

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

**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.**

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**STAFF’S RESPONSE TO VALLEY
QUEEN CHEESE FACTORY, INC.’S
MOTION TO REOPEN DOCKET**

NG23-015

The Commission Staff, by and through its attorney of record, hereby files this response in the above-captioned siting proceeding.

I. Preliminary Statement.

For purposes of this brief, the South Dakota Public Utilities Commission shall be referred to as the “Commission”; Commission Staff shall be referred to as “Staff”; Otter Tail Power Company shall be referred to as “Otter Tail”; and Valley Queen Cheese Factory, Inc. shall be referred to as “Valley Queen”.

II. Jurisdictional Statement and Authority.

The Commission has jurisdiction over this matter pursuant to SDCL Chapter 1-26, Chapter 15-6, Chapter 49-1 and Chapter 49-34A, specifically, SDCL § 15-6-60(b), SDCL § 49-34A-4, SDCL § 49-34A-26, and SDCL § 49-34A-61.

III. Background and Facts.

On August 18, 2023, NorthWestern filed with the Commission a Request to Approve a Contract with Deviations with Valley Queen Cheese Factory, Inc. regarding provision of interruptible natural gas service to Valley Queen. At the time of the filing, Valley Queen was a

NorthWestern natural gas customer, receiving firm service. NorthWestern also filed a copy of the Confidential Interruptible Transportation Service Agreement (Interruptible Agreement) executed by NorthWestern and Valley Queen for approval. In its filing Letter, NorthWestern asserted that Valley Queen requested additional transportation service capacity, and when presented with a number of options, including firm service options, by NorthWestern, Valley Queen chose the interruptible transportation service. NorthWestern further explained that to provide that service, NorthWestern would upgrade its distribution facilities to mitigate interruptions to Valley Queen, and would install sensors to monitor pressure and flow capabilities on the distribution system and the Milbank transmission line, as well as install a control valve on the pipeline to Valley Queen's facility that would automatically curtail Valley Queen's service to the volume stated in its firm capacity contract if there is a drop in pressure or flow capability.

In response to Staff's Data requests, NorthWestern explained that based on historical data and accounting for the new load, there would be a risk to Valley Queen of partial or total curtailment based on conditions on the transmission system feeding Milbank 9% of the time¹, and NorthWestern confirmed that under the proposed Contract, there would be two pipes bringing gas to Valley Queen, but there will still be just one meter.² NorthWestern further explained that the improvement project is to mitigate shortfalls in the capability of the Milbank distribution system to transport gas from the TBS to the Valley Queen plant, which must be addressed whether growth is via firm or interruptible service, and that the project will not address the transmission system, which was expected to be the driver of curtailment³. The Interruptible Agreement also includes a

¹ Response to Staff's Data Request 1-2.

² Response to Staff's Data Request 1-4 c.

³ Response to Staff's Data Request 1-2.

surcharge and minimum volume requirements due to recover the cost of installing the line that was needed to provide the interruptible service.

The Commission considered NorthWestern's request for Approval of the Contract with Deviations with Valley Queen on September 22, 2023. Mr. Jeff Decker and Mr. Reed McKee appeared at the meeting on behalf of NorthWestern. Mr. James Moore, Woods, Fuller, Shultz & Smith PC, appeared as the attorney representing Valley Queen. At this meeting, Commissioner Fiegen inquired into the costs to construct the improvement contemplated in the Contract and that Valley Queen would pay the costs associated with the improvements required to provide Valley Queen with this service, specifically to ensure those costs were not borne by other ratepayers⁴. Commissioner Nelson specifically asked Valley Queen if they were comfortable with the tradeoffs included in the contract and that NorthWestern's sensors may automatically interrupt service to Valley Queen without notice⁵. Mr. Moore represented to the Commission that he had no concerns or objections with the Contract⁶. After hearing from the parties, the Commission granted NorthWestern's request and on September 26, 2023, issued an Order Approving the Contract with Deviations and Approving Tariff Revisions.

On September 19, 2025, Valley Queen filed a Motion to Reopen the Docket to request the Commission vacate its previous order to allow the parties to negotiate a new agreement. Valley Queen further requests the Commission direct Staff to work with the parties on the terms of the new agreement and grant other relief the Commission deems just and equitable. The basis for

⁴ September 22, 2023, PUC Meeting Recording, <https://puc.sd.gov/commission/media/2023/puc09222023.mp3>, beginning at 21:36.

⁵ September 22, 2023, PUC Meeting Recording, <https://puc.sd.gov/commission/media/2023/puc09222023.mp3>, beginning at 21:36.

⁶ September 22, 2023, PUC Meeting Recording, <https://puc.sd.gov/commission/media/2023/puc09222023.mp3>, beginning at 21:36.

