**BEFORE THE PUBLIC UTILITIES COMMISION**
**OF THE STATE OF SOUTH DAKOTA**

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| In the Matter of the Complaint of Valley Queen Cheese Factory, Inc., Against Otter Tail Power Company | **EL25-026**<br><br>**OTTER TAIL POWER COMPANY'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR HEARING** |

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Ignoring the Legislature's express statutory limits to the Commission's power and jurisdiction, Valley Queen Cheese Factory, Inc. ("Valley Queen") asks this Court to disregard the plain language of SDCL 49-34A-26 and deny the motion to dismiss. Valley Queen's argument fails, and the Commission must dismiss Valley Queen's Complaint. Further, even if the Commission decides to open an investigation based upon its own motion, Valley Queen can only obtain prospective relief as a matter of law.

## I. The Complaint must be dismissed because there is no statute that gives Valley Queen standing to bring the Complaint.[1]

Valley Queen does not appear to dispute that it requires standing to bring its Complaint. However, Valley Queen fails to cite any statute that gives it standing to bring its Complaint before the Commission. Instead, Valley Queen states neither SDCL 49-34A-26, nor any other statute, precludes it from bringing its Complaint.

Valley Queen cannot establish standing by merely stating there is no statute that prohibits it from bringing a Complaint. It is well-established that the Commission may only exercise the authority that is conferred to it by statute. In other words, the Commission can only exercise jurisdiction in matters over which the Legislature has granted it express authority. *See Anderson*

[1] For the convenience of the Commission, this brief will apply the same defined terms as in Otter Tail Power Company's Motion to Dismiss and Motion for Hearing.

*v. Tri State Constr., LLC*, 2021 SD 50, ¶ 11, 964 N.W.2d 532, 536 ("An administrative agency has jurisdiction over a matter when the agency is given power 'by law'" (cleaned up)); *Matter of Nw. Pub. Serv. Co.*, 1997 SD 35, ¶ 23, 560 N.W.2d 925, 929 (noting the Commission has authority to act where granted by the Legislature); *see generally In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250, 27 A.3d 726, 731 (2011) (explaining that the jurisdiction of an administrative agency "is dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself" (cleaned up)); *Kleen Energy Sys., LLC v. Comm'r of Energy & Envtl. Prot.*, 319 Conn. 367, 380, 125 A.3d 905, 912 (2015) ("Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely on the validity of statutes vesting them with power and they cannot confer jurisdiction on themselves" (cleaned up)); *Univ. of Texas Rio Grande Valley v. Oteka*, 715 S.W.3d 734, 739 (Tex. 2025) (recognizing the power of an administrative agency is limited to "those powers expressly conferred [by the Legislature] and necessary to accomplish their duties" (cleaned up)).

The South Dakota Legislature adopted a specific statute limiting the Commission's authority to hear challenges to rates **after** that rate was approved and implemented. Specifically, SDCL 49-34A-26 authorizes the Commission to investigate whether a previously approved rate is "unreasonable, insufficient, or unjustly discriminatory" in four specific instances:

(a) The Commission files its own motion (**which has not occurred)**;

(b) A complaint filed by the governing body of a political subdivision (**which has not occurred)**;

(c) A complaint is filed by another public utility (**which has not occurred)**; and

(d) A complaint is filed by twenty-five of the consumers of a public utility (**which has not occurred**).

Nothing in SDCL 49-34A-26, nor any other statute, authorizes the Commission to open an investigation into a tariff based on a complaint of a single private ratepayer, such as Valley Queen. Because the Legislature did not give the Commission authority to open an investigation based upon the Complaint of a single ratepayer, the Complaint must be dismissed.

Valley Queen argues that the motion should not be dismissed because SDCL 49-34A-26 does not expressly prohibit the Commission from opening an investigation based on its Complaint. Otter Tail agrees that, pursuant to SDCL 49-34A-26, the Commission could open an investigation based upon its own motion, but that is not what has occurred here. Valley Queen filed the Complaint, and the Commission has not filed a separate motion to open its own investigation. The Complaint is the only matter actually before the Commission, and the Complaint must be dismissed because the Commission has not been given jurisdiction by the Legislature to hear Valley Queen's claims. *See Anderson*, 2021 SD 50, ¶ 11, 964 N.W.2d at 536.

