

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 Rules 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. Mr. Worthey has not demonstrated that the interruption in service that led to the alleged damage to his personal property was caused by any gross negligence or willful conduct by Evergy Kansas Metro. In fact, in this instance, the facts demonstrate that Evergy Kansas Metro exercised reasonable care in maintaining the poles in the area and that it was likely a lightening strike that caused the damage that Mr. Worthey complains of.

7. Kansas Courts have defined wanton conduct (also known as gross negligence) as "an act performed with a realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act. For an act to be wanton, the actor must realize the imminence of danger and recklessly disregard and be indifferent to the consequences of his or her act." *Reeves v. Carlson*, 266 Kan. 310, 313-314 (1998). For an act to

be willful, “there must be a design, purpose, or intent to do wrong or to cause the injury.” *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1195 (2009).

8. Evergy Kansas Metro’s conduct in this instance does not meet the definition of gross negligence or willful conduct.

9. Although the Kansas Commission does not mandate how often poles must be inspected, Evergy Kansas Metro follows the Missouri Public Service Commission inspection guidelines, which require eight-year detailed inspections and twelve-year intrusive inspections. The pole at issue was last officially inspected in 2016 and Evergy personnel constantly patrols and inspects equipment and would have looked at and inspected the pole informally since 2016.

10. Evergy Kansas Metro personnel believes it is likely that the pole at issue was struck by lightning, which caused it to fail during high winds on June 23, 2020. Evergy is constantly patrolling and inspecting equipment and had no knowledge and no way of knowing that the pole was going to fail. Therefore, there is no basis to support a claim that Evergy Kansas Metro acted with gross negligence or willful conduct.

11. 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. 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.

12. 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) (attached hereto as Exhibit B). 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.

13. Mr. Worthey has provided no basis for the Commission to disregard the liability provisions of Evergy Kansas Metro’s Tariff or this well-established case law.

14. 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,

EVERGY METRO, INC.



Cathryn J. Dinges, #20848

Corporate Counsel

818 South Kansas Avenue

Topeka, Kansas 66612

(785) 575-8344; Telephone

(785) 575-8136; Fax

Cathy.Dinges@evergy.com

VERIFICATION

STATE OF KANSAS)
)
COUNTY OF SHAWNEE) SS:

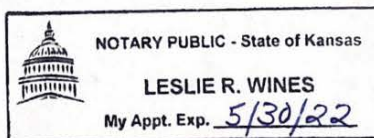
Cathryn J. Dinges, being duly sworn upon her oath deposes and says that she is one of the attorneys for Evergy Kansas Metro Energy, Inc.; that she is familiar with the foregoing **Motion to Dismiss**; and that the statements therein are true and correct to the best of her knowledge and belief.

Cathryn Dinges
Cathryn J. Dinges

SUBSCRIBED AND SWORN to before me this 5th day of October, 2020.

Leslie R. Wines
Notary Public

My Appointment Expires: *May 30, 2022*



CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2020, the foregoing **Motion to Dismiss** was electronically filed with the Kansas Corporation Commission and electronically served on all parties on the service list.

CATHRYN J. DINGES, CORPORATE COUNSEL
EVERGY KANSAS CENTRAL, INC
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
Cathy.Dinges@evergy.com

PHOENIX ANSHUTZ, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
p.anshutz@kcc.ks.gov

CARLY MASENTHIN, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
c.masenthin@kcc.ks.gov

SCOTT WORTHEY
SCOTT WORTHEY
13033 W 359TH STREET
PAOLA, KS 66071
Scott.Worthey@AIG.com

/s/ Cathryn J. Dinges
Cathryn J. Dinges