

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

VALLEY QUEEN CHEESE FACTORY, INC.,
a South Dakota corporation,

Plaintiff,

v.

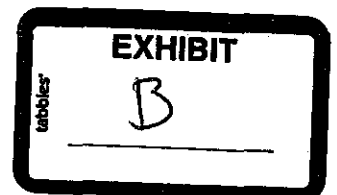
OTTER TAIL POWER COMPANY, a
Minnesota corporation,

Defendant.

Case No. 15-1022

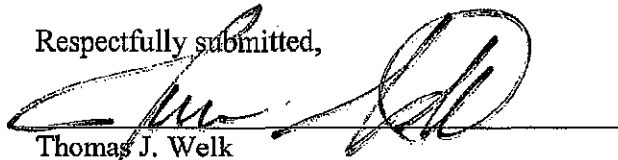
**DEFENDANT OTTER TAIL POWER
COMPANY'S MOTION TO DISMISS
OR, ALTERNATIVELY,
STAY AND REFER ISSUES TO THE
PUBLIC UTILITIES COMMISSION OF
THE STATE OF SOUTH DAKOTA**

Defendant Otter Tail Power Company ("Otter Tail"), by and through its attorneys, respectfully moves for a dismissal of this action pursuant to Federal Rules of Civil Procedure 12(b)(6) for the Plaintiff's failure to state a claim upon which relief can be granted, or, alternatively, moves to stay this proceeding and refer issues to the Public Utilities Commission of the State of South Dakota. This motion is supported by the following documents filed contemporaneously with this motion: the Brief in Support of Defendant Otter Tail Power Company's Motion to Dismiss, or Alternatively, Stay and Refer to the Public Utilities Commission of the State of South Dakota; the Affidavit of Patricia Van Gerpen; and the Defendant Otter Tail Power Company's Motion for Judicial Notice.



Dated this 26th day of June, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Welk', is written over a horizontal line. The signature is stylized and cursive.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

<p>VALLEY QUEEN CHEESE FACTORY, INC., a South Dakota corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>OTTER TAIL POWER COMPANY, a Minnesota corporation,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Case No. 15-1022</p> <p style="text-align: center;">BRIEF IN SUPPORT OF DEFENDANT OTTER TAIL POWER COMPANY'S MOTION TO DISMISS OR, ALTERNATIVELY, STAY AND REFER TO THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION</p>
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INTRODUCTION

Defendant Otter Tail Power Company ("Otter Tail") provides electricity to Plaintiff Valley Queen Cheese Factory, Inc. ("Valley Queen") under tariffs approved by the South Dakota Public Utilities Commission ("PUC"). Under the applicable tariffs, Valley Queen had various rate options for its electrical service. Under the tariffs and South Dakota regulations, Otter Tail simply must advise Valley Queen of the available rates. In this action, Valley Queen asks the Court to amend the tariff and create a new duty, namely a duty to recommend the best available rate. Because Valley Queen's claims are inconsistent with the terms of Otter Tail's filed tariffs, the filed rate doctrine bars Valley Queen's claims as a matter of law. Alternatively, Valley Queen's claims should be referred and adjudicated by the PUC pursuant to the primary jurisdiction doctrine. The PUC is in the best position to determine what information utilities need to provide to their customers regarding the available tariff rates. Under either scenario, Valley Queen's Complaint fails to state a claim and is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

BACKGROUND

Valley Queen commenced this action by filing a complaint on May 11, 2015. (Complaint, Document 1). Plaintiff also has filed a complaint on May 18, 2015, with the PUC (“PUC Complaint”), which is essentially a mirror image of the Complaint in this action.¹

Valley Queen manufactures cheese and dairy products in Milbank, South Dakota. (Complaint ¶ 1).² Otter Tail is a utility company that provides electrical service to, among others, Valley Queen. (Complaint ¶¶ 5-6). Otter Tail’s sale of electricity in South Dakota is regulated by the PUC, and Otter Tail’s price and conditions for the sale of electricity are governed by electric rate schedules, or tariffs, approved by the PUC. (Complaint ¶ 9). As expressly recognized in the Complaint, Otter Tail “can only sell electricity at retail in the manner and for the charge set out in the [tariffs].” (*Id.*).

