BEFORE THE PUBLIC UTILITIES COMMISSION

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.	:	EL 25-026 **VALLEY QUEEN'S RESISTANCE TO MOTION TO DISMISS**

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Valley Queen Cheese Factory, Inc. ("*Valley Queen*"), is a Milbank, South Dakota-based cheese producer. It is also an electricity customer of Otter Tail Power Company ("*Otter Tail*"), a public utility based out of Minnesota. Valley Queen is the sole Otter Tail customer in South Dakota for whom Otter Tail applies a fixed-price-based phase-in rider to a tariff based on real-time energy pricing. As set forth in the complaint, Valley Queen asserts that this practice is unreasonable and unjust and, therefore, barred by state law. Rather than arguing the merits of this point, Otter Tail has moved to dismiss the complaint on three grounds: (i) that Valley Queen lacks standing to bring its complaint in the first place; (ii) that the complaint is otherwise barred by the filed-rate doctrine, a common-law rule designed to prevent court interference in agency decisionmaking; and (iii) that, in any event, Valley Queen is limited to seeking only prospective relief. Because none of these grounds for dismissal withstands careful scrutiny, the Public Utilities Commission should deny the motion and permit this matter to proceed to the merits.

FACTUAL BACKGROUND

The point of a motion to dismiss is to "test[] the legal sufficiency of the pleading, not the facts which support it." *Paul v. Bathurst*, 997 N.W.2d 644, 650 (S.D. 2023) (internal quotation omitted). At this stage, therefore, the Commission must accept as true the factual allegations set forth in the complaint and must "resolve all doubts in favor of the pleader." *Id.* (internal

quotation omitted); *see* ARSD 20:10:01:01.02. At one point, Otter Tail purports to launch a "factual attack" on the Commission's jurisdiction. (Mot. 3.) But it does not identify any evidence that contradicts the complaint and bears on the Commission's jurisdiction, and instead confines its analysis to the well-pleaded facts set forth in the complaint. (*See id.* at 1-3.) The Commission should do likewise. *See Healy Ranch P'ship v. Mines*, 978 N.W.2d 768, 778 (S.D. 2022) (recognizing that, as a general matter, "[a] court may not consider documents outside the pleadings when ruling on a motion to dismiss for failure to state a claim") (internal quotation omitted); *Hutterville Hutterian Brethren, Inc. v. Waldner*, 791 N.W.2d 169, 175 (S.D. 2010) (acknowledging that facial attacks on jurisdiction remain subject to this general principle).

As set forth in the complaint, Valley Queen is a South Dakota corporation based out of Milbank. (Compl. ¶ 1.) There, Valley Queen manufactures and distributes cheese and other dairy products. (*Id.*) Valley Queen has expanded its operations in recent years. As of January 1, 2025, Valley Queen completed an expansion project that increased its processing capacity and its workforce by 50 percent, resulting in a major economic boon for the areas surrounding Milbank. (*Id.* ¶ 2.) Otter Tail is a Minnesota-based public utility in the business of selling electricity at retail in Minnesota and the Dakotas. (*Id.* ¶ 3.) Otter Tail's electricity service in South Dakota is regulated by the Commission. (*Id.*) Because Valley Queen is located within Otter Tail's designated service territory in South Dakota, Otter Tail has a monopoly on the retail sale of electricity to Valley Queen. (*Id.* ¶ 5.) And, accordingly, Valley Queen purchases all the electricity it uses in the course of its operations from Otter Tail. (*Id.*)

Valley Queen purchases a portion of this electricity pursuant to a real-time pricing tariff. (*Id.* ¶ 6.) This tariff was approved by the Commission in November 2023. (*Id.*) As the name suggests, this tariff determines prices in real time. "Hourly prices are determined for each day

based on projections of the hourly system incremental costs, losses according to voltage level, hourly outage costs (when applicable), and profit margin." (*Id.*) According to Otter Tail, these rates are configured using day-ahead locational marginal pricing, the results of which are unknown ahead of time and cannot be predicted. (*Id.*) Through this process, the tariff shifts the risk of changes in market rates from the utility to the consumer. (*Id.*) In part because of the risks associated with this pricing mechanism, Valley Queen is the only customer in South Dakota that has elected to receive any of its service under the real-time-pricing tariff. (*See id.* ¶ 8.)

