BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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| IN THE MATTER OF THE FILING BY NORTHWESTERN CORPORATION dba NORTHWESTERN ENERGY FOR APPROVAL OF A CONTRACT WITH DEVIATIONS WITH VALLEY QUEEN CHEESE FACTORY, INC. | : | REPLY IN SUPPORT OF VALLEY QUEEN CHEESE FACTORY, INC.'S MOTION TO REOPEN THE DOCKET |

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The Public Utilities Commission (the "*Commission*") should reopen the docket and vacate its prior approval of the 2023 interruptible transportation services agreement (the "*Interruptible Agreement*") between Valley Queen Cheese Factory, Inc. ("*Valley Queen*") and NorthWestern Energy ("*NorthWestern*"). There was no meeting of the minds when Valley Queen and NorthWestern executed the Interruptible Agreement, as the two entities were operating on irreconcilable understandings of how the agreement would work. Valley Queen would not have signed on to the agreement had it been aware of NorthWestern's view, which would defeat the very reason Valley Queen sought out the agreement: to receive more power. Instead, NorthWestern's view gives NorthWestern the power to deprive Valley Queen of promised firm power and to undermine the parties' 2018 agreement for firm service (the "*Firm Agreement*").

In response, NorthWestern has lodged only a procedural objection: It asserts that the Commission lacks authority to reopen the docket. Commission Staff ultimately disagrees for reasons not addressed by NorthWestern. But Staff questions whether Valley Queen's legal arguments have merit and whether the contract-formation question is more appropriately resolved in a judicial forum. Staff's concerns are misplaced. Because these issues can—and should—be resolved by the Commission, the Commission should grant Valley Queen's motion and reopen the docket.

## ARGUMENT

### I. The Commission has the authority to reopen the docket.

NorthWestern asserts that, the merits of Valley Queen's arguments notwithstanding, the Commission lacks the statutory or regulatory authority to reopen the docket. According to NorthWestern, the only plausible regulatory bases for reopening the docket—ARSD 20:10:01:30.01 and ARSD 20:10:01:27.01—are each time barred. (NorthWestern Br. 3-4.) The former regulation allows a party to file a motion for rehearing "within 30 days from the issuance of [a] commission decision or order." ARSD 20:10:01:30.01. The latter allows for the record of an administrative proceeding to be reopened after the matter is taken under advisement but "before a decision of the commission is entered." ARSD 20:10:01:27.01. The timeframes contemplated by each of these regulations have passed. And Valley Queen agrees that neither provision permits a docket to be reopened years after the initial decision is rendered.

But these two regulations are not the only possible bases for reopening the docket. Indeed, there are better options. For example, SDCL § 49-34A-61 presupposes that a party may seek modification or vacatur of a Commission order. Valley Queen has requested vacatur as relief here. Section 49-34A-61 sets forth no deadline for filing such a motion. Nor is a firm deadline supplied by the rules of civil procedure. *See* ARSD 20:10:01:01.02 (applying the rules of civil procedure to Commission proceedings, to the extent "appropriately applied to an agency proceeding" and consistent with the Administrative Procedures Act and the Commission's rules). *But see* SDCL § 15-6-81(a) (providing that the rules do not apply to the enforcement of Commission orders to the extent of a conflict). For example, Rule 60(b)(6) allows courts "to vacate judgments whenever such action is appropriate to accomplish justice." *Matter of Estate of Mack*, 17 N.W.3d 874, 879-880 (S.D. 2025) (internal quotation omitted). This is a

discretionary standard, to "be exercised liberally in accord with legal and equitable principles in order to promote the ends of justice." *Clarke v. Clarke*, 423 N.W.2d 818, 820 (S.D. 1988).