Moreover, allowing the Commission to proceed based upon Valley Queen's Complaint alone would require the Commission to rewrite SDCL 49-34A-26 to give itself jurisdiction over the Complaint. SDCL 49-34A-26 explicitly requires a minimum number of complaining customers to file a complaint before the Commission has jurisdiction to investigate the rate. Specifically, the complaint must be filed by 25 customers; not a complaint from a single customer. By assuming jurisdiction and opening an investigation based upon Valley Queen's Complaint only, the Commission would be improperly rewriting SDCL 49-34A-26 to expand its jurisdiction. When interpreting a statute, the Commission "must accept what the legislature has said—and has not said—rather than attempt to rewrite the law to conform with what [it] or others think it should have said." *State v. Burdick*, 2006 SD 23, ¶ 18, 712 N.W.2d 5, 10; *see also Oteka*, 715 S.W.3d at 739 (explaining generally that the power of an administrative agency is limited to "those powers expressly conferred [by the Legislature] and necessary to accomplish their duties" (cleaned up)); *Matter of Nw. Pub. Serv. Co.*, 1997 SD 35, ¶ 23, 560 N.W.2d at 929 (same). Valley Queen's request that the Commission rewrite SDCL 49-34A-26 to hold it has the power to open an investigation based on the Complaint must be rejected.

Next, Valley Queen argues the Commission should not dismiss its Complaint because that "would leave . . . ratepayers [such as Valley Queen] with no mechanism by which to bring unreasonable or unfair rates to the Commission's attention." (Valley Queen's Resistance to Motion to Dismiss ("VQ's Brief") at 6). Valley Queen then suggests that outcome would allow unjust and unfair rates to persist without challenge. (*See id.*). Valley Queen, of course, ignores that it had a chance to challenge the rates. It was provided notice of the filing to adopt and approve rate change adopting the PIR but declined to intervene in that docket.

Moreover, Valley Queen fails to recognize that the Legislature restricted the circumstances in which a tariff is subject to investigation by design. These restrictions serve several important goals. First, by limiting challenges to a tariff, it improves rate stability. A "carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.,* 284 U.S. 370, 389, 52 S.Ct. 183, 186 (1932).

Secondly, by preventing a single ratepayer from filing a complaint challenging approved rates, the Legislature necessarily recognized that changes to rates affect all of a utility's customers. As the Commission knows, during the rate approval process, the Commission evaluates and determines how the total costs are recouped from all a utility's customers. Adjusting how much of that cost is recovered from one single customer inherently harms other customers because those customers must, in turn, pay for that cost. In other words, decreasing one customer's rate necessarily will increase other customers' rates. As a result, SDCL 49-34A-26 precludes a single customer from challenging the legality of previously approved tariffs. Furthermore, by limiting investigation into settled rates, the Legislature also minimizes costs from litigation of settled rates. That litigation cost, like the risk of rate changes, is also ultimately borne by ratepayers. *See also Matter of Nw. Pub. Serv. Co.*, 1997 SD 35, ¶ 15, 560 N.W.2d at 927 (recognizing that the "policy underlying the [South Dakota Territorial Integrity Act] was elimination of duplication and wasteful spending in all segments of the electric utility industry").

In short, SDCL 49-34A-26 does not permit "unreasonable" rates to remain unchecked as Valley Queen claims. At the same time, it does not permit a single ratepayer to have standing to file a complaint and force an investigation into the legality of the previously approved rate. Because the Complaint was filed by a single customer, it must be dismissed.

Valley Queen rightly points out that SDCL 49-34A-26 gives the Commission the authority to investigate a tariff on its own accord. But, again, that provision of SDCL 49-34A-26 is irrelevant here as the Commission has not decided to open any investigation into the application of the PIR to RTP Tariff. Instead, the only issue before the Commission is whether Valley Queen has standing to bring its Complaint. While the Commission is free to commence its own action to investigate the application of the PIR to RTP Tariff, or any other tariff for that matter, that does not change the fact that Valley Queen lacks standing to bring its claims here. The Complaint must be dismissed for Valley Queen's lack of standing, and no further analysis is required.

