Case No. 23-126005-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HERITAGE TRACTOR, INC.,

Plaintiff-Appellant,

vs.

EVERGY KANSAS CENTRAL, INC.,

Defendant-Appellee.

BRIEF OF APPELLEE EVERGY KANSAS CENTRAL, INC.

Appeal from the District Court of Douglas County, Kansas

Honorable James R. McCabria, Judge

District Court Case No. 2020-CV-000136

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NATURE OF THE CASE

Heritage Tractor, Inc. ("Heritage") sued Evergy Kansas Central, Inc. ("Evergy" or "Westar") after an Evergy utility pole unexpectedly fell onto Heritage's tractor dealership and started a fire, causing property damage. The district court granted summary judgment to Evergy pursuant to the limitation on liability in Evergy's Tariff, as approved by the Kansas Corporation Commission ("KCC"), which conditions liability on an affirmative showing of willful or wanton conduct. The court found that Heritage "completely fail[ed] to bring forward any evidence that there was something [to] put Evergy on notice of impending risk and a concurrent disregard of that risk." (R. III, 142). The court held: "In the absence of any basis to believe that Evergy knew or had reason to know the pole at issue had soundness issues, it is hard to make the argument that Evergy was even negligent with respect to the maintenance of this pole." (R. III, 143).

The Kansas Supreme Court has held that utility tariffs may include limitations on liability for ordinary negligence. As discussed more fully below, the Supreme Court has held that these limitations are reasonable and sound as a matter of law and public policy. Like the district court, this Court should apply the Tariff and follow Supreme Court precedent to affirm summary judgment for Evergy.

STATEMENT OF THE ISSUES

1) Did the district court correctly hold that the limitations of liability in the Tariff apply to Heritage's claims?

2) Did the KCC have authority to approve the limitations on liability in the Tariff?

3) Should this Court follow Kansas Supreme Court precedent holding that limitations on liability for ordinary negligence in utility tariffs are reasonable and lawful?

4) Did the district court correctly hold that Heritage failed to set forth sufficient facts to submit the issue of "willful or wanton" conduct to a jury?

STATEMENT OF FACTS

The following facts were uncontroverted before the district court.

May 5, 2018 Fire

On May 5, 2018, a Westar utility pole fell onto the roof of the Heritage Tractor facility, causing a fire. (R. II, 182; III, 3). The weather that day was clear, with winds under 5 mph. (R. II, 182; III, 3).

The pole was approximately 50 years old. (R. II, 183; III, 3). Age alone is not a reliable predictor of pole integrity or strength, however. (R. II, 186; III, 4). The equipment attached to the pole made it lightly loaded to 41 percent of its original strength capacity under the National Electrical Safety Code. (R. II, 186; III, 4). To Westar's knowledge, the pole had never had a problem. (R. II, 186; III, 4). A fire investigation report determined that the cause of the fire was accidental. (R. II, 183, 240, 242, 243; III, 3).

No Prior Issues With Pole

Heritage purchased electrical service from Westar for approximately 9 years at this location, with a reliable service history. (R. II, 184; III, 3). Heritage's on-site manager, Tim Deneke, dealt with all significant problems at the business. (R. II, 183; III, 3).

Deneke expected employees to report any information about hazardous situations encountered on the job. (R. II, 183; III, 3).

Deneke testified that, prior to the accident, no one at Heritage mentioned any concerns about the pole. (R. II, 183-184 R. III, 3.) Nothing seemed unusual or out of the ordinary in the week leading up to the fire. (R. II 184; III, 3). Deneke walked or drove past the pole almost every day and it "[l]ooked like every other pole that was around there." (R. II 184; III, 4). Deneke never saw the pole swaying, wobbling, or moving in any way. (R. II, 184; III, 4). He never noticed anything change about the pole and had never commented on the pole's condition to anyone. (R. II, 184; Vol. III, 4).

Previous Service Call And Evaluation Of Pole

About six weeks prior to the fire, Westar responded to a call from Heritage that the building's electrical service line appeared to be touching the roof of the building. (R. II, 185; III, 4). Westar sent a journeyman lineman, David Shockley, to investigate. (R. II, 185; III, 4).

Shockley found the line was not touching the roof, but nonetheless took 1-2 inches of slack out of the line. (R. II, 185; III, 4). Nothing indicated to Shockley that the pole was unstable. (R. II, 185; III, 4). After Shockley's work, Heritage considered the reported problem resolved. (R. II, 185; III, 4). To Deneke's knowledge, there was never a time when Heritage reported an issue to Westar and Westar failed to address it. (R. II, 184; III, 3).

No Facts To Show Knowing Disregard Of Imminent Danger

Two additional Heritage employees were identified as having knowledge related to the fire: CEO Derek Dummermuth; and President Ken Wagner. (R. II, 191; III, 7). All three Heritage witnesses—Deneke, Dummermuth, and Wagner—testified they had no reason to believe the fire was anything but an accident. (R. II, 195; III, 7). They testified there was *no* indication Westar intentionally disregarded the risk of this pole falling, or that Westar consciously allowed the pole to fall despite knowledge of its imminent failure. (R. II, 191-195; III, 7). Further, none of Heritage's expert witnesses contradicted or disagreed with the Heritage employees' testimony. (R. II, 195; III, 7).

Westar Inspection Procedures

The National Electrical Safety Code, an industry safety code, directs that inspection of equipment may be performed "as experience has shown to be necessary." (R. II, 186, 187; III, 4, 5). The NESC provides that inspections may be performed by field employees in the course of other duties. (R. II, 187; III, 5).

Consistent with the NESC, Westar expected its field employees to be continuously inspecting the company's equipment while performing other duties. (R. II, 187; III, 5). Westar prioritized places where members of the public were likely to gather, such as parks, schools, or fairgrounds, along with service to critical community infrastructure, for regular patrol-type inspections. (R. II, 187; III, 5). Westar's general safety rules instructed employees to be alert, identify all hazards, and to work safely on all occasions. (R. II, 188; III, 5).

Westar linemen such as Shockley had authority to order a pole changed on the spot if they thought it was unstable. (R. II, 188; III, 5). The company relied on employees' judgment, experience, and training, including training during apprenticeship. (R. II, 188; III, 5). Westar expected qualified field employees to notice if equipment was damaged. (R. III, 188; III, 5). Before climbing any pole, linemen were required to insert an awl or screwdriver into the pole's base to gauge for soundness. (R. II, 188; III, 5).

The KCC's System-Wide Maintenance Requirements

The KCC's Electric Reliability Requirements specify that Westar must carry out an "effective preventive maintenance system," including making reasonable efforts to prevent service interruptions. (R. II, 189; III, 5). The KCC did not impose a specific inspection process or cycle for poles. (R. II, 189, 372; III, 5).

Westar submitted detailed annual reports to the KCC about work done to maintain and replace equipment along its circuits. (R. II, 189, 381–397; III, 6). Westar was never informed it was out of compliance with KCC reliability requirements. (R. II, 189; III, 5). System-wide, the number of customers experiencing service interruptions declined significantly between 2014 and 2018, as Westar prioritized its lower-performing service areas for remediation. (R. II, 191; III, 7).

As part of a comprehensive pole inspection program, Westar enlisted third-party contractors to perform groundline excavations of poles on targeted circuits. (R. II, 189–190; 307–308; III, 6). Between 2005 and 2016, the program encompassed more than 106,000 of the company's roughly 700,000 distribution poles. (R. II, 189–190; 307–308; III, 6). Heritage tried to controvert this statement by saying that a representative of pole-

inspection company Osmose, Dave LaPlante, did not remember performing any inspections of distribution poles for Westar in 2015 or 2016. However, later in his deposition, LaPlante reviewed emails he received from Westar describing distribution pole inspections in those years and agreed the company's records were accurate. (R. III, 112–115, 116–122).

Westar prioritized these inspections in areas where customers experienced the most frequent service interruptions, and also considered geographical distribution of poles as well as coordinating with ongoing maintenance and repair projects. (R. II, 190; III, 6). Poles with attached "service risers," like the pole at issue in this case, are typically not fully excavated for safety reasons. (R. II, 190; III, 6).

The Lawrence service area, which included the Heritage pole, was one of Westar's highest-performing service areas. (R. II, 190; III, 5, 126). As such, this area had not been a specific focus of the company's ongoing pole-inspection program prior to the accident. (R. II, 190; III, 66).

Heritage's appellate brief asserts that "Westar admitted it only inspected poles within circuits that were lesser performing." (Heritage Br., at 7). But this statement is not supported by the record. Below, Heritage did not controvert that geographic distribution also played a role in planning inspections, or that Westar coordinated among its local offices to avoid duplication with ongoing maintenance projects in the field. (R. II, 190; III, 6).

According to an expert report authored by NESC chairman Nelson Bingel, Westar's pole-management practices met the requirements of the NESC, made a

significant impact on the company's pole infrastructure, and improved public safety. R. II, 190, 421, 423-424; III, 6). Heritage did not refute Bingel's conclusions, but complained that Westar did not furnish separate affidavit testimony reiterating that portion of Bingel's expert report. However, Heritage proffered no NESC expert of its own to dispute Bingel's knowledge of the NESC, nor did it bring a K.S.A. 60-456 / 60-457 challenge to Bingel's conclusions about Westar's compliance with NESC pole-inspection requirements. Heritage therefore failed to show that Bingel's testimony on this subject would ultimately be inadmissible, while offering no contrary evidence of its own. (*See* R. III, 93); *cf. Stonebarger v. Union Pac. R.R. Co.,* 76 F. Supp. 3d 1228, 1235–36 (D. Kan. 2015) (considering expert report on summary judgment where it was clear that expert would be able to provide admissible testimony on referenced contents of report).

ARGUMENTS AND AUTHORITIES

I. THE DISTRICT COURT CORRECTLY HELD THAT THE TARIFF'S LIMITATIONS OF LIABILITY APPLY TO THE FACTS OF THIS CASE.

A. Standard of Review

Utility tariffs are construed in the same manner as a statute. *Grindsted Prods. v. Kan. Corp. Comm'n,* 262 Kan. 294, 310, 937 P.2d 1 (1997). Interpretation of a statute is a question of law and reviewed de novo. *Knoll v. Olathe Sch. Dist. No. 233,* 309 Kan. 578, 580, 439 P.3d 313 (2019). The Court should construe a statute in a manner that gives full effect to its intent, reconciling the various provisions to bring them into workable harmony. *Bruce v. Kelly,* 316 Kan. 218, 224, 514 P.3d 1007 (2022).

B. The District Court Correctly Held That The Tariff Applies To Plaintiff's Claims

The District Court properly held that Heritage's claims fall within the plain language of the General Terms & Conditions of Westar's Tariff with the KCC. Section 7.02 of the Tariff, "Limitation of Liability," provides that the company will not be liable to a customer for property damage unless it is "affirmatively" shown that the property damage was caused by the company's "willful or wanton" conduct. (R. II, 460–61).

The Tariff governs Westar's supply of "Electric Service" to a "Customer" at "Points of Delivery." (Appendix, Exhibit A, 10, § 1.0) (Table of Contents and "Definitions" section of the General Terms & Conditions of the Tariff in effect at the time of the accident) (Evergy can submit a sealed official copy of the 105-page Tariff to the Court, upon request).The Court may take judicial notice of duly enacted and published ordinances or regulations of Kansas governmental agencies, K.S.A. 60-409(b)(1), as well as of "matters of public record in other courts or governmental bodies." *In re Nwakanma,* 306 Kan. 704, 706, 397 P.3d 403 (2017).

The Tariff provides that, by taking Electric Service, a customer agrees to the Tariff's General Terms & Conditions. (R. II, 460). The term "Electric Service" is defined, in relevant part, as "the availability of electric power and energy supplied by Company at a Point of Delivery within Company's Service Territory on or near the customer's premises[.]" (Appendix, Exhibit A, 10, § 1.03). The term "Point of Delivery" means "the place where Company's wires are joined to customer's wires or apparatus," unless another location is specified. (Appendix, Exhibit A, 12, § 1.08). The term "Customer"

means "a person, partnership, association, public or private firm, corporation or governmental agency or other entity using Electric Service at a stated location under a Service Agreement." (Appendix, Exhibit A, 10, § 1.05). A "Service Agreement" is an "application for Electric Service accepted by Company" which may be applied for orally or in writing. (Appendix, Exhibit A, 17, § 2.03).

Sections 7.02(A)-(C) of the Tariff govern Westar's liability in connection with the delivery of Electric Service. These subsections differ in some respects, but the common thread is that Westar will not be liable for property damage or injury to persons unless it is affirmatively shown that the injuries were caused by the company's willful or wanton conduct.

Heritage suggests that these subsections are ambiguous because each might apply to the facts in a slightly different way, and yet all impose the same "willful or wanton" standard. But multiple provisions or instances of language are not ambiguous unless they create a conflict or doubtful interpretation. *E.g., State v. Paul,* 285 Kan. 658, 662, 175 P.3d 840 (2008) (ambiguity exists "where the statute contains provisions or language of *doubtful or conflicting meaning*") (emphasis added). The sections at issue, while perhaps overlapping to some extent, are actually different and not in conflict with each other.

Section 7.02(A) states that "Company shall use commercially reasonable efforts to supply steady and continuous Electric Service at the Point of Delivery." (R. II, 460). It further states:

> 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… *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.

(R. II, 460) (emphasis added). Section 7.02(A) does not state, as Heritage suggests, that this limitation applies *only* to loss, damage or injury caused by irregularities or interruptions in service. The language plainly encompasses any loss, damage or injury whatsoever that is "caused by or arising from Company's operations." (R. II, 460).

Heritage asks, in effect, that the Court ignore the word "including" in section 7.02(A). The term "including" is construed by courts as being "exemplary rather than exclusive." *State v. Jefferson,* 287 Kan. 28, 37, 194 P.3d 557 (2008) (emphasis in original); *see also In re Wilkinson,* 251 Kan. 546, 550, 834 P.2d 1356 (1992) ("including" means the list is not limited to enumerated categories).

Heritage would similarly have the Court ignore the phrase "or for any other cause" in Section 7.02(A). But "[s]imply put, 'any' means 'any.'" *Sierra Club v. Moser,* 298 Kan. 22, 53, 310 P.3d 360 (2013) (the word "any" should be given "expansive reading").

Further contradicting Heritage's overly narrow reading of section 7.02(A), section 7.05 of the Tariff explicitly addresses "Electric Service Continuity." This section provides that the "Company 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, its agents, or employees." (R. II, 462). This provision, directed specifically to "irregularities or interruptions" in service, confirms that section 7.02's broader language limits liability for more than just irregularities or interruptions in service.

Section 7.02(B) states that the customer "shall save Company harmless" from:

> [A]ll 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.

(R. II, 461). Notably, this section does not say it is limited to interruptions in service. It expressly covers operations, the provision of electric service, and the installation, maintenance, or replacement of lines or other facilities.

Heritage argues that all of these aspects of operations must simultaneously come into play for the limitation on liability to apply. Even assuming this is correct, Heritage's claim touches all three of the listed items: (a) Westar's operations; (b) the provision of Electric Service as defined in the Tariff; and (c) the installation, maintenance or replacement of Westar's service lines or other facilities necessary to serve the customer. (R. II, 461); see also Heritage's Petition (alleging Westar violated duty of care "in maintaining its electrical distribution system.") (R. I, 23).

Finally, Heritage asserts that section 7.02(C) of the of the Tariff applies only to "damages to a non-customer's property when the utility provide [sic] is installing, maintaining or replacing equipment on the customer's property." (Heritage Br. at 15-16). But that is not what 7.02(C) says. Section 7.02(C) provides, in relevant part, as follows:

> 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.

(R. II, 461). This section makes no distinction between customers' and non-customers' property; it does not refer to non-customers. (R. II, 461). Rather, as with the preceding two sections, it begins with a specific scenario (normal work procedures in installing, maintaining or replacing facilities) and then more broadly limits liability for trespass, injury to persons, or property damage "that may be caused by reason of or related to" the Company's operations, the provision of Electric Service under the Tariff, or the "installation, maintenance or replacement of Company's facilities to serve customer." This section is not limited in the way Heritage contends. (R. II, 461).

If there were any doubt what the KCC meant about the scope of these three complementary sections, its rulings in recent administrative proceedings provide further clarity. For example, a property owner filed a complaint with the KCC alleging that a fire at his rental property was caused by Westar's failure to manage vegetation or to have a neutral line connected correctly at the transformer. *In re: Complaint Against Westar by John Feldkamp,* Docket No. 19-WSEE-361-COM, 2020 WL 3962239 (Kan. Corp. Comm'n July 9, 2020) (Appendix B). KCC staff investigated the complaint and considered whether to order changes to Westar's maintenance procedures. 2020 WL 3962239 at ¶¶ 18, 29-31. Westar complied with a staff recommendation to install a protective disconnect switch upstream from the customer. 2020 WL 3962239 at ¶ 9. Citing Section 7.02 of the Tariff, the KCC denied the claim for monetary reimbursement

on the grounds that Westar's "vegetation management does not display a showing of willful or wanton conduct[.]" 2020 WL 3962239 at ¶¶ 20, 23.

