**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 MOTION TO DISMISS AND MOTION FOR HEARING** |

COMES NOW Otter Tail Power Company ("***Otter Tail***") and respectfully submits this Motion to Dismiss the Complaint filed with the Public Utilities Commission ("***Commission***") by Valley Queen Cheese Factory, Inc. ("***Valley Queen***") dated July 9, 2025 (the "***Complaint***") and Motion for Hearing on the same pursuant to ARSD 20:10:01:11:01 and ARSD 20:10:01:15. Otter Tail is entitled to dismissal because Valley Queen lacks standing to bring this Complaint under SDCL 49-34A-26. Additionally, Otter Tail is entitled to dismissal because the Complaint fails to state a claim upon which relief can be granted.

## I. Factual Background as alleged by Valley Queen.

Otter Tail is a public utility that sells electricity in South Dakota, North Dakota, and Minnesota. (Complaint ¶3). Otter Tail is regulated by the Commission. (Complaint ¶3). Valley Queen is a cheese and dairy product processing factory in South Dakota that buys all its electricity from Otter Tail. (Complaint ¶¶1, 5).

As Otter Tail is a public utility, the Commission approves all electric rates Otter Tail offers to customers for the purchase of electricity. (*See* Complaint ¶3). In 2021, the Commission approved an electric rate called the Real Time Pricing rate ("RTP") for electrical services, hereinafter referred to as the "***RTP Tariff***." (Complaint ¶6, Ex. A). Otter Tail offers the RTP Tariff to customers on a voluntary basis. (Complaint ¶8). Valley Queen chose to purchase some of its electrical services under the RTP Tariff. (Complaint ¶8). In November 2023, the Commission

approved an update to the RTP Tariff. (Complaint ¶6, Ex. A).

In the spring of 2024, Otter Tail requested an update to its electric rate known as the Phase in Rider ("***PIR***"). (Complaint ¶9, Ex. C). The PIR was designed to allow Otter Tail to recover additional costs associated with creating and maintaining its power supply. (Complaint ¶9). The Commission first issued an order adopting the PIR in 2019, and since then the PIR has been adjusted annually. (Complaint ¶¶9, 11). Importantly, the Commission issued an order stating that the PIR applies to the RTP Tariff. (Complaint ¶10, Ex. D). Since 2021, Valley Queen has paid several hundred thousand dollars to Otter Tail because of the Commission's orders approving the application of the PIR to the RTP Tariff. (Complaint ¶21).

In 2023, Valley Queen first approached Otter Tail to object to the application of the PIR to the RTP Tariff. (Complaint ¶20). Then, on July 9, 2025, Valley Queen filed a Complaint with this Commission objecting to the application of the PIR to the RTP Tariff. (Complaint). Therein, Valley Queen argues that the application of the PIR to the RTP Tariff is "unjust and unreasonable"; seeks an order from the Commission declaring that the "PIR should not apply to the RTP Tariff" and amending the "Mandatory Riders—Applicable Matrix" to that effect; and awarding Valley Queen damages for the "charges it has paid since at least June 2023 due to the application of the PIR to the RTP Tariff." (Complaint ¶24 and "Request for Relief").

Otter Tail now brings this Motion to Dismiss under rule SDCL 15-6-12(b)(1) on the basis of lack of subject matter jurisdiction and SDCL 15-6-12(b)(5) on the basis of failure to state a claim upon which relief can be granted.

## II. Motion to Dismiss Standard.

ARSD 20:10:01:11:01 permits Otter Tail to raise all defenses set forth in SDCL 15-6-12(b) in a motion to dismiss, and ARSD 20:10:01:11:01 provides that the South Dakota Rules of Civil

Procedure will apply in proceedings before the Commission. SDCL 15-6-12(b)(1) permits a motion to dismiss for lack of subject matter jurisdiction. Subject matter jurisdiction is the Commission's "competence to hear and determine cases of the general class to which [the] proceedings in question belong; the power to deal with the general subject involved in the action." *Bingham Farms Tr. v. City of Belle Fourche*, 2019 SD 50, ¶ 12, 932 N.W.2d 916, 919. "The [Commission's] authority to act in a particular class of cases is conferred solely by constitutional or statutory provisions." *Id.* (cleaned up and citations omitted). In other words, a motion to dismiss for lack of subject matter jurisdiction concerns the threshold question of whether a plaintiff's claims can be heard by the Commission. *See id*. A motion to dismiss under SDCL 15-6-12(b)(1) can be brought as a facial attack, under which the Commission cannot consider matters outside the pleadings, or a factual attack, under which the Commission can consider matters outside the pleadings. *Bingham Farms Tr.*, 2019 SD 50, ¶ 13, 932 N.W.2d at 919–20. Otter Tail brings its Motion to Dismiss as a factual attack, although Otter Tail is entitled to relief under either standard.