At all times relevant, Otter Tail sold electricity to Valley Queen for its electric boiler as well as Valley Queen’s factory operations. (Complaint ¶ 17). Electricity to the boiler and the factory were separately metered. (*Id.*). From June of 2005 through June of 2010, Otter Tail sold electricity for the electric boiler pursuant to a written contract. (Complaint ¶ 16). The electricity was billed at Otter Tail’s Bulk Interruptible Rate. (*Id.*). On May 29, 2009, Otter Tail informed Valley Queen that the boiler contract would expire June 1, 2009. (Complaint ¶ 18).³ On June 15, 2009, Otter Tail met with Valley Queen to discuss Valley Queen’s options for purchasing

¹ Otter Tail respectfully moves this Court to take judicial notice of the filings in the PUC Docket CE-15-001. (Motion for Judicial Notice). This Court can take judicial notice of other proceedings as part of Rule 12(b)(6) motion. United States ex rel. Kraxberger v. Kansas City Power & Light Co., 756 F.3d 1075, 1083 (8th Cir. 2014) (“[I]n a motion to dismiss, a court may consider ‘matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.’”).

² Otter Tail disputes many of the factual allegations in the Complaint. Nevertheless, for purposes of this Rule 12(b)(6) motion only, Otter Tail will assume the factual allegations in the Complaint are true.

³ Actually, the contract was not set to expire until June of 2010. The mistake regarding the term of the boiler contract is not at issue, however, in this lawsuit because Otter Tail has credited Valley Queen’s bill for the mistake. (Complaint ¶ 28).

electricity. (Complaint ¶ 19). Due to the nature of the service provided for the electric boiler and the factory, Valley Queen had various rate options under the applicable tariffs for delivery of electricity. (Complaint ¶¶ 19-25). Following the June 15, 2009 meeting, Valley Queen chose to purchase electricity pursuant to Otter Tail's Large General Service-Time of Day Rate ("LGS-TOD") for both the plant and boiler starting on July 1, 2009. (Complaint ¶ 19).

Effective July 1, 2009, the PUC approved Otter Tail's request for a new rider to its tariff that included a Real Time Pricing ("RTP") rate. (Complaint ¶ 20). The first time Otter Tail offered the LGS-TOD rate and the RTP rate were in the tariff effective July 1, 2009. (Complaint ¶ 24).

In this lawsuit, Valley Queen alleges that it would have saved electricity costs if it purchased electricity under a different rate than the LGS-TOD rate. (Complaint ¶ 29). Valley Queen alleges Otter Tail was "legally obligated" to tell Valley Queen what the most economical rate would have been for the electric boiler and the plant. (Complaint ¶ 25). Valley Queen sues in this action for violation of that alleged "legal obligation." (Complaint ¶ 31).

The applicable tariffs and South Dakota administrative rules only require Otter Tail to advise Valley Queen about the available rates; not to recommend the rate. The tariff in effect in June 2009 ("June Tariff"), and cited in part at Paragraph 12 of the Complaint, requires that each customer should be served at the most advantageous rate; however, "the customer . . . has the responsibility to select the most advantageous rate." (Affidavit of Patricia Van Gerpen, Ex. A, Motion for Judicial Notice). Additionally the tariff states,

"[t]he customer is the only one who can best determine whether his future load will follow the pattern of the past or estimate monthly use based upon increased load. Therefore, while the company has the responsibility to advise the customer, it is the customer who has the responsibility to select the rate schedule."

(*Id.*)⁴ The tariff in effect for service after July 1, 2009 (“July Tariff”) has similar language that:

“[t]he Company does not guarantee that the Customer will at all times be served under the most favorable rate; nor will the company make refunds representing the difference in charges between the rate for which service was bill and another rate which is or may be subsequently become available when the Company has complied with South Dakota law.”

(Affidavit of Patricia Van Gerpen, Ex. B; Motion for Judicial Notice). Finally, ARSD 20:10:17:01 requires that “[i]f a customer is eligible to receive service under more than one rate, the utility, upon notice of this fact, shall advise the customer of all alternatives.”

By claiming in this lawsuit that Otter Tail had a legal obligation to advise Valley Queen of the most cost effective rate, Valley Queen is asking this Court to impose additional conditions on the sale of electricity that do not exist in the applicable tariffs, which is prohibited by the filed rate doctrine. Otter Tail thus moves to dismiss the Complaint for failure to state claim. Alternatively, the Complaint should be dismissed based upon primary jurisdiction, and Valley Queen’s claims should be referred to and adjudicated by the PUC pursuant to the PUC Complaint.