Under this liberal standard, vacatur is warranted. Valley Queen filed its motion to reopen on September 19, 2025. The Commission approved the Interruptible Agreement roughly two years earlier, on September 26, 2023. (Mot. ¶ 19.) At the hearing before approval, Valley Queen represented that it had no objection to the Commission's approval of the agreement. (*Id.* ¶ 21.) Importantly, the approval took place long before NorthWestern would deliver gas under the Interruptible Agreement. Valley Queen's statement to the Commission was based on corresponding representations by NorthWestern, in which it stated or implied (i) that curtailment was rare, (ii) that Valley Queen would be afforded the information necessary to "anticipate interruptions in service and plan its manufacturing actions," (iii) that the agreement would enable the delivery of greater quantities of natural gas, and (iv) that the Interruptible Agreement would not modify or undermine the Firm Agreement. (*See id.* ¶¶ 22-25.) At the time, Valley Queen had no reason to question those representations, and it thus took NorthWestern at its word.

Unfortunately, time proved those representations to be inaccurate. But Valley Queen was in no position to recognize the inaccuracy until much later. In particular, the valve used to limit Valley Queen's receipt of natural gas did not become operational until January 2025. (*Id.* ¶¶ 2, 32-34, 51.) Before then, Valley Queen had no data concerning how NorthWestern would use the valve, did not know what notice NorthWestern would provide about service interruptions, and was not aware of NorthWestern's view that it could deprive Valley Queen of all gas on ten minutes' notice. (*Id.* ¶¶ 32, 34, 40.) The full scope of the problem did not become apparent until this year, when Valley Queen first experienced shutdowns and NorthWestern, for the first time, set forth its expansive view of the power supposedly afforded to it by the Interruptible

Agreement. The delay in asking to reopen the docket is attributable to the fact that, until this year, Valley Queen was not aware of the need to reopen. Given that reality, the Commission's prior decision should be vacated to allow the agreement to be amended to work for both parties.

The Commission could also reopen the matter under SDCL § 49-34A-26. This statute permits the Commission, "[o]n its own motion," to investigate whether the service being afforded a customer is sufficient, adequate, and obtainable. If the Commission has reason to believe there is an issue, it can investigate and take action "deemed necessary and appropriate." There is good reason to act here: Under the Firm Agreement, Valley Queen contracted for firm service of 72.5 MMBtu per hour, up to a maximum of 1,450 MMBtu per day. (Mot. ¶ 8.) The Interruptible Agreement was supposed to increase Valley Queen's transportation-service capacity above its existing firm capacity. (*Id.* ¶ 15.) It did not purport to modify NorthWestern's duty to make available 1,450 MMBtu per day. (*Id.* ¶ 20.) Yet, in practice, NorthWestern's conduct under the Interruptible Agreement has meant that Valley Queen does not receive the firm service for which it contracted. As explained in more detail below, this is because Valley Queen cannot risk its gas delivery being suddenly curtailed to zero. As a result, for example, during the first four months of 2025, there was not a single day in which Valley Queen received its contracted-for daily maximum of 1,450 MMBtu—much less increased capacity. (*Id.* ¶ 44.) This arrangement is neither sufficient nor adequate, and warrants investigation.

In accordance with those principles, there is no basis for dismissing this action. The Commission has the power to entertain a motion seeking vacatur of an order, and such a motion is not time-barred in the same way as the alternative remedies NorthWestern identifies. Even if a motion seeking vacatur were unavailable, moreover, the Commission could investigate

NorthWestern's practices with respect to the Interruptible Agreement on its own motion. NorthWestern is thus incorrect that the Commission has no power to reopen this matter.

## II. The Commission can resolve the questions raised by the motion to reopen.

Commission Staff rightly disagrees with NorthWestern's argument that the Commission lacks authority to reopen the docket. Staff is unconvinced, however, that all of Valley Queen's arguments can be resolved by the Commission. In particular, Staff agrees that the Commission can decide any issues related to whether NorthWestern is providing service in accordance with the Interruptible Agreement or with the Firm Agreement. But it questions whether the Commission can resolve any contract-formation issues related to the Interruptible Agreement. (*Id.* at 6-8.) In other words, Staff's position is that the Commission can adjudicate whether the parties have complied with the Firm Agreement and the Interruptible Agreement, but not whether the Interruptible Agreement was validly formed. Valley Queen agrees with Staff with respect to the former issue but not the latter.[1] At least insofar as it bears on an issue within the Commission's jurisdiction, the Commission has the authority both to evaluate whether the parties had an agreement in place and, if so, whether NorthWestern ran afoul of its terms.