Valley Queen's claims and prayer for relief rely on allegations that NorthWestern's implementation of the Interruptible Agreement, particularly based on the use of a risk notification system and control valves that close automatically which prevents Valley Queen from taking the 1,450 MMbtu firm service agreed to in the Firm agreement and is preventing Valley Queen from taking interruptible service pursuant to the agreement approved in NG23-015, and leave Valley Queen responsible for costs of their minimum use volumes without the ability to actually receive the volumes. Valley Queen claims that Valley Queen would not have agreed to the Interruptible Agreement had they known how NorthWestern would provide interruptible service, and therefore there was no meeting of the minds and the Interruptible Agreement is void and should be vacated.

Analysis

- 1. There is a basis in state law for the Commission to reopen the docket to vacate the Commission's previous Order, but Valley Queen's Motion fails to provide legal authority or factual support to reopen the docket.**

Valley Queen's Motion fails to state a statutory or other legal authority to support the Commission reopening the docket and vacating the September 26, 2023, Order Approving Contract with Deviations and Approving Tariff Revisions (Order). Therefore, it is a bit unclear what basis Valley Queen relies on to reopen the docket.

One statute, SDCL § 49-34A-61 allows a party to seek modification or vacation of any commission order. In its Motion to Reopen the Docket, Valley Queen requests the Commission to vacate the previous order, and the statute does not establish a specific time limit for filing such a request. This request to vacate is entirely encompassed in the NG23-015 proceeding and in the

Commission's order in that docket, so it is reasonable to reopen the docket to consider the request to vacate the 2023 decision if filed properly and sufficient basis is raised.

Under state law, motions for relief from a judgment, such as a lack of meeting of the minds, must be filed within a reasonable timeframe based on a void judgment, or within one year, depending on the basis of the motion. See § SDCL15-6-60(b). In this case, the Order was issued in September 2023, and the Motion was filed in September 2025. This timeframe raises a question as to whether the Motion was filed within a reasonable timeframe. However, given that the tariff and Interruptible Agreement sought to be vacated took some time for NorthWestern to implement, it is plausible that Valley Queen may not have recognized that NorthWestern's intent and understanding of the terms of the Contract may have differed from Valley Queen until the service was implemented.

SDCL § 49-34A-61 is clear that the burden of proof in such a proceeding is on the party seeking to vacate the Commission's order, and as the moving party, Valley Queen must show there is a sufficient basis to reopen the docket to vacate the 2023 order. "To form a contract, there must be a meeting of the minds or mutual assent on all essential terms." *Jacobson v. Gulbransen*, 623 N.W. 2d 84, 90 (S.D. 2001). "Whether there was mutual assent is determined by looking at the words and conduct of the parties". *Read*, 2000 SD 66 at ¶ 25, 610 N.W.2d at 786. *Id.* "Whether the parties had a meeting of the minds is a question of fact". *Id.* "As a general principle, one who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party." *LPN Trust v. Farrar Outdoor Adv., Inc.*, 1996 S.D. 97, ¶13, 552 N.W. 2d 796, 799 (*quoting Flynn v. Lockhart*, 526 N.W.2d 743, 746 (S.D. 1995)). Valley Queen bears the burden to show there was no meeting of the minds in regard to, and at the time of their agreement to the Interruptible

Agreement. To meet its burden, Valley Queen's must overcome the presumption that it understood the terms of the Interruptible Agreement, and prove that at the time the Agreement was signed, and approved by the Commission

Staff is not convinced Valley Queen has presented such a factual basis in the Motion. Valley Queen has not provided evidence in the text of the Interruptible Agreement, or from other sources that corroborates their claim that there was not a meeting of the minds. In response to Commission questions Valley Queen also affirmatively recognized that it understood the tradeoffs it would have to make in entering the Interruptible Agreement and understood that the interruptible gas could be curtailed with no warning⁷. While it is apparent that at this point in time, after implementation of the Interruptible Agreement, Valley Queen believes it would be more beneficial to Valley Queen if NorthWestern were to supply gas, and calculate firm and interruptible capacity in a different manner, Valley Queen has not presented evidence to show that they actually had a different understanding of how Interruptible Agreement would be implemented at the time of agreement. In this case, the allegations in the Motion, and the supporting evidence, even when taken in the light most favorable to Valley Queen, do not appear to present a reasonable basis that there was not a meeting of the minds when Valley Queen signed the Interruptible Agreement or when the Commission approved the Agreement.