STANDARD OF REVIEW

A motion to dismiss under Federal Rule 12(b)(6) challenges the legal sufficiency of the complaint. Northern Valley Communications, LLC v. Qwest Communications Co., LLC, Civ. No. 11-4052-KES, 2012 WL 523683, at *1, *3 (D.S.D. Feb. 16, 2012)(citation omitted). To survive a motion to dismiss, the plaintiff must “plead facts sufficient to ‘raise a right to relief above the speculative level.’” Brown v. Medtronic, Inc., 628 F.3d 451, 459 (8th Cir. 2010) (quoting Bell Atlantic Corp., v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007)). When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court

⁴ The Court can consider the tariffs attached to the Motion for Judicial Notice when ruling on this Rule 12(b)(6) motion because the Complaint refers to the tariff. See United States ex rel. Kraxberger, 756 F.3d at 1083.

must accept the allegations of the complaint as true. Northern Valley Communications, LLC v. Qwest Communications Corp., 659 F. Supp.2d 1062, 1065 (D.S.D. 2009) (citing Stufflebeam v. Harris, 521 F.3d 884, 886 (8th Cir. 2008)(citations omitted). Although the Court assumes any factual allegations in the Complaint are true when ruling on a Rule 12(b)(6) motion, the plaintiff must actually plead facts showing entitlement to relief, and the Court does not need to assume legal conclusions are true. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). “[I]n a motion to dismiss, a court may consider ‘matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.’” United States ex rel. Kraxberger v. Kansas City Power & Light Co., 756 F.3d 1075, 1083 (8th Cir. 2014).

ARGUMENT

Otter Tail moves to dismiss the Complaint for failure to state a claim based upon two independent, alternative theories: the filed rate doctrine; and the primary jurisdiction doctrine. Under both theories, this Court should dismiss the Complaint.

I. Valley Queen’s Attempt to Manufacture a Duty Different than the Terms of the Tariff is Barred by the Filed Rate Doctrine, and thus, the Complaint Fails to State a Claim Upon Which Relief Can be Granted.

The tariff is the sole source of Otter Tail’s obligations to Valley Queen. Under the terms of the tariff, Otter Tail must inform Valley Queen about the available rate options. Valley Queen then selects the appropriate rate. Valley Queen’s claims in this lawsuit are premised on the allegation that Otter Tail has a legal obligation, or a duty, to advise Valley Queen what the most cost effective rate would be. (Complaint ¶¶ 25, 30-31). Because Otter Tail does not have this duty under the applicable tariffs, Valley Queen’s claim asks this Court to deviate from the terms and conditions for selling electricity stated in the tariffs. The filed rate doctrine prohibits this Court from doing so. The Complaint, therefore, fails to state a claim.

When a utility provides services to a customer pursuant to a filed tariff, the filed rate doctrine bars a plaintiff's claim based upon different prices, terms, and conditions for the service than those contained in the tariff. See Sancom, Inc. v. Qwest Communications Corp., 643 F.Supp.2d 1117, 1124 (D.S.D. 2009). Once the tariff has been approved by the regulatory agency, "the terms of the tariff are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities'" between the utility and the customer. Iowa Network Servs., Inc. v. Qwest Corp., 466 F.3d 1091, 1097 (8th Cir. 2006) (quoting Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000)). While "[t]he filed rate doctrine has its origins in [Supreme] Court[] cases interpreting the Interstate Commerce Act, [the doctrine] has been extended across the spectrum of regulated utilities." Crumley v. Time Warner Cable, Inc., 556 F.3d 879, 881 (8th Cir. 2009)(citing Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925 (1981)). The filed rate doctrine applies equally to rates promulgated by state regulatory agencies as to those rates set by federal regulatory agencies. Sancom, Inc. v. Qwest Communications Corp., 643 F.Supp.2d 1117, 1124 (citing Firstcom, Inc. v. Qwest Corp., 555 F.3d 669, 681 (8th Cir. 2009)); H.J. Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485, 494 (8th Cir. App. 1992)(citation omitted).