As Staff agrees, the Commission has the power to evaluate whether NorthWestern "is not providing service in accordance with the tariffed Interruptible or Firm Agreement." (*Id.* at 9.) That is because the Commission is tasked by statute with approving tariffs, SDCL § 49-34A-4(1); *id.* § 49-34A-10, and with determining whether a public utility has "furnish[ed] adequate, efficient, and reasonable service" thereunder. *Id.* § 49-34A-2. Here, the applicable tariff rates—

[1] Valley Queen also disagrees that the Commission must decide now, as Staff suggests, whether it has presented sufficient evidence that the parties did not share the same understanding of how the Interruptible Agreement would operate. (Staff Br. at 5-6.) Valley Queen need not prove its entitlement to relief in its motion. Rather, the purpose of reopening is to allow the parties to present, and the Commission to consider, evidence on that question. The issue under consideration (whether to reopen) is legal and procedural. Resolving the merits is factual.

and the capacity to which Valley Queen is entitled—are determined by reference to the private contracts between NorthWestern and Valley Queen. Those contracts are submitted to and then approved by the Commission. By definition, then, any subsequent issues related to compliance with the Commission's orders will require the Commission to consider the terms of the Interruptible and Firm Agreements that are approved and incorporated thereby.

The Commission also has the power to evaluate whether a valid agreement existed in the first place. The Commission possesses "broad inherent authority in matters involving utilities." *Matter of N. States Power Co.*, 489 N.W.2d 365, 370 (S.D. 1992). Generally speaking, it is true that the Commission "cannot consider, or adjudicate, contractual rights and obligations between parties." *Matter of Nw. Pub. Serv. Co.*, 560 N.W.2d 925, 930 (S.D. 1997) (quoting *Williams Elec. Co-op., Inc. v. Mont.-Dakota Utils. Co.*, 79 N.W.2d 508, 517 (N.D. 1956)). But there is a caveat: The Commission *may* construe or adjudicate the validity of a contract "as to its effect upon matters within [the Commission's] jurisdiction." *Williams Elec.*, 79 N.W.2d at 517-18; *accord Nw. Pub. Serv.*, 560 N.W.2d at 930. As relevant here, the Commission approved the Interruptible Agreement by order. In so doing, the Commission concluded that the basis for the change was Valley Queen's need for additional capacity to accommodate an expanded operation, and observed that Valley Queen had "elected to receive that additional capacity via interruptible transportation service." (Order Approving Deviation 1.) It also noted that Valley Queen supported the change. (*Id.*) If, however, there was no meeting of the minds between NorthWestern and Valley Queen concerning the basic contours of the Interruptible Agreement, then the premises on which the Commission rested its approval order fail.

It is within the Commission's authority to evaluate whether Valley Queen is receiving adequate service, *see* SDCL § 49-34A-2; to regulate the fees charged in return for those services,

*see id.* § 49-34A-6; and to determine the scope of its own orders. Here, each of those inquiries is intertwined with the question of whether the parties reached a valid contract. The central thrust of the Commission's order dated September 26, 2023, was to "approv[e] . . . a contract with deviations," alongside its associated tariff sheet. (Order Approving Deviation 3-4.) The substantive terms of the order are as specified in the contract; the order does not set out any governing principles that operate independently of the parties' agreement. (*See id.*) Yet, if there was no meeting of the minds, "there can be no contract." *Knutson v. Knutson*, 80 N.W.2d 871, 873 (S.D. 1957) (quoting *Kelly v. Wheeler*, 119 N.W. 994, 996 (S.D. 1909)); *see, e.g.*, *Paweltzki v. Paweltzki*, 964 N.W.2d 756, 765 (S.D. 2021) (explaining that "[t]here must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract") (alteration in the original) (internal quotation omitted). Without clarifying whether a contract exists, the Commission cannot judge whether the parties have complied with their obligations under the order—or, indeed, what those obligations even are. The Commission should thus resolve the question of invalidity as a necessary antecedent to its statutory responsibilities.