In another recent proceeding, the KCC dismissed a customer's complaint arising out of damage to his home and yard after a fire started on a Westar pole and spread to his property. *In re: Complaint against Westar by Jerry Jackson,* Docket No. 17-WSEE-326-COM, 2017 WL 3386378 (Kan. Corp. Comm'n Aug. 3, 2017) (Appendix B). KCC staff analyzed Westar's maintenance procedures and determined the fire was caused by an insulator failure, which was the result of "normal wear and tear, not willful or wanton conduct." *Jackson*, 2017 WL 3386378 at ¶¶ 6-7. The KCC ordered Westar to conduct a failure analysis. 2017 WL 3386378 at ¶ 10. The KCC concluded: "Since there is no showing, or even allegation, that the fire was caused by willful or wanton conduct by Westar, the Commission finds that pursuant to Section 7.02 of Westar's Tariff, Westar cannot be held liable for the damages to Mr. Jackson's property." 2017 WL 3386378 at ¶ 9.

The Tariff's plain and unambiguous language provides that Westar is not liable for damage to a customer's property absent an affirmative showing of "willful or wanton" conduct. The district court properly concluded that the Tariff's limitations on liability apply to Heritage's claims.

II. THE KCC HAD LEGAL AUTHORITY TO IMPLEMENT THE TARIFF'S LIMITATIONS ON LIABITY FOR ORDINARY NEGLIGENCE

A. Standard Of Review

Whether the KCC had authority to adopt the Tariff's limitations of liability for ordinary negligence is a question of law over which this Court's review is unlimited. *See Danisco Ingredients USA, Inc. v. Kan. City Power & Light Co.,* 267 Kan. 760, 764-65 986 P.2d 377 (1999).

B. The KCC Had Statutory Authority To Approve The Tariff's Limitations On Liability For Ordinary Negligence.

Heritage argues the KCC did not have sufficient authority to implement limitations on liability for ordinary negligence in the Tariff. But the Kansas Supreme Court has already decided this issue, holding that the KCC has statutory authority to limit a public utility's liability for ordinary negligence as part of the ratemaking process. *Danisco,* 267 Kan. at 773-74. This Court should follow that controlling Supreme Court precedent.

1. In *Danisco*, The Kansas Supreme Court Held That The KCC Can Limit The Liability Of A Public Utility For Ordinary Negligence.

In *Danisco*, certified questions from the Missouri Court of Appeals and the parties assumed that: (a) the KCC had authority to adopt tariffs limiting a utility company's liability to its customers; and (b) the Kansas Supreme Court had authority to determine whether such restrictions were reasonable. 267 Kan. at 765. But the Court declined to act on those assumptions, stating: "Nevertheless, an examination of the controlling statutes and case law supporting such assumptions is appropriate." 267 Kan. at 765.

The Court reviewed statutory provisions granting the KCC broad authority to adopt rules and regulations governing utility rates and operations. For example, K.S.A. 66-101 provides as follows:

> The commission is given **full power, authority and jurisdiction** to supervise and control the electric public utilities, as defined in K.S.A. 66-101a, doing business in Kansas, and is **empowered to do all things necessary and convenient** for the exercise of such power, authority and jurisdiction.

K.S.A. 66-101 (emphasis added); cited in *Danisco*, 267 Kan. at 765. In addition, K.S.A. 66-101g provides:

> As applied to regulation of electric public utilities, the provisions of this act **and all grants of power**, authority and jurisdiction herein made to the commission, shall be **liberally construed**, and **all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission**.

K.S.A. 66-101g (emphasis added); cited in *Danisco*, 267 Kan. at 766.

The Court also surveyed prior case law concerning limitations on a public utility's liability for negligence. *See Danisco*, 267 Kan. at 766-67. The Court concluded that the Electric Public Utilities Act does not explicitly confer upon the public utility or the KCC the power to make tariffs which limit the liability of a public utility to its customers. 267 Kan. at 767-86. **"However, Kansas allows reasonable limitations on such liability as an integral part of the rate making process."** 267 Kan. at 768 (emphasis added).

This ruling is hardly surprising, considering that the Kansas Legislature has granted broad authority to the KCC to regulate public utilities in this state. "In no other field of business is the authority to regulate so completely reserved to and exercised by the state as in the case of public utilities." *Kan. Power & Light Co. v. Great Bend*, 172

Kan. 126, 129, 238 P.2d 544 (1951). On numerous occasions, the Kansas Supreme Court has "sustained the jurisdiction of the Corporation Commission to regulate the business of a public utility," and "will always extend a very liberal interpretation of the public utilities act so as to give the [Corporation Commission] effective use of its lawful powers over the utility companies lawfully subject to its control." 172 Kan. at 130.

"Under the constitutional separation of powers doctrine, the regulation of utilities is legislative in nature. The legislature created the Kansas Corporation Commission and granted it full and exclusive authority and jurisdiction to supervise, control, and regulate the public utilities of this state." *Kan. Gas & Elec. Co. v. State Corp. Comm'n*, 239 Kan. 483, 491, 720 P.2d 1063 (1986) (citing K.S.A. 66-101 through 66-101h). "These various statutes grant to the KCC broad authority to do all things necessary and convenient for the establishment of just and reasonable rates in order to maintain reasonably sufficient and efficient service from electric public utilities." 239 Kan. at 491. These statutory powers must be "liberally construed, and all incidental powers necessary to carry into effect the provisions of the act are expressly granted to and conferred upon the Commission." 239 Kan. at 491. "The KCC's expertise in the field is vast, and the Commission must, of necessity, have considerable discretion in order to regulate utilities in the public interest." 239 Kan. at 491.

"The Commission's decisions 'involve complex problems of policy, accounting, economics, and other special knowledge.'" *Kan. Indus. Consumers Group, Inc. v. State Corp. Comm'n*, 36 Kan. App. 2d 83, 87, 138 P.3d 338 (2006).

> To say the task of the Commission in deciding rate cases is complex is an understatement. These cases are huge and involve many learned disciplines such as electrical engineering, physics, and economics. Topics such as the applicability of federal rules and regulations, tax implications, as well as the application of its own rules and regulations are areas of concern for the Commission when making these decisions.

Citizens Util. Ratepayer Bd. v. State Corp. Comm'n, 47 Kan. App. 2d 1112, 1122, 284 P.3d 348 (2012). "The Commission is granted broad discretion by the legislature in weighing the competing interests involved in utility rate cases." *Kan. Indus. Consumers*, 36 Kan. App. 2d at 86.

"The fundamental rule regarding statutory construction is that the intent of the legislature governs, where it can be ascertained." *Danisco*, 267 Kan. at 772. "In construing statutes, the legislative intention is to be determined from a general consideration of the entire act." 267 Kan. at 772. In construing tariffs, "consideration must be given to both the role and the intent of the KCC in the process of approval, and the intent of all participants . . . ." 267 Kan. at 772-73.

Applying these rules of statutory construction, the Court found that the intent of the KCC and the utility in establishing the tariffs was that the utility should have some limits on its liability in return for the rates established in the tariff. 267 Kan. at 773. The Court therefore upheld the KCC's approval of a limitation on liability for ordinary negligence, finding it was "sound as a matter of law and public policy." 267 Kan. at 774.

> Giving consideration to the role played by the KCC in the rate-making process, its intent and responsibility to insure reasonable rates to consumers, and the intent of [the utility] to provide reasonable service with its need for sufficient revenue to meet the cost of furnishing service and to earn a reasonable profit, we believe it is reasonable and sound public policy

> to interpret the tariffs in question as limiting the liability of [the utility] to its customers for its ordinary negligence only.

267 Kan. at 776.

The district court quoted this language in granting summary judgment for Westar. (R. III, 139). The district court observed that this Court had similarly followed *Danisco* in upholding a tariff's limitations of liability for claims of ordinary negligence in a case alleging loss of oil-well production due to faulty electrical equipment. (R. III, 139) (citing *Midwest Energy, Inc. v. Stoidi 2, Inc.*, No. 90,109, 2004 WL 421990, at *3 (Kan. Ct. App. March 5, 2004) (unpublished opinion), *rev. denied*, 278 Kan. 846 (2004)).

The Supreme Court's holding in *Danisco* is controlling on this subject. In Kansas, the KCC may authorize limitations on a utility company's liability for ordinary negligence as part of the broad regulatory authority granted to the KCC by the Kansas Legislature.

2. Cases From Other States With Different Statutes Do Not Shed Any Light On Kansas Law Concerning The Authority Of The KCC.

Heritage does not reference the broad and explicit grant of statutory authority from the Kansas Legislature to the KCC. Instead, Heritage cites cases from other states finding, for various reasons, that a tariff did not limit liability for negligence under that state's governing statutes or based upon the language of the tariff at issue. These cases are not controlling or persuasive, generally, and are even less so in light of the specific Kansas statutes cited above and the holding in *Danisco*.

In *Public Service Corp. v. Missouri Gas Energy*, 388 S.W.3d 221 (Mo. Ct. App. 2012), the Missouri Court of Appeals explained that, under Missouri law, the Missouri

Public Service Commission "is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto." 388 S.W.3d at 230. This case is easily distinguishable, however, because Kansas statutes do not limit the KCC's powers to those "expressly conferred by statute." Instead, they give the KCC "full power, authority and jurisdiction to supervise and control . . . public utilities"; empower the KCC "to do all things necessary and convenient for the exercise of such power, authority and jurisdiction"; direct that this grant of authority "shall be liberally construed"; and provide that "all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission." K.S.A. 66-101; 66-101g.

Viewed through Missouri's different—and much more restrictive—statutory frame, the Missouri Court of Appeals could "find no statute . . . that grants the Commission the authority to limit a public utility's negligence liability involving personal injury or property damage." *Pub. Serv. Corp.,* 388 S.W.3d at 230. The court noted that the Missouri legislature could abrogate negligence claims for personal injuries or property damage, if it chose to do so, or it could delegate that power to the Missouri Public Service Commission. 388 S.W.3d at 231. However, under Missouri law, that delegation would need to be explicit. 388 S.W.3d at 231.

The *Public Service Corp.* opinion also says it "makes sense" that a tariff's limitations on liability would extend to economic losses, but not to damages for property damage or personal injury. *See* 388 S.W.3d at 231. The court did not explain, or cite any legal authority for, this assertion. To make matters worse, the court summarily rejected

cases to the contrary from California, Florida, and Texas, and distinguished two Missouri Supreme Court cases which did not support the court's contention. *See* 388 S.W.3d at 231-32.

Ultimately, the Missouri court held that the Missouri commission could not limit liability for negligence resulting in property damage or personal injuries "unless the Legislature provides the Commission with such explicit authority by statute." 388 S.W.3d at 232. In other words, the court found that the Missouri legislature *could* authorize the Missouri commission to limit liability for these types of damages, but had *not yet done so*.

Heritage also cites *Szeto v. Arizona Public Service Co.*, 252 Ariz. 378, 503 P.3d 829 (Ariz. App. 2021), *rev. denied and ordered not published in part*, *Szeto v. Ariz. Pub. Serv.*, 515 P.3d 155 (Ariz. 2022). In *Szeto*, the court concluded that the utility's tariff did not limit liability for damage to property. 503 P.3d at 834. This followed the court's observation that "the policy supporting the limitation of liability for economic damages for service interruptions does not support eliminating liability for damages to property caused by unsafe transmission lines." 503 P.3d at 834. This statement was not supported by any expressed logic or reasoning, but was instead based upon a citation to the Missouri case discussed immediately above. As noted, the outcome in the Missouri case flowed from a reading of Missouri law that any limitations on utility liability must expressly be granted by the legislature or by the commission upon an explicit delegation of authority, neither of which had occurred. This is a far cry from a legal pronouncement that limitations on liability for property damage or personal injuries can *never* be

authorized by the legislature, or by a public utilities commission pursuant to delegated authority. The *Szeto* case is also distinguishable because the tariff's limitation on liability, as written, did not cover the alleged acts of negligence in that case. *See* 503 P.3d at 834.

Heritage cites an Illinois case, *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 809 N.E.2d 1248 (2004). This was a wrongful death case against a natural gas utility involving a connection between the decedent's kitchen range and the gas supply. 809 N.E.2d at 1253. Plaintiff alleged the utility was aware of dangers related to a brass connector but negligently failed to warn the decedent. 809 N.E.2d at 1253. The Illinois Supreme Court explained that utility tariffs can limit liability as part of the rate-making process. 809 N.E.2d at 1264 (citing, *inter alia*, *Danisco*, 267 Kan. at 769). The court noted that the tariff "provides the source for, and determines the nature and extent of, a public utility's service obligations." 809 N.E.2d at 1265. The question, therefore, was whether the language of the tariff barred plaintiff's cause of action. 809 N.E.2d at 1267.

The court found the tariff codified the common law rule that a utility has no responsibility for a customer's gas pipes and fittings, based on the customer's duty to maintain that equipment and the company's lack of control and knowledge. *Adams*, 809 N.E. 2d at 1268. However, the commission did not intend to abrogate the common law rule that a limitation of liability is unavailable when the utility actually knows of a gas leak. *See* 809 N.E.2d at 1269, 1272. "Absent express language that disavows the common law exception based on notice, we cannot say that it was eliminated by the tariff provision." 809 N.E.2d at 1273. The court concluded: it is "for the General Assembly,

and not this court, to abrogate [the utility's] common law duty." 809 N.E.2d at 1273 (internal quotation omitted).

Thus, just like the Missouri Court of Appeals, the Illinois Supreme Court held that it is permissible to have limitations on liability for common law negligence claims. But in those cases the alleged liability was not eliminated by the tariffs in question.

Heritage includes a string of cases cited in *Adams*. (Heritage Br. at 25-26). In one of those cases, the Missouri Court of Appeals found that the plaintiff's allegations fell outside the tariff's ambit. *Adams,* 809 N.E.2d at 1272 (citing *Nat'l Food Stores, Inc. v. Union Elec. Co.,* 494 S.W.2d 379 (Mo. Ct. App. 1973)). In another case, a court held that the Oklahoma legislature had not expressed an intent that the filed-tariff doctrine abrogated a common law fraud claim against the utility. 809 N.E.2d at 1272 (citing *Satellite Sys., Inc. v. Birch Tel. of Okla., Inc.*, 51 P.2d 585 (Okla. 2002)). These and the other cited cases, however, do not address the situation presented here—a duly-adopted tariff expressly limiting the utility's liability for ordinary negligence, approved pursuant to a broad grant of statutory authority which, as the Kansas Supreme Court has held, gives the Commission power to approve precisely that type of limitation.

Citing *Adams*, Heritage also references the "Moorman doctrine," a principle of Illinois law limiting the recovery of purely economic damages in tort actions. (Heritage Br. at 28). In *Adams*, the Moorman doctrine appears in a block quote from an administrative proceeding in which a party requested that the commission approve liability limits for claims brought by its business partner's customers. *See* 809 N.E. 2d at 1270. The commission declined to do so, observing that the Moorman doctrine would

provide the company with sufficient liability protections even absent protections in the tariff. The Moorman doctrine sheds no light on the KCC's authority to limit a utility's liability for ordinary negligence in Kansas.

There is an important difference between the law in Kansas and the out-of-state cases cited by Heritage. In Kansas, statutes "in derogation of the common law" are not disfavored or construed strictly. The Kansas Legislature has directed that "the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object." K.S.A. 77-109. Thus in Kansas there is no barrier, but rather, a statutory *mandate* to give effect to duly-enacted statutes, even if they might be considered "in derogation of the common law." Accordingly, Kansas statutes and the KCC tariff (which is treated like a statute) must be "liberally construed to promote their object" and not strictly limited in favor of preexisting common law.

Heritage's out of state cases do not undermine *Danisco*'s holding that the KCC has authority to approve limitations on liability for ordinary negligence.

3. The KCC Has Authority To Limit Liability For More Than Service Interruptions or Economic Damages Claims.

Heritage would have this Court cabin the holding of the Kansas Supreme Court in *Danisco* to service interruption and economic damages claims. But that is not what *Danisco* held. The Supreme Court expressly held that it was reasonable for a tariff to relieve an electric utility "of liability for *damages of any nature* resulting from the utility's own simple negligence." *Danisco*, 267 Kan. at 761 (emphasis added). Contrary

to Heritage's suggestion, *Danisco* was not focused on the type of damages alleged, but instead addressed the type of *duty* underlying the claim: a duty of ordinary care, for which liability limits are reasonable; or a duty to refrain from willful and wanton conduct, for which they are not. 267 Kan. at 761.

The rationale underpinning the *Danisco* decision—the broad authority given the KCC to manage public utility rates and thereby insure efficient and effective delivery of services—is not varied by the type of injury or the nature of damages a claimant might allege. The impact on rates is the same regardless of the type of injury or nature of damages. In fact, the rationale for the *Danisco* decision is even more compelling in the case of broader potential liability. As the Court noted, "reasonable rates are dependent in no small measure on rules limiting liability, for the broader the exposure, the greater the cost of electric service." 267 Kan. at 773. Narrowly circumscribing the limitation would dramatically undermine this objective—an objective the Kansas Supreme Court described as "sound as a matter of law" and "reasonable and sound public policy." 267 Kan. at 773-74.

