

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Complaint Against ) Docket No. 17-WSEE-326-COM  
Westar Energy, Inc. by Jerry Jackson )

**MOTION TO DISMISS OF WESTAR ENERGY, INC.**

Westar Energy, Inc. (Westar) submits the following Motion to Dismiss (Motion) the Complaint filed by Jerry Jackson (Mr. Jackson). In support of its Motion, Westar states as follows:

1. On or about March 21, 2017, Mr. Jackson filed his Complaint in this matter. Westar received the Complaint on April 3, 2017.

2. Mr. Jackson contends that a fire began on one of Westar's poles that caused property damage at his residence. He asks the Commission to hold Westar responsible for the damages incurred and require Westar to make payment.

3. None of the allegations made by Mr. Jackson constitute a violation of any law, regulation, or Westar's Electric Tariffs (Tariffs). In fact, Westar's Tariffs make it clear that Westar is not liable to customers for loss or damage that occurs from Westar's operations, including the installation, maintenance or replacement of service lines or other facilities necessary to serve customer unless such damage is the result of Westar's willful or wanton conduct. Section 7.02 of the General Terms and Conditions (GT&C) of Westar's Tariffs provides:

- A. Company shall use commercially reasonable efforts to supply steady and continuous Electric Service at the Point of Delivery. Company shall not be liable to customer for any loss, damage or injury whatsoever caused by or arising from Company's operations including loss, damage or injury occasioned by irregularities of or interruptions in Electric Service, leakage, escape or loss of electric energy after same has passed the

Point of Delivery or for any other cause unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct. In no event shall Company be liable for any loss, damage or injury caused by any defects in customer's wiring or appliances.

- B. Customer shall save Company harmless from all claims for trespass, injury to persons and damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder and the installation, maintenance or replacement of Company's service lines or other facilities necessary to serve customer, unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct.
- C. In accordance with its normal work procedures, Company shall exercise reasonable care when installing, maintaining and replacing Company's facilities located on customer's premises. However, beyond such normal procedures, Company assumes no responsibility for trespass, injury to persons or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of or related to Company's operations, the provision of Electric Service hereunder or the installation, maintenance or replacement of Company's facilities to serve customer, unless it shall be shown affirmatively that the injury to persons or damage to property complained of has been caused by Company's willful or wanton conduct.

4. 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.

5. Mr. Jackson has not met the requirements of the above-cited regulation. He has not indicated that Westar has violated any provision of any law, regulation, or order. In fact, as has been discussed above, even if all of the facts stated by Mr. Jackson in his Complaint are assumed to be true, Westar has not violated any provision of its Tariffs.

6. Mr. Jackson does not contend that Westar acted willfully or wantonly in a way that caused the alleged damage. Instead, he simply states that he believes the fire started on Westar's side of the point of delivery and seems to imply that therefore the fire must have been Westar's responsibility. However, Westar's Tariff makes it clear that Westar is not liable for damage occurring as a result of its operations as long as it does not act willfully or wantonly, regardless of whether the damage occurs on the Company's or Customer's side of the point of delivery.

7. The provisions of Westar'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.

8. Westar'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 (10<sup>th</sup> 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").

9. 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.

10. 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.

11. A number of courts in this 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”).

12. Mr. Jackson has provided no basis for the Commission to disregard the liability provisions of Westar’s Tariff or this well-established case law.

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

WHISEFORE, Westar 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,

WESTAR ENERGY, INC.



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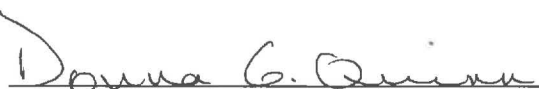
### VERIFICATION

STATE OF KANSAS                    )  
  )  
COUNTY OF SHAWNEE            )       ss:

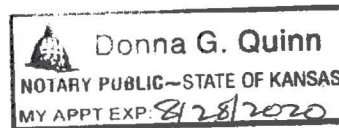
Cathryn J. Dinges, being duly sworn upon her oath deposes and says that she is one of the attorneys for Westar Energy, Inc.; that she is familiar with the foregoing **Motion to Dismiss**; and that the statements therein are true and correct to the best of her knowledge and belief.

  
Cathryn J. Dinges

SUBSCRIBED AND SWORN to before me this 5<sup>th</sup> day of April, 2017.

  
Notary Public

My Appointment Expires: 8/28/2020



### CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of April, 2017, 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