The text of the Interruptible Agreement supports Valley Queen's request of the Commission. Paragraph 7.4 of the agreement provides that "[a]ny action or proceeding arising out of or related to the Interruptible Service conditions governed by the Tariff or the Commission's rules and regulations are subject to the exclusive jurisdiction of the Commission." (Interruptible Agreement ¶ 7.4.) This language must be given its ordinary meaning. *Poeppel v. Lester*, 827 N.W.2d 580, 584 (S.D. 2013). Here, that meaning is quite broad. For a proceeding to "relate[] to" an interruptible-service condition within the Commission's remit, the proceeding and the interruptible-service condition need only "stand in some relation"; "bear[]," "concern" or "pertain" to one another; or have some "association" or "connection." *See Morales v. Trans*

*World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). The present dispute "relate[s] to" interruptible-service conditions, as the scope of those conditions depends on whether an agreement was reached by the parties. By the Interruptible Agreement's plain terms, Valley Queen was required to bring this action to the Commission.

To be sure, Paragraph 7.4 also provides that the parties must bring in state or federal court "[a]ny *other* action or proceeding seeking to enforce any provision of, or based on any right arising out of," the Interruptible Agreement. (Interruptible Agreement ¶ 7.4 (emphasis added).) But the key word in this sentence is "other." This second sentence, by its terms, encompasses only proceedings that fall outside the scope of the first sentence. *See Other*, Merriam-Webster Dictionary (2025) ("being the one or ones distinct from that or those first mentioned or implied"). For the reasons already addressed, the concerns raised in Valley Queen's motion to reopen "relate[] to the Interruptible Service conditions governed by the Tariff or the Commission's rules and regulations." The second, catch-all sentence is not implicated.

As both Valley Queen and Commission staff have explained, the Commission has jurisdiction to determine whether NorthWestern is providing service in accordance with the terms of the Interruptible Agreement and the Firm Agreement, each of which has been approved by the Commission via published order. Because the validity of the Interruptible Agreement is inextricably intertwined with these and other questions within the Commission's authority, the Commission also has authority to determine whether there was a meeting of the minds between Valley Queen and NorthWestern concerning the Interruptible Agreement in the first place.

## III. Accepting the factual allegations in the motion to reopen as true, Valley Queen has set forth a valid basis for reopening the docket.

Once it dispenses with any supposed procedural barriers, the Commission should reopen the docket. Valley Queen has set forth a valid basis for doing so. At points, Staff, in its briefing,

indicates that it is "not convinced" of the merits of Valley Queen's motion. (Staff Br. 6.) That is not a problem, however, because the law does not require that Valley Queen prove its entitlement to relief in its initial filing. Rather, Valley Queen expects that the merits of its dispute with NorthWestern will be resolved on the basis of evidence presented to the Commission.

To the extent that Valley Queen's motion is not clear, however, Valley Queen offers this further explanation:

1. The Interruptible Agreement provides that Valley Queen "now desires to increase its transportation service capacity at its Facility in an amount above the firm capacity of 72.5 MMBtu per hour up to 1,450 MMBtu per day." (Interruptible Agreement 1, Sixth *Whereas* paragraph.) There are two such *Whereas* paragraphs. The other states that Valley Queen "receives firm transportation service for the delivery of natural gas purchased by Customer and delivered by NorthWestern in the amount of 72.5 MMBtu per hour up to 1,450 MMBtu per day." (*Id.*, Fourth *Whereas* paragraph.) The Sixth *Whereas* paragraph states that interruptible service is service "above the firm capacity" so described.

2. In Paragraph 7.7, the Interruptible Agreement states that nothing in the Interruptible Agreement is intended to change Valley Queen's firm service.

3. Long after the parties signed the Interruptible Agreement, NorthWestern developed a SCADA system described in paragraphs 26-33 of Valley Queen's motion. The SCADA data informs Valley Queen about the operating condition of NorthWestern's distribution system and when Valley Queen's delivery of gas could be curtailed. The system was not operational or made known to Valley Queen until January 9, 2025. As the Interruptible Agreement is administered by NorthWestern, when NorthWestern declares a critical state (red), one of two things happens to the delivery of natural gas to Valley Queen. If Valley Queen has used more than 1,450 MMBtu per day, the valve will close to zero within ten minutes until the critical state ends. If Valley Queen has used less than 1,450 MMBtu per day, however, the valve will close to limit Valley Queen's gas delivery to no more than 72.5 MMBtu per hour.