This conclusion is bolstered by the cases that the Court cited in support of its holding. Some of the cited cases involved interruptions of service, while others did not. Some of the cases involved property damage, and one additionally involved personal injuries. *See Danisco*, 267 Kan. at 796 (citing *Pilot Indus. v. S. Bell Tel. & Tel.* Co., 495 F. Supp. 356, 358 (D.S.C. 1979) (alleged faulty equipment and failure to list business in phone directories); *Olson v. Mountain States Tel. & Tel. Co.,* 119 Ariz. 321, 323, 580 P.2d 782 (Ariz. Ct. App. 1978) (alleged failure to forward calls); *Prof'l Answering Service,*

Inc. v. Chesapeake Tel., 565 A.2d 55, 56 (D.C. 1989) (alleged defective equipment, ineffective service, and failure to maintain and repair system); *Landrum v. Fla. Power & Light Co.,* 505 So.2d 552, 553 (Fla. Dist. App. 1987) (alleged interruption in electric power causing personal injuries and property damage); *S. Bell Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 800, 204 S.E.2d 457 (1974) (alleged curtailment of service); *In re Ill. Bell Switching*, 161 Ill. 2d 233, 244, 641 N.E.2d 440 (1994) (alleged failure to take adequate fire prevention measures followed by fire at utility facility and loss of service to customers); *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 108-09, 825 P.2d 588 (1992) (alleged negligence in advising customer about contemplated phone system purchase and subsequent sale of defective equipment to customer); *Lee v. Consolidated Edison Co.*, 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826 (N.Y. App. Term 1978) (alleged liability for summer blackout); *Garrison v. Pac. Nw. Bell,* 45 Or. App. 523, 531-32, 608 P.2d 1206 (1980) (alleged telephone directory error); *Behrend v. Bell Tel. Co.,* 242 Pa. Super. 47, 74-75, 363 A.2d 1152 (1976) (alleged omission and errors in directory listings; disruption of telephone service), *vacated and remanded*, 473 Pa. 320, 374 A.2d 536 (1977), *further proceedings at* 257 Pa. Super. 35, 390 A.2d 233 (1978) (tariff not violative of state constitution); *Sw. Bell Tel. Co. v. Rucker,* 537 S.W.2d 326, 329 (Tex. App. 1976) (alleged voltage surge causing property damage and loss of service); *Warner v. Sw. Bell*, 428 S.W.2d 596, 599 (Mo. 1968) (alleged incorrect listing of business in telephone directories)). In each of these cases, the court followed the same principles embraced by *Danisco*—that limitations of liability are an essential part of the ratemaking function and will be enforced as to ordinary negligence.

This is the correct reading of *Danisco*, as confirmed by *Ottawa County Lumber & Supply, Inc. v. Sharp Electronics Corp.*, No. 03-4187-RDR, 2004 WL 813768 (D. Kan. Feb. 17, 2004) (unpublished decision). In that case, plaintiff alleged that defective wiring installed by defendant Southwestern Bell Telephone Company helped to cause a fire that destroyed plaintiff's business. 2004 WL 813768, at *1. The court, following *Danisco*, granted Southwestern Bell's motion to dismiss based upon the limitation of liability in its tariff. 2004 WL 813768, at *3-4. The court stated: "Therefore, in accord with *Danisco Ingredients*, we find that the disclaimers of liability contained in [the tariffs] are valid and enforceable insofar as they disclaim liability for simple negligence." 2004 WL 813768, at *4. This holding—in a faulty wiring and property damage case—illustrates that *Danisco* is not restricted to claims of service interruption or purely economic losses.

Heritage's proffered limitations to the *Danisco* holding also gloss over the difference between the existence of a legal duty and the nature of injury or type of damages claimed. A limitation on liability for ordinary negligence addresses the duty owed, not the types of injury or damages that might result from a breach of that duty. "The 'cause of action' is the wrong done, not the measure of compensation for it, or the character of relief sought." *Schmeck v. Shawnee*, 231 Kan. 588, 590, 647 P.2d 1263 (1982) (internal quotation omitted). "Damage is not the cause of action. It is merely part of the remedy which the law allows for the injury resulting from a breach or wrong." 231 Kan. at 590.

In situations where a tariff eliminates liability for ordinary negligence, ordinary negligence does not give rise to a cause of action. Absent a cause of action, the type of

injury or nature of damages are not a factor. "[T]he cause of action is based not upon the existence of damages alone, but must be based upon the existence of actionable negligence, the breach by the defendants of some duty owed to the plaintiff, resulting in plaintiff's injury." *Schmeck*, 231 Kan. at 590.

Finally, *Danisco* approved limitations on liability for the utility "in connection with delivery of the services." *See* 267 Kan. at 771. If the Court had intended to limit its holding to "service interruptions," or to claims for economic damages, it easily could have said so. But the Court did not say so because the grant of authority to the KCC is very broad and the rationale for the liability limitation is not affected by the type of injury or the nature of the alleged injuries.

In short, nothing in *Danisco's* ruling, reasoning, or rationale would support an effort by this Court to create exceptions to, or limitations on, that precedent. The authority of the KCC to authorize limitations on liability for ordinary negligence is a settled question in Kansas.

C. The Tariff Is Not An Unconstitutional Abrogation of The Common Law.

To the extent Heritage now seeks to assert a constitutional claim, Heritage did not raise that issue below. Heritage does not develop the argument in its appellate brief. A constitutional challenge to the Tariff is not properly before this Court.

Because the constitutional aspects of the argument are not developed, Westar is unsure what Heritage seeks to argue in this regard. In an abundance of caution, however,

Westar will attempt to touch on the substance of Heritage's constitutional "argument," although Westar can only speculate what that might be.

1. Heritage Did Not Argue The Tariff's Constitutionality Below; Heritage Has Not Developed The Issue On Appeal; The Issue Is Not Properly Before This Court

Whether a party has preserved an issue for appeal is a question of law over which the appellate court exercises unlimited review. *Johnson v. Bd. of Dirs. Of Forest Lakes Master Ass'n*, 61 Kan. App. 2d 387, 393, 503 P.3d 1038 (2021).

Heritage did not preserve a constitutional challenge to the Tariff. Heritage's Petition does not allege a constitutional violation. (R. II, 21-25). Heritage's briefing on the motion for summary judgment did not argue the tariff is unconstitutional. (R. III, 2-20). The word "constitution" and its derivatives, such as "unconstitutional," appeared nowhere in Heritage's brief below. (*See* R. III, 2-20). During oral argument on the motion for summary judgment, no one uttered the words "constitutional" or "unconstitutional" (or anything similar). (*See generally* R. IV). The district court's ruling on summary judgment did not address any constitutional claim. (R. III, 137-143). The district court adjudicated the argument the way Heritage presented it, as a question of the KCC's authority and the enforceability of the Tariff. (R. III, 137-140).

The first time Heritage asserted that the Tariff was unconstitutional was on appeal. But even now, the issue has not been developed. Heritage's "argument" on this point goes no further than to insert the word "unconstitutional" at two places in its brief, with no elaboration or even a citation to any provisions of the federal or state constitutions.

It is a fundamental rule of appellate procedure that issues not raised before the trial court cannot be raised on appeal. *Miller v. Bartle*, 283 Kan. 108, 119, 150 P.2d 1282 (2007). Issues that have not been adequately briefed are deemed waived or abandoned. *State v. Willis*, 312 Kan. 127, 146, 475 P.3d 324 (2020). A point raised only incidentally in a brief, but not argued, is also waived or abandoned. *Manhattan Ice & Cold Storage, Inc. v. City of Manhattan*, 294 Kan. 60, 71, Syl. ¶ 1, 274 P.3d 609 (2012). "Failure to support an argument with pertinent authority or to show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue." *Friedman v. Kan. State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013).

Constitutional issues presented for the first time on appeal are not properly before an appellate court. *See Miller*, 283 Kan. at 119. Ordinarily, constitutional challenges will not be considered unless they were alleged in the pleadings or presented at trial. *Vaughn v. Murray*, 214 Kan. 456, 461, 521 P.2d 262 (1974). Barring exceptional circumstances, a court will only hear constitutional questions that are "duly raised and insisted upon and are adequately argued." *State ex rel. Osborn v. Richardson*, 174 Kan. 382, 390, 256 P.2d 135 (1953).

In opposing Westar's motion for summary judgment, Heritage argued that the tariff was "unenforceable as it abrogates the common law without the necessary legislative authorization." (R. III, 2). The heading to Heritage's argument on this point states: "The Westar Tariff is Unenforceable to the Extent it Abrogates Common Law." (R. III, 11). Heritage addressed the KCC's authority to adopt tariffs, discussed the holding in

Danisco, and asserted that the Kansas Legislature "did not delegate it [sic] ability to abrogate common law to the KCC." (R. Vol III, 13). Heritage concluded its argument as follows: "As such, the KCC did not have the ability to revoke Heritage's right to sue Westar for common law negligence. The Westar Tariff, to the extent it attempts to limit Heritage's common law rights, is unenforceable." (R. III, 14). The argument is plainly about the KCC's authority, not a violation of the state or federal constitution.

In *Friedman,* the plaintiff waived a constitutional challenge because he did not adequately explain how particular rulings against him resulted in due process violations. 296 Kan. at 646. Similarly, in *State v. Sprague*, 303 Kan. 418, 424-25, 362 P.3d 828 (2015), the State's briefing on the issue of ineffective assistance of counsel was "sparse" and cited only one case; the Court concluded that the issue was inadequately briefed and thus abandoned. In *National Bank of Andover v. Kansas Bankers Sur. Co.*, 290 Kan. 247, 281, 225 P.3d 707 (2010), Kansas Bankers Surety (KBS) asserted the trial court abused its discretion in ordering a new trial. In its appellate brief, however, KBS did not develop arguments to challenge all three alternative grounds for new trial. 290 Kan. at 281.The Court held that "a fleeting reference to two of the three reasons" the trial court granted a new trial was "insufficient to preserve the issue for appeal." 290 Kan. at 281.

Heritage had every opportunity to raise a constitutional challenge below, but did not. Westar had no opportunity to develop a record on a constitutional claim, and the trial court did not rule on it. The constitutional issue is not developed in Heritage's appellate brief. Heritage can offer no valid basis for this Court to depart from the well-settled rules providing that a constitutional issue cannot be raised for the first time on appeal, and that

an issue not sufficiently developed in the briefing is not properly before the Court. The Court should refuse to consider any constitutional challenge as part of this appeal.

2. The Tariff Does Not Unconstitutionally Abrogate the Common Law

Heritage does not explain how the Tariff ostensibly violates any provision of the federal or state constitutions. Therefore, Westar can only speculate concerning the nature of Heritage's bare assertion that the Tariff is "unconstitutional."

"Whether a statute is constitutional is a question of law." *Bd. of Johnson County Comm'rs v. Jordan*, 303 Kan. 844, 858, 370 P.3d 1170 (2016). "[B]efore a statute may be struck down, the constitutional violation must be clear. The statute is presumed to be constitutional, and all doubts are resolved in favor of upholding it." 303 Kan. at 858; *cf., Butler v. Shawnee Mission Bd. of Educ.,* 314 Kan. 553, 554, 502 P.3d 89 (2022) (constitutional avoidance rule "strongly counsels against courts deciding a case on a constitutional question if it can be resolved in some other fashion, especially when the question concerns the validity of a statute enacted by our coordinate branches of state government.").

Tariffs "are those terms and conditions which govern the relationship between a utility and its customer." *Danisco*, 267 Kan. at 765. Once approved by the KCC, "they generally bind both the utility and the customer." 267 Kan. at 765. Although a utility's customers do not individually negotiate the terms and conditions of the tariff, their interests are represented by the public utilities commission. *See Prior v. GTE North*, 681 N.E.2d 768, 774-75 (Ind. App. 1997) (the public utilities commission served as the plaintiff's representative in the rate-making process); *Danisco,* 267 Kan. at 773 (KCC's

statutory mandate is to balance the public need for adequate, efficient, and reasonable service with the utility's need for sufficient revenue to provide the service).

The Tariff explicitly provides that, by taking electric service from Westar, the "customer agrees to abide by and conform to these General Terms and Conditions." (R. II, 460-61) Those General Terms and Conditions include the limitations of liability in section 7.02. (R. II, 460-61). The Tariff, which has the force and effect of law, thus expressly provides that customers consent to the limitations of liability by virtue of requesting and receiving electric service pursuant to the Tariff.

Notwithstanding the limitations of liability in the Tariff, it remains possible for customers who claim injury on account of alleged acts or omissions by Westar to pursue a remedy. Claimants must establish that the acts or omissions were done with a willful or wanton mindset, but there is still a remedy.

As Heritage acknowledges, the legislature has the power to change the common law. (Heritage Br. at 18). Therefore, even if the Tariff is viewed as a legislative modification of the common law, that does not automatically equate to a violation of constitutional rights.

Heritage does not identify any provision of the federal or state constitution that the Tariff allegedly violates. If Heritage is hoping the Court will consider section 18 of the Bill of Rights to the Kansas Constitution, this section "does not create any new rights of action; it merely requires the Kansas courts to be open and afford a remedy for such rights as are recognized by law." *Prager v. State*, 271 Kan. 1, 40, 20 P.3d 39 (2001); *Clements v. United States Fid. & Guar. Co.,* 243 Kan. 124, 128, 753 P.2d 1274 (1988)

(section 18 provides that injured parties shall have "a remedy by due course of law, and justice administered without delay"); *Schmeck*, 231 Kan. at 594 (section 18 does not create rights of action; it means only that "for such wrongs as are recognized by the law of the land, the courts of this state shall be open and afford a remedy") (internal quotation omitted).

Section 18, on its face, does not limit the legislature's power to modify the common law. Nevertheless, Kansas courts have held that the legislature can modify the common law so long as there is a "quid pro quo" for the rights infringed or abolished. *See e.g., Bair v. Peck*, 248 Kan. 824, 839, 811 P.2d 1176 (1991). In considering the adequacy of the quid pro quo, "no hard and fast rule can apply to all cases." 248 Kan. at 843. In *Lemuz v. Fieser*, 261 Kan. 936, 933 P.2d 124 (1997), the Court applied the quid pro quo test to a statutory limitation on corporate negligence for medical malpractice claims. The first question for the Court was whether a significant public interest justified abrogation of the cause of action; this was essentially a "rational basis" review. 261 Kan. at 948. The second question was whether the legislature provided "an adequate substitute remedy or quid pro quo for the abrogation of the common-law remedy." 261 Kan. at 949.

The Court found the first part of the test was satisfied because the statute was part of a larger effort to address the medical malpractice crisis of the 1970s. 261 Kan. at 950. The act was intended to alleviate an insurance crisis and ensure the continued availability of physicians and affordable medical malpractice insurance in the state. 261 Kan. at 950. In addition, "with the threat of liability gone, the legislature hoped that the use of peer

review in hospitals would increase." 261 Kan. at 950. The Court held that this satisfied the "significant public interest" part of the test. 261 Kan. at 950.

Next, the Court found that the legislature had provided an adequate quid pro quo. The Court considered the history of the act, the availability of insurance coverage, and later-enacted supplemental statutes requiring that medical care facilities establish risk management programs, including systems to investigate and reduce adverse incidents. 261 Kan. at 957. The Court found that the "supplemental quid pro quo"—the requirement that hospitals engage in risk management—would, ideally, decrease medical malpractice incidents, reduce insurance rates, and provide Kansans with health care "to ensure their health and welfare." 261 Kan. at 958-59; *see also Bonin v. Vannaman*, 261 Kan. 199, 219, 929 P.2d 754 (1996) (continued availability of health care in Kansas was an adequate quid pro quo for limiting a minor's right to pursue a cause of action after 8 years); *Prager*, 271 Kan. at 50 (limits on state employees' remedies for whistleblowing claims represented a "legislative attempt to balance the various competing interests" and was "necessary for the general public good").

The first part of the quid pro quo test is easily satisfied in this case. The legislature delegated broad authority to the KCC to supervise and control electric public utilities so they will furnish reasonable and effective service at just and reasonable rates. *Danisco*, 267 Kan. at 773 (citing K.S.A. 66-101). The Kansas Supreme Court has determined that limitations on utility liability for ordinary negligence are an integral part of the ratemaking process and "sound as a matter of law and public policy." 267 Kan. at 774.

The Tariff also meets the second part of the quid pro quo test. The Tariff is part of a comprehensive regulatory framework that enhances the availability, reliability, efficiency, and safety of an important public benefit—electrical service. By statute, the KCC is empowered to implement rules and regulations for utility operations, investigate complaints, and may require utilities to make "such improvements and do such acts as are or may be required by law to be done by any such electric public utility." K.S.A. 66-101e. The KCC exercises "general supervision of all electric public utilities . . . and shall inquire into any neglect or violations of the laws of this state." K.S.A. 66-101h. The KCC is empowered to "examine and inspect the condition of each electric public utility, its equipment, the manner of its conduct and its management with reference to the public safety and convenience." K.S.A. 66-101h.

