

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Dwight D. Keen, Chair
 Shari Feist Albrecht
 Jay Scott Emler

In the Matter of the Complaint Against)
Westar Energy by Daniel F. Smalley.) Docket No. 18-WSEE-209-COM

ORDER DISMISSING FORMAL COMPLAINT

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined the pleadings submitted and being duly advised in the premises, the Commission finds as follows:

I. CONDENSED BACKGROUND

1. On November 16, 2017, Daniel F. Smalley (Complainant) filed a Formal Complaint against Westar Energy, Inc. (Westar) with the Commission.¹ The Formal Complaint alleged that Westar’s Advanced Metering Infrastructure (AMI) (commonly referred to as “Smart Meters”) presented a variety of health and safety concerns as well as cybersecurity risks.²

2. On October 25, 2018, the Commission issued its Order Adopting Legal Memorandum.³ The Commission noted its jurisdiction to investigate complaints regarding rates, rules, regulations, or practices of gas and electric public utilities.⁴ The Commission adopted Commission Staff’s position the Complainant’s Formal Complaint was procedurally deficient and, based on the Commission’s determination in Docket No. 15-WSEE-211-COM *et al.* (15-115 Docket), the Formal Complaint as presented did not state a claim upon which relief could be

¹ Complaint Against Westar Energy by Daniel F. Smalley (Nov. 16, 2017) (Formal Complaint).

² *See id.*

³ Order Adopting Legal Memorandum (Oct. 25, 2018) (209 Order).

⁴ *See id.*

granted.⁵ The Commission found the Formal Complaint did not cite to a provision of law, tariff, regulation, Commission order or statute Westar was violating.⁶ The Commission granted the Complainant an opportunity to amend its Formal Complaint.⁷

II. THE AMENDED COMPLAINT

A. Summary of the Amended Complaint

3. On November 15, 2018, the Complainant filed an Amended Formal Complaint.⁸ The Complainant cited to a variety of authorities to cure procedural deficiencies identified in the Commission's Order,⁹ and generally reiterated previous factual statements.¹⁰

B. Constitutional Arguments

4. The Amended Formal Complaint references both the United States Declaration of Independence and United States Constitution as legal authority supporting the Complainant's cause of action.¹¹ In essence, the Complainant argues Westar's use of AMI meters violates the Complainant's rights. Specifically, the Complainant alleges its "right to life" is at stake based on its belief AMI meters are dangerous and that the Fourth Amendment protects data that Complainant claims is put at risk by the use of AMI meters.¹² The Commission cannot rule on constitutional questions. The Kansas Supreme Court has repeatedly held administrative agencies lack the authority to make determinations on constitutional matters.¹³

⁵ *See id.*

⁶ *See* 209 Order.

⁷ *See id.*

⁸ Answer to Order Adopting Legal Memorandum (Nov. 15, 2018) (Amended Formal Complaint).

⁹ *See generally* Amended Formal Complaint.

¹⁰ *See id.* at pp. 1-3.

¹¹ *Id.* at p. 2.

¹² *Id.*

¹³ *See Stinemetz v. Kansas Health Policy Auth.*, 45 Kan. App. 2d 818, 829, 252 P.3d 141, 148 (2011). *See also*, *Board of Education of Unified School District No. 443, Ford County v. Kansas State Board of Education*, 266 Kan. 75, 81, 966 P.2d 68, 76 (1998).

C. Energy Policy Act of 2005

5. The Complainant cites to various provisions of the Energy Policy Act of 2005 to argue Westar acted maliciously or unlawfully in installing AMI meters.¹⁴ The Complainant misreads the scope and purpose of the Energy Policy Act of 2005. The Energy Policy Act of 2005 was enacted by Congress as a “stop-gap” to provide state regulatory bodies time to implement policies regulating demand response programs and time-based metering. Following passage of the Energy Policy Act of 2005, the Commission conducted appropriate investigations and implemented regulations needed to provide guidance on these issues.¹⁵

6. In addition, the Energy Policy Act of 2005, contrary to the Complainant’s assertion, encourages the use of such demand response and time-based metering programs – i.e. the installation of AMI meters.¹⁶ Accordingly, the Complainant’s references to the Energy Policy Act of 2005 are inapplicable and provide no basis for the Complainant’s Formal Complaint.