SDCL 15-6-12(b)(5) allows a motion to dismiss for failure to state a claim upon which relief can be granted. On a motion to dismiss for failure to state a claim, the Commission "may not consider documents 'outside' the pleadings." *Healy Ranch P'ship v. Mines*, 2022 SD 44, ¶ 35, 978 N.W.2d 768, 778 (citations omitted). To survive a motion to dismiss for failure to state a claim, a plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level. The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true." *Sisney v. Best Inc.*, 2008 SD 70, ¶7, 754 N.W.2d 804, 808 (cleaned up and citations omitted).

## III. Analysis and Argument.

Valley Queen's Complaint, at its core, attacks an enforceable tariff as "unlawful" and requests a refund for past payments made under that tariff. Valley Queen requests such relief because, in its view, the current design and application of a Commission-approved rate—the application of the PIR to RTP Tariff—is illogical, unjust, and unreasonable.

The Commission cannot provide Valley Queen any of its requested relief. First, South Dakota law does not give a single private ratepayer, such as Valley Queen, standing to ask the Commission to reexamine a lawful tariff. As such, Valley Queen lacks standing for its Complaint, and the Complaint should be dismissed for lack of subject matter jurisdiction.

Additionally, the Complaint fails to state a claim upon which relief can be granted. As a matter of law, a tariff has the full force and effect of law and is unassailable in judicial proceedings attacking the sufficiency of that tariff. Instead, a ratepayer may only challenge a tariff prospectively, which Valley Queen does not do here. Valley Queen is free to intervene in, or bring challenges to, the prospective application of a proposed rate before the Commission and should do so if it seeks changes to any current tariff. However, Valley Queen's Complaint attacking the legal sufficiency of the application of the PIR to RTP Tariff is barred and Valley Queen cannot request a refund for past payments made under that tariff. Dismissal should ensue.

### A. The Commission lacks subject matter jurisdiction over the Complaint because Valley Queen lacks standing to bring its Complaint under SDCL 49-34A-10 and SDCL 49-34A-26.

"Standing . . . is a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Lake Hendricks Imp. Ass'n v. Brookings Cnty. Planning & Zoning Comm'n*, 2016 SD 48, ¶ 12, 882 N.W.2d 307, 312. Although standing and subject matter jurisdiction are separate doctrines, lack of standing deprives a court or commission of jurisdiction over a claim. *See Powers*

*v. Turner Cnty. Bd. of Adjustment*, 2020 SD 60, ¶ 13, 951 N.W.2d 284, 290 (stating "a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing"). Here, the Complaint should be dismissed in its entirety because Valley Queen lacks standing to bring the Complaint.

There is both traditional standing, which requires an injury in fact, and statutory standing creating a private right of action, which is created by statute. *See Jensen v. Dep't of Corr.*, 2025 SD 35, ___ N.W.3d _____ (discussing the Supreme Court's application of traditional and statutory standing historically). Both statutory and traditional standing are required to bring a Complaint. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 1547–48 (2016). The allegations in the Complaint fail to establish that Valley Queen has either statutory standing giving Valley Queen a private right of action under South Dakota law or traditional standing (injury in fact standing). Because Valley Queen has no standing, the Commission should decline to exercise jurisdiction of the Complaint. *See Powers*, 2020 SD 60, ¶ 13, 951 N.W.2d at 290.