The regulatory framework established by the legislature confers a significant public benefit on all users of the electric utility's system. It promotes safe, reliable, efficient, and nondiscriminatory delivery of electric service at reasonable rates. *See CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 205, 213-14 (Tex. 2022) (regulation of the utility industry affords consumers protection against unsafe or inadequate service, and ensures continued availability of service); *Kan. Gas & Elec. Co. v. Pub. Serv. Comm'n*, 122 Kan. 462, 466, 251 P. 1097 (1927) (regulation of public utilities provides "a measure of security against ruinous competition," and avoids the "evils attendant on unnecessary duplication of public utilities"); *see also Duggal v. G.E. Capital Commc'ns Servs.*, 81 Cal. App. 4th 81, 94, 96 Cal. Rptr. 2d 383 (2000) (limitation on utility liability serves the public interest); *Sw. Elec. Power Co. v. Grant*, 73

S.W.3d 211, 221 (Tex. 2002) (limitation on utility liability "protects the utility's ability to provide effective, consistent, and nondiscriminatory service"); *Prior*, 681 N.E.2d at 774 (tariff represents a trade-off between ensuring that the utility will provide reasonably adequate service and providing customers with relatively low-costs service).

If, as Heritage asserts, the Tariff is an abrogation of the common law, and if that abrogation necessitates a quid pro quo under the Kansas Constitution, the legislature has met that requirement. The Tariff is not unconstitutional.

III. THE TARIFF'S LIMITATION OF LIABILITY IS REASONABLE.

A. Standard Of Review

Whether limitations of liability in a tariff are reasonable and enforceable is a legal question over which this Court's review is unlimited. *Danisco*, 267 Kan. at 765.

B. The Kansas Supreme Court Has Held That Limitations On A Utility's Liability For Ordinary Negligence Are Reasonable.

Much of this has been covered already. In *Danisco*, the Kansas Supreme Court held that because "[a] public utilit[y's] liability exposure has a direct effect on its rates . . . it is reasonable to allow some limitation of liability such as that for ordinary negligence in connection with the delivery of the services." 267 Kan. at 772.

Heritage asserts that the Tariff is unreasonable to the extent it applies to claims for property damage. (Heritage Br. at 34). But the Supreme Court specifically held it was reasonable for a tariff to relieve an electric utility "of liability *for damages of any nature* resulting from the utility's own simple negligence." 267 Kan. at 761 (emphasis added). Thus, allegations of property damage or personal injury do not override *Danisco's*

holding that limitations on liability for ordinary negligence are enforceable as matter of law and public policy.

Danisco upheld limitations on liability for ordinary negligence as reasonable because they are an "integral part of the rate-making process." 267 Kan. at 767. The cases cited in support of the decision expressed the same rationale. *See e.g.*, *Pilot Indus.,* 495 F. Supp. at 361 ("The limitation exists as an integral part of the rate-making function[.]"); *S. Bell Tel. & Tel. Co.,* 204 S.E.2d at 460 ("Reasonable rates are in part dependent upon such a rule."); *Warner,* 428 S.W.2d at 601 ("such limitations are at least indirectly considered and involved in establishing its rates."); *Behrend,* 363 A.2d at 1165 (citing cases upholding tariff limitations of liability based on the interrelationship of the limitation with the rate structure).

Other courts have upheld limitations on liability for property damage. *See*, *e.g.*, *Landrum*, 505 So. 2d at 554 (termination of service led to customer lighting candle that caused fire); *Ottawa County Lumber & Supply,* 2004 WL 813768, at *1-4 (property damage from fire allegedly caused by faulty telephone wiring).

Similarly, courts have upheld limitations on tort liability for personal injuries. *See e.g., L.A. Cellular Tel. Co. v. Superior Court*, 65 Cal. App. 4th 1013, 76 Cal. Rptr. 2d 894, 895, (1998) (tariff limitation on liability enforceable where woman was shot after trying to call 911); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 214 (Tex. 2002) (electrical shock to woman caused by failure to disconnect electricity service).

As stated in a recent Texas case, there are at least three important factors supporting the reasonableness of such limitations:

> (1) a regulated utility's inability to raise rates for incurred liability "could have a direct detrimental effect on its finances"; (2) the requirement of nondiscriminatory service means the utility cannot refuse service to customers who have a greater potential for suffering losses; and (3) extensive regulation of the utility industry afforded consumers protection through regulations providing remedies to consumers and penalizing utilities for unsafe or inadequate service.

CenterPoint Energy Res. Corp., 640 S.W.3d at 213-14 (internal citation omitted).

Unlike private businesses, public electric utilities are subject to comprehensive regulation of their rates, services, and facilities by the state's regulatory authority. Private businesses typically face "no impediment to setting rates sufficient to cover the cost of insurance or its liability in the absence of service" and are not "compelled to serve customers regardless of their ability to pay for services." *See Raspberry Junction Holding, LLC v. Se. Conn. Water Auth.*, 331 Conn. 364, 375-65, 203 A.3d 1224, 1231 (2019); *see also Adams,* 809 N.E.2d at 1264 ("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."). "An unregulated business can set its prices based on what the market will bear and can factor in potential or actual liability." *Houston Lighting & Power Co. v. Auchan USA, Inc.,* 995 S.W.2d 668, 674 (Tex. 1999). "Without a limitation of liability, the potential for substantial damages awards either threatens the financial integrity of the utility or must be passed on with regulatory approval to all rate payers." 995 S.W.2d at 674.

In arriving at its holding, the *Danisco* Court explained that utility tariffs "represent a bargained-for compromise between the KCC and [the utility] with the intention of trading liability limits for a lower rate for electrical services." 267 Kan. at 773. "We

believe it reasonable and sound public policy to interpret the tariffs in question as limiting the liability of [the utility] to its customers for its ordinary negligence only." 267 Kan. at 773.

Heritage attempts to compare the Tariff at issue in this case with tariffs in other states, most of which relate to a single entity, Xcel Energy. But whether other tariffs explicitly apply to actions involving property damage or personal injury claims has no relevance to the question of reasonableness in this case.

Heritage argues that "[i]t is unreasonable to say that every cause of action brought against Westar for negligence must rise to the level of willful or wanton." Heritage contrives an example of a Westar vehicle colliding with another vehicle and causing damages. (Heritage Br. at 36-37). There are at least two problems with this argument. First, it is not clear that the Tariff would apply to this imagined scenario. The definitions section of the Tariff, and the particular liability limitations in section 7.02, could lead a court to conclude that this scenario is not covered by the Tariff. Moreover, the particular facts of this hypothetical claim are unknown. Analyzing a non-existent claim to determine whether it might be covered by the Tariff is not useful to the present analysis, where the facts are well-developed and the Tariff expressly covers the claim.

Heritage also argues, without evidence, that "power outages and shorts are commonplace, but fires caused by fallen, rotten poles are not." (Heritage Br. at 36). Even if this is true, there is no principled reason to distinguish between more frequent and less frequent occurrences. Any occurrence could result in a significant damage award, upsetting the balance and calculus of the ratemaking process. This is why the Court in

Danisco focused on the nature of the duty owed, not the potential consequences of a breach of that duty. See section II(B)(3), supra. A standard that requires a court, in every case, to perform a subjective, *ad hoc* assessment of the extent and nature of the damages alleged, as well as the particular manifestation of the alleged negligence, is no standard at all. The *Danisco* Court foreclosed this kind of crazy-quilt approach; limitations on ordinary negligence in utility tariffs, when approved by the KCC, are reasonable and enforceable under Kansas law.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT THERE WERE INSUFFICIENT FACTS TO SUBMIT THE ISSUE OF WANTON CONDUCT TO THE JURY

A. Standard Of Review

The Court exercises de novo review over a trial court's grant of summary judgment. *Dominguez v. Davidson,* 266 Kan. 926, 929, 974 P.2d 112 (1999). A court resolves all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. 266 Kan. at 929. Summary judgment is proper if no genuine issue of fact remains. 266 Kan. at 929. A party opposing a motion for summary judgment must come forward with evidence to establish a genuine dispute as to a material fact. 266 Kan. at 929. A court is "not duty bound to accept the opposing party's reading of the facts." 266 Kan. at 929. An issue of fact is "not genuine unless it has legal controlling force as to the controlling issue." *Mitchell v. City of Wichita,* 270 Kan. 56, 59, 12 P.3d 402 (2000) (citation omitted).

B. The District Court Correctly Held There Was Insufficient Evidence to Support a Finding of Wanton Conduct by Westar

1. Wanton Conduct Standard

While negligence is merely a failure to exercise due care, wantonness "involves a state of mind indicating indifference to known circumstances." *Elliott v. Peters,* 163 Kan. 631, 634, 185 P.2d 139 (1947). ("There is a potent element of consciousness of danger in wantonness."). One "ordinarily cannot be held guilty of wanton conduct if the conduct occurs before the peril is actually discovered." 163 Kan. at 637-38. Wanton conduct is 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 . . . . Wantonness refers to the mental attitude of the wrongdoer rather than a particular act of negligence." *Reeves v. Carlson,* 266 Kan. 310, 313-14, 969 P.2d 252 (1998).

Wantonness requires: (1) "a realization of the imminence of danger"; and (2) "a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act." *Willard v. City of Kan. City,* 235 Kan. 655, 658, 681 P.2d 1067 (1984) (internal quotation omitted).

2. Wanton Conduct Must "Affirmatively Appear."

The Tariff provides that "willful or wanton" conduct must "affirmatively appear." The term "affirmatively appear" is not separately defined in the Tariff, but the term is regularly used to signify a heightened factual burden that does not rely merely on inferences, speculation, argument, or bare allegations. *See, e.g., State v. Richard,* 252 Kan. 872, 877, 850 P.2d 844 (1993) ("Errors which do not affirmatively appear to have

prejudicially affected the substantial rights of the party complaining do not require reversal when substantial justice has been done."); *Hurst v. Allen,* 188 Kan. 201, 202, 361 P.2d 893 (1961) ("Error in the trial court is never presumed. The burden is on an appellant to make it affirmatively appear."); *Grace v. Amer. Cent. Ins. Co.,* 109 U.S. 278, 284 (1883) (where jurisdiction must affirmatively appear, it may not be "inferred argumentatively"); *see Williams v. City of Douglasville,* 354 Ga. App. 313, 318, 840 S.E.2d 715 (2020), ("affirmatively appear" means more than "merely alleging something"); *Wagner v. Am. Family Mut. Ins. Co.*, 65 Wis. 2d 243, 249 222 N.W.2d 652 (1974) ("affirmatively appear" requires showing that "in all probability" the case would have turned out differently).

3. Heritage's Appellate Brief Does Not Demonstrate The Existence Of A Genuine Issue Of Material Fact.

Unable to point to any evidence establishing willful or wanton conduct by Westar, Heritage mischaracterizes the record and recites proffered expert opinions that were properly disregarded by the trial court as immaterial. (Heritage Br. at SOF ¶¶ 6-9, 10-15; *see* R. III, 142). Even if these assertions were accurate and supported by the record—which they are not—at most they go to negligence and thus have no bearing on the question of willful or wanton conduct by Westar.

For example, Heritage quibbles over the definition of "accidental" in the fire investigators' report. The report stated the fire was one "for which the proven cause does not involve an intentional human act to ignite or spread fire into an area where the fire should not be." (R. II, 243). The report also stated that "no evidence or information was

discovered that would support any deliberate act which would have caused this fire." (R. II, 242). This does not create a genuine issue of material fact.

Heritage asserts that the "standards in the industry" are to "inspect a utility pole every 10 years." (Heritage Br. at 7, 46). In support of this statement, Heritage cites two slides in a PowerPoint presentation from the U.S. Department of Agriculture's Rural Utilities Service ("RUS"). (R. III, 39). The RUS is a federal agency that helps to finance construction of electric facilities in rural areas. *See* U.S. Department of Agriculture, "Rural Utilities Service" summary page, *available at* https://www.rd.usda.gov/about-rd/agencies/rural-utilities-service (last accessed June 8, 2023) (describing programs which provide funding to "maintain, expand, upgrade and modernize America's rural electric infrastructure"). The RUS slides do not establish industry standards for utility pole inspections. (R. III, 39, 68). Rather, they address recommendations about how to extend the life of a pole through treatment. (R. III, 72). The presentation acknowledges that industry standards do not establish required maintenance practices for utility poles. (R. III, 59) (emphasis added).

Heritage also cites the testimony of Westar's expert Nelson Bingel acknowledging a recommendation by the RUS that poles be re-inspected at 10-year intervals. (R. III, 35). However, Heritage offers no indication that this recommendation by the RUS is a safety standard applicable to Kansas public electric utilities. Heritage also ignores Bingel's testimony in the same passage that this is not a safety standard, but a recommendation for how to achieve "the lowest cost of pole ownership[.]" (R. III, 13).

Heritage asserts that the pole "was never inspected." (Heritage Br. at 46). But at least one known, documented visual inspection occurred just weeks before the pole fell, when lineman Dave Shockley was on site for a service call. (R II, 185; III, 4). Heritage also asserts the pole was "rotted through" at groundline. (Heritage Br. at 45). Yet it was undisputed, below, that a core of unbroken wood remained at the center of the pole at groundline, about 23 inches around. (R. II, 187; III, 5).

Heritage refers to statements from its retained "wood scientist," Matt Anderson, about the condition of the pole. (E.g., Heritage Br. at 4-5). Anderson is not an engineer or an expert on the pole-strength requirements of the NESC, nor did he analyze the equipment attached to the pole or the physical load it would have placed on the pole. (R. I, 475–476). Anderson also declined an opportunity to test the soundness of the remaining wood in the core of the pole. (R. I, 463, 478). In sum, Anderson's unsupported assertions do not establish that the pole was actually unsound. More to the point, they do not establish that Westar's conduct was "willful or "wanton" and that such willful or wanton conduct caused this pole to fail. His opinions are not material to the issues before this Court. (*See* District Court's Mem. Dec., R. III, 141-42 (among other things, cause of pole failure not material to summary judgment analysis on wanton standard)).

Finally, Heritage makes various arguments about the proffered expert testimony of Westar's wood scientist, Dr. Todd Shupe, who (unlike Anderson) probed with an awl into the wood remaining at the core of the pole to estimate the dimensions of remaining solid wood. (R. I, 278–279; II, 121, 154–155). Heritage did not mention Dr. Shupe in its summary judgment briefing below, and his testimony and conclusions did not factor into

the court's summary judgment ruling. In any event, while the parties apparently disagree about the actual dimensions of sound wood in the base of the pole and its remaining strength, the precise mechanism of failure is ultimately immaterial given the absence of any evidence affirmatively showing "willful or wanton" conduct on Westar's part.

4. The District Court Correctly Concluded There Was Insufficient Evidence To Support A Finding Of Wanton Conduct.

To raise a genuine issue of material fact regarding wanton conduct, Heritage would need to identify facts *affirmatively* showing it could meet two separate elements. First, it must establish Westar's knowledge of a specific danger allegedly disregarded. Second, it must establish that Westar realized or should have realized this danger, yet made the choice to act with reckless disregard or indifference to its probable consequences. *Willard,* 235 Kan. at 658.

The United States Court of Appeals for the Tenth Circuit, interpreting Kansas law, explained that the two prongs of this test must be evaluated from the same perspective—that is, whether the risk is defined narrowly, as in the risk of a particular pole failing, or broadly, as in the general risk of poles failing across a wide service area. *Wagner v. Live Nation Motor Sports, Inc.,* 586 F.3d 1237, 1245 (10th Cir. 2009).

> In other words, if the first part of Kansas' two-part inquiry asks whether the defendant had knowledge of a broadly described dangerous condition, the second part of that inquiry must ask whether the defendant recklessly disregarded or was indifferent to the same broadly described risk; conversely, if the first part of the test targets the narrow, specific risk that caused the particular accident at issue and asks if the defendant was aware or should have been aware of that particular specific risk, then the second part of the analysis to be consistent must ask if the defendant was indifferent to that specific risk.

586 F.3d at 1245.

Heritage's argument does exactly what the *Wagner* decision cautions against: it starts with the proposition that Westar was aware of the broad risk generally presented by electricity and poles based on the "mere fact" that it is a distributor of electricity. (Heritage Br. at 43). It then asserts that, because of the failure of this particular pole, Westar must have disregarded a risk that this particular pole would fail. Heritage thus conflates the knowledge of a broad risk—that, generally, poles age and could fail under certain circumstances—with disregard of a specific risk, i.e., that this particular pole was at imminent risk of failure. Heritage compounds the error by referencing the standard of reasonable care, which is inapplicable given the "willful or wanton" liability standard in the Tariff. (See Heritage Br. at 42-43).

As the district court correctly held, there is no evidence to establish willful or wanton conduct here. It is undisputed that, before the accident: (a) the pole never came to Westar's attention as having an issue; and (b) no one at Heritage ever noticed or reported any issues with the pole. (R. II, 183-184, 186, R. III, 3-4). The pole was within the "average expected life" of a wood utility pole. (Heritage Br. at 4). According to the Heritage manager who passed it every day, it looked like any other pole. (R. II 184; III, 4). Six weeks prior to the fire, Westar sent a journeyman lineman in response to Heritage's service call about a power line possibly touching the building. (R. II, 185; III, 4). The lineman adjusted the service line, visually inspected the pole, and left believing all was well. (R. II, 185; III, 4). Heritage, too, considered the issue resolved. (R. II, 185; III, 4).