The filed rate doctrine is not strictly limited to "rates" in terms of the prices paid for service, but also applies to any services, or privileges, or practices affecting such charges. As the Supreme Court stated: "[r]ates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." American Telephone and Telephone Company v. Central Office Telephone, Inc., 524 U.S. 214, 223, 118 S. Ct. 1956, 1963 (1998). "As a result, under the filed rate doctrine, [t]he rights as defined by the tariff cannot be varied or

enlarged by either contract or tort of the carrier” Keogh v. Chicago & Northwestern Railroad Co., 260 U.S. 156, 163, 43 S. Ct. 47, 49 (1922). The filed rate doctrine bars a plaintiff’s attempt to alter the terms and conditions provided for in a tariff. Northern Valley Communications, 659 F.Supp.2d 1062, 1068 (D.S.D. 2009)(quoting AT & T v. Central Office Telephone, 524 U.S. at 229, 118 S. Ct. at 1962-63.

“[T]he purpose of the filed rate doctrine is to: (1) preserve the regulating agency’s authority to determine the reasonableness of the rates; and (2) insure that regulated entities charge only those rates that the agency has approved or been made aware of as the law may require.” Sancom, Inc., 643 F. Supp. 2d at 1124 (quoting Quest Corp. v. Scott, 380 F.3d 367, 375 (8th Cir. 2004). There are two core principles protected by the filed rate doctrine: (1) the preservation of the role of state agencies in approving rates and services by keeping courts out of the rate-making process, a function that agencies are better equipped to perform (“Nonjusticeability”); and (2) preventing carriers or utilities from discriminating between customers (“Nondiscrimination”). See Sancom, 643 F.Supp.2d at 1124 (citing Marcus v. AT&T Corp., 138 F.3d 46, 58 (2nd Cir. 1998)). The filed rate doctrine applies when a cause of action implicates either of the two prongs. Northern Valley Communications, 659 F.Supp.2d at 1067 (D.S.D. 2009) (citing Marcus, 138 F.3d at 59). When a claim implicates either the Nonjusticeability or the Nondiscrimination principles, the plaintiff cannot prove any set of facts that would entitle it to relief on its claims. Sancom, Inc. v. Quest Communications Corp., 643 F.Supp.2d at 1127 (D.S.D. 2009). Additionally, a cause of action that could provide relief which differs from the tariffs approved by the PUC is prohibited. Splitrock Properties, Inc. v. Qwest

Communications Corp., 2009 WL 2827901, *1, *2 (D.S.D. Aug. 28, 2009).⁵ The appropriate remedy is dismissal of the Plaintiff's claims.

Here, Valley Queen's claims are barred by the filed rate doctrine because Valley Queen seeks a higher level of service than is required by the applicable tariffs. As indicated in the Complaint, Otter Tail is selling electricity to Valley Queen pursuant to tariffs approved by the PUC. (Complaint ¶ 9). The terms and conditions of the sale of electricity are controlled by the tariff, which has the full force and effect of law. See Iowa Network Servs., Inc., 466 F.3d at 1097; SDCL 49-34A-10. At most, under the June Tariff and July Tariff, Otter Tail advises Valley Queen what rate alternatives exist. (Affidavit of Patricia Van Gerpen, Exs. A & B, Motion for Judicial Notice). Valley Queen then chooses the rate from the various alternatives. (*Id.*). Contrary to Valley Queen's allegations in the Complaint, nothing in the tariffs requires Otter Tail to determine the most economical rate for Valley Queen.⁶

Disregarding the language of the applicable tariffs, Valley Queen's lawsuit alleges Otter Tail must advise Valley Queen which rate is the most economical. (Complaint ¶ 25). Valley Queen seeks a duty neither anticipated in the tariffs nor required by the law. Valley Queen seeks to shift its responsibilities to select the rate under the tariff to Otter Tail. Analytically, Valley Queen's complaint asks the Court to alter the terms and conditions for the sale of electricity stated in the tariff. The filed rate doctrine prohibits such judicial amendment of the tariff, and Valley Queen's claim is barred as a matter of law.

⁵ Memorandum opinion and order by Judge Piersol granting dismissal of claims of breach of implied contract and unjust enrichment.

⁶ In providing its customer service, Otter Tail endeavors to assist customers in selecting the appropriate rate including discussing the various options with the customer in light of the customer's stated energy needs. Valley Queen's allegations in paragraph 25 of the Complaint that Otter Tail has a legal obligation to identify and advise its customer which is the most cost effective or economical rate is not consistent, however, with Otter Tail's obligations under the applicable tariffs.