4. Thus, NorthWestern is administering the Interruptible Agreement so that the reference to 72.5 MMBtu/hour is a restriction on Valley Queen's ability to receive firm service when it has not met its daily firm capacity. But NorthWestern also maintains that all gas delivered up to 1,450 MMBtu/day is firm service, which is inconsistent with limiting delivery to 72.5 MMBtu/hour in that circumstance.

5. Valley Queen understands that gas delivered in excess of 72.5 MMBtu/hour is interruptible gas, not firm, in any hour of the gas day before Valley Queen reaches

its maximum daily capacity of 1,450 MMBtu. Within that daily capacity, NorthWestern may curtail the delivery of interruptible gas, but not firm below 72.5 MMBtu. Two examples illustrate why this makes sense.

6. Example 1. Assume Valley Queen has used 1,150 MMBtu with two hours left in the gas day and NorthWestern declares a red state. If all gas delivered up to 1,450 MMBtu is firm without regard to the reference to 72.5 MMBtu/hour, then Valley Queen should be able to use up to 150 MMBtu per hour for the last two hours of the gas day to reach its firm capacity of 1,450 MMBtu. Instead, as NorthWestern is administering the agreement, it limits Valley Queen's usage during the last two hours of the gas day to 72.5 MMBtu/hour. The result is that Valley Queen cannot reach its daily firm capacity for that gas day. NorthWestern has, in this example, limited Valley Queen's delivery of firm service contrary to the Firm Agreement and paragraph 7.7 of the Interruptible Agreement.

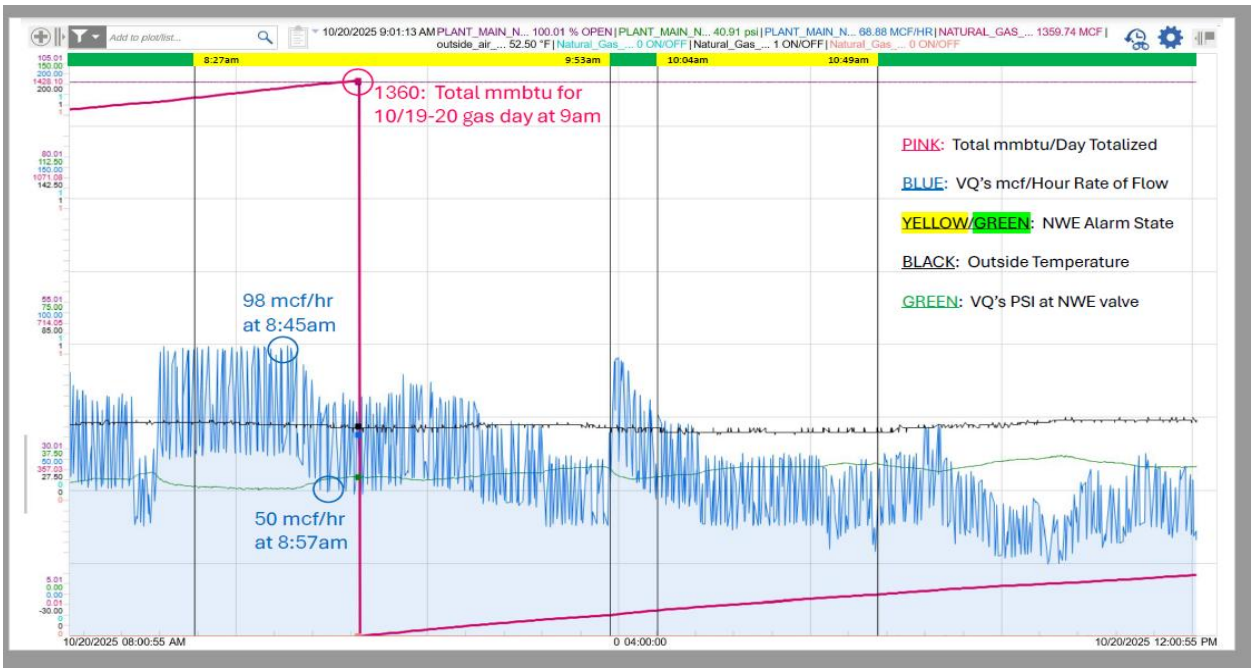
7. Example 2. Assume with two hours left in the gas day that Valley Queen has used 1,450 MMBtu for the day and NorthWestern declares a critical state. NorthWestern will close the valve to zero and curtail Valley Queen's delivery of interruptible gas. But if with two hours left in the gas day Valley Queen has used less than 1,450 MMBtu for the day and NorthWestern declares a critical state, NorthWestern will continue delivering gas up to 72.5 MMBtu/hour. This anomaly is inconsistent with Paragraph 3.3 of the Agreement, which states that "Interruptible Service will only be available when adequate capacity exists on the Milbank Distribution System." It is also nonsensical because the same situation presents two different outcomes depending on whether Valley Queen has used gas in excess of 72.5 MMBtu/hour earlier in the gas day. Valley Queen has repeatedly asked NorthWestern to explain this anomaly but has not received an answer.