In 2024, Otter Tail petitioned the Commission to approve an update to its phase-in rider. The phase-in rider affords Otter Tail the ability to recover costs associated with certain power-supply assets that are necessary to provide firm service under Otter Tail's fixed-price tariffs, as opposed to tariffs that depend on real-time pricing adjustments. (*Id.* ¶ 9.) The rider includes two components—(i) a per-customer charge and (ii) a percent-of-bill charge—only the latter of which is at issue in this case. (*Id.*) The Commission approved the initial rider and its 3.345-percent-of-bill charge on August 26, 2019. (*Id.* ¶ 11.) This percentage figure is adjusted annually. (*Id.*) By August 29, 2024, the charge had been increased by Otter Tail to 10.502 percent. (*Id.* ¶ 12.) Notably, in approving the phase-in rider and the percent-of-bill charge, the Commission does not appear to have considered whether the rider should apply to tariffs that are calculated using real-time pricing. (*Id.* ¶ 10.) At the time, no one brought the potential issue to the Commission's attention. (*Id.*) Despite that fact, the matrix published alongside the phase-in rider shows that the rider *does* apply to the real-time-pricing tariff. (*Id.*; *see id.* ¶ 13.)

Valley Queen has maintained that this practice is unreasonable for over two years. It first brought the issue to Otter Tail's attention in mid-June 2023. (*Id.* ¶ 20.) The parties then engaged in protracted discussions about resolving the problem. The talks ultimately proved unproductive,

and after discussions stalled, Valley Queen submitted a consumer complaint to the Commission. (*See id.*) The basic premise of Valley Queen's complaint is that, "as a matter of logic, pricing methodology, and consistency," it is unreasonable to apply the phrase-in rider to the real-time-pricing tariff. (*Id.* ¶¶ 14, 24.) By applying the rider to the real-time-pricing tariff, Otter Tail forces Valley Queen both to bear the risk of market changes and to shoulder an additional percentage payment meant to cover a revenue requirement based on embedded costs that bear no relation to the market. (*Id.* ¶ 15.) Meanwhile, as incremental prices increase, Otter Tail receives a windfall. (*Id.* ¶ 16.) Presumably recognizing as much, Otter Tail has not applied comparable adjustment riders to the real-time-pricing tariff. (*Id.* ¶¶ 17-19.) Valley Queen's position is that it was unreasonable and unfair for Otter Tail to depart from that practice here.

Valley Queen occupies a unique position with respect to this tariff-rider combination. Because Valley Queen is the sole consumer who receives energy subject to the real-time pricing tariff, it is the only consumer for whom the application of the phase-in rider has any impact. (*See id.* ¶ 8.) That impact has been costly: Between June 2023—when Valley Queen first raised the issue—and June 2025—the last full month before it submitted its complaint—Valley Queen paid $213,269.27 due to the application of the rider to the tariff. (*Id.* ¶ 21.). From June 2021 to May 2023, the charges were $138,060.86. (*Id.*) Valley Queen should not have been forced to bear these costs, which are "unjust and unreasonable" under South Dakota law, result in a windfall to Otter Tail, and are inconsistent with the treatment of other, analogous riders. (*Id.* ¶ 24.)

In response, Otter Tail moved to dismiss Valley Queen's complaint. Otter Tail's motion has nothing to do with the merits of Valley Queen's arguments. Instead, Otter Tail asserts that the Commission should avoid the merits altogether. According to it, Valley Queen, as a solitary customer, lacks standing to bring a complaint challenging the energy rates it pays to Otter Tail.

Alternatively, Otter Tail asserts that the complaint is either barred by the filed-rate doctrine or barred to the extent it constitutes an impermissible attempt to retroactively repeal a tariff rate.

ARGUMENT

I. The Commission has jurisdiction to entertain Valley Queen's complaint and, if it so desires, to open an investigation on the basis of Valley Queen's allegations.

a. SDCL § 49-34A-26, which sets forth certain circumstances in which the Commission must take further action, does not preclude the Commission from acting on Valley Queen's complaint.

Otter Tail's principal argument is that Valley Queen lacks a statutory basis for bringing its complaint before the Commission. Specifically, Otter Tail points to SDCL § 49-34A-26. This statute provides that the Commission "shall" investigate the reasonableness of a tariff charged by a public utility "[o]n its own motion or upon a complaint made against any public utility, by the governing body of any political subdivision, by another public utility, or by any twenty-five consumers of the particular utility." Otter Tail construes this provision as doing two things. First, it says the statute creates a "statutory standing" requirement that must be satisfied before Valley Queen can lodge a complaint in the first place. (*See* Mot. 5 ("SDCL [§] 49-34A-26 bars Valley Queen from bringing its Complaint.").) Second, it prohibits the Commission from launching an investigation in circumstances in which a complaint is levied by a party who is not a political subdivision, another public utility, or a group of 25 consumers. (*See id.* at 6 (arguing that § 49-34A-26 "permits" an investigation in only "three circumstances," and that, as such, the Commission cannot investigate "based on the complaint of a single private ratepayer.").)