Here, Valley Queen's Complaint asks the Commission to open an investigation into a tariff the Commission has already approved, now declare that previously-approve tariff is "unjust and unreasonable," and retroactively change that tariff to Valley Queen's liking. SDCL 49-34A-26 bars Valley Queen from bringing its Complaint. SDCL 49-34A-26 permits the Commission to reexamine a tariff based only on a claim brought by (1) a political subdivision, (2) by another public utility, and (3) by 25 private ratepayers. *See* SDCL 49-34A-26. Valley Queen is none of these.

SDCL 49-34A-26 was enacted in 1975 as part of the South Dakota Territorial Integrity Act. *Matter of Nw. Pub. Serv. Co.*, 1997 SD 35, ¶ 15, 560 N.W.2d 925, 927. The legislation was enacted for the purpose of "elimination of duplication and wasteful spending in all segments of

the electric utility industry." *Id*. To further that goal, the Legislature conferred statutory standing to bring a complaint concerning a tariff in limited circumstances. Those circumstances do not permit the Commission to open an investigation into a rate based on the complaint of a single private ratepayer. SDCL 49-34A-26, titled "Investigation of rates or services by commission--Notice—Action," states in full:

> On its own motion *or upon a complaint made against any public utility, [1] by the governing body of any political subdivision, [2] by another public utility, [3] or by any twenty-five consumers of the particular utility that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any regulation*, measurement, practice, act or omission affecting or relating to the transmission, delivery or furnishing of natural gas or electricity or any service in connection *therewith is in any respect unreasonable, insufficient or unjustly discriminatory,* or that any service is inadequate or cannot be obtained, the Public Utilities Commission shall proceed, with notice, to make such investigation as it may deem necessary and take such action as deemed necessary and appropriate.

SDCL 49-34A-26 (emphasis added).

The plain language of this statute permits the Commission to open an investigation into a public utility based on customer complaints in three circumstances: when the complaint is brought by (1) a political subdivision, (2) by another public utility, and (3) by 25 private ratepayers. SDCL 49-34A-26. The South Dakota Supreme Court has stated that "[w]here the legislature prescribes a standard of guidance for the administrative agency to follow," the administrative agency "must lend credence to the guidelines established in the statutes." *Matter of Nw. Pub. Serv. Co.*, 1997 SD 35, ¶¶23, 29, 560 N.W.2d at 929–30. Further, "a statute . . . provid[ing] that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. . . . [I]t has also been assumed when the legislature expresses things through a list, that what is not listed is excluded." *In re Estate of Flaws*, 2012 SD 3, ¶ 19, 811 N.W.2d 749, 753–54.

As such, SDCL 49-34A-26, which the Commission must defer to, does not allow the Commission to open an investigation into Otter Tail based on Valley Queen's Complaint or any

other complaint brought by a single private ratepayer. This makes sense. It would not serve to promote government efficiency if the Commission was required to reevaluate its settled rates whenever a single private ratepayer complained. If any single ratepayer could challenge a tariff, utilities and the PUC could be overwhelmed with litigation. As such, in SDCL 49-34A-26, the Legislature prudently limited the circumstances in which a tariff could be reconsidered to when a complaint was brought: (1) by a government entity, (2) another public utility, or (3) by 25 private ratepayers. SDCL 49-34A-26 does not give Valley Queen the right to request an investigation into the application of the RTP Tariff and PIR. Because Valley Queen lacks standing to require the Commission to reexamine the application of the PIR to RTP Tariff, the Complaint should be dismissed under SDCL 15-6-12(b)(1) for lack of jurisdiction.[1]

Valley Queen also lacks traditional standing for its Complaint. To establish traditional standing, Valley Queen "must have personally suffered some actual or threatened injury as the result of *the putatively illegal conduct of the defendant*." *See Abata v. Pennington Cnty. Bd. of Commissioners*, 2019 SD 39, ¶ 12, 931 N.W.2d 714, 719 (emphasis added). Valley Queen cannot establish traditional standing because it has not alleged any illegal conduct of Otter Tail. As a matter of law, once a rate is approved by the Commission, that tariff has the full force and effect of law. SDCL 49-34A-10 ("Schedules and tariffs approved by the commission have the force and effect of law."). Tariffs have the full force and effect of law so that utility companies can rely on those rates. *See Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.,* 284 U.S. 370, 389, 52 S. Ct. 183, 186 (1932). As all tariffs are lawful, Valley Queen has not alleged any "putatively illegal

