

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Ag Processing, Inc.,	)	
Complainant,	)	
	)	
v.	)	Case No. HC-2010-0235
	)	
KCP&L Greater Missouri Operations	)	
Company,	)	
Respondent.	)	

**KCP&L GREATER MISSOURI OPERATIONS COMPANY’S  
BRIEF CONCERNING AGP’S BURDEN OF PROOF**

KCP&L Greater Missouri Operations Company (“GMO” or “Respondent”), pursuant to the December 5, 2012 Order Directing Briefing of the Missouri Public Service Commission (“Commission” or “PSC”), submits this Brief concerning whether Complainant Ag Processing, Inc. (“AGP”) has carried its burden of proof under the preponderance of the evidence standard with regard to its allegation of imprudent operation of the steam hedging program conducted by GMO, then known as Aquila, Inc. (“Aquila”), in 2006 and 2007.

**I. Burden of Proof.**

1. The general standard of proof for civil cases is preponderance of the evidence. See State ex rel. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. en banc 2003). “Preponderance of the evidence is a standard of proof, that is, the degree or level of proof demanded in a specific case. Preponderance of the evidence is that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” Fujita v. Jeffries, 714 S.W.2d 202, 206 (Mo. App. E.D. 1986). Accord, Spencer v. Zobrist, 323 S.W.3d 391, 399 (Mo. App. W.D. 2010). “To

satisfy the preponderance standard, a party has the burden of proving that a proposition is more likely true than not.” Horning v. White, 314 S.W.3d 381, 385 (Mo. App. W.D. 2010).

2. This standard of proof must be differentiated from the competent and substantial evidence standard, which “is not a standard of proof but, rather, is a standard of judicial review of an administrative agency’s decision.” Spencer, 323 S.W.3d at 399.

3. A reviewing court looks at whether the decision of an administrative agency like the Commission is based on substantial evidence, which is “that which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inferences which can be drawn from it, and deferring all issues of weight and credibility, to the fact finder.” Fujita v. Jeffries, 714 S.W.2d 202, 206 (Mo. App. E.D. 1986). “To establish the preponderance of evidence, the trier of fact must resolve conflicting evidence; not so to establish substantial evidence. The competent and substantial evidence burden of proof is a different and lesser burden than the preponderance of the evidence burden of proof.” Id. (emphasis added).

4. The burden of proof never shifted in this case, and always remained with Complainant AGP. See Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. en banc 1991). The duty was on AGP to remove its case “from the field of conjecture and establish it by substantial evidence of probative value, or by inferences reasonably to be drawn from the evidence.” Zeigenbein v. Thornsberry, 401 S.W.2d 389, 393 (Mo. 1966). “Granting relief without requiring Ag Processing to prove the allegations in its complaint is reversible error.” Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., 2012 WL 5199664 at \*4 (Mo. App. W.D. 2012).

5. “The party having the burden of proof carries the risk of nonpersuasion.” Dills v. Dills, 304 S.W.3d 738, 743 (Mo. App. S.D. 2010), quoting McCloskey v. Koplar, 46 S.W.2d 557, 561-63 (Mo. en banc 1932). Indeed, “the party not having the burden of proof on an issue

need not offer *any* evidence concerning it.” Sneil, LLC v. Tybe Learning Ctr., Inc., 370 S.W.3d 562, 567 (Mo. en banc 2012) (original emphasis). “The trier of fact has the right to disbelieve evidence, even when it is not contradicted.” Id.

6. The Commission, as the trier of fact, is free to reject any inference of imprudence regardless of whether GMO presented evidence to the contrary. See State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, (Mo. App. W.D. 2003). “Merely creating a reasonable inference of imprudence would not conclusively establish imprudence, as the Commission is free to reject any inferences.” Id. “If the trier of fact does not believe the evidence of the party bearing the burden, it properly can find for the other party.” White v. Director of Revenue, 321 S.W.3d 298, 305 (Mo. en banc 2010).

7. Furthermore, if the evidence “is equally balanced and the jury is left in doubt, the litigant having the burden of proof loses.” Dills v. Dills, 304 S.W.3d 738, 743 (Mo. App. S.D. 2010). “Where evidence will support either of two contradictory inferences respecting the ultimate facts, there is a failure of proof, since it leaves the subject of liability in the field of conjecture.” Sigmund v. Lowes, 236 S.W.2d 14, 17 (Mo. App. St. Louis 1951). Where facts “give no more than an equal basis to two inconsistent inferences as to an essential fact, such party has failed by his proof to remove his case beyond the realm of speculation and conjecture as to the existence of this essential fact.” Edwards v. Business Men’s Assur. Co., 168 S.W.3d 82, 89 (Mo. 1942).

8. In other words, “[i]f the evidence presents a situation from which liability or nonliability may be equally inferred, the court must declare that no case has been made.” Farnham v. Boone, 431 S.W.2d 154, 156 (Mo. 1968). “Neither difficulty nor impossibility of proof of a material element in a case, though unfortunate, will alter the rules of evidence, and the

one having the burden of proof who cannot bear it is simply left with an unenforceable claim.” Daniels v. Smith, 471 S.W.2d 508, 513 (Mo. App. Springfield 1971).