D. K.S.A. 66-101b

7. The Complainant cites to K.S.A. 66-101b to support the claim Westar’s implementation of its AMI deployment policy is unjust, unreasonable, or discriminatory.¹⁷ By indicating Westar’s use of AMI meters violates Kansas law, the Complainant’s Formal Complaint provides K.A.R. 82-1-220(b)’s procedurally-required information for making a *prima facie* determination. Having satisfied this requirement, the Commission examines the Formal Complaint in its entirety.

¹⁴ Amended Formal Complaint, p. 2.

¹⁵ See, e.g., Order Adopting Report and Recommendation and Closing Docket, Docket No. 07-GIME-116-GIV (Aug 8, 2007) (116 Order).

¹⁶ See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 966 (2005) (codified as amended at 16 U.S.C. § 2621(d)).

¹⁷ Amended Formal Complaint, pp. 2-3.

8. The Complainant's factual allegations do not support finding a *prima facie* case for Commission action. In the 15-211 Docket,¹⁸ the Commission consolidated nine Formal Complaints brought against Westar and Kansas City Power & Light Company (KCP&L) for their respective deployment of AMI meters. The Commission found the use of AMI meters complies with Commission-approved tariffs and was therefore not unreasonable, unjust, or discriminatory.¹⁹ Health, safety, and security concerns were also addressed in full by the Commission at that time.²⁰ To further study policy implications of its decision, the Commission opened a general investigation (Docket No. 19-GIME-012-GIE) into the feasibility of an AMI meter opt-out program.²¹

9. In the Commission's Order Adopting Legal Memorandum, the Commission adopted Commission Staff's Legal Memorandum on the Complainant's Formal Complaint. In the Memorandum, Commission Staff noted:

The basis for establishing jurisdiction to rule on a Formal Complaint is the responsibility of the Complainant. Accordingly, by not referencing any specific law, tariff, regulation, Commission order or statute violated by Westar, it is not possible to determine if the factual statement is sufficient to meet procedural requirement (2).²²

10. Although the Complainant has provided information K.A.R. 82-1-220(b) requires, the facts presented do not constitute a violation of law or the regulations or orders of the Commission. While the Complainant was not part of the 15-211 Docket, the Complainant has provided no facts that materially differ from those proffered by Complainants in the 15-211 Docket. The Complainant has not individually presented new evidence to support an allegation

¹⁸ For the Commission's summation of these arguments, *see* Order on Smart Meter Complaints, pp. 1-4, Docket No. 15-WSEE-211-COM (April 5, 2018) (211 Order).

¹⁹ *See* 211 Order, p. 12 (citing Order Approving Application for Accounting Authority Order at 7-8, Application of Westar Energy, Inc. for Approval of an Accounting Authority Order to Record and Defer Costs Related to Westar Energy's SmartStar Lawrence Project, Docket No. 11-WSEE-610-ACT (Oct. 19, 2011)).

²⁰ *See id.* at 1-4.

²¹ It should be noted that the pending investigation into the feasibility of such a program has not yet been completed and an order not yet published by the Commission at this time.

²² Legal Staff's Memorandum, p. 2 (October 18, 2018) (Legal Memorandum).

that Westar's use of AMI meters presents health, safety, or security concerns. The Commission has reviewed Westar's current use of AMI meters and the facts demonstrate this practice is not unreasonable, unjust, or discriminatory. The Commission has also found Westar's use of AMI meters does not present health, safety, or security concerns and the Complainant has not alleged facts that would, if assumed true, violate Kansas law.

11. This lack of factual difference, in light of the Commission's decision in the 15-211 Docket, indicates the use of AMI meters is not unjust, unreasonable, or discriminatory. To avoid an arbitrary result, the Commission must similarly find here that the Complainant's Amended Formal Complaint does not state a claim upon which relief can be granted. Accordingly, while the Complainant does provide responses to three procedural items required by K.A.R. 82-1-220(b), the facts as presented do not constitute a violation of law or the regulations or orders of the Commission.

