

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Complaint Against) Docket No. 18-WSEE-286-COM
Westar Energy, Inc. by Douglas Yoder)

MOTION TO DISMISS OF WESTAR ENERGY, INC.

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

I. INTRODUCTION

1. On or about January 8, 2018, Mr. Yoder filed his Complaint in this matter. Westar was served with the Complaint on May 2, 2018.

2. Mr. Yoder contends that he suffered water damage in his basement as a result of a power outage that occurred on August 21, 2017. He asks the Commission to hold Westar responsible for the alleged damages incurred and require Westar to make payment.

3. None of the allegations made by Mr. Yoder 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 interruptions in electric service or from damage caused by the installation, maintenance or replacement of Westar's facilities used to serve customer unless such damage is the result of Westar's willful or wanton conduct. Section 7.02(A) and (C) of the General Terms and Conditions (GT&C) of Westar's Tariffs provide:

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.

...

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. Yoder has not met the requirements of the above-cited regulation. He has not demonstrated that Westar has violated any provision of any law, regulation, or order. Mr. Yoder cites to a number of provisions in the GT&C of Westar's Tariff in his Complaint; however, all of these citations are either illogical or misapplied to the facts involved in this Complaint, as discussed in detail below.

6. Additionally, even if all of the facts stated by Mr. Yoder in his Complaint are assumed to be true, Westar has not violated any provision of its Tariffs. Mr. Yoder does not

contend that Westar acted willfully or wantonly in a way that caused the alleged damage. Instead, he simply states that he believes it took Westar too long to restore power to his residence and that Westar's estimates of restoration time were inaccurate. 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.

II. RESPONSE TO FACTUAL ALLEGATIONS

7. Mr. Yoder alleges that his power went out at around 9:30pm on August 21, 2017, was restored a little after midnight, and then went out again at 12:23 a.m. and wasn't restored the second time until shortly after 8 a.m. the next morning. He contends that he called Westar in the morning to ask about the outage and power was restored within 10 minutes of that call. He also contends that Westar told him they expected power to be restored by 2 a.m. but it took longer than that to restore power. Mr. Yoder contends Westar has told him the second outage was related to weather and to equipment failure and he believes Westar is inconsistent in its explanation because the bad weather had passed through the area where he lives when the second outage occurred.

8. Westar's electronic records indicate exactly what time each of these events occurred. The first outage, which was caused by a lightning strike, began at 9:40 p.m. and power was restored at 12:07 a.m. The second outage, which was caused by a failed fuse that was caused by a failed section of underground primary cable, started at 12:23 a.m. Mr. Yoder contacted the customer relations center at 7:35 a.m. about the outage. Power was restored the second time at 8:13 a.m., about 40 minutes later.

9. Weather – a lightning strike – caused the first outage. Westar replaced the fuse that went out as a result of the lightning and initially was able to restore power. However, the weather likely weakened the primary cable and the replaced fuse only held for a few hours until the primary cable failed, causing the second outage. Although the weather in the immediate area around Mr. Yoder's residence had improved at the time of the second outage, Westar was experiencing severe weather throughout many parts of its territory that night. Once Westar employees repaired the initial outage, they moved on to other areas to repair the other outages caused by the weather. Westar had crews working all night to restore power in various areas as a result of the weather and even had to bring in two crews from a contractor to assist with restoration efforts. As a result, it took longer for a crew to return to the site of the outage that affected Mr. Yoder because all of the crews were working on other power outages. Once a crew returned to the area, because the failure involved underground cable, they had to go to each device and look at the fault indicators in order to determine where the fault had occurred. Westar restored power for all customers the night of August 21, 2017, as quickly as possible and had crews working through the night to do so.

10. There was no prior indication that the underground primary cable was going to fail and Westar had no reason to expect this failure to occur.

11. When Westar provides an estimate of the time power will be restored for a customer, the time provided is an estimate made based on restoration times for historical outages. The times provided are merely estimates and that is made clear to the customer when the estimate is provided. It is not always possible for Westar to provide a perfect estimate of restoration time because it can be affected by a large number of factors outside of Westar's control.

III. RESPONSE TO CITATIONS TO WESTAR'S TARIFF

12. Mr. Yoder cites to various provisions of the GT&C of Westar's Tariff in his Complaint but fails to offer any understandable explanation of how these provisions apply or how Westar violated the provisions cited.

13. Mr. Yoder cites Section 2.06.01 of Westar's GT&C and states that Westar "failed perform notice and due diligence." This is an illogical interpretation of Section 2.06.01. Section 2 of the GT&C is addressing instances when the customer is "required to provide notice to Company." Section 2.06.01 provides that in instances when a customer is required to provide notice to Westar, Westar "shall exercise reasonable diligence in responding to notices from customer, but shall not be responsible for error, delay or expense resulting there from, unless it shall be shown affirmatively that the error, delay or expense has been caused by willful or wanton conduct on part of Company." There are various instances throughout Westar's Tariff where the customer is required to provide notice, such as disconnection of service. This section applies to those instances, not to Mr. Yoder's "notice" to Westar that his power was out.