The U.S. Supreme Court has previously barred claims by those who seek to enforce an added benefit or service not in the tariff. In Chicago & Alton Railroad Company v. Kirby, 225 U.S. 155, 32 S.Ct. 648 (1912), the Court rejected a shipper's breach-of-contract claim against a railroad for failure to ship a carload of racehorses by a particular train. The Court held that the shipper's claim was invalid as a matter of law because the railroad's tariffs "did not provide for an expedited service, nor for transportation by any particular train[.]" and therefore the shipper would receive an "an undue advantage . . . that is not one open to others in the same situation" if the Court were to enforce the contract. Id. at 165, 32 S. Ct. at 650. Like the shipper in Kirby, Valley Queen cannot sue for violation of terms and conditions that are not included in the applicable tariff.

Furthermore, Valley Queen's claim conflicts with both the principles protected by the filed rate doctrine. The Nonjusticeability prong of the filed rate doctrine precludes any judicial action which undermines the rate-making agency tasked with determining the "reasonableness" of rates and services filed with regulated agencies. Sancom, 643 F.Supp.2d 1124-125 (citing Marcus, 138 F.3d at 61; Arkansas Louisiana Gas Co., 453 U.S. at 577-78, 101 S. Ct. at 2925). The PUC is the primary rate making agency for the tariffs at bar in South Dakota and is responsible for determinations as to reasonableness (SDCL 49-34A-6),⁷ and is also responsible for providing the regulations required for tariff changes. SDCL 49-34A-4(1).⁸ The PUC has

⁷ SDCL 49-34A-6:

Every rate made, demanded or received by any public utility shall be just and reasonable. Every unjust or unreasonable rate shall be prohibited. The Public Utilities Commission is hereby authorized, empowered and directed to regulate all rates, fees and charges for the public utility service of all public utilities, including penalty for late payments, to the end that the public shall pay only just and reasonable rates for service rendered.

⁸ SDCL 49-34A-4(1):

The commission shall regulate to the extent provided in this chapter every public utility as defined in this chapter. The commission may promulgate rules pursuant to chapter 1-26 in furtherance of the purposes of this chapter concerning:

approved the tariffs at issue in this case. (Affidavit of Patricia Van Gerpen, Exs. A & B, Motion for Judicial Notice). In determining the appropriate rates, among other things, the PUC determined what services would be provided by Otter Tail, and the conditions of that service. See SDCL 49-34A-10.

Now, Valley Queen asks this Court to amend the tariff and require Otter Tail to provide additional services, namely analysis and recommendation of the most cost effective rate option for a large, sophisticated customer with varying needs and demands. Imposing this obligation is effectively judicial rate making prohibited by the filed rate doctrine. Sancom, Inc., 643 F.Supp.2d at 1128 (citing Marcus, 138 F.3d at 58) (stating that where a decision would have the effect of the court engaging in rate-making, the claim must be dismissed). As noted above, the filed rate doctrine is not strictly limited to the price component of the tariff, but instead also applies to any services, or privileges, or practices affecting such charges--“[r]ates . . . do not exist in isolation.” American Telephone, 524 U.S. at 223, 118 S. Ct. at 1963. This is also reflected in both the definition for “[r]ate[s]” under SDCL 49-34A-1(13)⁹ and that the tariffs and schedules filed by utilities with the PUC include the “the terms and conditions of service and all rates established by the utility.” SDCL 49-34A-10. The rates, and services to which they are associated, are so intertwined that a Court’s adjudication that additional terms and conduct are required amounts to judicial rate making prohibited by the filed rate doctrine.

Valley Queen’s claim also violates the Nondiscrimination principle, which requires that all customers of a regulated utility are treated uniformly and are charged the same rate for service

(1) Procedures and requirements for applications for rate and tariff change

⁹ SDCL 49-34A-1(13):

“Rate,” any compensation, charge and classification, or any of them demanded, observed, charged, or collected by any public utility for any service and any rules, regulation, practices, or contracts affecting any such compensation, charge or classification.

by a utility. Sancom, Inc., 643 F.Supp.2d at 1125 (citing Hill v. BellSouth Telecomm., Inc., 364 F.3d 1308, 1316 (11th Cir. 2004)). It prohibits courts from adjudicating claims that would “invalidate, alter, or add to the terms of the filed tariff.” Sancom, Inc., 643 F.Supp.2d at 1128 (citing Davel Communications, Inc. v. Qwest Corp., 460 F.3d 1075, 1084 (9th Cir. 2006)).