All of Heritage's fact witnesses confirmed they had no reason to believe the fire was anything but accidental, or that Westar acted in disregard of a known, imminent risk. (R. II, 191-195; III, 7, 191-196). *See Scheibmeir v. Dreiling,* 210 Kan. 351, 502 P.2d 854 (1972) (upholding trial court's grant of summary judgment as to alleged "wanton" conduct where plaintiff's own testimony negated defendant's liability).

Westar took numerous steps that materially lessened the chances of pole failures across its system, negating any showing of wantonness with regard to a more generalized risk. (R. II, 424). Heritage offered no facts suggesting otherwise. These steps included: a comprehensive groundline-inspection program; patrols near high-traffic areas; directing employees to leave work sites in a manner that enhanced public safety; giving qualified field employees the authority to order replacement poles on the spot; and a practice of inspecting equipment continuously while performing other duties. (R. II, 187; III, 5).

Heritage proffered no expert testimony to challenge or contradict the findings by NESC chairman Nelson Bingel that Westar's pole-management practices were reasonable, consistent with industry standards, and materially lessened the chances of pole failure across the company's system. (R. II, 190; III, 6). As noted, the NESC allows inspection while performing other duties and does not mandate a specific time frame for equipment inspection, specifying that inspections shall be performed as experience has shown to be necessary. (R. II, 186, 187; III, 4, 5). Heritage did not proffer any evidence or expert testimony to contradict Bingel's opinion that Westar's overall pole-management practices were consistent with reasonable utility practices and the NESC, and materially

lessened the risk of poles falling throughout the company's vast service area. (R. III, 420-424).

In sum, as the district court held, it is difficult to imagine the facts as presented by Heritage could lead a jury to find even that Westar was negligent in this case. (R. III, 143). Because there were no facts from which a reasonable jury could have found that Westar engaged in "wanton" conduct, the district court properly granted summary judgment to Westar.

CONCLUSION

The district court properly concluded that: Westar's Tariff was applicable to Heritage's claims in this case; the Tariff's "willful or wanton" liability standards foreclosed Heritage's claims for ordinary negligence; these limitations of liability are reasonable and lawful under Kansas law; and there was insufficient evidence from which a jury could find Westar liable for "wanton conduct." This Court should, in all respects, affirm the district court's Order granting Summary Judgment.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Brief of Appellee Evergy Kansas Central, Inc., was served on counsel for Appellant Heritage Tractor, Inc., by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b), on the 14th day of July, 2023.

/s/ John T. Bullock
John T. Bullock, #15119

APPENDIX A

GENERAL TERMS AND CONDITIONS OF WESTAR TARIFF

Index _____

THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY — SCHEDULE GT&C

(Name of Issuing Utility)

Replacing Schedule GT&C Sheet 1

WESTAR RATE AREA

(Territory to which schedule is applicable) — which was filed December 21, 2011

No supplement or separate understanding shall modify the tariff as shown hereon.

Sheet 1 of 9 Sheets

GENERAL TERMS AND CONDITIONS

Issued _____
Month Day Year

Effective April 27, 2012
Month Day Year

By _____
Jeffrey L. Martin, Executive Director

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Kansas Corporation Commission
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/S/ Patrice Petersen-Klein

18-WSEE-328-RTS
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/S/ Lynn M. Retz

GENERAL TERMS AND CONDITIONS

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY (Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 3

WESTAR RATE AREA (Territory to which schedule is applicable)

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY (Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 4

WESTAR RATE AREA

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/S/ Lynn M. Retz

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY (Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 5

WESTAR RATE AREA (Territory to which schedule is applicable)

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY (Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 6

WESTAR RATE AREA (Territory to which schedule is applicable)

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY

(Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 7

WESTAR RATE AREA

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY

(Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 8

WESTAR RATE AREA

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY
(Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 9

WESTAR RATE AREA
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GENERAL TERMS AND CONDITIONS

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12.04	Bill Error Amount	12.1
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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY

(Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 1

WESTAR SERVICE AREA

(Territory to which schedule is applicable)

which was filed April 18, 2012

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Sheet 1 of 6 Sheets

GENERAL TERMS AND CONDITIONS

1. DEFINITIONS

These General Terms and Conditions apply to all Service Agreements between Company and customer and to all Rate Schedules and Riders thereto approved by the Commission. They are subject to additions and modifications from time to time, and upon filing with and approval by the Commission, become effective and binding as a matter of law without any further notice. No inconsistency is intended between these General Terms and Conditions and more specific provisions in the Service Agreements, Rate Schedules, or Riders. Any inconsistency shall be resolved in favor of the more specific provisions in the Service Agreements, Rate Schedules or Rider. Copies of these General Terms and Conditions may be reviewed or obtained by any customer of Company at Company's principal place of business or at the Commission.

1.01 "Company" means Westar Energy, Inc. or Kansas Gas and Electric Company both doing business as Westar Energy.

1.02 "Commission" means The State Corporation Commission of Kansas or any successor of such Commission having jurisdiction of the subject matter.

1.03 "Electric Service" means the availability of electric power and energy supplied by Company at a Point of Delivery within Company's Service Territory on or near the customer's premises, at approximately the standard voltage and frequency for a class of service made available by Company in that area, which source is adequate to meet customer's requirements, irrespective of whether or not the customer makes use of such Electric Service.

1.04 "Service Territory" means all areas included with that portion of the territory within the State of Kansas in which Company is duly certificated and authorized by the Commission to supply Electric Service.

1.05 "Customer" means a person, partnership, association, public or private firm, corporation or governmental agency or other entity using Electric Service at a stated location under a Service Agreement.

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY (Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 2

WESTAR SERVICE AREA

(Territory to which schedule is applicable)

which was filed April 18, 2012

No supplement or separate understanding shall modify the tariff as shown hereon.

Sheet 2 of 6 Sheets

GENERAL TERMS AND CONDITIONS

1.05.01 Residential: Residential customers shall mean those customers having single or multiple dwelling units each having separate kitchen facilities, sleeping facilities, living facilities and permanent provisions for sanitation and are served through one meter. Residential Electric Service shall mean the use of Electric Service principally for domestic purposes in customer's household, home, detached garage on the same premise as customer's home, or place of dwelling for the maintenance or improvement of customer's quality of life. Residential customer uses shall also include domestic premises served through one meter that have been converted from one to no more than 5 single-family dwelling units each having separate kitchen facilities; and, also premises in which 4 or fewer sleeping rooms are rented or available for rent. Those premises exceeding such limitations shall not be considered residential. The primary use of Electric Service shall be limited to lighting, small motor usage, comfort space conditioning, water heating, food preparation and other household uses.

1.05.02 Commercial: Commercial customers shall be those whose use of Electric Service is of a non-manufacturing and non-residential character. Such customers shall include but not be limited to those engaged in the wholesale and retail trade, professional services and miscellaneous business services; hotel and other lodging places; clubs; commercial office buildings; warehouses; theaters and auditoriums; water pumping plants; laundries; greenhouses; public buildings; universities; colleges and schools; hospitals; institutions for the care or detention of persons; airfields; military and naval posts; houses of worship and all other similar establishments.

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/s/ Lynn Retz

GENERAL TERMS AND CONDITIONS

1.05.03 Industrial: Industrial customers shall be those whose use of Electric Service changes raw or unfinished materials into other forms or products. Such customers shall include but not be limited to those engaged in the production of ordinance and accessories; food and kindred products; tobacco products; textile mill products; apparel and other finished products made from fabrics and similar materials; lumber and wood products; furniture and fixtures; paper and allied products; printing, publishing and allied products; chemicals and allied products; petroleum and coal products; rubber products; leather and leather products; stone, clay and glass products; primary metals; fabricated metal products; machinery; electrical machinery, equipment and supplies; transportation equipment; instruments; miscellaneous manufactured products; coal, gas, oil, electric power, and ice; establishments engaged in mining and quarrying; establishments engaged in the overhaul and repair of transportation and other equipment; and other similar establishments.

1.06 "Premise" means the land and buildings on property controlled by customer.

1.07 "Contiguous Premise" means a properties, sharing at least one common point or local boundary, upon which all buildings and/or electric consuming devices are owned or occupied by the same customer, and upon which all electric service is utilized to supply one or more connected electrical loads which Company considers to be components of a unified operation. Streets, alleys, and other rights-of-way intersecting the customer's properties are not considered property occupied or used by others.

1.08 "Point of Delivery" means the place where Company's wires are joined to customer's wires or apparatus unless some other Point of Delivery is specified in the Service Agreement.

1.09 "Delivery Voltage" means the voltage level provided by Company to the Point of Delivery designated by Company on customer's premises, regardless of Metering Voltage.

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THE STATE CORPORATION COMMISSION OF KANSAS

WESTAR ENERGY, INC & KANSAS GAS & ELECTRIC COMPANY, d.b.a. WESTAR ENERGY (Name of Issuing Utility)

SCHEDULE GT&C

Replacing Schedule GT&C Sheet 4

WESTAR SERVICE AREA

(Territory to which schedule is applicable)

which was filed April 18, 2012

No supplement or separate understanding shall modify the tariff as shown hereon.

Sheet 4 of 6 Sheets

GENERAL TERMS AND CONDITIONS

1.10 "Voltage" means the potential in an electric system, measured in volts, normally ranging from 120 to 34,500 volts on Company's distribution system and 69,000 volts or higher on Company's transmission system.

1.11 "Metering Voltage" means the Voltage level at which the Electric Service provided by the extension of the distribution system to Company's designated Point of Delivery on customer's premises, is actually metered.

1.12 "Meter" means a device or devices used for measuring the Kilowatt-hours, Kilowatts and other characteristics of a customer's electric power and energy consumption, as required by the applicable provisions of a customer's rate.

1.13 "Meter Installation" means the Meter or Meters, together with auxiliary devices, if any, constituting the complete installation needed by Company to measure the class of Electric Service supplied to a customer at a single Point of Delivery.

1.14 "Customer's Installation" means all wiring, appliances and apparatus of every kind and nature on the customer's premises, on the customer's side of the Point of Delivery (except Company's meter installation), used or useful by a customer in connection with the receipt and utilization of Electric Service supplied by Company.

1.15 "Primary Service" means the Electric Service provided to a customer at a Delivery Voltage of 2,400 volts or higher, the point of delivery is from Company provided Network service.

1.16 "Secondary Service" means Electric Service provided to customer at a Delivery Voltage of 600 volts or less or network service (e.g., similar to the Wichita downtown core) regardless of voltage.

1.17 "Load" means the customer's electric power requirements in kilowatts, which must be supplied at various voltage levels on Company's distribution system at the time and in the magnitude required by customer's operating characteristics.

Issued

	Month	Day	Year
Effective	October	28	2015
	Month	Day	Year

By

Jeffrey L. Martin, Vice President

15-WSEE-115-RTS
Approved
Kansas Corporation Commission
October 28, 2015
/S/ Amy L. Green

20-WSEE-123-CCN
Superseded
Kansas Corporation Commission
October 8, 2019
/s/ Lynn Retz

GENERAL TERMS AND CONDITIONS

1.18 "Kilowatt" means the basic unit of customer's electric power consumption (or demand) at any point in time and shall be abbreviated as kW.

1.19 "Kilowatt-hour" means the basic unit of customer's electric energy consumption, equivalent to an average of one Kilowatt of electric power utilized for a period of one hour and shall be abbreviated as kWh.

1.20 "Demand" means the average rate of consumption of electric power by a Customer, measured in Kilowatts, during a designated interval of time.

1.21 "Power Factor" means the ratio of a customer's real electric power requirements (kilowatts) to a customer's apparent electric power requirements (kilovolt amperes) or (volts * amperes) / 1000.

1.22 "Billing Month" means an interval of approximately thirty (30) days.

1.23 "Security Deposit" means an amount of money or other guarantee acceptable to Company, including but not limited to cash, surety bond, irrevocable letter of credit as determined in Company's sole discretion, required for credit or other security purposes.

1.24 "Net Revenue" means the amount received or to be received from customer for Electric Service provided by Company, exclusive of all sales or related taxes.

1.25 "Basic Service Fee" means a fixed dollar component of a customer's monthly bill for Electric Service which recovers a portion of the annual investment and operating costs incurred by Company in making service available to customer.

1.26 "Demand Charge" means a rate component of a customer's monthly bill for Electric Service, applicable to metered or otherwise established Kilowatt demands, which recovers a portion of Company's annual fixed investment and operating costs associated with buildings, as well as a portion of Company's investment and operating costs incurred in providing electric capacity capable of supplying customer's maximum demand at any time, e.g., local transformers,

GENERAL TERMS AND CONDITIONS

distribution lines and substations, and generation and transmission facilities.

1.27 "Energy Charge" means a rate component of a customer's monthly bill for Electric Service, applicable to metered or otherwise established electric energy consumption in Kilowatt-hours, which recovers the variable operating costs incurred by Company in customer's Kilowatt-hours, e.g., fuel handling and variable production plant operating and maintenance expenses, as well as any additional non-variable costs not recovered in the Basic Service Fee and/or Demand Charge which may be applicable.

1.28 "Confidentiality" Company's treatment of customer-specific information: This information, which shall include all billing statement information, usage data and agent information, shall not be released to any other party without the customer's consent, except that neither notice nor customer consent shall be required when customer-specific information is released in response to a request of the Commission or its staff. This section shall not prevent Company from providing information regarding customer status when requested by law enforcement or emergency personnel acting in an official capacity or when customer-specific information is released by court order, subpoena, or other order or requirement issued by a duly constituted authority, or when release of such information is necessary to provide service. Company shall not be required to notify the customer or obtain the customer's consent in these instances.

1.29 "Resale of Service" The resale of Electric Service is prohibited by customers to third parties or tenants of customer without the written consent of Company. The customer may pass on to the occupant(s) of rental facilities an amount equal to the billing received to such tenant(s).

APPENDIX B

UNPUBLISHED OPINIONS

2020 WL 3962239 (Kan.S.C.C.)

In the Matter of the Complaint Against Westar Energy by John Feldkamp.

Docket No. 19-WSEE-361-COM

Kansas State Corporation Commission

July 9, 2020

ORDER PARTIALLY ADOPTING STAFF'S REPORT AND RECOMMENDATION AND DENIAL OF THE FORMAL COMPLAINT

BEFORE: Susan K. Duffy, Chair, Dwight D. Keen, and Andrew J. French, Commissioners.

BY THE COMMISSION.

***1** This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed its pleadings and records, the Commission makes the following findings:

BACKGROUND

1. On March 11, 2019, John Feldkamp (Complainant) filed a Formal Complaint (Complaint) [1] with the Commission against Westar Energy (Evergy). [2] The Complaint followed an electrical fire at Complainant's rental property in Riley, Kansas. [3] Complainant alleges the fire was due to Evergy's failure to "properly remove[] vegetation" and failure to have "a neutral line hooked up and working properly at the transformer." [4] Complainant contends the fire caused $3,529.33 in damage. [5] Complainant requests a finding of fault and $1,000 as reimbursement for his out-of-pocket insurance deductible. [6]

2. On April 2, 2019, the Commission adopted Commission Litigation Staff's Legal Memorandum, finding the Complaint complied with the procedural requirements in K.A.R. 82-1-220 and established a prima facie case for Commission action. [7]

3. On April 17, 2019, Evergy filed a Motion to Dismiss, arguing the Complaint did not meet the requirements of K.A.R. 82-1-220 because Complainant failed to demonstrate Evergy violated any provision of law, regulation, or order. [8] Evergy further contends that even if the Complainant's allegations were found true, Complainant did not claim that Evergy "acted willfully or wantonly in any way that caused the alleged damage" and Evergy did not violate Evergy's Electric Tariffs (Tariffs). [9] Evergy asserts the Complaint should be dismissed for failure to state a claim. [10]

***2** 4. Complainant did not respond to Evergy's Motion to Dismiss.

5. On January 29, 2020, Commission Technical Staff (Staff) filed its Report and Recommendation (R&R), recommending denial of the Complaint. [11]

6. On April 17, 2020, Staff filed its Amended Report and Recommendation (Amended R&R), again recommending denial of the Complaint. [12] Staff found the condition of Evergy's facilities and Evergy's response to the incident did not violate any of the General Terms and Conditions found in the Tariffs. Staff found no evidence indicating willful or wanton neglect on the part of Evergy. The Amended R&R is attached and incorporated by reference. [13]

7. Staff made the following additional recommendations: (1) "that Evergy place a protective fused disconnect switch directly upstream of the CSP transformer serving Mr. Feldkamp"; and (2) when performing work on a customer's service line, Evergy is required to "inspect and test its customer's ground rod at the meter base and the ground rod attached to the transformer serving the customer." [14] Staff further recommends Evergy "instruct its first responders to fully document its investigation, findings, and subsequent repairs with greater detail and photographs from both pre and post repair." [15]

8. Complainant did not respond to either the initial R&R or the Amended R&R.

9. On April 28, 2020, Staff and Evergy filed a Joint Motion for Extension of Time. [16] Evergy and Staff agreed that Evergy complied with Staff's recommendation to install the disconnect switch. [17] Staff and Evergy continue to discuss Staff's recommendations and Evergy requested an extension of time to respond to the Amended R&R. [18]

***3** 10. Complainant did not file a response to the Joint Motion for Extension of Time.

11. On May 26, 2020, Evergy filed its response to Staff's Amended R&R. Evergy states it has complied with Staff's recommendation regarding Complainant's disconnect switch. Evergy requests the Commission to not adopt the remaining two recommendations. Evergy further requests the Commission adopt Staff's conclusion denying the Complaint. [19]

FINDINGS AND CONCLUSIONS

I. Legal Standards

12. The Commission may initiate an investigation into rates, rules, and regulations of gas and electric public utilities under K.S.A. 66-101 *et seq.* [20] As applied to the regulation of electric public utilities, the Commission's authority and jurisdiction, "shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission." [21]

II. Motion to Dismiss for Failure to State a Claim

13. Evergy argues the Complaint should be dismissed for failure to state a claim. [22] Evergy contends none of the Complainant's allegations constitute a violation of any law, regulation, or tariff and the Complainant failed to state the fire was a result of willful or wanton conduct by Evergy. [23]

14. Evergy cites Section 7.02 of the General Terms and Conditions of Evergy's Tariffs. [24] Evergy also provides a response to the factual allegations and legal analysis supporting its position that the Tariffs are enforceable and applicable to Complainant. [25]

15. "When a motion to dismiss under K.S.A. 60-212(b)(6) raises an issue concerning the legal sufficiency of a claim, the question must be decided from the well-pleaded facts of plaintiff's complaint. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim." [26]

***4** 16. On April 2, 2019, the Commission found the Complaint met the requirements of K.A.R. 82-1-220 and established a prima facie case for Commission action. [27]

17. On the face of the Complaint alone, Complainant established a prima facie case and Evergy's motion to dismiss for failure to state a claim is denied. The remainder of Evergy's motion is treated as an Answer to the Complaint.