Finally, while the Commission has authority to bring its own motion to investigate the application of the PIR to RTP Tariff, it should decline to do so for multiple reasons. First, as discussed below, Valley Queen is limited to prospective relief only. Second, Otter Tail anticipates filing a new docket in October 2025 seeking Commission approval for modifications to the RTP Tariff that will make RTP Tariff a truer market energy pricing mechanism. With these modifications, RTP Tariff will not be subject to the application of the PIR. Assuming the Commission approves of these changes, Valley Queen's claims for prospective relief will be moot. Thus, there will be no benefit to Valley Queen (or anyone else) in investigating the application of the PIR to RTP Tariff as requested by Valley Queen.[2]

### II. If the Commission decides to open an investigation into the application of the PIR to RTP Tariff, it can only change the tariff prospectively.

In the event the Commission opens an investigation into the tariff, Valley Queen does not appear to dispute that the rule against retroactive lawmaking would prohibit Valley Queen from recovering damages for past payments. (VQ's Brief at 15–20). Valley Queen, nevertheless, argues that the Commission should decline to apply the rule against retroactive lawmaking here. (*Id*.). In support, Valley Queen argues that the Commission's rate-making role is not a "legislative function," and thus, the Commission may "revisit" its previous rates to award damages without invoking the rule against retroactive lawmaking. (*See id*.). Similarly, Valley Queen also argues the filed rate doctrine does not bar Valley Queen from relief because it only applies in judicial proceedings. (*Id*.). Valley Queen asserts that the Commission may review its Complaint in an administrative capacity, not a judicial capacity, so the filed rate doctrine would not apply. (*Id*.).

Both of Valley Queen's arguments fail. As a matter of law, and despite Valley Queen's creative arguments to the contrary, the United States Supreme Court, and virtually every federal court and administrative agency that have addressed the issue to Otter Tail's knowledge, have held rate-making is a legislative or quasi-legislative function. Further, the Supreme Court and lower courts have held that challenges to an existing tariff on grounds that the tariff is unlawful are judicial or adjudicative in nature and thus subject to the filed rate doctrine. *See generally* CHARLES

[2] As further detailed in Otter Tail's answer, Otter Tail properly applied the PIR to Valley Queen's real-time price rate structure. The Commission does not need to reach that issue to dismiss Valley Queen's Complaint.

H. KOCH JR. ADMINISTRATIVE LAW AND PRACTICE § 5:1 (3d ed. May 2025 Update) (explaining the difference between rulemaking and adjudication in administrative proceedings); *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 389, 52 S.Ct. 183, 186 (1932) (setting forth that agencies work in a quasi-legislative capacity when setting rates and act in a quasi-judicial capacity when considering challenges to rates as unlawful and first setting forth the bar against retroactive lawmaking based on this distinction).

More to the point, based on the filed rate doctrine and the rule against retroactive lawmaking, courts all but universally hold ratepayers can neither challenge rates previously charged under a tariff nor recover any damages for past payments made under tariffs. *See, e.g.*, *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 967 (D.C. Cir. 2007) (citing *Arizona Grocery* as controlling law); *Verizon Tel. Companies v. F.C.C.*, 269 F.3d 1098, 1107 (D.C. Cir. 2001) ("*Arizona Grocery* has been and should be understood in the terms in which it was decided, as a proscription against the retroactive revision of established rates through ex post reparations"); *Home Builders Ass'n of Metro. Denver v. Pub. Serv. Co. of Colorado*, 219 P.U.R.4th 129 (Colo. P.U.C. June 19, 2002) (stating that when an agency is setting rates, then it is acting in an quasi-legislative capacity, and when an agency is "determining whether reparations" are appropriate based on past rate payments, then the agency is acting in a quasi-judicial capacity and the rule against retroactive lawmaking applies; and further explaining that the filed rate doctrine likewise "preempt[s] suits that seek to alter the terms and conditions provided for in the tariff"); 2024 WL 3226288 at p.24 (Ill.C.C.) (finding a ratepayer's claim that a tariff was unlawful was barred by the filed rate doctrine, which sets forth that, "once a tariff is approved, a customer has no right to receive service on rates, terms, conditions different from those in the approved tariff"); *Util. Reform Project v. Portland Gen. Elec. Co.*, No. 03-629, 2003 WL 22938480 (Or. P.U.C. Oct. 22,

2003) (recognizing that both the filed rate doctrine and rule against retroactive lawmaking precludes ratepayers from requesting relief based on past payments under a lawful tariff).