The trouble for Otter Tail's argument, however, is that the statute's text says neither of those things. First, to the extent Otter Tail construes the statute as limiting the circumstances under which a consumer can lodge a complaint, it is mistaken. A statute's meaning "is determined from what the legislature said." *Burkard v. Burkard*, 9 N.W.3d 752, 760 (S.D. 2024)

(internal quotation omitted). Section 49-34A-26, by its terms, governs the circumstances in which the Commission *must* respond to a complaint—either by opening an investigation or by taking other "necessary and appropriate" action. The statute says nothing about whether, or under what circumstances, a consumer *may* bring a problem to the Commission's attention. Instead, the legislature (understandably) left it to the Commission to set the requirements for filing consumer complaints. SDCL § 49-1-11(2); *id.* § 49-34A-4(6). The Commission took up that task. It set forth, among other things, the essential contents of a complaint, *see* ARSD 20:10:01:07.01; the method of service, *see id.* 20:10:01:09; and the available defenses. *See id.* 20:10:01:11.01. But nowhere did the Commission limit the customers who have the right to bring a complaint.

Rightly so. South Dakota law requires that "[e]very rate" promulgated by a public utility be "just and reasonable," and demands that "[e]very unjust or unreasonable rate shall be prohibited." SDCL § 49-34A-6. Otter Tail's preferred interpretation of the statute would exempt from that principle every rate that is charged to fewer than 25 private ratepayers, leaving those ratepayers with no mechanism by which to bring unreasonable or unfair rates to the Commission's attention. This case illustrates the point: It is undisputed that Valley Queen is the sole consumer in the entire state that has elected to receive service under Otter Tail's real-time-pricing tariff—and, thus, the only consumer whose real-time pricing is subject to a percent-of-bill charge. (Compl. ¶ 8; Ans. ¶ 9.) Despite being the only consumer to which the challenged rate applies, on Otter Tail's logic, Valley Queen has no standing to file a complaint. Not only that: Otter Tail argues that the Commission has no jurisdiction to take up a complaint even if Valley Queen files one. Under such a regime, the promise that "every rate" must be reasonable would ring hollow. Fortunately, § 49-34A-26 does not restrict who may file complaints.

Second, § 49-34A-26 does not place a jurisdictional limit on the Commission's ability to investigate (or take action with respect to) unreasonable rates that are challenged by a consumer who is not a municipality or a competitor and who has not joined with at least 24 other ratepayers. Otter Tail emphasizes time and again that the statute specifies only these three sets of potential challengers. (*See* Mot. 5, 6, 7.) It appeals to the legal maxim *expressio unius est exlusio alterius*, which provides that, generally, "when the legislature expresses things through a list, . . . what is not listed is excluded." (*Id.* at 6 (quoting *In re Estate of Flaws*, 811 N.W.2d 749, 753-54 (S.D. 2012).) This interpretation canon, also called the negative-implication canon, must be used with caution. "Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context." Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012). The courts have endorsed the canon's limited reach. *See, e.g., State v. Armstrong*, 939 N.W.2d 9, 15 (S.D. 2020) (treating the canon as a mere "auxiliary rule," "to be applied with great caution") (internal quotations omitted); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (explaining that the canon "does not apply to every statutory listing or grouping," and instead has force only when the statutory context "justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence") (internal quotation omitted). Moreover, the canon has limited usefulness for administrative agencies. It is "especially feeble in administrative setting, where a legislature often leaves to reasonable agency discretion questions it has not directly resolved." 2A Jabez Gidley Sutherland, *Statutes and Statutory Construction* § 47:25 (7th ed. 2007).

Contrary to these authorities, Otter Tail's argument is not based on caution and instead encourages the Commission to misread the plain language of the statute. In particular, Otter Tail's reliance on this canon ignores the clause that immediately precedes the statute's three-item

list. That clause provides that the Commission may also pursue an investigation "[o]n its own motion." SDCL § 49-34A-26. The legislature's choice to include this more general provision suggests that Otter Tail's reliance on the negative-implication canon is misplaced. By its terms, the statute's reach is not limited to the three circumstances Otter Tail identifies. Instead, it also contemplates a fourth, much more flexible basis for agency action. *See Warren Props. v. Stewart*, 864 N.W.2d 307, 317 (Iowa 2015) (reasoning that *expressio unius* does not apply absent evidence that "the legislature specifically intended for all other options to be excluded").