Similarly, South Dakota law bars a public utility from:

receiv[ing] from any person a greater or lesser compensation for any service within the jurisdiction of the Public Utilities Commission rendered or to be rendered by such public utility than prescribed in its schedules of rates and charges which have been filed with the commission as provided in this chapter.

SDCL 49-34A-9. No utility can any preference or advantage to any customer as to rates or service. SDCL 49-34A-3.

In this case, Valley Queen claims Otter Tail must advise Valley Queen which rate was the most economical. (Complaint ¶ 25). This is a service that is not provided to any other customer under the applicable tariffs. Valley Queen requests Otter Tail to conduct a study of the energy use, risk-tolerance, and expansion plans of one of its sophisticated energy consumers. Such an interpretation of the tariff would require Otter Tail in all cases bear the burden for the rate selection of its customers. However, this is not indicated in the tariff. Under ARSD 20:10:17:01,¹⁰ and the terms of the June Tariff¹¹ and July Tariff,¹² Otter Tail’s only responsibility is to advise its customers of the options. The customer must select the rate for itself. Thus, if this claim is recognized, the effect would be to grant preferential treatment to Valley Queen in violation of the nondiscrimination principle and South Dakota law.

¹⁰ ARSD 20:10:17:01:

“[i]f a customer is eligible to receive service under more than one rate, the utility, upon notice of this fact, shall advise the customer of all alternatives.”

¹¹ “[w]hile the company has the responsibility to advise the customer, it is the customer who has the responsibility to select the rate schedule.”

¹² “[t]he Company will . . . advise the customer of all alternatives . . . the Company does not guarantee the customer will at all times be served with the most favorable rate”

In conclusion, the filed rate doctrine bars Valley Queen's claim in the Complaint. A cause of action that could provide relief which differs from the tariffs approved by the PUC is prohibited. Splitrock Properties, Inc. v. Qwest Communications Corp., 2009 WL 2827901 (D.S.D. 2009).¹³ As a result, the Complaint fails to state a claim and should be dismissed.

II. The Primary Jurisdiction Doctrine Bars Valley Queen's Claims in This Court.

The Court should also dismiss the Complaint under the primary jurisdiction doctrine. The primary jurisdiction doctrine is a "common-law doctrine that is utilized to coordinate judicial and administrative decision making." Sancom, Inc. v. Sprint Communications Co. Ltd. Partnership, No. CIV-07-4107-KES, 2010 WL 936718, at *1, *3 (D.S.D. March 15, 2010)(quoting Access Telecommunications. v. Southwestern Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998)). The doctrine applies when the "enforcement of a claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Sancom, 2010 WL 936718, at *3 (quoting Alpharama, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005)(citations omitted). The Eight Circuit has recognized two primary reasons for the application of the doctrine: 1) cases requiring agency expertise not within the conventional experience of judges or "requiring the exercise of administrative discretion;" and 2) "[t]he promotion of uniformity and consistency within the particular field of regulation." Sancom, Inc., 2010 WL 936718, at *4 (quoting Alpharama, 411 F.3d at 938). When the primary jurisdiction doctrine applies, the "district court has the discretion either to [stay the case and] retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." Id. (citing Access, 137 F.3d at 609).

¹³ Memorandum opinion and order by Judge Piersol granting dismissal of claims of breach of implied contract and unjust enrichment.

Valley Queen's claims should be dismissed because the determination of whether Otter Tail must advise Valley Queen which rate to select has far reaching implications firmly rooted in the specialized rate-making regulatory jurisdiction of the PUC. Setting applicable rates is within the exclusive regulatory authority of the PUC. SDCL 49-34A-4, 49-34A-6. As noted above, determining the terms and conditions of providing service is an integral part of rate-setting. See American Telephone, 524 U.S. at 223. Rate setting thus requires administrative discretion, and the primary jurisdiction doctrine applies.

Additionally, the primary jurisdiction doctrine applies because allowing the PUC to determine whether Otter Tail (and other utilities) must advise customers which rate is the most economical will promote "uniformity and consistency in the particular field of regulation." Valley Queen alleges that it was not adequately informed about the rate alternatives as required by the applicable tariffs and ARSD 20:10:17:01. (Complaint ¶ 25). In adjudicating this claim, the Court will inevitably have to address what duty a utility has under ARSD 20:10:17:01 to advise customers, including sophisticated business customers like Valley Queen, of all rate alternatives. The interpretation of this rule would have far reaching effects for all utilities in South Dakota because it directly affects both the services provided by the utility and the allocation of risk between the customer and the utility. The PUC, which regulates utilities in South Dakota, should make this determination.