9. A review of the record in this case demonstrates that AGP has not met its burden of proof. AGP has failed to prove that it was more likely than not that GMO operated its hedging program imprudently. It similarly failed to present evidence from which the Commission may properly infer that it is more likely than not that GMO operated its hedging program imprudently. To the contrary, GMO has presented substantial evidence to demonstrate that it acted properly. The Commission must conclude that AGP has failed to prove its prudence complaint by a preponderance of the evidence.

## II. AGP Has Not Satisfied Its Burden of Proof.

### A. The Evidence Demonstrates That Aquila Prudently Operated Its Steam Hedging Program.

10. The Commission found that Aquila was prudent in adopting a natural gas hedging program, and that Aquila’s hedging program was prudently designed. See Report and Order, ¶ 25 at 9-10, ¶ 31 at 11. Nevertheless, the Commission found that Aquila’s hedging program was imprudently operated because Aquila listened to, and believed, its five industrial customers regarding their estimated volume requirements of steam and administered the program on that basis. Id., ¶¶ 44-48 at 14-16.

11. The Commission made this finding after it improperly shifted the burden of proof to GMO. Id., ¶ G at 18. Relying on the rebuttal testimony of AGP’s sole witness, the Commission found that “[t]hroughout the years in question, Aquila’s forecasted/budgeted natural gas usage far exceeded the actual amounts burned for steam production.” Id., ¶ 44 at 14, citing Johnstone Rebuttal, Ex. 2 at 22, Chart Reb-2. This finding served as the linchpin for its Conclusion of Law in Paragraph G, where it determined that such variation “is sufficient to

demonstrate a serious doubt as to the prudence of Aquila's operation of that hedging program. Thus, the initial presumption of prudence is overcome, and the burden shifts to Aquila to dispel those doubts and prove that the hedging program was operated prudently. Aquila has failed to meet the burden." Id., ¶ 44 at 15 (emphasis added).

12. While the Commission found that AGP's evidence that budgeted natural gas volumes exceeded actual natural gas volumes "is sufficient to demonstrate a serious doubt as to the prudence of Aquila's operation of that hedging program" (Report and Order ¶ 44 at 14-15), it is insufficient to show that Aquila more likely than not was imprudent in the operation of its hedging program.

13. The evidence presented by GMO demonstrated that despite differences in the amount of natural gas budgeted and burned, Aquila acted properly in operating its steam hedging program. Therefore, GMO will review the evidence that outweighs any evidence of alleged imprudence offered by AGP, given that a "preponderance of the evidence is that which is of greater weight or more convincing than the evidence which is offered in opposition to it." Fujita v. Jeffries, 714 S.W.2d 202, 206 (Mo. App. E.D. 1986).

14. AGP's expert and only witness was consultant Donald Johnstone, who has no experience designing, administering, or executing a hedging program. (Tr. [Johnstone] at 62-63). Mr. Johnstone made much of the month of October 2006, holding it out as illustrative of Aquila's imprudent operation of its steam hedging program. (Ex. 1 [Johnstone Direct] at 20-21). The Commission relied upon Mr. Johnstone's testimony for just that one month, calling it a "good illustration of the problem with the operation of Aquila's hedging program," in making its imprudence determination for the entire 2006-2007 period. (Report and Order ¶ 43 at 14).

15. Yet Company witnesses Gary Gottsch and Wm. Edward Blunk explained that Mr. Johnstone's analysis ignored the market environment during that month, that Aquila's hedge

positions were still in a favorable financial position (“in the money”) as late as July 31, 2006, and that it was not uncommon to see poor performance in October 2006 among utilities that use hedging tools to protect against volatility. (Tr. [Gottsch] at 252; Ex. 102 at 9, 14-15; Ex. 105 at 33). Even Mr. Johnstone admitted this month was “extremely bad” and “one of the worst.” (Ex. 1 at 20-21).<sup>1</sup> Relying upon one or only a few months during the relevant years of 2006-07 for a finding of imprudence, particularly if those months are outliers, is unreasonable and contrary to the weight of the evidence.

16. AGP’s overall position (which was erroneously adopted by the Commission as generating the doubt sufficient to shift the burden of proof) is based on the mistaken contention that the volumes Aquila hedged should not have been based on anticipated volumes used, but rather on actual volumes. (Ex. 1 [Johnstone Direct] at 15-19, 28-30; Ex. 2 [Johnstone Rebuttal] at 15-22). Such a conclusion is at odds with the facts of the case.