What's more, that fourth option would make little sense in a jurisdictional statute. "Authority to exercise discretion is not notably a hallmark of jurisdictional statutes." *Baldwin Piano & Organ Co. v. Blake*, 441 A.2d 183, 185 (Conn. 1982) (Peters, J., concurring). According to Otter Tail's argument, the statute provides the Commission the means to escape the other supposed statutory limitations and create its own jurisdiction. But no authority supports that proposition. *Cf. Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) (observing that a court "is powerless to create its own jurisdiction"); *cf., e.g.*, *Duke v. State*, 829 S.E.2d 348, 358 (Ga. 2019) (same); *Cox v. Court of Common Pleas*, 537 N.E.2d 721, 725 (Ohio Ct. App. 1988) (same). If Otter Tail's argument were correct, there would have been no reason for the legislature to specify the other supposed "limits" on the Commission's jurisdiction, as the Commission could always decide that it would like to hear the case "on its own motion."

A better, non-jurisdictional reading of the statute is available. Section 49-34A-26 provides for two circumstances in which the Commission may "make such investigation as it may deem necessary and take such action as deemed necessary and appropriate." First, in some, specifically outlined scenarios, the Commission *must* take up the complaint. These are the scenarios Otter Tail has identified: when a complaint is levied (i) by a political subdivision,

(ii) by another public utility, or (iii) by 25 ratepayers. The legislature reasonably could have concluded that these scenarios were important enough to always mandate an investigation by the Commission. For example, political divisions and other public utilities stand in for the interests of large swaths of consumers in a way that other individual complainants may not. Second, for other complaints, the legislature allowed for the possibility that the Commission could dispense with the complaint in more summary fashion, subject to its own rules. While individual or scattered complainants are still free to bring issues to the Commission's attention, the Commission is not obliged to expend substantial resources investigating their claims unless it concluded—"on its own motion"—that further action was warranted by the circumstances.

Under this better understanding of the statute, which is consistent with its plain language, the Commission has discretion to investigate Valley Queen's complaint. It should do so. As Valley Queen has explained, the application of the phrase-in rider to the real-time pricing tariff is unreasonable. The point of the real-time pricing tariff is to place the risk of market changes on the consumer. (Compl. ¶ 7.) The tariff rates are thus "mostly dependent on the market and not on Otter Tail's embedded costs." (*Id.* ¶ 15.) Meanwhile, the phase-in rider (and, in particular, its percent-of-bill element) provides Otter Tail a means of recouping costs associated with fixed-price tariffs. (*Id.* ¶ 9.) Valley Queen should not be required to pay an additional percentage over and above its market risk to cover a revenue requirement to which the tariff it pays bears no relation—especially where the additional percentage paid results in a windfall for the utility at the consumer's expense and is inconsistent with its treatment of other riders. (*Id.* ¶¶ 15-18, 24.)

b. There is no freestanding requirement for "traditional standing" in a Commission proceeding, and, even if there was, that requirement is satisfied.

In passing, Otter Tail suggests that Valley Queen also lacks "traditional standing, which requires an injury in fact." (Mot. 5.) But what Otter Tail calls "traditional standing" is just

another species of statutory standing. Unlike their federal counterparts, South Dakota's courts are courts of general subject-matter jurisdiction. *Bingham Farms Tr. v. City of Belle Fourche*, 932 N.W.2d 916, 920 & n.3 (S.D. 2019); *see Miner v. Standing Rock Sioux Tribe*, 619 F. Supp. 2d 715, 722 (D.N.D. 2009) ("Unlike state courts, federal courts have no 'inherent' or 'general' subject matter jurisdiction."). Any universal limitation on that principle—what Otter Tail calls "traditional standing"—derives from SDCL § 15-6-17(a), which provides that "[e]very action shall be prosecuted in the name of the real party in interest." *Arnoldy v. Mahoney*, 791 N.W.2d 645, 653 (S.D. 2010); *In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 813 N.W.2d 111, 121 (S.D. 2012). This inquiry is thus "controlled by statute." *Arnoldy*, 791 N.W.2d at 653. It is not some extra-statutory standard akin to the Article III standing required of federal courts.

This fact creates two problems for Otter Tail's argument. First, there is no basis for extending this statutory limit from circuit courts to the Commission. The Commission "is not a court." *In re Nw. Pub. Serv. Co.*, 560 N.W.2d 925, 930 (S.D. 1997). It is an elected body with a specific statutory remit and the discretion to conduct its business in any manner most conducive "to the proper dispatch of business and to the ends of justice." SDCL § 49-1-2; *id.* § 49-1-8; *id.* § 49-1-9. Unlike courts, which may entertain claims only by those with the "right to make a legal claim or seek judicial enforcement of a duty or right," *Hostler v. Davison Cnty. Drainage Comm'n*, 974 N.W.2d 415, 419 (S.D. 2022) (internal quotation omitted), the Commission, subject to its own rules, is free to hear claims by "[a]ny party." SDCL § 49-1-10. Under its rules, for example, "[a]ny person" may seek a declaratory ruling about whether a statute, rule, or order apples to him or her. ARSD 20:10:01:34. And any "consumer" may submit a complaint about services for the Commission to evaluate. ARSD 20:10:01:07.01; *see, e.g.*, *In re Complaint Filed by Randy Kieffer*, No. TC98-176, 2001 WL 36672084 (P.U.C. Oct. 4, 2001) (entertaining