[1] The plain language of SDCL 49-34A-26 only prohibits complaints brought by single ratepayers about any rate or practice is "is in any respect unreasonable, insufficient or unjustly discriminatory" in certain circumstances. SDCL 49-34A-26. SDCL 49-34A-26 does nothing to prohibit customer complaints in other circumstances, such as in billing disputes, in which a complaint is not attacking the sufficiency of a lawful tariff. However, here, Valley Queen's Complaint directly challenges the sufficiency of the application of the PIR to RTP Tariff and thus is prohibited by SDCL 49-34A-26.

conduct" on Otter Tail's behalf to establish an injury in fact. *See Abata v. Pennington Cnty. Bd. of Commissioners*, 2019 SD 39, ¶ 12, 931 N.W.2d 714, 719. Further, essentially all states, like South Dakota, prohibit lawsuits challenging tariffs. This prohibition is known as the "filed rate doctrine." *See Wegoland, Ltd. v. NYNEX Corp.,* 27 F.3d 17, 18 (2d Cir. 1994) (explaining that the filed rate 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"); *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679 (8th Cir. 2009) (also discussing the filed rate doctrine). Put simply, because Valley Queen has not alleged any "putatively illegal conduct" on behalf of Otter Tail, it cannot establish standing based on an "injury in fact."

In sum, Valley Queen has neither statutory standing nor injury in fact (traditional) standing for its Complaint, so the Commission lacks subject matter jurisdiction over Valley Queen's claims. Further, as discussed below, even if the Commission has jurisdiction to hear the Complaint, the Commission should dismiss the Complaint for failure to state a claim upon which relief can be granted.

### B. The Complaint should be dismissed under SDCL 15-6-12(5) because it fails to state a claim upon which relief can be granted.

Further, even if the Commission had jurisdiction of the Complaint, the Complaint should be dismissed for failure to state a claim upon which relief can be granted. Again, Valley Queen seeks to have the Commission declare a lawful tariff to now be unlawful. But the Commission can provide no such relief. As a matter of law, the Commission has no power to change a tariff retroactively. South Dakota law, the filed rate doctrine, and the Supreme Court bar against "retroactive lawmaking" prohibit any challenge to a lawful tariff or challenges to a tariff based on previous payments under that tariff. Instead, ratepayers may only seek relief by requesting changes to a tariff prospectively. Because the Complaint does not seek prospective changes but rather

attacks the current tariff and past payments under that tariff, it should be dismissed in its entirety for failure to state a claim upon which relief can be granted.

As a matter of law, the Commission has no power to retroactively change the RTP Tariff and PIR under *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 52 S. Ct. 183 (1932) and its bar against "retroactively lawmaking." In *Arizona Grocery Co.*, the United States Supreme Court held that a public utility cannot "retroactively repeal" a tariff in response to a customer complaint that the tariff is unlawful. The Court stated:

> [a utility] *carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and if the order merely sets limits, it is entitled to protection if it fixes a rate which falls within them.* Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.

*Arizona Grocery Co.,* 284 U.S. at 389, 52 S. Ct. at 186 (emphasis added). Courts and commissions across the country have recognized that *Arizona Grocery Co.* prohibits a court or commission from hearing a complaint concerning a tariff and refers to this principle as a "bar against retroactive lawmaking." *See ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 967 (D.C. Cir. 2007) ("The *Arizona Grocery* doctrine is essentially a prohibition against retroactive ratemaking."); *BP W. Coast Products, LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004) ("*Arizona Grocery* proscribes the retroactive revision of established rates through ex post reparations. . . . *Arizona Grocery* bars reparations that retroactively change a final Commission-approved rate."); *Verizon Tel. Companies v. F.C.C.*, 269 F.3d 1098, 1108 (D.C. Cir. 2001) (same); *Util. Reform Project v. Portland Gen. Elec. Co.*, No. 03-629, 2003 WL 22938480 (Or. P.U.C. Oct. 22, 2003) ("Further, the utility cannot be ordered to give refunds based on past rates which it lawfully charged under its tariff. . . . [T]he Commissioner has no authority to award any reparations, either for

unreasonable or unjustly discriminatory rates, or for overcharges" based on the filed rate doctrine and bar against retroactive lawmaking, which "are cornerstones of Oregon regulatory law"); 2024 WL 3226288 (Ill.C.C.) 22 (applying Illinois's statutory scheme, which is similar to South Dakota's statutory scheme, to state that the Commission only has authority to change a tariff prospectively, not retroactively, and thus cannot order a utility to issue a refund for a lawful tariff); *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) (discussing *Arizona Grocery Co*.).