The PUC is charged with regulating public utilities in South Dakota. SDCL 49-34A-4, 49-34A-6. The PUC adopts the standards and regulations to be followed by a public utility with respect to the services to be furnished. SDCL 49-34A-27. The PUC also promulgates the procedures for tariff changes, customer billings, and requirements for customer refunds. SDCL 49-34A-4(1), -4(3), -4(10). It was also responsible for the rulemaking in ARSD 20:10:17:01,

which forms the basis for the June and July Tariffs in dispute, which it also approved. The PUC is the best body available to discern the potential ramifications of interpretation of ARSD 20:10:17:01 on the utilities in South Dakota.

Finally, not only is discretion implicated under these facts, but uniformity and consistency within the field of regulation is especially important. As described above regarding the filed rate doctrine, the Court would be discriminating between utilities by recognizing Valley Queen's claim in this lawsuit. The PUC should determine what Otter Tail must do to advise Valley Queen about the rate because, in doing so, the PUC is better situated to obtain uniformity among utilities in South Dakota regarding what information is provided to customers about rate alternatives. The adjudication of this case impacts not only Otter Tail but all South Dakota public electric utilities that have filed rates with the PUC. A ruling which expands a public utilities' duties in South Dakota would create issues and liabilities not anticipated by these utilities. Therefore, this is not a unique or narrow factual dispute. Ultimately, Valley Queen's claims, if any, which survive the filed rate doctrine, should be adjudicated before the PUC.

Alternatively, if this Court will not dismiss the matter, then Otter Tail requests that the matter be stayed and referred to the PUC for a decision. A district court "has discretion either to [stay the case and] retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." Access Telecommunications v. Southwest Bell Tel. Co., 137 F.3d 605, 609 (8th Cir. 1998)(citing Reiter v. Cooper, 507 U.S. 258, 268, 113 S.Ct. 1213, 1220 (1993)). "The courts, while retaining the final authority . . . should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." (Sancom, 2010 WL 936718, at *7 (citing United States v. Great Northern Railroad Company, 337 F.2d 243, 246 (8th Cir. 1964)). Referral of the tariff

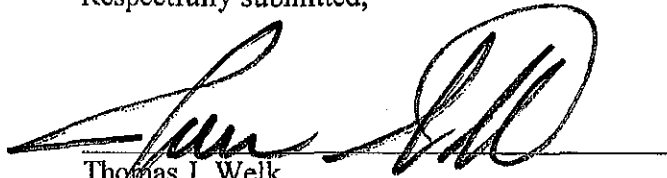
application would also have the effect of promoting uniformity and consistency within the field of regulation. (*See Id.* at *8). Therefore, this court should stay the matter pending, and await resolution by the PUC.

CONCLUSION

Based upon the foregoing, Otter Tail respectfully requests this court dismiss the Complaint for failure to state a claim. Alternatively, Otter Tail requests the Court stay this action and refer the matter to the PUC.

Respectfully submitted,

Dated: June 26, 2015

A handwritten signature in black ink, appearing to be 'Tom Welk' and 'Jason Sutton', written over a horizontal line.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

VALLEY QUEEN CHEESE FACTORY, INC.,
a South Dakota corporation,

Plaintiff,

v.

OTTER TAIL POWER COMPANY, a
Minnesota corporation,

Defendant.

Case No. 15-1022

**AFFIDAVIT OF PATRICIA VAN
GERPEN**

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF HUGHES)

I, Patricia Van Gerpen, being duly sworn on oath, depose, state and declare as follows:

1. I am the Executive Director for the Public Utilities Commission of the State of South Dakota ("Commission"). My duties and responsibilities in this position are provided for SDCL 49-1-8.2. As part of its duties for regulating electric utilities in South Dakota, the Commission reviews and approves tariffs, which are filed as official public documents with the Commission and available for inspection at the Commission. The tariff documents attached to this affidavit are being authenticated by me pursuant to my duties and responsibilities in SDCL 49-1-8.2.