Even if Valley Queen had provided evidence that there was not a meeting of the minds in entering the Interruptible Agreement, Valley Queen has not shown that the Commission is the appropriate forum to consider Valley Queen's Motion and the request the Commission vacate its previous Order. The Commission is not a court of general jurisdiction and only has the authority

⁷ September 22, 2023, PUC Meeting Recording, <https://puc.sd.gov/commission/media/2023/puc09222023.mp3>, beginning at 21:36.

granted by the Legislature through statute. The Commission has the authority under SDCL Chapter 49-34A to approve tariffs, including contracts with deviations, and to implement those tariffs. The Commission also has the authority to vacate its own orders. However, Valley Queen's Motion and the request to vacate rests entirely on whether there was a meeting of the minds when the Interruptible Agreement was created, and therefore whether a contract was actually formed between Valley Queen, and Valley Queen has not made clear under what authority that the Commission should issue such an order that would determine specific legal rights and obligations on a contract between two parties. Additionally, even if the Commission did issue such an Order, the Commission does not have authority to grant any type of relief necessary as a result of vacating the Order, particularly in assessing the costs NorthWestern has invested in the line constructed pursuant to the agreement.

Further, the Interruptible Agreement specifically addresses how disputes stemming from the Interruptible Agreement will be handled. Specifically, Section 7.4 provides:

7.4 Disputes, Forum and Applicable Law. This Agreement is governed by the laws of the State of South Dakota. Any 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. **Any other action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement must be brought against either of the Parties in the courts of the State of South Dakota or, if it can acquire jurisdiction, in the United States District Court for the District of South Dakota.** The Parties consent to the jurisdiction of such courts and waive any objection to venue therein. See Interruptible Agreement, Section 7.4, (*Emphasis added*).

Pursuant to this Section, actions arising out of the interruptible service conditions are governed by the tariff or Commission rules and regulations and are subject to the exclusive jurisdiction of the

Commission, while any other action must be brought in the courts of South Dakota or in the United States District Court.

In this case Valley Queen's Motion goes beyond a claim that the Interruptible Agreement is not being implemented in accordance with provisions included therein and essentially seeks a declaration from the Commission that the Interruptible Agreement was never formed and could never have been approved by the Commission. Such a determination has a direct impact on the legal rights of the parties, particularly because NorthWestern has already invested in constructing a line to Valley Queen pursuant to the contract. Vacating the Commission's approval of the Interruptible Agreement would leave unanswered questions regarding the rights and obligations of both Valley Queen and NorthWestern. The question of whether the parties ever entered into and presented a valid agreement to the Commission for approval appears to be a matter for circuit court as outlined in Section 7.4 of the Interruptible Agreement and therefore, the Commission should deny the Motion to Reopen the Docket for the purpose of vacating the 2023 Order.

2. Valley Queen's service concerns raised in the Motion to Reopen the Docket are within the scope of the Commission's jurisdiction and NG23-015 is a reasonable forum to explore those concerns.

Valley Queen's Motion did reasonable questions regarding how NorthWestern is delivering gas, and particularly whether the control valves and the warning system is preventing Valley Queen from accessing firm and interruptible gas. In this case, NorthWestern and Valley Queen agreed that NorthWestern would provide firm service up to 1,450 MMBtu per day under the Firm Service Agreement, and NorthWestern would provide interruptible service pursuant to the Interruptible Agreement, along with other conditions. Valley Queen agreed to pay the costs

associated with the upgrades NorthWestern needed to make to the system in order to provide the service requested by Valley Queen. Based on Valley Queen's Motion, Valley Queen has significant concerns about how NorthWestern is implementing both the Firm and Interruptible Agreements and is provisioning gas service to Valley Queen, and specifically whether NorthWestern is providing service in accordance with the tariffs, though the actual cause of the concern is unclear. As a public gas utility, NorthWestern does have an obligation to provide service in accordance with state law, and pursuant to the company's tariffs and the Commission clearly has jurisdiction to examine Valley Queen's concerns.

If NorthWestern is not providing service in accordance with the tariffed Interruptible or Firm Agreement, there may be cause for action by the Commission, including opening an investigation into NorthWestern's furnishing of natural gas service to Valley Queen pursuant to SDCL § 49-34A-26, or a complaint. Staff is currently reviewing the allegations raised in the Motion as to the delivery of gas to Valley Queen. At this point, Staff believes further information is necessary from both Valley Queen and NorthWestern to determine whether NorthWestern is providing service in accordance with the tariff, whether a formal investigation is needed, and the type of action or filing that is most appropriate. While Valley Queen's filing may be better suited as a new docket, and while the final resolution of the concerns raised in the Motion may ultimately need to be resolved with a new docket, Staff does not object to reopening the docket as a preliminary forum to explore Valley Queens concerns.

Conclusion

After review and consideration of all issues raised in Valley Queen's Motion to Reopen the docket, Staff believes the Motion to Reopen the Docket for the purpose of vacating the Order

should be denied. However, Staff does not object to reopening the docket as a preliminary forum to further explore the operational and service concerns raised in the Motion with the understanding that this matter may ultimately need to be handled in a different docket or forum.

Dated this 23rd day of October.



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