Valley Queen's argument that the Commission is not acting in a legislative capacity when adopting tariffs further conflicts with South Dakota law. SDCL 49-34A-10 provides that all approved schedules and tariffs "approved by the commission have the force and effect of law." Otter Tail must bill its customers as required by the terms of the approved tariff. SDCL 49-34A-12. Before any public utility—like Otter Tail here—can change its rates (or charge a different rate), it must obtain approval by the Commission. *Id.* The utility also must provide notice of the rate change to all affected customers. *Id.*

In short, Valley Queen's attempts to distinguish its claims from the filed rate doctrine and rule against retroactive lawmaking must be rejected. "The filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). "Simply stated, the doctrine holds that any "filed rate"—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Id.*

Here, the filed rate doctrine bars Valley Queen from relief because Valley Queen has requested damages based on past payments under a tariff and alleged the tariff is unlawful. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488, 494 (8th Cir. 1992) (finding that the filed rate doctrine applies equally to federal and state administrative agencies and stating that the "filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved," even in cases of alleged fraudulent conduct).

Likewise, the rule against retroactive lawmaking precludes Valley Queen from relief. Valley Queen argues this rule is inapplicable because it is not seeking "to 'retroactively repeal' a tariff but instead to correct an undiscovered issue with its previous factual findings and to make Valley Queen whole for the damage caused as a result." (VQ's Brief at 14). Valley Queen is simply arguing semantics. The rule against retroactive lawmaking bars the very relief Valley Queen admittedly seeks—"the retroactive revision of established rates through ex post reparations." *BP W. Coast Products, LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004). The Commission should reject Valley Queen's plea that the Commission disregard Supreme Court precedent and establish law to permit Valley Queen's claim seeking ex post reparations to proceed.

Valley Queen's request for damages effectively acts as a retroactive rate change. However, Otter Tail could not legally charge a different rate under South Dakota law, and the Commission has no legal authority to change rates retroactively. South Dakota law gives the Commission no authority to change settled rates, and further, the filed rate doctrine and rule against retroactive law-making preclude such relief. At most, if the Commission opens its own investigation, the Commission can change rates on a prospective basis only.

Further, Valley Queen cannot cite a single case in which a court or agency granted a ratepayer reimbursement for payments made under an approved tariff. Valley Queen cites *State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina*, 312 N.C. 59, 320 S.E.2d 679 (1984). However, unlike the present case, that case concerned a direct appeal of the rate case by intervenors in the docket where the rate increase was initially approved. *Utilities Comm'n*, 312 N.C. at 60, 320 S.E.2d at 681. In fact, *Utilities Comm'n* shows how Valley Queen should have acted if it opposed the application of the PIR to RTP Tariff—by intervening in the initial docket where the tariff was approved. The North Carolina court's holding in *Utilities Comm'n* has no application here where Valley Queen failed to intervene in the docket approving the tariff and instead brought this Complaint years after the tariff was approved and the opportunity to appeal the rate change had passed. *See id*. Moreover, until the appeal was adjudicated in the rate case at issue in *Utilities Comm'n*, no final order existed approving the tariff. Valley Queen cites no law authorizing a refund of money collected pursuant to a fully approved tariff.

In short, as Valley Queen's Complaint has challenged a tariff and requested reimbursement based on past payments under the tariff, its Complaint is barred by the filed rate doctrine. Valley Queen's request for reimbursement for past payments under that tariff is also barred by the rule against retroactive lawmaking. The Complaint should be dismissed, and Valley Queen has not stated any claim for which relief can be granted.

**III. Conclusion.**

For the foregoing reasons, Valley Queen has no standing to bring its Complaint, and the Complaint should be dismissed. If the Commission decides to open its own investigation, any request for refund of monies previously paid by Valley Queen are wholly barred by the filed rate doctrine and the rule against retroactive lawmaking. Instead, should the Commission open an investigation, it may only change a tariff prospectively.

Dated this 14th day of October, 2025. *__/s/ Jason R. Sutton__*

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## CERTIFICATE OF SERVICE

I, Jason R. Sutton, do hereby certify that I am a member of Boyce Law Firm, LLP, attorneys for Otter Tail Power Company and that on the 14th day of October, 2025, a true and correct copy of the foregoing and this Certificate of Service were served via email to the following addresses listed:

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