III. Formal Complaint

18. On June 9, 2018, an electrical fire occurred at the Complainant's rental property in Riley, Kansas, causing $3,529.33 in damage.[28] Staff performed an extensive and independent investigation into the allegations of the Complaint.[29] Staff's factual findings regarding the cause of the fire are stated in the Amended R&R. The Commission adopts the factual findings regarding the cause of the fire. The following is an overview of said findings.

19. The responding Evergy technician and Riley County Fire District #1 attributed the fire's cause to a tree limb that rubbed insulation off of Evergy's service line, which energized the neutral. The technician noted the meter base did not have a properly installed ground rod in accordance with Evergy's Electric Service Standards (ESS) and the National Electric Code (NEC). Based on this information, Staff concluded failure of the service line created an electrical short. The short could not ground through Complainant's home ground wire because it was improperly connected. Responding firefighters determined the circuit was grounding through the cable TV wire. The electrical short heated the wire enough to ignite the cable box and surrounding siding.[30]

A. Vegetation Management

20. Section 7.02 of Evergy's General Terms and Conditions mandate that Evergy shall not be held liable to a customer for any loss, damage, or injury whatsoever caused by or arising from the company's operations unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by willful or wanton conduct.[31]

21. "Tariffs are those terms and conditions which govern the relationship between a public utility and its customers. They may be and are usually the handiwork of the regulated utility. However, when filed with and approved by the [Commission], tariffs generally bind both the public utility and its customers."[32]

***5** 22. Evergy's records state the vegetation for the circuit was last trimmed on May 26, 2015. It is Evergy's policy the customer is responsible for trimming vegetation around service lines. Evergy will temporarily remove the service line so the customer can make arrangements to have vegetation trimmed. Evergy has no record of any request made to de-energize the service line at Complainant's property since Evergy trimmed the circuit in 2015.[33]

23. For these reasons, the Commission finds Evergy's vegetation management does not display a showing of willful or wanton conduct by Evergy.

B. Complainant's Grounding Equipment

24. The Evergy technician found the Complainant's ground rod was not installed in accordance with Evergy's service standards or the NEC. A properly installed ground rod would not have prevented the short circuit; however, it may have prevented the resulting electrical fire.[34]

25. Evergy's Electric Service Standards dictate that the point of delivery for overhead service is defined as the point of attachment. [35] Evergy's General Terms and Conditions provides that all equipment on the customer's side of the point of delivery is the customer's responsibility. [36] The grounding rod is on the customer's side of the point of delivery. [37]

26. Evergy's General Terms and Conditions also state that in no event will the company be held responsible for any loss, damage, or injury caused by any defects in the customer's wiring or appliances. [38]

27. Based on the above standards and conditions, the Commission finds the Complainant was responsible for maintaining a properly grounded system and Evergy was not at fault.

C. Conclusion

28. The Commission agrees with Staff: (1) Evergy complied with the terms and conditions in its Tariffs; (2) Evergy's conduct did not constitute "willful or wanton" negligence; (3) vegetation management was Complainant's responsibility; (4) the improperly installed grounding equipment was Complainant's responsibility; and (5) Evergy is held harmless from failure of equipment that is a customer's responsibility.

IV. Staff's Recommendations

***6** 29. Staff makes two additional recommendations regarding Evergy's processes going forward. Staff recommends that Evergy "inspect and test its customer's ground rod at the meter base and the ground rod attached to the transformer serving the customer." [39] Staff also recommends Evergy "instruct its first responders to fully document its investigation, findings, and subsequent repairs with greater detail and photographs from both pre and post repair." [40]

30. The matter before the Commission is the Complaint regarding the electrical fire at Complainant's rental property in Riley, Kansas. Staff recommended denial of the Complaint, and the Commission agrees, for the reasons stated above.

31. The Commission finds resolution of Staff's additional recommendations regarding Evergy's future processes is not necessary to dispose of the Complaint. The Commission declines to adopt Staff's recommendations regarding Evergy's future processes at this time. The Commission notes Evergy and Staff stated an intent to continue discussions of Staff's additional recommendations. The Commission urges Evergy and Staff to pursue further discussions, including consideration of potential improvements to Evergy's post failure investigations. [41]

THEREFORE, THE COMMISSION ORDERS:

A. Evergy's Motion to Dismiss for failure to state a claim is denied.

B. Mr. Feldkamp's Formal Complaint and request for $1,000 reimbursement is denied.

C. 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). [42]

BY THE COMMISSION IT IS SO ORDERED.

Duffy, Chair; Keen, Commissioner; French, Commissioner

Dated: 07/09/2020

Lynn M. Retz

Executive Director

Utilities Division

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Topeka, KS 66604-4027

Susan K. Duffy, Chair

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*7 Laura Kelly, Governor

AMENDED REPORT AND RECOMMENDATION UTILITIES DIVISION

TO:	Chair Susan K. Duffy
	Commissioner Shari Feist Albrecht
	Commissioner Dwight D. Keen
FROM:	John Gorrell, Utility Engineer
	Leo M. Haynos, Chief Engineer
	Jeff McClanahan, Director of Utilities
DATE:	4/17/20
SUBJECT:	Docket 19-WSEE-361-COM:

In the Matter of the Complaint Against Westar Energy by John Feldkamp

EXECUTIVE SUMMARY:

On June 9th, 2018, an electrical fire occurred at a home located at 315 W Kansas Ave, Riley, KS, causing $3,529.33 in damage. John Feldkamp owns and rents out the property. Mr. Feldkamp filed a Formal Complaint with the Kansas Corporation Commission against Westar Energy, Inc. ("Westar")[43] on March 11th, 2019. Mr. Feldkamp claims that the fire was Westar's fault and seeks $1,000 to cover his insurance deductible.

The Westar technician that responded to the incident attributed the fire's cause to a tree limb that rubbed insulation off of Westar's service line which energized the neutral. The Westar technician noted that the meter base did not have a properly installed ground rod in accordance with their Electric Service Standards. A properly installed and maintained ground rod could have prevented the fire from starting. Based on the information available, it is logical to conclude that the improperly grounded neutral caused the fault current from the electrical short circuit to not go to ground as designed. Instead, the fault current ran through a nearby cable TV box which ignited as a result. Westar's Electric Service Standards provide that the ground rod for the meter base is located on the customer's side of the point of delivery, thus proper installation of the ground rod is the customer's responsibility.

***8** Based on the results of its investigation, Staff finds that the condition of Westar's facilities and Westar's response to the incident did not violate any of the General Terms and Conditions found in their tariff, and there is no evidence indicating willful or wanton neglect on the part of Westar. Therefore, Staff concludes that Westar is not at fault for the damages incurred by Mr. Feldkamp. Staff recommends the Commission dismiss Mr. Feldkamp's Complaint.

However, Staff's investigation also indicates that Westar should improve its investigative techniques related to monitoring the condition of its distribution system and to investigating electrical failures of this kind. In general, Staff recommends that the Commission require Westar to perform the following:

• When Westar performs work on a customer's service line, Westar should measure the electrical resistance of the ground connection of the transformer serving the customer, as well as the customer's ground connection at the meter base. If the resistance of the ground connection of the transformer serving the customer is greater than 25 Ω (ohm), Westar should repair the ground connection; if the resistance of the customer's ground connection at the meter base is greater than 25 Ω, Westar should follow its process in Section 5 of its General Terms and Conditions for alerting its customer of the unsafe condition and the need for repairs.[44]

• Staff recommends that Westar take steps to better document the findings of their investigation in cases such as these where there is a possibility that a failure of Westar's equipment may have damaged customer property. This includes, but is not limited to, taking pictures both pre and post repair of equipment. This action will aid Staff, Westar, and the customer in removing doubt as to the root cause of incidents in future investigations.

• In the case of the transformer serving Mr. Feldkamp's property, Staff recommends the Commission require Westar to place a protective fused disconnect switch directly upstream of the CSP transformer.

BACKGROUND:

On March 8th, 2019, John Feldkamp (Mr. Feldkamp or Customer) filed a Formal Complaint against Westar Energy Inc. (Westar or Company) in regards to an electrical fire that took place at a rental property he owned. The fire took place on the afternoon

of June 9th, 2018, at 315 W Kansas Ave, Riley, KS 66531. The fire did not cause any injuries, and damages totaled $3,529.33. Mr. Feldkamp is asking Westar to reimburse him his out of pocket insurance deductible of $1,000, claiming that Westar is at fault because the failure of their equipment caused the fire.

A Westar technician responded to the outage at the property on June 9th, 2018. After safely deenergizing the transformer, the Westar technician determined through a visual inspection that the insulation on one of the conductors on Westar's service line had failed, causing the energized conductor to short circuit to the neutral conductor. All trees were clear of the service line, however Westar later noted that there were nearby Oak and Hackberry trees that may have caused the damage to the insulation. [45] The technician stated he did not see a ground rod installed at the house as required by Westar's Electric Service Standards (ESS) and the National Electric Code (NEC). Westar surmises these circumstances likely led the energized service drop neutral to, at least partially, ground through a nearby cable box which led to the fire. *Exhibits 1 through 6* show pictures of the service line leading to 315 Kansas Avenue's meter, the resulting damage from the fire, and the ground rod being repaired.

***9** Documentation shows that Westar trimmed the trees around the customer's service line and replaced the service line itself in order to restore service. Westar also helped repair the customer's ground wire. [46] Last, Westar installed a new compression connection at the service pole because a short piece of secondary wire needed to be replaced where it had flashed due to the tree. [47]

ANALYSIS:

The Westar technician that responded to the incident concluded that the likely cause of the fire was a tree limb that had rubbed the insulation off of one of Westar's service line conductors. The failed insulation led to a direct short which energized the neutral. The Riley County Fire District #1 report of the incident also concludes that a tree limb had rubbed off the insulation on the service line. [48] Additionally, the responding firefighters confirmed that the circuit was grounding through the cable TV wire. [49] Based on the observations of the Westar technician, corroborated by the firefighter's report, Staff agrees that failure of the service line created the electrical short that started the fire. Under that scenario, Staff investigated the following causal factors:

Vegetation Management

Westar's records state that the last time the circuit was trimmed for vegetation was May 26th, 2015. Westar's tree trimming policy states that trimming vegetation around service lines is the customer's responsibility, but it will temporarily remove the service line so that the customer may make arrangements to remove any nearby vegetation. Having said this, Westar has no record of any requests made to deenergize the service line at 315 Kansas Avenue for the purposes of vegetation management since they trimmed the circuit in 2015.

Section 7.02 of Westar's General Terms and Conditions state that Westar shall not be held liable to customer for any loss, damage or injury whatsoever caused by or arising from Company's operations 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. [50] Although it appears that vegetation damaging the insulation on the service line was the root cause of this incident, Staff notes that Westar has regularly performed tree trimming service in this area and the customer never notified Westar of vegetation interfering with his service line. Therefore, Staff concludes Westar's actions do not display "willful or wanton" neglect of vegetation management in this case.

Customer's Grounding Equipment

***10** The Westar technician found that the installation of the customer's ground rod was not in accordance with their service standards or the National Electric Code (NEC). In this case, a properly installed ground rod would not have prevented the short circuit in the service line, but it may have prevented the fire from occurring as the current could have grounded through the ground rod rather than through the cable box.

According to section 10.1 of Westar's ESS, [51] the point of delivery for overhead service is defined as the point of attachment, which is where the service line is spliced and enters the weatherhead. This means that the grounding rod is on the customer's side of the point of delivery. Section 6.02 of Westar's General Terms and Conditions states that all equipment on the customer's side of the point of delivery is the customer's responsibility. Additionally, section 7.02 of Westar's General Terms and Conditions state that in no event shall Company be liable for any loss, damage or injury caused by any defects in customer's wiring or appliances. Based on these standards and conditions, Staff concludes Mr. Feldkamp is responsible for maintaining a properly grounded system. [52]

Westar's Protective Equipment

In accordance with the National Electric Safety Code (NESC) Section 9 Rule 096A, [53] an electrical circuit shall be designed with a grounding system that shall have resistances to ground low enough to permit prompt operation of circuit protective devices. For a residential service, the grounding system consists of ground rods connected to the distribution system. Typically, the closest ground rods to a secondary service line are located at the base of the transformer pole and at the customer's home beneath the meter base. Westar stated that the ground wire on the transformer pole was "good" although they did not take any resistance measurements to confirm this. [54] In this case, the nearest upstream protective device is a breaker located on the primary side of the transformer. The current flow from the fault in the service line onto the neutral to the ground rod may have activated the breaker, however Westar claims that the transformer and the breaker on the high voltage side of the transformer did not function because it did not see enough current. Given the breaker is located on the high voltage side of the transformer, Staff agrees with Westar's assumption that the breaker may not have experienced enough current flow to activate. Having said this, it is important to note that the amp rating of the breaker at the transformer serving the property is unknown because it is contained within a completely self-protecting (CSP) transformer. There was no maintenance performed on the transformer or its breaker prior to this incident or since, and there has been no analysis or testing of the equipment to determine if the breaker inside the transformer is operable. [55]

CSP Transformers

***11** In the past, Westar has indicated that it finds CSP transformers to be somewhat unreliable. Staff notes that in Docket Number 15-WSEE-115-RTS, Westar placed an emphasis on replacing aging assets as a part of its Electric Distribution Grid Resiliency, or EDGR, program, including a high priority on replacing CSP transformers. Westar has replaced approximately 7,500 of an estimated total of 65,000 CSP transformers since implementing the EDGR program. These transformers have been replaced at opportune times such as when damaged due to weather related events or mechanical failure. [56] Westar no longer considers proactive CSP transformer replacement to be a high priority for the distribution system, noting that they have found other ways to increase system reliability that have a bigger impact and are of higher priority than replacing CSP transformers. Westar has mitigated some of the unknown variables presented by CSP transformers by adding fused disconnect switches upstream of CSP transformers in many areas. [57]

Westar's Investigation

Staff contends there are several additional steps that Westar should have taken in the investigation of this incident. As noted previously, Westar did not test or investigate the operation of the breaker in the CSP transformer serving the customer. In fact, the amp rating of the internal device is unknown. Westar did not perform any testing or take any measurements of resistance on the ground wire attached to the transformer. The Westar technician claimed that there was not a ground rod present on the customer's system however, Westar could not provide any pictures to confirm this observation. On the other hand, an electrician that performed repairs for the Customer after the incident stated that he believed there was a ground rod present. Although Westar provided Staff some pictures related to its incident investigation, we could not draw any meaningful conclusions from the few pictures provided.

Staff considers testing of the grounding system as part of a complete and thorough investigation of an electrical fire resulting from a fault. Staff contends Westar should improve its failure investigation procedures such as testing, taking pictures, and recordkeeping, in order to minimize any doubt as to the cause of a failure. An improvement in documenting observations and actions taken when responding to an electrical fire can only help to serve their customers and resolve disputes on liability in a more efficient manner. In fact, in its Order in Docket 15-WSEE-177-COM (15-177 Docket), the Commission determined that Westar "should fully document the details of its failure analysis going forward, to including taking pre-repair and post-repair photographs."