outages complaint by a single consumer); *In re Complaint Filed by Loretta Spear*, No. TC98-155, 2001 WL 36672083 (P.U.C. July 27, 2001) (same). There is no sound reason to import a jurisdictional limit that is ill-suited to the Commission's limited role in state government.

Granted, the Commission's rules incorporate the Rules of Civil Procedure to the extent "appropriately applied to an agency proceeding" and not inconsistent with the Administrative Procedures Act or the Commission's other rules. ARSD 20:10:01:01.02. But this is one of those circumstances in which it would be inappropriate to transpose a rule designed to govern circuit courts on agency proceedings. On that score, it is telling that § 15-6-17(a) appears never to have been cited in a published Commission ruling. The Commission's regular practice is to recite the basis for its jurisdiction in its written opinions. *See, e.g.*, *In re Application of LTD Broadband, LLC*, No. TC21-001, 2021 WL 3879218, at *1 (P.U.C. Aug. 26, 2021); *In re LW Sales/LW Seed's Failure to Obtain Necessary Licensure*, No. GD07-001, 2007 WL 8674015, at *1 (P.U.C. Nov. 16, 2007). If § 15-6-17(a)'s "real party in interest" requirement impacted that jurisdiction, the Commission presumably would have acknowledged as much at one point or another. The Administrative Procedures Act, likewise, has its own rules concerning who is entitled to participate in contested-case proceedings. Participation is open to all "parties." *See* SDCL § 1-26-16; ARSD 20:10:01:02. That is, to any person "by or against whom a proceeding is commenced," who is otherwise admitted by the Commission as a party, or who is entitled to be so admitted. ARSD 20:10:01:01.01(5); *see* SDCL § 1-26-1(5). Here, Valley Queen, as complainant, is a party. *See* ARSD 20:10:01:07.01 *et seq.* (outlining complaint process).

Second, even supposing that SDCL § 15-6-17(a) applied in this context, the point of that statute is simply to identify whether the complainant is a "real party in interest" or "aggrieved person." *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 769 N.W.2d 817, 825 (S.D. 2009); *see also*

In re Estate of Calvin, 963 N.W.2d 319, 323 (S.D. 2021) ("Standing is established through being a 'real party in interest.'") (internal quotations omitted). This requirement is satisfied if the complainant "has a real, actual, material, or substantial interest in the subject matter of the action." *Ellingson v. Ammann*, 830 N.W.2d 99, 101 (S.D. 2013) (internal quotation omitted). Put differently, the complainant has standing if it "suffered some actual or threatened injury" as a consequence of the challenged conduct. *State v. Rolfe*, 825 N.W.2d 901, 910 (S.D. 2013) (internal quotation omitted). That criterion is easily satisfied here: Valley Queen is challenging the reasonableness of the rate figures charged to it. Valley Queen paid thousands of dollars in charges as a result of those rates—both before and after it brought the issue to Otter Tail's attention. (Compl. ¶ 21.) Those charges continue to accrue. This is a classic pocketbook injury that supports standing. *Cf. TransUnion, LLC v. Ramirez*, 594 U.S. 413, 425 (2021) (classifying monetary harms as among the "most obvious" and "traditional" bases for Article III standing).

To evade this fact, Otter Tail insists that this injury is not "the result of the putatively illegal conduct of the defendant." (Mot. 7 (quoting *Abata v. Pennington Cnty. Bd. of Comm'rs*, 931 N.W.2d 714, 719 (S.D. 2019).) But it is. Otter Tail is a public utility. Under South Dakota law, then, "[e]very rate" it promulgates must be "just and reasonable." SDCL § 49-34A-6. Valley Queen's core allegation is that the challenged rate, as applied to its circumstances, is unreasonable and is therefore "prohibited." (Compl. ¶ 22 (quoting SDCL § 49-34A-6).) In other words, Valley Queen's position is that the rate is illegal.[1] Otter Tail may well disagree with that characterization. But its disagreement is beside the point: The reasonableness of the rate is a

[1] Of course, for the challenged conduct to be "putatively illegal" for purposes of establishing standing, it need not be proscribed by statute or regulation. If that were the case, courts would lack standing to entertain all manner of common-law disputes well within their traditional domain. Presumably, rather, the *Abata* court used "putatively illegal" to contemplate any conduct that is alleged to be "not according to or authorized by law" and that can be redressed by a judicial (or administrative) decision. *See Illegal*, Merriam-Webster Dictionary (2025).

merits question, and "establishing standing does not require [Valley Queen] to prove [it] will prevail on the merits." *Powers v. Turner Cnty. Bd. of Adj.*, 983 N.W.2d 594, 601 (S.D. 2022).