8. Valley Queen's understanding of the Interruptible Agreement is that gas delivered in excess of 72.5 MMBtu/hour is interruptible and that Valley Queen's delivery of gas can be curtailed anytime during the day when NorthWestern declares a critical state and Valley Queen's usage has exceeded 72.5 MMBtu/hour. But it can be curtailed only to the hourly capacity stated in the Interruptible Agreement, not to zero.

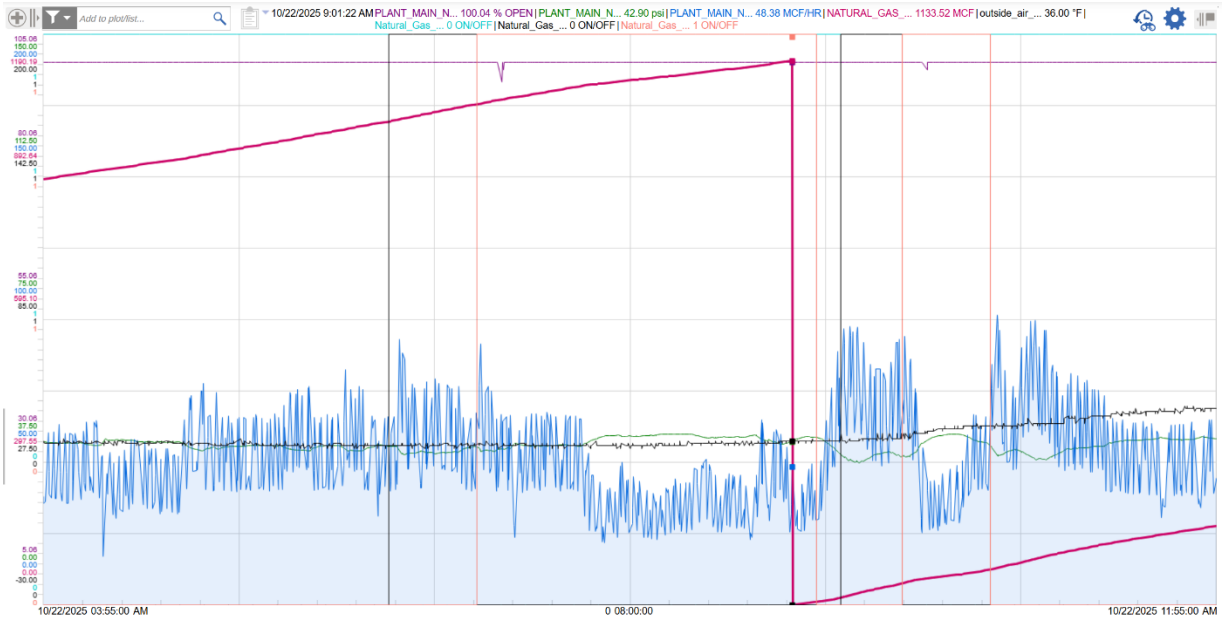
9. The important difference between the understanding of the parties is that Valley Queen's understanding would allow it to operate without fear that its gas delivery can be reduced to zero, while NorthWestern's understanding subjects Valley Queen to an unacceptable operating condition of its gas delivery being entirely curtailed anytime it has exceeded its daily firm capacity and NorthWestern declares a critical state. Valley Queen cannot risk its delivery being reduced to zero within ten minutes for the reasons explained in paragraphs 36-39 of the motion. This threat of being reduced to zero prevents Valley Queen from reaching its daily firm capacity under the Firm Agreement. For this reason, Valley Queen is of necessity currently managing its gas usage so that it does not

