

Case Number: CIV.
Complaint

4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a).

BACKGROUND

5. Defendant, a wholly owned subsidiary of Otter Tail Corporation, is a public utility, in the business of selling electricity at retail in parts of South Dakota. Defendant and its predecessors have been in the business of selling electricity at retail for nearly 75 years.

6. By virtue of South Dakota law, Defendant has a monopoly on the sale of electricity at retail in a geographic territory that includes Milbank, South Dakota, the location of Plaintiff's factory.

7. Defendant owns an interest in and operates the Big Stone Power Plant, a 475 megawatt coal fired generator, in Grant County, South Dakota, a few miles from Milbank.

8. Milbank and Plaintiff's factory are within the Midcontinent Independent System Operator's (MISO) geographic footprint. MISO maintains a node near Milbank at which electricity is metered. The price for the purchase of electricity at wholesale at the node is set hourly by MISO and is called the locational marginal price (LMP). Defendant purchases electricity from MISO at the LMP and resells it at retail, including the electricity it provides to Plaintiff.

9. Defendant's retail sale of electricity, pursuant to South Dakota law, is regulated by the South Dakota Public Utilities Commission. The retail rates Defendant is permitted to charge and the conditions subject to which electricity is delivered to are set forth in written Electric Rate Schedules, commonly called tariffs, which are approved by the SD PUC. Defendant can only

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sell electricity at retail in the manner and for the charge set out in the approved Electric Rate Schedules.

10. At all times material to the matters in issue, Plaintiff purchased all of its electricity from Defendant. Plaintiff is one of Defendant's 20 largest customers.

11. Because of Defendant's monopoly on the sale of electricity at retail in Milbank, Plaintiff must either purchase electricity from Defendant or generate its own electricity.

12. In June 2009, Defendant's then effective tariff, at Section No. 5-Sheet No. 1, second revision, provided, in part

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 . . . 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 . . .

13. Defendant's current tariff, effective July 1, 2009, provides, at Section 2.01

If a customer is eligible to receive service under more than one rate schedule, the Company, upon notice of this fact, shall advise the Customer of all alternatives.

14. The current tariff parrots South Dakota Public Utilities Regulation ARSD 20:10:17:0.

15. At all times material hereto, Plaintiff operated an electric boiler as backup to its gas fired main boilers. In the period 2008-2009, the electric boiler was used on a limited basis, a fact well known to Defendant. The electric boiler must be operated at least once a week for blow-down and operational assurance purposes.

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16. Plaintiff and Defendant had a contract that governed Defendant's supply of electricity to the electric boiler. The contract was effective June 2005 and expired in June 2010. The contract provided that boiler electricity would be billed at the Defendant's Bulk Interruptible Rate.

17. Plaintiff's Milbank plant and the electric boiler were separately metered. In 2009, Plaintiff purchased electricity from Defendant for the rest of its Milbank plant operations under Defendant's Large General Service Rate (LGS).

18. On May 29, 2009, Defendant told Plaintiff the boiler contract would expire June 1, 2009. Defendant gave Plaintiff until June 12, 2009, to select a new rate for the boiler.

19. On June 15, 2009, Plaintiff and personnel from the Defendant met at Plaintiff's Milbank plant to discuss the Plaintiff's electric service options going forward. Based on Defendant's recommendation, Plaintiff agreed to purchase electricity under Defendant's Large General Service-Time of Day Rate (LGS-TOD) for both the plant and boiler, effective July 1, 2009.

20. Defendant petitioned the South Dakota PUC for a rate increase October 31, 2008. The petition included a new rider with a rate for Real Time Pricing (RTP). The RTP rate for retail purchase of electricity is set out in Volume II, Section 14.02 of Defendant's Electric Rate Schedules.

21. RTP charges are calculated employing the Customer's Baseline Load (CBL). A customer's CBL is determined by averaging the customer's consumption of electricity in the 12 months preceding the commencement of LGS-RTP service.

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22. Under the RTP rate, electricity consumed up to the CBL is billed at the LGS or TOD rate. Electricity consumed in excess of the CBL is billed at the LMP at the closest MISO delivery point, plus a mark-up for Defendant's overhead, return on investment and profit.

23. Defendant's RTP rate rider was approved by the South Dakota PUC effective July 1, 2009.

24. The first time Defendant offered the LGS-TOD rate and the RTP rate rider in South Dakota was in the new tariff that became effective July 1, 2009.

25. During discussions between Plaintiff and Defendant in June 2009, Defendant failed to advise Plaintiff of the new RTP rate. Defendant was legally obligated to tell Plaintiff about the RTP rate rider. Defendant was legally obligated to, and should have advised Plaintiff that combining the plant and the electric boiler on the LGS-TOD rate was not the most cost effective rate available. Defendant was legally obligated to, and should have advised Plaintiff that the most economical approach was to bill the main plant at the LGS-RTP rate and bill the boiler at the Controlled Service-Interruptible Load (commonly called Large Dual Fuel or LDF) rate.

26. In 2007, Plaintiff began construction of a \$40 million expansion of its operations. During the 2009 discussions between Plaintiff and Defendant, the construction was ongoing and readily apparent to Defendant's personnel when they met with Plaintiff.

27. Between 2009 and 2010, Plaintiff's consumption of electricity increased from approximately 2,500 kw to slightly more than 3,000 kw, a twenty percent increase. Between

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2010 and 2011, consumption increased another ten percent, and has increased steadily since, reaching 3,600 kw in 2014.

28. In 2013, Plaintiff discovered Defendant was a year in error in determining the boiler contract expiration date. Defendant unilaterally credited Plaintiff \$31,633.94 on its billings to cover the error.

29. After discovering the contract expiration date error, Plaintiff evaluated its rate options, but only after repeatedly asking Defendant for assistance. In the period July 1, 2009 to December 31, 2014, Plaintiff would have paid materially less for electricity by having elected LGS with the RTP rate rider for the main plant and LDF for the boiler in 2009 (or 2010 when the contract for the boiler actually expired). Presuming Defendant had made it known those rates were available and/or fulfilled its legal obligation to advise Plaintiff of the best rates available to it, Plaintiff would have selected those rates in 2009.

CLAIMS FOR RELIEF

30. Had Defendant complied with its contractual, regulatory, and tariff obligation to advise Plaintiff of all of the rate options in 2009 when the new rate choices were made, Plaintiff's CBL would have been approximately 2,450 kw.

31. Had Defendant fulfilled its obligations and made Plaintiff aware of the options available after the July 1, 2009, tariff became effective, even after taking into account the 2013 credit, Plaintiff would have saved more than \$1,400,000 in electricity charges through 2014.

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32. Defendant breached its contractual, regulatory, and tariff obligations to Plaintiff in failing to advise Plaintiff of the most advantageous rate available in June of 2009 and has continued to breach its ongoing contractual, regulatory, and tariff obligations since that date.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays the Court find that Defendant breached its contract with Plaintiff, failed to fulfill its tariff and regulatory duties and legal obligations to Plaintiff, failed to allow Plaintiff to select rate options resulting in a CBL of approximately 2,450 kw, that Plaintiff was damaged thereby in the sum of at least one million four hundred thousand dollars (\$1,400,000), and award Plaintiff all damages arising from the foregoing breach of contract and failure to fulfill tariff and regulatory duties and legal obligations, together with interest thereon, Plaintiff's costs and disbursements, and any other and further relief the Court deems adequate in the premises.

Dated this 16 day of May 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

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THE PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES OF FACT