RECOMMENDATION:

***12** Based on the above evidence, Staff first recommends the Commission dismiss Mr. Feldkamp's complaint. Staff contends Westar's actions in this case do not show "willful or wanton" negligence in terms of vegetation management. Staff also notes the meter base ground rod installation and maintenance are the responsibility of the customer because it lies on the customer's side of the point of delivery, as outlined in Westar's General Terms and Conditions and ESS. Further, the Commission does not have the authority to award monetary damages, as requested by Mr. Feldkamp. [58]

Second, Staff recommends that Westar place a protective fused disconnect switch directly upstream of the CSP transformer serving Mr. Feldkamp. This is a practice that Westar already uses when dealing with CSP transformers in other areas and can improve their system's ability to prevent damage from faults.

Third, Staff recommends the Commission require Westar routinely inspect and test its customer's ground rod at the meter base and the ground rod attached to the transformer serving the customer. Westar should perform these tests to ensure the grounds are functioning properly whenever they perform work on a customer's service line. The ground rods' resistance should comply with NESC Section 9 Rules 096A and 096D. [59] Rule A states that grounding systems shall be designed to minimize hazard to personnel and shall have resistance to ground low enough to permit prompt operation of circuit protective devices. Rule D states that the ground resistance of an individual made electrode used for a single grounded system should meet the requirements of 96A and should not exceed 25 Ω. Accordingly, Staff recommends the testing of ground connections to ensure that they function properly and have a resistance less than 25 Ω. If the resistance of the ground connection of the transformer serving the customer exceeds 25 Ω, Westar should repair the ground connection. If a customer's ground rod does not comply with Westar's service standards, Staff recommends Westar follow its disconnection protocol for dangerous equipment, found in Section 5 of its General Terms and Conditions, to notify the customer to make necessary repairs.

Last, Staff renews its recommendation and reminds Westar of the Commission's Order from the 15-177 Docket that Westar instruct its first responders to fully document its investigation, findings, and subsequent repairs with greater detail and

photographs from both pre and post repair. Attention to detail when documenting investigations, such as those involving an electrical failure suspected of damaging customers' property, can only help minimize doubt into the cause of the failure.

***13** Staff believes that the above recommendations will help to prevent future incidents and questions of liability if and when they occur.

Exhibit 1

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Google Street View of 315 W Kansas Ave

Exhibit 2

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Electrician's photo of damage caused by the electrical lire. The electrician believes the wire painted white in the bottom left corner of the photo was the original ground.

Exhibit 3

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Another picture from the electrician that performed repairs on 315 W Kansas Ave. This shows what he previously believed to be the original ground removed and a new ground in the process of being installed (circled in red).

Exhibit 4

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Two google street view images highlighting the path of the service line running to 315 W Kansas Ave.

Exhibit 5

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

A picture provided by Evergy showing the vegetation most likely responsible for rubbing the insulation off of the service line. The service line can be seen hanging in the foreground, with the home in the background.

Exhibit 6

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

An additional picture provided by Evergy showing the pole that the service line runs from to the house. This same pole can be seen in the first Google street view image in Exhibit 4.

ATTACHMENT 1

Westar General Terms and Conditions:

5.01(A)(4) Conditions for Discontinuing Electric Service: Company may discontinue or refuse Electric Service when a dangerous condition exists on customer's premises.

5.03(A)(2)(c): Disconnect Procedure: Company may disconnect a customer immediately, if disconnection is made when a dangerous condition exists on customer's premises.

6.02.01 Customer's Responsibility: Customer shall be responsible for all electric wiring and equipment on customer's side of the point of delivery and shall save Company harmless against all claims for injuries and/or damages to persons or property resulting from the supplying and taking of electric service of the use thereof on customer's side of the point of delivery.

7.02 Limitation of Liability:

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.

ATTACHMENT 2

Drawings

10.1 - Point of Delivery

POINT OF DELIVERY - RESIDENTIAL

WHAT'S YOURS? WHAT'S OURS?

UNDERGROUND

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***14** Electricity is important to you. That's why when it comes to the electrical equipment connected to your house, it is good to know who is responsible for what Having this information could save you valuable time, particularly in a storm or emergency.

• The UTILITY is responsible for the incoming service cable to the point of delivery. We will repair or replace the service cable.

• The UTILITY is also responsible for the electric meter. If the meter is damaged, we will repair or replace it.

• The CUSTOMER is responsible for providing and installing the wires after the point of delivery, service conduit, and the meter can, to which the meter is attached.

• The CUSTOMER may also be required to obtain a permit and/or electrical inspection. Please check with your local building inspector. After the work is completed by your electrician, call us so we can schedule a crew to reconnect service.

OVERHEAD

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Electricity is important to you. That's why when it comes to the electrical equipment connected to your house, it is good to know who is responsible for what. Having this information could save you valuable time, particularly in a storm or emergency.

• The UTILITY is responsible for the service wire to the point of delivery, which includes repair or replacement of the service wire. We will make the connection to the Customer's wire at the point of delivery.

• The UTILITY is also responsible for the electric meter. if the meter is damaged, we will repair or replace it.

• The CUSTOMER is responsible for providing and installing the service point of attachment, as well as the wires after the point of delivery, the weather-head, the entrance cable and the meter can to which the meter is attached.

• The CUSTOMER may also be required to obtain a permit and/or electrical inspection. Please check with your local building inspector. After the work is completed by your electrician, call us so we can schedule a crew to reconnect service.

10.2 - Grounding Diagrams

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Notes:

1. Customer to install adequate grounding for service entrance according to NEC 250. This may consist of a 5/8″ diameter by 8 ft. steel copper clad ground rod that is driven vertically the entire length into undisturbed earth with #6 copper wire connected between the ground rod and the meter enclosure (or disconnect device) if concrete encased electrode is not available, NEC 250.52(A)(5)(b). Ground rod to be located exterior to house; consult local inspection authorities.

2. All examples are acceptable to the NEC, NESC and Company. New construction for buildings shall follow Example A. however, customer/developer should first check with the local code authority to determine the example that the local code authority also requires.

3. Weather proof breaker panel may be substituted for disconnect as long as it complies with the NEC.

4. Concrete encased electrode as specified in NEC 250.52(A)(3) (if applicable)

***15** 5. Grounding electrode conductor connection shall be made in the house breaker panel if the meter enclosure ground terminal is not available.

6. Equipment grounding shall not be installed between the meter and the house breaker panel per NEC 100 definition egc.

ATTACHMENT 3

National Electric Safety Code (NESC) Section 9 Rule 096. Ground resistance requirements

A. General

Grounding systems shall be designed to minimize hazard to personnel and shall have resistances to ground low enough to permit prompt operation of circuit protective devices. Grounding systems may consist of buried conductors and grounding electrodes.

D. Single-grounded (unigrounded or delta) systems

The ground resistance of an individual made electrode used for a single-grounded system should meet the requirements of Rule 096A and should not exceed 25 Ω. If a single electrode resistance cannot meet these requirements, then other methods of grounding as described in Rule 094B shall be used to meet the requirements of Rule 096A.

Footnotes

1 *See* Formal Complaint of John Feldkamp (Mar. 11, 2019).

2 Westar Energy, Inc. recently changed its name to Evergy Kansas Central, Inc. and Kansas Gas and Electric Company recently changed its name to Evergy Kansas South, Inc. *See* Docket No. 20-WSEE-123-CCN.

3 Complaint.

4 *Id.*

5 *Id.*

6 *Id.*

7 Order Adopting Legal Memorandum (Apr. 2, 2019).

8 Motion to Dismiss of Westar Energy, Inc., pp.3-6 (Apr. 17, 2019) (Motion to Dismiss).

9 *Id.* at ¶ 5.

10 *Id.* at ¶ 17.

11 Notice of Filing of Staff's Report and Recommendation (Jan. 29, 2020).

12 Notice of Filing of Staff's Amended Report and Recommendation (Apr. 17, 2020).

13 *Id.*

14 *Id.*

15 *Id.*

16 Joint Motion for Extension of Time (Apr. 28, 2020).

17 *Id.* at ¶ 3.

18 *Id.* at ¶ 4.

19 *See* Evergy Kansas Central, Inc.'s Response to Staff Report and Recommendation (May 26, 2020) (Evergy's Response).

20 *See* K.S.A. 66-101--66-101h.

21 K.S.A. 66-101g.

22 Motion to Dismiss, ¶ 17.

23 *See id.* at ¶ 5.

24 *Id.* at ¶¶ 3, 9.

25 *Id.* at ¶¶ 6-15.

26 *Grindsted Products, Inc. v. Kansas Corp. Com'n*, 262 Kan. 294, Syl. ¶ 1 (1997).

27 Order Adopting Legal Memorandum, ¶¶ 3-4.

28 *See* Complaint; Amended R&R.

29 *See* Amended R&R.

30 *See id.*

31 *See id.* at Attachment 1.

32 *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, Syl. ¶ 2 (1999).

33 *See* Amended R&R.

34 *Id.*

35 *Id.* at Attachment 2.

36 *Id* at Attachment 1.

37 *See* Amended R&R.

38 Amended R&R, Attachment 1.

39 Amended R&R.

40 *Id.*

41 *See* 15-177 Docket, Order Dismissing Complaint, ¶ 5 (Feb. 10, 2015) (Staff's previous recommendation for Evergy to improve documenting the details of its failure analysis).

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

43 On October 8, 2019, the Kansas Corporation Commission issued an order in Docket No. 20-WSEE-123-CCN (Order) approving the Company's name change from Westar Energy, Inc. to Evergy Kansas Central, Inc. Because this docket was filed prior to the Order, the docket title refers to the Company as Westar. For the sake of consistency throughout the report, the Company will be referred to as Westar.

44 The relevant provisions of Section 5 of Westar's General Terms and Conditions are included in Attachment 1.

45 Response to Staff Data Request 3.

46 Response to Staff Data Request 2.

47 Response to Staff Data Request 28.

48 The Fire Department report of the incident is included in response to Staff Data Request 22.

49 Response to Staff Data Request 22.

50 Section 7.02 of Westar's General Terms and Conditions is included in Attachment 1.

51 Sections 10.1 - Point of Delivery and 10.2 - Grounding Diagrams of Westar's ESS are included in Attachment 2.

52 Sections 6.02 and 7.02 of Westar's General Terms and Conditions are included in Attachment 1, while

53 NESC Section 9 Rule 096A is included in Attachment 3.

54 Response to Staff Data Requests 24 and 25.

55 Response to Staff Data Request 20.

56 Response to Staff Data Request 19.

57 Response to Staff Data Request 21.

58 K.S.A. 66-176 authorizes the court to make this award, if the Commission first finds that a public utility has violated any provisions of the law for the regulation of public utilities. *See* Order Dismissing Complaint, Docket No. 00-KGSG-882-COM (Jul. 26, 2000).

59 NESC Rules 096A and 096D are included as Attachment 3.

End of Document

2017 WL 3386378 (Kan.S.C.C.)

In the Matter of the Complaint Against Westar Energy, Inc. by Jerry Jackson.

Docket No. 17-WSEE-326-COM

Kansas State Corporation Commission

August 3, 2017

ORDER GRANTING WESTAR'S MOTION TO DISMISS

BEFORE: Pat Apple, Chairman, Shari Feist Albrecht, and Jay Scott Emler, Commissioners.

BY THE COMMISSION.

***1** This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the pleadings and record, the Commission makes the following findings:

1. On January 23, 2017, the Commission received a Formal Complaint from Jerry J. Jackson alleging $2798.60 in damages to his home and yard resulting from a fire on February 27, 2016, that started on a Westar Energy, Inc. (Westar) pole. [1]

2. On March 8, 2017, Litigation Staff issued a Memorandum advising the Commission that Jackson's Formal Complaint does not satisfy the procedural requirements of the Commission's rules of practice and procedure. [2] Accordingly, Litigation Staff recommended the Commission deny the Formal Complaint, but allow Jackson an opportunity to amend his Formal Complaint. [3] On March 14, 2017, the Commission adopted Litigation Staff's Memorandum and granted Jackson thirty (30) days to amend his Formal Complaint to correct the procedural deficiencies, by identifying any law, tariff, regulation, Commission order, or statute that Westar violated or face dismissal without prejudice. [4]

3. On March 21, 2017, Jackson filed an Amended Formal Complaint, alleging Westar violated Sections 6.02.01 and 7.02 of its General Terms and Conditions (Tariff). [5] After reviewing the additional information, the Litigation Staff concluded the Amended Formal Complaint cured the procedural deficiencies and recommended it be served on Westar. [6]

4. On March 28, 2017, the Commission issued an Order Adopting Staff's Memorandum and found the Amended Formal Complaint establishes a *prima facie* case for Commission action. [7]

5. On April 5, 2017, Westar filed a Motion to Dismiss, explaining under Section 7.02 of its Tariffs, Westar is not liable to its customers for loss or damage occurring from Westar operations necessary to provide service, absent willful or wanton conduct on Westar's part. [8] Since the Amended Formal Complaint does not allege Westar acted willfully or wantonly, [9] Westar moved to dismiss the Amended Formal Complaint for failure to state a claim. [10]

***2** 6. On July 20, 2017, Litigation Staff filed Staff's Report and Recommendation, recommending: (1) dismissal of the Amended Formal Complaint because the equipment failure was not the result of willful or wanton conduct by Westar; and (2) directing Westar to conduct a failure analysis of the components responsible for the fire to enhance the reliability of its system. [11] Staff determined that electricity arising from a Westar insulator resulted in the top of a transformer pole igniting. [12] High winds and low humidity cause embers from the burning pole to ignite grass and the spreading fire damaged Mr. Jackson's property. [13] Based on discovery responses, Staff concluded the failure of Westar's insulator was the result of normal wear and

tear, not willful or wanton conduct. [14] Since the failure of the insulator was not a result of willful or wanton conduct by Westar, Westar's Tariff protects them from liability. [15]

7. While recommending dismissal of the Amended Formal Complaint, Staff is concerned inadequate collection or analysis of failure data could lead to system neglect. [16] To guard against system neglect, Staff recommends Westar extend its enterprise asset management system to existing devices to determine if proactive steps can be taken to maintain its system. [17] Staff recommends the Commission order Westar to conduct a failure analysis on the equipment that caused the fire. [18]

8. Neither Westar nor Mr. Jackson responded to Staff's Report and Recommendation.

9. Since there is no showing, or even allegation, that the fire was caused by willful or wanton conduct by Westar, the Commission finds that pursuant to Section 7.02 of Westar's Tariff, Westar cannot be held liable for the damages to Mr. Jackson's property. Therefore, the Commission agrees with Staff's Report and Recommendation and grants Westar's Motion to Dismiss.

10. Westar is directed to conduct a failure analysis of the components which caused the fire, through its enterprise asset management system.

***3 THEREFORE, THE COMMISSION ORDERS:**

A. Westar's Motion to Dismiss is granted.

B. Westar is directed to conduct a failure analysis of the components which caused the fire.

C. The parties have 15 days from the date of electronic service of this Order to petition for reconsideration. [19]

D. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Apple, Chairman; Albrecht, Commissioner; Emler, Commissioner.

Date: AUG 03 2017

Lynn M. Retz

Secretary to the Commission

Footnotes

1 Formal Complaint, Jan. 23, 2017, p. 3.

2 Memorandum, Mar. 8, 2017, p. 1.

3 *Id.*

4 Order Adopting Staff's Legal Memorandum, Mar. 14, 2017, ¶¶ 8-9.

5 Amended Formal Complaint, Mar. 21, 2017, pp. 14-15.

6 Order Adopting Staff's Memorandum, Mar. 28, 2017, ¶

7 *Id.,* ¶ 10.

8 Motion to Dismiss of Westar Energy, Inc., Apr. 5, 2017, ¶ 3.

9 *Id.,* ¶ 6.

10 *Id.,* ¶ 13.

11 Notice of Filing of Staff Report and Recommendation, July 20,2017, ¶¶ 1-2.

12 Report and Recommendation (R&R), July 17, 2017, p. 2.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.,* at p. 3.

17 *Id.*

18 *Id.,* at p. 4.

19 K.S.A. 66-118b; K.S.A. 77-529(a)(1).

85 P.3d 228 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

MIDWEST ENERGY, INC., Appellant,
v.
STOIDI 2, INC., et al, Appellee.

No. 90,109.
|
March 5, 2004.
|
Review Denied May 25, 2004.

Synopsis

Background: Electrical power supplier brought breach of contract action against owner and operator of oil and gas lease, and lease owner filed counterclaim for damages associated with alleged negligent supply of power to lease. After issuing pretrial order granting judgment to supplier on its claim, denying supplier's motion to dismiss counterclaim, and receiving jury verdict in favor of lease owner on its counterclaim, the Stafford District Court, Barry A. Bennington, J., denied supplier's motion for judgment as a matter of law. Supplier appealed.

Holding: The Court of Appeals held that liability limitation provisions of Kansas Corporation Commission (KCC) tariff prevented lease owner from recovering damages for supplier's ordinary negligence in maintaining proper electrical connections on lease property.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict.