II. The filed-rate doctrine does not preclude Valley Queen from challenging the application of the real-time-pricing tariff to it before the Commission.

Alternatively, Otter Tail argues that Valley Queen's complaint is blocked by the filed-rate doctrine. This doctrine, which was first developed by the federal courts, holds that the filed rate—"that is, one approved by the governing regulatory agency"—is "unassailable in judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18-19 (2d Cir. 1994). The key word there is "judicial." On its own terms, the filed-rate doctrine precludes *the judiciary* from entertaining statutory or common-law actions in which a consumer claims an injury "by virtue of having paid a filed rate." *Taffet v. S. Co.*, 967 F.2d 1483, 188-89 (11th Cir. 1992) (en banc); *see Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679 (8th Cir. 2009). As the courts to recognize the doctrine have explained, it is not a job for the "courts to determine what the reasonable rates during the past should have been." *Taffet*, 967 F.2d at 1489-90 (quoting *Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 236, (1951)). That task, instead, belongs to the state regulatory commission charged with overseeing ratemaking. *Id.*

Whatever role the filed-rate doctrine may play in judicial proceedings, it has no role here—in an administrative proceeding before a state regulatory commission. It may be that courts are not "institutionally well suited" to engage in rate-setting. *Wegoland*, 27 F.3d at 20. But the Commission is. By statute, the Commission is "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." SDCL § 49-34A-6. To that end, the Commission has published protocols for consumers to bring complaints to its attention. *See, e.g.*, ARSD 20:10:01:07.01. If courts were

free to assess the reasonableness of rates while adjudicating common-law actions, they may well "unduly subvert the regulating agencies' authority." *Wegoland*, 27 F.3d at 21; *see also Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 314 (Minn. 2006) (justifying the doctrine on the basis that courts lack the "technical expertise" and administrative capacity "to second-guess the decisions of the agency to whom the legislature has delegated the responsibility to approve rates"). But the Commission cannot somehow subvert its *own* authority to regulate rates by evaluating, pursuant to the protocols it has established, the reasonableness of rates charged.

For these reasons, it would be incoherent and self-defeating to extend the filed-rate doctrine to administrative proceedings before the Commission. By design, the filed-rate doctrine limits the power of courts to preserve the authority of "regulators who are intimately familiar with the industry." *Wegoland*, 27 F.3d at 21. It would make no sense for that same doctrine to place a check on the regulators' power in carrying out their statutory responsibilities. In simple terms, the filed-rate doctrine addresses only "*where* a customer may pursue a remedy for unjust and unreasonable or unjustly discriminatory rates," and resolves that question in favor of a proceeding before the Commission, rather than a judicial forum. *In re Application of Portland Gen. Elec. Co.*, No. 08-487, 2008 WL 4457778 (Or. P.U.C. Sept. 2, 2009), *aff'd*, 299 P.3d 533 (Or. 2013). It has nothing to say about "the scope of the agency's remedial authority." *Id.* Otter Tail points to no decision holding otherwise. Its reliance on the doctrine is misplaced.

III. Valley Queen has not asked the Commission to "retroactively repeal" the 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.

Finally, Otter Tail asserts that, even if the application of the phase-in rider to the tariff is unreasonable, the Commission has no power to fix the problem retroactively. Otter Tail cites *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932), for this

proposition. In its view, because the Commission previously approved the application of the phrase-in rider, Otter Tail is entitled to rely upon the approval, as a "declaration as to what will be a lawful, that is, reasonable, rate." (Mot. 9 (quoting *Arizona Grocery*, 284 U.S. at 389).) On this basis, it argues, Valley Queen would not be entitled to any credit or refund from the period leading up to the Commission's order in this case—during which the rider was in effect.

a. Otter Tail's argument on this point is retrospective only; it has no bearing on whether the Commission may revisit the rate and determine that the rate cannot reasonably continue to apply in the future.