III. THE AMENDED APPEAL

12. On January 8, 2019, the Complainant filed an "Amended Appeal."²³ The Amended Appeal presents new arguments primarily centered on policy concerns relating to AMI meters. The Complainant appears to have styled its Amended Appeal as a form of contract and attempts to bind the Commission and Westar to its terms – namely, that only a traditional analog meter will be installed on Complainant's property and will not be replaced with any substitute smart meter technology.²⁴

A. Silence as Acceptance

13. The Complainant argues the Commission has "accepted" the facts claimed by the Complainant through the Commission's silence on the Complainant's Formal Complaint and its

²³ Amended Appeal (Jan. 8, 2019).

²⁴ *Id.* at p. 1.

subsequent November, 2018, Amended Formal Complaint.²⁵ The Complainant argues further the Commission's silence on these pleadings binds it and Westar to Complainant's requested terms regarding the use of AMI meters on Complainant's premises. This is incorrect. Notwithstanding numerous Kansas-specific statutory provisions regarding contracting with state agencies,²⁶ generally recognized principles of contract law in Kansas hold that "mere silence when an offer is made does not constitute acceptance; something more than silence is required."²⁷ To be clear, silence in no way binds the Commission or Westar to any terms offered by Complainant and the Commission unequivocally rejects any request of the Complainant to enter into any agreement whatsoever.

14. The Commission reviews complaints against utilities as expeditiously as possible. Formal complaint proceedings, however, are not subject to statutory timelines. Accordingly, the Commission rejects the Complainant's claims the Commission has "accepted" the facts as alleged by the Complainant.

15. Still, when reviewing formal complaints, the Commission determines whether a complaint establishes a *prima facie* cause for Commission action. Phrased differently, the Commission assumes alleged facts and violations of law are true. Based on this assumption, the Commission then determines whether a claim against a utility exists. However, assuming facts to be true for the purpose of a *prima facie* analysis does not act as a formal Commission finding of fact.

²⁵ *Id.*

²⁶ See, e.g., K.S.A. 77-3739, -3740, -3740a, -3744.

²⁷ See *Foodbrands Supply Chain Servs., Inc. v. Terracon, Inc.*, No. CIV.A. 02-2504-CM, 2004 WL 955989, at *6 (D. Kan. Mar. 5, 2004) (citing *Caterpillar Tractor Co. v. Sickler*, 149 Kan. 457, 460, 87 P.2d 503 (1939) (holding mere silence when an offer is made does not constitute an acceptance of an offer; something more than silence is required)); see also E. Allan Farnsworth, *Contracts* § 3.15 at 155 (2d ed.1990) (citing general rule that a promise will not be inferred from the offeree's mere inaction).

B. Tariffs and Application of the Law

16. The Complainant argues any tariffs implementing an opt-out program and charging customers for utilizing the opt-out program must be deemed an illegal application of the law.²⁸ Notwithstanding Commission-approved tariffs are presumed reasonable and construed in the same manner as statutes,²⁹ no opt-out tariffs have been ordered or filed in any docket at this time. The Complainant's argument that opt-out tariffs are illegal is premature.

C. Representation of the People of Kansas

17. The Complainant argues any Commission decision on its Formal Complaint will not only affect the Complainant but also the people of the State of Kansas at large. As such, the Complainant claims it represents "the entirety of the aggregate and the people of Kansas."³⁰ The Kansas Legislature, by statute, created the Citizens' Utility Ratepayer Board (CURB) which is charged with representing residential and small commercial customers before the Commission.³¹ CURB is permitted to speak for the residential interests of Kansas utility ratepayers.³² The Complainant, individually, has not provided any authority indicating it may wield such authority. Accordingly, the Commission rejects the claim the Complainant represents any person or persons other than itself.

D. Constitutional Issues and the Energy Policy Act of 2005

18. The Complainant's Amended Appeal reiterates the Complainant's belief the Commission should entertain complaints involving alleged Constitutional infringements.³³ As discussed above, the Commission, as a state agency, does not have authority to adjudicate such

²⁸ See Amended Appeal, p. 2.

²⁹ K.S.A. 66-115. See also *Grindsted Products, Inc. v. Kansas Corp. Com'n.*, 262 Kan. 294, 310, 937 P.2d 1, 11 (1997) (citing *Shehi v. Southwestern Bell Telephone Co.*, 382 F.2d 627 (10th Cir. 1967)).