2. Attached as Exhibit A is a true and accurate copy of Section 5, First Revised Sheet No. 30, Cancelling Original Sheet No. 39, which was part of the filed tariff for Otter Tail Power Company from April 30, 1993 until June 30, 2009. Exhibit A was approved by the

Commission on April 20, 1993, and became effective April 30, 1993. Exhibit A is a true and correct copy of the public record filed at the Commission in Docket EL93-006.

3. Attached as Exhibit B is a true and accurate copy of General Rules and Regulations – Section 2.01 – Sheet No. 1, Electric Rates Schedule, which was part of the filed tariff of Otter Tail Power Company. Exhibit B was approved by the Commission on June 30, 2009, and became effective July 1, 2009. Exhibit B remained in effect until June 1, 2011. Exhibit B is a true and accurate copy of the public record filed at the Commission in Docket EL08-030. Exhibit B superseded Exhibit A effective July 1, 2009.

Dated this 26 day of June, 2015.


Patricia Van Gerpen

Subscribed and sworn to before
me this 26 day of June, 2015.


Notary Public – TINA DOUGLAS
My Commission Expires: April 14, 2017

OTTER TAIL POWER COMPANY
Fergus Falls, Minnesota

Section No. 5
First Revised Sheet No. 30
Cancelling Original Sheet No. 39

FOR GENERAL OFFICE MANUAL - 5/25/89
(Replaces Sheet Dated 9/26/73)

SUBJECT: OPTIONAL OR ALTERNATIVE RATE SCHEDULES

Each customer should be served at the most advantageous rate schedule for which the customer can qualify. Where there are optional or alternative rate schedules the customer should have the opportunity and has the responsibility to select the most advantageous rate. Each Division office should periodically review billing of customers who might qualify for a more advantageous optional or alternative rate schedule. Customers who so qualify should be advised. The billing should be also reviewed for customers who have a relatively large change in monthly demand or energy use. The customer is the only one who can best determine whether his future load will follow the pattern of the past or estimate monthly use based upon increased load. Therefore, while the company has the responsibility to advise the customer, it is the customer who has the responsibility to select the rate schedule.

The customer, after selecting a particular rate schedule, shall take service under said rate schedule for a period of not less than twelve months, unless the rates are changed or there is a material change in the customer's load. Customers whose normal changes in load follow a seasonal pattern do not qualify for a change in rate solely because of the provision for a "material change in the customer's load."

CANCELLED

Daniel Dallen

Administrator, Regulatory Filings

APPROVED:

Jay W. Myster

Vice President, Governmental & Legal

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION
Date Filed: February 26, 1993

Effective: April 30, 1993
Order Date: April 20, 1993
Docket No.: EL93-006

Jay D. Myster, Corporate Secretary





Fergus Falls, Minnesota

South Dakota P.U.C. Volume II
General Rules & Regulations - Section 2.01 - Sheet No. 1
ELECTRIC RATE SCHEDULE
Assisting Customers in Rate Selection

Original

RATE APPLICATION

SECTION 2.01 ASSISTING CUSTOMERS IN RATE SELECTION

If a Customer is eligible to receive service under more than one rate schedule, the Company will, upon notice of this fact, advise the Customer of all alternatives. While the Company will endeavor to assist the Customer in the choice of the most advantageous rate schedule, either for initial service or subsequent thereto, the Company does not guarantee that the Customer will at all times be served under the most favorable rate; nor will the Company make refunds representing the difference in charges between the rate for which service was actually billed and another rate which is or may subsequently become available when the Company has complied with South Dakota law.

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION
Filed on: October 31, 2008
Approved by order dated: June 30, 2009
Docket No. EL08-030

Bernadeen Bruttig
Manager, Regulatory Services

EFFECTIVE with bills
rendered on and after
July 1, 2009,
in South Dakota.

EXHIBIT

B

OTTER TAIL POWER COMPANY
Fergus Falls, Minnesota

Section No. 5
First Revised Sheet No. 30
Cancelling Original Sheet No. 39

FOR GENERAL OFFICE MANUAL - 5/25/89
(Replaces Sheet Dated 9/26/73)

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Daniel Dellen

Administrator, Regulatory Filings

APPROVED:

Jay W. Myster

Vice President, Governmental & Legal

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Beauregard Falls, Minnesota

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UTILITIES COMMISSION
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Bernadese Bratlag
Manager, Regulatory Services

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EXHIBIT

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