At the threshold, Otter Tail's arguments based on *Arizona Grocery* are backward-facing only. These arguments thus have no impact on whether the Commission has authority to *prospectively* remedy the problems caused by application of the phase-in rider. Indeed, Otter Tail's reasoning presupposes the opposite: The Commission's obligation to ensure that rates are reasonable does not end at its initial approval. *Cf. OXY USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995) ("The fact that a rate was once found reasonable does not preclude a finding of unreasonableness in a subsequent proceeding.") (internal quotation omitted). As a result, Otter Tail's motion to dismiss on this basis is, at best, partial. The Commission still has unquestioned authority to conclude that applying the phase-in rider to the real-time pricing tariff is unreasonable as a prospective matter. Once it does so, Otter Tail no longer will be able to rely on any previous declaration holding that the rate application was reasonable—in much the same way that a party could not rely on a judicial decision that has since been overturned. At a minimum, from that point forward, Otter Tail cannot continue to apply the rider to the tariff.

b. Neither the Commission nor the South Dakota Supreme Court has ever adopted *Arizona Grocery*, and the Commission should not do so now.

Even Otter Tail's retrospective reliance on *Arizona Grocery* is misplaced. *Arizona Grocery* concerned the intersection of three federal statutes: the Interstate Commerce Act, the

Hepburn Act, and the Transportation Act. 284 U.S. at 385-86. Together, those three acts afforded the Interstate Commerce Commission (the "*ICC*") the power to set a maximum reasonable rate to be charged by interstate carriers of commodities. *Id.* If the ICC by order "declare[d] a specific rate to be the reasonable and lawful rate for the future," it spoke as the legislature, "and its pronouncement ha[d] the force of a statute." *Id.* at 386, 387-88. In a 1921 order, the ICC set the maximum reasonable rate at 96.5 cents per hundred pounds of sugar. *Id.* at 381-82. In 1925, it changed its mind and promulgated a new maximum of 71 cents. *Id.* Sugar shippers, who had paid a rate above the 71-cent threshold during the preceding four years, sued the railway carriers to recover the difference between the rates paid and the new maximum. *Id.*

The U.S. Supreme Court concluded that the shippers were not entitled to reimbursement. It was true that the ICC's ratemaking decision was supposed to be guided by a single, continuous "reasonableness" standard, and that, in theory, the carriers' rates greater than 72 cents were just as unreasonable in 1922 as they were in 1925. *See id.* As a substantive matter, however, the ICC was speaking in a "quasilegislative capacity" each time it set a new maximum rate. *Id.* at 387-88. As such, the carriers were entitled to rely on the prevailing maximum rate for as long as the rate remained in place—in much the same way that they would have been entitled to rely on a statute enacted by Congress until that statute was amended or repealed. *Id.* It followed that the ICC was without power to require reparations for past overpayments in adjudicatory proceedings. While acting in that capacity, the ICC "was bound to recognize the validity of the rule of conduct prescribed by it, and not to repeal its own enactment with retroactive effect." *Id.*; *see also Portland Gen. Elec. Co.*, 2008 WL 4457778 (recognizing that *Arizona Grocery*'s rule against retroactive rulemaking "was initially based on statutes that specifically stated that the regulatory agency's actions had prospective application only," a feature that is absent here).

Neither the South Dakota Supreme Court nor this Commission has ever extended the logic of *Arizona Grocery* to the rate-approval process in this state. The Commission should not do so now. In South Dakota, the Commission is structured as "an administrative tribunal with expertise." *In re N. States Power Co.*, 489 N.W.2d 365, 370 (S.D. 1992). Rather than promulgating a uniform rate in a manner akin to a legislature, the Commission approves rates and rate increases on a case-by-case basis, with due consideration for service needs and for the costs to the utility. *See* SDCL § 49-34A-6; *id.* § 49-34A-8; *id.* § 49-34A-21. In so doing, the Commission is engaged in what essentially amounts to a factfinding function. *See Nw. Bell Tel. Co. v. Chi & N.W. Transp. Co.*, 245 N.W.2d 639, 641 (S.D. 1976) (explaining that it is outside the Commission's purview to decide issues of law and that the agency is instead tasked with "find[ing] and determin[ing] facts, upon which [its governing] statutes operate"). Its role is to determine whether a given rate formula is reasonable under the circumstances. *See, e.g.*, *First Lady, LLC v. JMF Props., LLC*, 681 N.W.2d 94, 99 (S.D. 2004) (observing, in a different context, that "[r]easonableness is a question of fact"); *Feister v. Swenson*, 368 N.W.2d 621, 624 (S.D. 1985) (same). This task is not legislative in character. Rather than creating new law, the Commission identifies the operative facts and then applies existing law to those facts.