Furthermore, the filed rate doctrine, which is a corollary to the bar against retroactive lawmaking, prohibits Valley Queen from challenging the RTP Tariff and PIR as unlawful. "Simply stated, the [filed rate] 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." *Wegoland, Ltd. v. NYNEX Corp.,* 27 F.3d 17, 18 (2d Cir. 1994); *see also Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679 (8th Cir. 2009). South Dakota law has codified the filed rate doctrine in SDCL 49-34A-10, which states that "[s]chedules and tariffs approved by the commission have the force and effect of law." SDCL 49-34A-10. While the bar against retroactive lawmaking prohibits any cause of action based on prior charges accrued under a tariff, the filed rate doctrine also prohibits the challenge of tariffs as unlawful.

Here, the Complaint demands that the Commission do exactly what is prohibited by the bar against retroactive lawmaking and the filed rate doctrine. As a matter of law, the Commission has no authority to retroactively change a tariff, the very relief Valley Queen seeks, or hear a claim that the current rate is unlawful. Additionally, as a matter of law, the RTP Tariff and PIR are lawful under SDCL 49-34A-10. As such, Valley Queen's allegations do not state a claim upon which relief can be granted.

Regardless, Valley Queen is not completely without remedy. While Valley Queen cannot bring a claim seeking to retroactively change a lawful tariff, it may petition to request a change in rates proposed to the Commission. Therefore, dismissal of the Complaint will not prejudice Valley Queen. Valley Queen may intervene in any prospective proceedings concerning rate proposals.[2]

**IV. Conclusion.**

For the foregoing reasons, Valley Queen has no standing to bring its Complaint. Further, the Complaint fails to state a claim upon which relief can be granted. Otter Tail respectfully requests that its Motion to Dismiss be granted in full. Otter Tail also respectfully requests its Motion for Hearing in this matter be granted.

Dated this 15th day of August 2025.

*/s/ Paul W. Tschetter*

Paul W. Tschetter
Jason R. Sutton
BOYCE LAW FIRM, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
jrsutton@boycelaw.com
pwtschetter@boycelaw.com

Mr. Cary Stephenson
Associate General Counsel
Otter Tail Power Company
215 South Cascade St.
PO Box 496
Fergus Falls, MN 56538-0496
CStephenson@otpco.com
Attorneys for Otter Tail Power Company

[2] It is also relevant to consider that Otter Tail anticipates filing with the Commission significant modifications to the RTP Tariff in the next several weeks. The complex work underlying this filing, which pertains to all Otter Tail's state jurisdictions, has been ongoing for some time. Among other things, the changes will move the RTP Tariff more closely to a market energy pricing mechanism that will not require application of the PIR percent of bill methodology. Otter Tail has advised Valley Queen that this work is underway and has committed to discussing the filing with Valley Queen.

## CERTIFICATE OF SERVICE

I, Paul W. Tschetter, do hereby certify that I am a member of Boyce Law Firm, LLP, attorneys for Otter Tail Power Company and that on the 15th day of August 2025, a true and correct copy of the foregoing and this Certificate of Service were served via email to the following addresses listed:

Ms. Leah Mohr
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Leah.Mohr@state.sd.us

Ms. Amanda Reiss
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
amanda.reiss@state.sd.us

Mr. Darren Kearney
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
darren.kearney@state.sd.us

Mr. Jon Thurber
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
jon.thurber@state.sd.us

Mr. James E. Moore – Valley Queen Cheese Factory, Inc.
Woods, Fuller, Shultz & Smith P.C.
P.O. BOX 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
James.Moore@woodsfuller.com

Mr. Cary Stephenson
Associate General Counsel
Otter Tail Power Company
215 South Cascade St.
PO Box 496
Fergus Falls, MN 56538-0496
CStephenson@otpco.com

*/s/ Paul W. Tschetter*
Paul W. Tschetter