use its maximum daily capacity of 1,450 MMBtu. The purpose of the Interruptible Agreement, however, was to provide delivery of more gas, so NorthWestern's administration of the Interruptible Agreement is defeating its purpose.

10. To further illustrate this point, below is a screenshot of the SCADA data that Valley Queen sees each day with a legend on the right side that explains the data. This wavy blue line is the rate of gas delivery to Valley Queen per hour. The box at the top shows whether NorthWestern's distribution system is operating in a critical (red), alert (yellow), or normal (green) state. The pink line shows the end of Valley Queen's gas day and, here, the total amount of gas delivered that day, which on October 19-20 was 1,360 MMBtu.




11. Another screenshot of SCADA data shows what happened on a different day. On October 22, 2025, at the end of the gas day, NorthWestern declared a critical state. Because Valley Queen had been controlling its gas usage throughout the day so as not to reach 1,450 MMBtu, NorthWestern limited Valley Queen's usage to not exceed 72.5 MMBtu/hour. Had Valley Queen reached its daily firm capacity before the critical state was declared, its gas delivery would have been reduced to zero.




12. NorthWestern's understanding of the Interruptible Agreement is not mandated by its plain language. It does not say that Valley Queen can receive delivery of interruptible gas only at the end of its gas day. It does not say that Valley Queen's firm service can be interrupted. And it does not say that the control valve at Valley Queen's plant can be closed to zero.

13. The situation would be easily resolved if the parties agreed that Valley Queen's use of gas in excess of 60 MMBtu/hour will be treated as interruptible gas, up to the maximum daily capacity of 1,450 MMBtu. The 60-MMBtu figure is derived from the maximum daily capacity divided by 24 hours, which is appropriate because Valley Queen operates 24/7. If this were how the Interruptible Agreement were administered, the delivery of natural gas to Valley Queen could only be reduced to 60 MMBtu/hour, not zero, which would eliminate the threat of injury to Valley Queen's employees and damage to its equipment. Valley Queen would be able to use its maximum daily capacity *plus* whatever interruptible gas was available on NorthWestern's distribution system. Moreover, NorthWestern would be in a better situation than it is today because if it declares a critical state at the end of the gas day, Valley Queen's use could be limited to 60 MMBtu, whereas today it can only be limited to 72.5 MMBtu according to NorthWestern. Valley Queen does not seek an entirely new agreement, but clarity that its firm service cannot be interrupted, which would provide it with operational certainty and safety. The same result would be achieved if there were two meters at Valley Queen's plant, one for firm gas and one for interruptible.

As noted in footnote 1, the issue at this point is not whether Staff or the Commission agrees that Valley Queen is entitled to further relief as requested in its motion. The issue is whether Valley Queen has set forth allegations showing that reopening the docket is warranted.

Valley Queen hopes that this explanation of the basis for its motion is helpful to the Commission in deciding whether to reopen this docket for further proceedings.

## CONCLUSION

The Commission has the power to vacate the Interruptible Agreement, because, for example, there was no meeting of the minds at creation. The Commission also has the power to determine whether, by virtue of how NorthWestern has misapplied the Interruptible Agreement, NorthWestern has run afoul of its obligations under the Firm Agreement. Valley Queen has made out a cognizable case that either of these remedies is warranted. On that basis, Valley Queen respectfully requests that the Commission reopen the docket for further proceedings.

Dated this 31st day of October, 2025.

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