Against that backdrop, there is no basis for treating the Commission's ratemaking decisions as akin to statutes. The operative statutory requirement has not changed. Now, as before, the charge by a public utility must be "just and reasonable." SDCL § 49-34A-6. And this requirement, as it is presently interpreted, has "full retroactive effect" to the statute's date of enactment. *See Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993); *Burgard v. Benedctine Living Cmtys.*, 680 N.W.2d 296, 299 (S.D. 2004). What *may* change are the facts on the ground—*i.e.*, the facts "upon which" § 49-34A-6 operates. *Nw. Bell*, 245 N.W.2d at 641. And it

is possible that such a change could, as a factual matter, render what was once a reasonable rate unreasonable. To take an extreme example: Suppose the region experienced a major and unexpected energy crisis, which necessitated rationing fuel and dramatically increased the going rate to acquire it. In such a case, the Commission may well be justified in revisiting its prior decision concerning the permissible rate. And, in that case, the Commission's decision should apply only prospectively—starting from the point at which the operative facts changed.

That is not what occurred in this case. Here, the application of the phrase-in rider to the real-time pricing tariff was unreasonable from the start. No facts on the ground changed and altered that fact. The Commission did not address the impact that the rider would have on the tariff because the issue was not brought to its attention when Otter Tail announced the proposed rate change. If the Commission rules in favor of Valley Queen, it will not be enacting a new quasi-statute that should be afforded only forward-facing effect. *Cf. Fed. Farm Mortg. Corp. v. Noel*, 285 N.W. 871, 872 (S.D. 1939) (recognizing the rule of statutory construction that new statutes be given "only a prospective operation"). Nor will it be acknowledging a factual change that would alter how § 49-34A-6 applies on the ground. *See Nw. Bell*, 245 N.W.2d at 641; *cf. Gen. Motors Corp. v. Pub. Serv. Comm'n No. 2*, 438 N.W.2d 616, 619-20 (Mich. Ct. App. 1988) (refusing to issue a refund to consumers, but only because the factual change that rendered the challenged rate unreasonable—a plant closure—occurred *after* initial approval). It simply will be correcting a latent issue with its previous factual findings that was not considered.

In issuing this correction, the Commission has the power to make Valley Queen whole. From the moment the phase-in rider first applied, Valley Queen has been paying what was—and still is—an unjust and unreasonable rate for the service it receives. As other courts have observed in the context of a utility rate reversed after an appeal, it would "def[y] common sense"

to permit the utility "to retain the proceeds of rates that were illegally charged" while denying the customer the full relief to which it is entitled. *State ex rel. Utilities Comm'n v. Conservation Council of N.C.*, 320 S.E.2d 679, 686 (N.C. 1984). There is no basis for applying a different rule when the Commission realizes its own factual mistake and corrects course. To remedy any injustice, the Commission should award the full relief requested by Valley Queen, including a credit for the charges it has already paid due to application of the phrase-in rider to the tariff.

Adopting Otter Tail's contrary rule would put energy consumers in an unenviable position and would encourage parties to waste public and private resources on matters that can be resolved outside Commission proceedings. As noted above, Valley Queen has spent the last two years negotiating directly with Otter Tail in an effort to resolve this matter. (Compl. ¶ 20.) During those discussions, Otter Tail made representations—that it now repeats in its motion—about filing a modified real-time pricing tariff that supposedly will discard the "percent of bill methodology." (*See* Mot. 11 n.2.) To date, however, the new tariff has not emerged. During the delay, Valley Queen has incurred thousands in unjust costs that could have been avoided had it eschewed negotiating in good faith and instead filed a complaint immediately upon discovering the problem. If the Commission were to adopt Otter Tail's stilted limitation on relief, it would incentivize consumers in Valley Queen's position to take immediate action to protect themselves: to file a complaint first and ask questions later, rather than to attempt to resolve issues via discussions with the utility. One doubts that is the regime the legislature intended to encourage when it created the Commission and entrusted it with the authority to approve rates.

In short, the Commission is a factfinding body entrusted with the power to ensure that rates charged by public utilities are just and reasonable. It is not a quasi-legislature with the power to impose universal rates. Its decisions are not akin to statutes, and it has the right to

revisit decisions that are rooted in erroneous or incomplete factual support. If the Commission does so, it has the authority to make whole a party who ends up overpaying as a result.

CONCLUSION

Otter Tail argues that the Commission, which approved the phase-in rider as applied to Otter Tail's real-time-pricing rate, may not now consider Valley Queen's complaint about exactly that. None of the reasons Otter Tail offers to dodge the merits withstands careful review: Valley Queen is an injured party and a rightful complainant. The Commission has the authority to consider its complaint. And the Commission has the power to investigate—and, eventually, to remedy—Valley Queen's injury. Neither the filed-rate doctrine nor *Arizona Grocery* stand in its way. Valley Queen respectfully requests that Otter Tail's motion be denied.

Dated this 30th day of September, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

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