³⁰ Amended Appeal, p. 3.

³¹ See K.S.A. 66-1222 *et seq.*

³² K.S.A. 66-1223.

³³ Amended Appeal, p. 4.

claims and the Complainant cannot rely on such claims to resolve Formal Complaints against public utilities in this forum.

19. The Complainant also repeats its argument that the Commission and Westar have violated the Energy Policy Act of 2005 in not fully disclosing information about the AMI program and not offering a “full disclosure” of facts regarding the AMI meters.³⁴ The Commission has sufficiently met the obligations imposed upon it by the federal statute on several occasions.³⁵ As presented by the Complainant, there is no requirement in the Energy Policy Act of 2005 for an “opt-in” program such as that described by the Complainant nor is there a requirement imposed upon the Commission or Westar regarding how the public was to be informed about AMI meters. The Energy Policy Act of 2005 provides no basis for the Complainant’s Formal Complaint.

E. Alleged Contracts & Instruments of Equity

20. The Complainant claims any contracts between utilities and their customers must be implied contracts, and makes a series of arguments attempting to undermine the validity of such contracts.³⁶ In Kansas, the “contract” between a utility and its customer is contained within that utility’s tariffs.³⁷ Tariffs contain all of the terms and conditions which govern the relationship between the utility and the customer.³⁸ Tariffs and rate schedules duly filed with the Commission bind both the utility and its customers as well as the utility and the Commission.³⁹ By taking service from Westar, the Complainant has agreed to the terms and conditions governing that

³⁴ *Id.* at p. 3.

³⁵ *See, e.g.*, Order Adopting Report and Recommendation and Closing Docket, Docket No. 07-GIME-116-GIV (Aug 8, 2007) (116 Order).

³⁶ *See* Amended Appeal, p. 4 and p. 6.

³⁷ *See* *Shehi v. Southwestern Bell Telephone Co.*, 382 F.2d at 629 n. 2 (noting that “[a] tariff so filed is more than a contract – ‘it is the Law’”) (quoting *Carter American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966)).

³⁸ *Farmland Indus., Inc. v. Kansas Corp. Comm’n*, 29 Kan. App. 2d 1031, 1043, 37 P.3d 640, 648 (2001).

³⁹ *See id.* (“Tariffs contain those terms and conditions which govern the relationship between a utility and its customers. Tariffs duly filed with the regulatory agency are generally binding on both the utility and its customers.”) (citing *Grindsted Products, Inc. v. Kansas Corporation Comm’n*, 262 Kan. 294 at 309)).

service. Further, modification of such terms (e.g. rates) from time to time is a lawful function of the Commission.

21. The Complainant has not provided sufficient evidence such that the Commission could find Westar's AMI metering policy is in violation of its Commission-approved tariffs or that such a policy in any way contravenes any other applicable laws.

22. The Complainant alleges the Commission has created an "instrument(s) of equity" in the Complainant's name and requests the return of such "in kind or by certified bank draft for the full amount."⁴⁰ The Commission is unaware of any "instrument of equity" created in the Complainant's name.

F. Citations of Law

23. The Complainant argues the Commission is in a better position to determine which law, rule, regulation or Commission order a utility has violated or may violate.⁴¹ As such, the Complainant argues it is not required to meet the procedural threshold established by K.A.R. 82-1-220(b). As indicated in Commission Staff's October 2018 Memorandum:

The burden of establishing evidence to support a Formal Complaint rests with the Complainant. The basis for establishing jurisdiction to rule on a Formal Complaint is the responsibility of the Complainant.⁴²

24. Neither the Commission nor its Staff can make the Complainant's case for the Complainant. The burden rests with the Complainant to make a proper allegation of wrongdoing against a Kansas public utility. This burden includes satisfying the elements of K.A.R. 82-1-220. The Complainant presents no evidence to persuade the Commission to waive its procedural requirements in this instance.

⁴⁰ Amended Appeal, p. 5.

⁴¹ *Id.*

⁴² Legal Memorandum, p. 2.