14. Mr. Yoder cites Section 7.05 of Westar's GT&C, presumably in an attempt to argue that Westar should have provided continuous electric service to him. However, Mr. Yoder ignores the fact that Section 7.05 clearly provides that Westar "shall not be liable to customer for any damages to property or equipment . . . occasioned by irregularities or interruptions, except when directly caused by willful, or wanton acts of Company." Mr. Yoder has not demonstrated that the interruption in his service was caused by Westar's willful or wanton conduct.

15. Mr. Yoder cites Section 7.06.03 of Westar's GT&C, which is titled "Emergency Electric Service Policy" and provides that Westar may install certain types of special equipment

and facilities when requested by the customer. Mr. Yoder has not requested any of the types of equipment or facilities listed in this section and it is therefore irrelevant to his Complaint.

16. Mr. Yoder cites Section 7.07 of Westar's GT&C, which indicates that Westar will maintain, repair and replace its electric service facilities that serve customers. It also provides that Westar, "without incurring any liability" can "suspend Electric Service for reasonable periods of time when necessary to maintain, repair, or replace facilities, or in case of any emergency." In Mr. Yoder's case, Westar completed the necessary repairs within a reasonable amount of time under the circumstances involved and there was no violation of this provision of the GT&C.

17. Mr. Yoder cites Section 7.08 of Westar's GR&C, which is titled "Electric Service Use Limitation" and indicates that a customer's use of electric service must be consistent with the limitations in Westar's Tariff. This section is irrelevant to Mr. Yoder's complaint.

18. Mr. Yoder cites Section 10.02 of Westar's GT&C, which is titled "Rules and Regulations of the Commission" and indicates that Westar's GT&C do not supersede or modify the general rules and lawful orders of the Commission. This section is irrelevant to Mr. Yoder's complaint.

19. Mr. Yoder cites Section 10.04 of Westar's GT&C, which is titled "Waiver of Requirements" and provides that Westar may request waiver of the requirements in the GT&C in individual cases with a written request to the Commission if the requirement would not serve the interests of the Company or customer. Westar has not made a written request for a waiver related in any way to Mr. Yoder's Complaint and this section is irrelevant to that Complaint.

20. Mr. Yoder offers no evidence that Westar violated any of the sections of the GT&C he cites in his Complaint. Many of those sections are wholly irrelevant to his Complaint

and his citations to some of the sections are illogical. Additionally, because Mr. Yoder has not alleged or demonstrated that Westar acted willfully or wantonly, Westar's GT&C clearly indicate that Westar is not liable for damages resulting from the power outage. Instead, the facts demonstrate that Westar acted reasonably under the circumstances and restored the power outage as soon as reasonably possible.

IV. THE LIMITATION OF LIABILITY PROVISIONS OF WESTAR'S TARIFF ARE ENFORCEABLE AND APPLICABLE TO BAR MR. YODER'S CLAIM

21. As indicated above, Section 7.02 of the GT&C of Westar's Tariff indicates that Westar is not responsible for the damage claimed by Mr. Yoder unless he demonstrates that Westar's conduct caused the damage and was willful or wanton. Kansas Courts have defined wanton conduct 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).

22. Mr. Yoder makes no allegation in his Complaint that Westar acted with intent to cause damage or with reckless disregard for the consequences of their actions, let alone offers any evidence that would support such a claim. Westar was not aware that the underground cable was going to fail and acted reasonably to restore power given the weather conditions in the area at the time of the outage.

23. Furthermore, 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.

24. 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 (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").

25. 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.

26. 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.

27. 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”).

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

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

WHEREFORE, 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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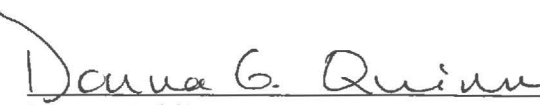
VERIFICATION

STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

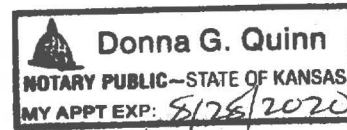
Cathryn J. Dinges, being duly sworn upon her oath deposes and says that she is one of the attorneys for Westar Energy, Inc.; that she is familiar with the foregoing **Motion to Dismiss**; and that the statements therein are true and correct to the best of her knowledge and belief.


Cathryn J. Dinges

SUBSCRIBED AND SWORN to before me this 14th day of May, 2018.


Notary Public

My Appointment Expires: 8/28/2020



CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2018, 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