West Headnotes (1)

[1] Electricity ⇐ Care Required in General

Liability limitation provisions of Kansas Corporation Commission (KCC) tariff prevented owner and operator of oil and gas lease from recovering damages for ordinary negligence of electrical power supplier in maintaining proper electrical connections on lease property.

Appeal from Stafford District Court; Barry A. Bennington, judge. Opinion filed March 5, 2004. Reversed and remanded with instructions.

Attorneys and Law Firms

Gregory A. Lee, of Davis, Unrein, McCallister, Biggs & Head, L.L.P., of Topeka, for appellant.

Michael S. Holland, of Holland and Holland, of Russell, for appellee.

Before RULON, C.J., ELLIOTT and HILL, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Plaintiff Midwest Energy, Inc., appeals the district court's denial of plaintiff's motion to dismiss and plaintiff's motion for judgment as a matter of law. The plaintiff contends the district court erroneously ruled the liability limitation provisions of plaintiff's tariff filed with the Kansas Corporation Commission (KCC) did not extend to the negligence counterclaim of defendant Stoidi 2, Inc.

The defendant owned and operated an oil and gas lease in Stafford County, Kansas, commonly referred to as the Teichmann Lease. The plaintiff contracted with the defendant to supply equipment, materials, and supplies for the development of the defendant's lease and to supply electrical power to the lease.

On November 1, 2000, the plaintiff filed a breach of contract action, alleging that the defendant had failed to pay for supplies provided under the contract. The defendant filed a counterclaim against the plaintiff for damages associated with the plaintiff's negligent supply of power to the lease.

On May 1, 2002, the district court issued a pretrial order granting judgment to the plaintiff on its breach of contract claim but suspending payment of the judgment until the defendant's counterclaim had been resolved. The counterclaim was characterized by the district court as "negligence in the manner [the plaintiff] supplied electricity to the Defendant's Teichmann Lease on or about November 11, 1999." The district court specifically ruled that questions of fact here, concerning the cause of the high voltage and whether the plaintiff was negligent in providing electrical service, should be presented to a jury.

On June 27, 2002, the plaintiff filed a motion to dismiss the defendant's counterclaim based upon liability limitation provisions within the tariff plaintiff had filed with the KCC. In response, the defendant filed a Statement of Uncontroverted Fact, alleging that the plaintiff's negligence was not covered by the liability limitation provisions of the tariff. The district court denied the motion to dismiss the counterclaim. In the district court's memorandum decision, the court stated:

> "The thrust of the defendant's response is that a question of fact exists as to whether the damages allegedly sustained by the defendant were a result of negligent maintenance and installation by the plaintiff or whether the damages were the result of those types of events that are itemized in the tariffs and for which the defendant is not entitled to recover.
>
> ....
>
> "The defendant has raised a question of fact and alleges a form of negligence from which the plaintiff is not immune under the provisions of the tariffs.
>
> "Since that question of fact exists, it [is] for the jury to decide whether the defendant's damages were the result of any negligence whatsoever, and if the result of negligence, whether it was of the type from which the plaintiff is immune or for which the plaintiff may be held responsible."

Eventually, the counterclaim was presented to a jury, which returned a verdict in favor of the defendant. The plaintiff again argued for judgment as a matter of law based upon the liability limitation provisions, but the district court again denied the plaintiff's motion.

***2** On appeal, this court is presented only with the narrow issue of determining 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. This issue involves the construction of a written instrument, over which an appellate court may exercise independent review. See *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

The pertinent liability limitation provisions state:

> "G. CONTINUITY OF SERVICE
>
> "The Company will use reasonable diligence to supply continuous electric service, but does not guarantee the supply of electric service against irregularities or interruptions. In no event will the Company be liable for damages from irregularities or interruptions of service, caused by, but not limited to, failure of facilities, breakdowns or injury to equipment, extraordinary repairs, an act of God, public enemy, accidents, labor disturbances, strikes or their equivalent, sabotage, legal process, federal, state, or municipal interferences and restraint by public authority, any emergency, or any cause beyond the Company's control.
>
> ....
>
> "J. LIABILITY OF COMPANY
>
> "The Company will not be considered in default of the Electric Service Agreement and will not otherwise be liable on account of any failure by the Company to perform any obligation if prevented from fulfilling such obligation by reason of any delivery delay, breakdown or failure of, or damage to facilities, an electric disturbance originating on or transmitted through [an] electrical system 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, or any cause beyond the control of the Company."

In *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 986 P.2d 377 (1999), our Supreme Court considered the extent to which liability limitation provisions within utility tariffs would be enforced. Having considered provisions similar to those presented in the current case, the *Danisco* court noted that such liability limitation provisions attempted to completely insulate the utility from liability for damage caused by any interruption in service, whatever the cause. 267 Kan. at 768–69, 986 P.2d 377.

The *Danisco* court held that, while the regulated nature of utility services permitted the utilities to seek liability protection through the use of such provisions, Kansas public policy would not allow a court to enforce a liability limitation provision when a utility sought to limit liability for damages caused by its own willful or wanton conduct. 267 Kan. at 771–72, 986 P.2d 377.

As we understand, the defendant concedes the validity and enforceability of liability limitation provisions but contends that the plaintiff's liability limitation provision does not extend to the conduct at issue in this case. The defendant frames the issue as one of negligent maintenance of proper electrical connections on the Teichmann Lease, not a question of negligent supply of electricity to the lease.

***3** In overruling the plaintiff's motion to dismiss the counterclaim, the district court implicitly found that liability for ordinary negligence in the maintenance of the proper electrical connections was not encompassed by the limiting provisions of the tariff. We disagree.

According to the defendant, the direct cause of the defendant's loss was a ferroresonant overvoltage causing damage to the electrical connections of two of the pumps on the lease. This overvoltage, arguably, would not have occurred if the plaintiff had employed a different type of electrical connection within plaintiff's transformers. However, because of the plaintiff's negligence, an irregularity in service, commonly known as ferroresonance, occurred, leading to a burn-out of the electrical equipment. This malfunction, in turn, led to an interruption of service, causing the defendant a loss of production in two oil wells.

We conclude that the liability limitation provisions within the plaintiff's tariff insulate the plaintiff from ordinary negligence of this kind. The district court improperly denied the plaintiff's motion to dismiss the counterclaim.

The judgment is reversed and remanded with instructions to the district court to vacate the damage award in favor of the defendant.

All Citations

85 P.3d 228 (Table), 2004 WL 421990

End of Document

2004 WL 813768
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

OTTAWA COUNTY LUMBER & SUPPLY, INC. and Federated Mutual Ins. Co., Plaintiffs,

v.

SHARP ELECTRONICS CORP. and Southwestern Bell Telephone Company, Defendants.

No. 03–4187–RDR.

Feb. 17, 2004.

Attorneys and Law Firms

Dustin L. DeVaughn, McDonald, Tinker, Skaer, Quinn & Herrington, Wichita, KS, Pedro L. Irigonegaray, Irigonegaray & Associates, Topeka, KS, for Plaintiffs.

Elizabeth Raines, Baker, Sterchi, Cowden & Rice, L.L.C., Thomas E. Rice, Jr., Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, MO, Bruce A. Ney, Southwestern Bell Telephone Co., Melanie N. Sawyer, Southwestern Bell Telephone Co., Timothy S. Pickering, Southwestern Bell Telephone Co., Topeka, KS, for Defendants.

MEMORANDUM AND ORDER

RICHARD D. ROGERS, District Judge.

***1** This matter is presently before the court upon defendant Southwestern Bell Telephone Company's (SWBT) motion to dismiss and amended motion to dismiss. Having carefully reviewed the arguments of the parties, the court is now prepared to rule.

This action arises from a fire that destroyed the plaintiff Ottawa County Lumber and Supply, Inc.'s (Ottawa County) business office on October 13, 2001. In its original complaint, which was filed on October 13, 2003, Ottawa County alleged that the fire was caused by the negligence of SWBT and Sharp Electronics Corporation. Specifically, Ottawa County contended that the fire occurred because of wiring performed by SWBT and a faulty fax machine manufactured by Sharp. The complaint contained four counts, two counts against SWBT (negligence and breach of implied warranty of workmanlike performance) and two counts against Sharp (negligence and breach of implied warranty of merchantability).

In response to the complaint, SWBT filed a motion to dismiss. SWBT argued that it was protected from liability by its General Exchange Tariffs. On December 18, 2003, Ottawa County filed an amended complaint against SWBT. The amended complaint added Federated Mutual Insurance Company (Federated Mutual) as a plaintiff and new allegations against SWBT. In its negligence claim against SWBT, Ottawa County alleged that SWBT acted with "wanton negligence" in wiring Ottawa Lumber's telephone system. Federated Mutual made the same allegations of negligence against SWBT and indicated that it was "responsible pursuant to a contract for a portion of plaintiff Ottawa County Lumber's damages and paid damages in excess of $75,000." Plaintiffs also filed a response to the motion to dismiss. Plaintiffs asserted that the amended complaint rendered SWBT's motion to dismiss moot. Plaintiffs also suggested that the new plaintiff, Federated Mutual, was not bound by the General Exchange Tariffs. SWBT responded with an amended motion to dismiss. SWBT makes four arguments: (1) Federated Mutual is subject to SWBT's General Exchange Tariffs; (2) plaintiffs have failed to state a claim for wanton negligence against SWBT because plaintiffs have provided no factual support for this assertion; (3) plaintiffs have failed to state a claim for implied warranty of workmanlike performance against SWBT because no such duty is owed plaintiffs under the General Exchange Tariffs; and (4) Federated Mutual has failed to state a claim because its claim is untimely and does not relate back to the original filing of the complaint.

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir.1998), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, *Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir.1998). The issue in resolving a

motion such as this is not whether the plaintiff will ultimately prevail, but whether plaintiff is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds, *Davis v. Scherer*, 468 U.S. 183 (1984).

***2** The court shall begin by agreeing with plaintiffs that SWBT's original motion to dismiss is moot. The arguments contained in that motion lack any force in light of the filing of plaintiffs' amended complaint. The court shall then proceed to consider SWBT's amended motion to dismiss.

The court must initially consider the issue of the addition of Federated Mutual as a plaintiff in the amended complaint. SWBT argues that Federated Mutual's claim should be dismissed because it is untimely. SWBT points out that, if the amended complaint does not relate back to the filing of the original complaint, then Federated Mutual's claim is untimely because it was filed after the running of the applicable two-year statute of limitations, K.S.A. 60–513(a)(2). SWBT argues that, given the circumstances, the amended complaint should not relate back to the filing of the original complaint.

When a complaint is filed in federal court, the matter of relation back of amendments to pleadings is generally governed by the Federal Rules of Civil Procedure. See *Myelle v. Am. Cyanamid Co.*, 57 F.3d 411, 416 (4th Cir.1995) (holding that, although capacity to sue is governed by state law, the Federal Rules of Civil Procedure govern relation back). The court will therefore turn to the Federal Rules of Civil Procedure to determine whether plaintiffs' amended complaint relates back to the date of the filing of the original complaint.

Fed.R.Civ.P. 15(c) provides as follows:

> An amendment of a pleading relates back to the date of the original pleading when
>
> ....
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and ... the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The goal of relation-back principles is "to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." Fed.R.Civ.P. 15, Advisory Committee Notes (1991). Although Rule 15(c) refers only to an amendment that "changes the party or the naming of the party against whom a claim is asserted," the rule clearly applies to amendments substituting or adding a plaintiff as well. Fed.R.Civ.P. 15, Advisory Committee Notes (1966).

In the present case, the claim of Federated Mutual in the amended complaint is exactly the same as the claim of Ottawa County. The only difference is that a new party has been added as an additional plaintiff. The plaintiffs are not seeking any additional damages. There is no indication that defendants will be prejudiced by the lack of earlier notice of the addition of another plaintiff. Under these circumstances, the court concludes that the date of the amended complaint should relate back to the date of the original complaint. See 6A Wright & Miller, Federal Practice and Procedure: Civil § 1501 (2d ed. 1990) ("As long as defendant is fully apprised of a claim arising from specified conduct and has prepared himself to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense."); see also *American Banker's Insurance Co. of Florida v. Colorado Flying Academy, Inc.*, 93 F.R.D. 135, 136–37 (D.Colo.1982) (amended complaint adding insurance carrier subrogated to plaintiff's claim relates back to date of original complaint).

***3** The court shall next turn to SWBT's arguments concerning the application of the tariffs in this case. SWBT is a tele-communications public utility subject to the jurisdiction of the Kansas Corporation Commission (KCC). See K.S.A. 66–104, 66–1,188. The KCC is vested with full power and authority to regulate SWBT. See K.S.A. 66–1,188. Under

Kansas law, a public utility must file tariffs with the KCC. K.S.A. 66–101b, 66–101c, 66–117, 66–1,189 and 66–1,190. Tarifffs are those terms and conditions which govern the relationship between a utility and its customers. *Southwestern Bell Telephone Co. v. Kansas Corporation Comm.*, 233 Kan. 375, 664 P.2d 798, 800 (1983). 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. *Id.*

In this case, SWBT points to two of the General Exchange Tariffs that have been filed with and approved by the KCC as limiting its liability in the provisioning of telephone service. These tariffs provide as follows:

> The customer/patron assumes all risk for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission, failures or defects in equipment and facilities furnished by SWBT occurring in the course of furnishing service, in the telephone service or other communication services furnished by SWBT, or of SWBT failing to maintain proper standards of maintenance and operation and to exercise reasonable supervision, whether the patron is receiving resold SWBT service or service through SWBT unbundled network elements....

General Exchange Tariff 20.11.3.
SWBT shall be liable for damage arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission or other injury, including but not limited to injuries to persons or property from voltages or currents transmitted over the service of SWBT, whether (1) caused by customer-provided equipment (except where a contributing cause is the malfunctioning of a SWBT-provided connecting arrangement, in which event the liability of SWBT shall not exceed an amount equal to a proportional amount of SWBT billing for the period of service during which such mistakes, omission, interruptions, delays, errors, defects in transmission or injury occur), or (2) not prevented by customer-provided equipment. This paragraph applies whether the customer/ patron is receiving service directly from SWBT, resold SWBT services or service through unbundled network elements.

General Exchange Tariff 20.11.5.
SWBT argues, based upon the language of these tariffs, that it is not liable for any damage claims made by the plaintiffs. Plaintiffs, in response, suggest that SWBT remains liable for claims of wanton negligence, the claim made by them in this case.

In *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 986 P.2d 377 (1999), the Kansas Supreme Court considered the application of utility tariffs limiting liability to claims for damages arising from power outages. The Court concluded that it was reasonable for the KCC to allow a tariff that relieved a utility of liability for damages resulting from its own simple negligence in regard to the supply of its service. 985 P.2d at 385. The Court, however, determined that it was not reasonable for the KCC to allow a tariff which would relieve a utility of its liability for damages resulting from its wanton or willful misconduct. *Id.*

***4** Therefore, in accord with Danisco Ingredients, we find that the disclaimers of liability contained in General Exchange Tariffs 20.11 .3 and 20.11.5 are valid and enforceable insofar as they disclaim liability for simple negligence, but we find them to be void and unenforceable, as against public policy, insofar as they purport to limit SWBT's liability for its own willful and wanton misconduct. Here, plaintiffs have alleged that SWBT engaged in wanton negligence. In their amended complaint, they allege that SWBT "failed to properly ground its telephone system and acted with waton (sic) disregard by failing to properly operate and maintain its telephone system when it had knowledge or should have had knowledge of an unsafe condition." At the pleading stage, plaintiffs' allegations of wanton conduct by SWBT are more than sufficient to survive a motion to dismiss, and SWBT cites no authority indicating otherwise. Therefore, this aspect of SWBT's motion to dismiss must be denied.

The court finds no merit to plaintiffs' argument that Federated Mutual is not bound by the tariffs because it was not a customer of SWBT. Federated Mutual's sole claim of

alleged negligence against SWBT stems from its contractual relationship with its insured, Ottawa County. As accurately pointed out by SWBT, Mutual Federated, as the insurer, stands in the shoes of its insured. See *Western Motor Co., Inc. v. Koehn*, 242 Kan. 402, 748 P.2d 851, 853 (1988) ("An insurer claiming the right of subrogation stands in the shoes of its insured, and any defenses against the insured are likewise good against the insurer."). Therefore, Federated Mutual is subject to SWBT's General Exchange Tariffs.

The court shall, however, grant SWBT's motion to dismiss Ottawa County's claim based upon an implied warranty of workmanlike performance. The court finds that the aforementioned tariffs do preclude this claim. Ottawa County has provided no argument to the contrary. Accordingly, this aspect of the defendant SWBT's motion shall be granted.

IT IS THEREFORE ORDERED that defendant Southwestern Bell Telephone Company's motion to dismiss (Doc. # 8) be hereby denied as moot.

IT IS FURTHER ORDERED that defendant Southwestern Bell Telephone Company's amended motion to dismiss (Doc. # 19) be hereby granted in part and denied in part. Plaintiff Ottawa County Lumber & Supply, Inc.'s claim against Southwestern Bell Telephone Company for breach of implied warranty for workmanlike performance shall be dismissed for failure to state a claim upon which relief can be granted. The remainder of the amended motion shall be denied.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2004 WL 813768

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