G. Attorney's Fees

25. The Complainant argues it should be reimbursed for approximately \$45,000 in legal research and litigation charges.⁴³ Reimbursement for attorney's fees is a form of damages. The Commission does not have the authority to award such reimbursement.⁴⁴

H. Consequences

26. The Complainant argues its service may be terminated which would lead to a myriad of unfavorable consequences.⁴⁵ The Commission, however, has found that a utility's deployment of AMI meters does not present health, safety, or cyber security concerns – the very concerns underpinning the Complainant's Formal Complaint. The Commission and its Staff have investigated the use of AMI meters and found no evidence that the use of such devices present credible threats to human life or property. The Complainant's claims and alleged facts in this docket, if assumed true, do not support a different conclusion. Notwithstanding, the Commission recognizes the Cold Weather Rule is in effect at the time of this order, and any change in service must comply with the Commission's preexisting Cold Weather Rules.

I. Jurisdiction

27. The Complainant argues the Commission does not have jurisdiction over the Complainant's Formal Complaint. The Complainant then requests a hearing. The Complainant argues this request is necessary before escalating judicial review of the Commission's actions.⁴⁶

28. The Commission's rules regarding Formal Complaints do not entitle the Complainant to an evidentiary hearing at this time on a *prima facie* determination. In the case of

⁴³ Amended Appeal, p. 6.

⁴⁴ See *Western Kansas Exp., Inc. v. Dugan Truck Line, Inc.*, 11 Kan.App.2d 336, 340—41, 720 P.2d 1132, 1136 (1986) (holding there is no language in K.S.A. 66-176 that vests the Commission with the ability to award damages but is instead intended to grant the court in which a damage action has been filed guidance for awarding damages and attorney's fees to aggrieved parties).

⁴⁵ See Amended Appeal, p. 6.

⁴⁶ *Id.* p. 7.

this Order, if the Complainant disagrees with the findings or conclusions it may seek reconsideration of the Order. If the Complainant does not agree with the Commission's decision regarding reconsideration it may seek judicial review of any such order on reconsideration.⁴⁷ This procedural framework does not require a formal hearing before the Commissioners.

29. The Complainant's Amended Appeal presents no additional facts or relevant citations to law and, even when read in light of Complainant's Amended Formal Complaint, the Complainant does not present any evidence indicating Westar is in violation of the law or the regulation or orders of this Commission.

IV. FINDINGS AND CONCLUSIONS

30. The Commission finds it has jurisdiction to investigate formal complaints regarding rates, rules, regulations, or practices of gas and electric public utilities.⁴⁸ The Commission, however, finds it may not answer constitutional questions.

31. The Commission finds the Formal Complaint, as amended, does not establish a *prima facie* case for Commission action.

32. Accordingly, the Commission finds and concludes the Formal Complaint brought by Daniel F. Smalley, as amended, should be dismissed. The Commission dismisses Daniel F. Smalley's Formal Complaint without prejudice.

⁴⁷ See K.S.A. 66-1,163, -1,164.

⁴⁸ Specifically, the Commission is granted broad authority to review formal complaints. See K.S.A. 66-101e ("Upon a complaint in writing made against any electric public utility governed by this act that any of the rates or rules and regulations of such electric public utility are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any regulations, practice or act whatsoever affecting or relating to any service performed or to be performed by such electric public utility for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient or insufficient, unjustly discriminatory or unduly preferential, or that any service performed or to be performed by such electric public utility for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, the commission may proceed with or without notice, to make such investigation as it deems necessary."); see also K.S.A. 66-1,205(a).

IT IS THEREFORE, BY THE COMMISSION ORDERED THAT:

- A. The Amended Formal Complaint shall be dismissed.
- B. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).⁴⁹
- C. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary and proper.

BY THE COMMISSION IT IS SO ORDERED.

Keen, Chair; Albrecht, Commissioner; Emler, Commissioner

Dated: 01/31/2019



Lynn M. Retz
Secretary to the Commission

REV / drsj

⁴⁹ K.S.A. 66-118b; K.S.A. 77-503(c); K.S.A. 77-531(b).

CERTIFICATE OF SERVICE

18-WSEE-209-COM

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of first class mail and electronic service on 01/31/2019.

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