvenience.

21. Maintaining Garden City's service to Conestoga also satisfies the above policies because Garden City already has facilities in place. If Wheatland is awarded the right to serve Conestoga, Wheatland would be required to construct new facilities, thereby causing waste and encumbering the landscape, while Garden City would be forced to remove and reconfigure its facilities, creating more waste and duplication. Moreover, Garden City has been providing reliable and efficient service to Conestoga for eleven years, with established billing and payment routines. It would be inconvenient and unnecessary to require Conestoga to switch providers.

[4] Although cooperatives can opt-out of jurisdiction under K.S.A. 66-104d, subsection (f) of that statute maintains the Commission's jurisdiction with regard to certificates and service territory.

IV. Conclusion

22. For the reasons stated above, Garden City respectfully requests that the Commission dismiss the Complaint, approve and enforce the transfer of territory necessary to serve Conestoga from Wheatland to Garden City, and take any other action that the Commission deems necessary and reasonable to effectuate the forgoing.

Respectfully Submitted,

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ATTORNEYS FOR THE CITY OF GARDEN CITY, KANSAS

VERIFICATION

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

Frank A. Caro, Jr., being first duly sworn upon his oath, deposes and states that he is Counsel for the City of Garden City, Kansas, that he has read and is familiar with the foregoing, and that the statements therein are true to the best of his knowledge, information and belief.

Frank A. Caro, Jr.

Subscribed and sworn to before me this 28th day of March, 2017.

ANDREA J. CHILTON
Notary Public - Notary Seal
STATE OF MISSOURI
Jackson County
My Commission Expires: Nov 14, 2017
Commission # 13404320

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was __X__ mailed, postage prepaid, ___X_____ e-mailed this 28th day of March 2017, to:

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