17. A review of the evidentiary record demonstrates that GMO presented substantial evidence that Aquila acted properly. First, Aquila prudently administered its steam hedging program by hedging to the most accurate volumes possible, based on information received directly from steam customers who continued to assure Aquila that their operations would require such levels of service. Second, because customers are in the best position to determine their steam load requirements, Aquila has a duty to them to ensure reliable steam service and to believe their forecasted requirements. Third, Aquila adjusted its forecasts and natural gas hedge purchases in light of actual customer requirements. Finally, uncertainty in volumes is

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<sup>1</sup> It is important to note that natural gas prices were extremely volatile in the wake of Hurricanes Katrina and Rita, which struck in August-September 2005. (Ex. 105 [Blunk Direct] at 26-34 & Sched. WEB-12). The price of natural gas in December 2004 was about \$6.83/MMBtu. In December 2005 it reached a peak of \$15.378/MMBtu, then dropped to \$4.120/MMBtu in September 2006. These moves represented a price spike of 125%, followed by a decline of 73%. October 2006 was an “extremely bad” month in terms of hedging costs largely because of this sharp price decline. (Ex. 105 [Blunk Direct] at 23-24).

accommodated by the steam hedging program's One-Third Strategy, which has the capacity to manage the risk of decreasing volumes by as much as 66%.

(1) Aquila Maintained Regular Communication With Its Customers, Who Assured Aquila of their Load Requirements.

18. Contrary to the Commission's finding that Company witness and customer liaison Joseph Fangman "periodically spoke with customers about their anticipated need for steam" (Report and Order ¶ 45 at 15), Mr. Fangman testified that he talked with steam customers about their operations and load requirements "on a regular basis." (Tr. [Fangman] at 269; Ex. 103 at 4). Mr. Fangman's forecast knowledge was based on monthly, if not more frequent, contact with Aquila's steam customers. (Ex. 103 at 5 & Schedules JGF-1, JGF-2).

19. The information upon which Aquila launched its steam hedging program in mid-February 2006 was based upon an update that occurred days earlier. (Tr. [Gottsch] at 229-30, 252; Tr. [Fangman] at 274, 285-86; Ex. 102 at 13; Ex. 102 at Schedule GLG-2). Mr. Gottsch, who purchased the hedges, was aware of these customer forecasts as a result of his daily conversations with plant personnel (Ex. 102 at 11). Such efforts by both Mr. Fangman and Mr. Gottsch continued into 2007. (Ex. 103 at Schedule JGF-13; Tr. [Gottsch] at 252-53).

20. The evidence shows that the five steam customers continuously assured Aquila that they would increase their steam volumes to forecasted levels. (Ex. 102 at 11; Ex. 103 at 6-10). As noted in Mr. Fangman's Direct Testimony, assurances by the customers with regard to their load estimates continued throughout 2005 into 2007. (Ex. 103, Schedule JGF-3 at 17).

21. When an Aquila steam customer expected a significant change in its steam load requirements, that customer contacted Mr. Fangman, who was the primary contact at Aquila for any customer who had a change in steam load. (Tr. [Fangman] at 268-69, Ex. 103 at 6-7). Mr. Fangman also talked with Aquila steam customers about their operations and load requirements.

(Tr. [Fangman] at 269, 279). Based on these frequent customer communications, Aquila gathered the most accurate information regarding its steam customers' requirements.

22. Because customers maintained that they would indeed require the steam loads they predicted, the load requirements communicated to Mr. Fangman did not significantly vary from month-to-month during 2006 and 2007. (Ex. 103, Schedule JGF-1 at 85, 90-97, 101-105 & Schedule JGF-2 at 9-21). Similarly, their anticipated steam load requirements did not vary significantly from 2006 to 2007. (Ex. 103, Schedule JGF-1 at 85, 90-97, 101-105 & Schedule JGF-2 at 9-21).

23. Moreover, the customers' estimated load requirements were largely based on new load. (Tr. [Johnstone] at 84-85; Ex. 104 at 10). Thus, Aquila did not have historical load data upon which to judge its customers' needs, and therefore had no basis to know that its customers' estimates might be unreliable. (Tr. [Johnstone] at 85).

24. Mr. Fangman passed the information he received from steam customers regarding anticipated load requirements to Tim Nelson, an Electric System Analyst and a member of the Resource Planning Group at Aquila, to develop and update the budget upon which the hedges were purchased. (Tr. [Fangman] at 276-77; Ex. 103 at 4, 7).

25. The Commission inaccurately stated that "[t]he record does not indicate how Tim Nelson prepared his forecasts because he did not testify." See Report and Order ¶ 45 at 15. While Mr. Nelson did not testify, the record is replete with evidence as to Aquila's preparation of forecasts. Mr. Fangman testified that he worked on the forecasts of loads. (Tr. [Fangman] at 271). He further explained in detail the forecasting of natural gas requirements in his Direct Testimony, the stated purpose of which "is to describe the process for preparing forecasts and annual sales budgets for steam operations at the St. Joseph Lake Road Generating Station." (Ex. 103 at 2). As Mr. Fangman explained, "forecasts were prepared based on sales history and on



customer projections for large industrial loads.” (Ex. 103 at 3). Furthermore, Mr. Fangman reviewed Mr. Nelson’s forecasts for reasonableness, based on the information steam customers had given Mr. Fangman regarding their anticipated steam load requirements. (Tr. [Fangman] at 276-77, 288). Mr. Fangman made sure that steam customers’ anticipated load requirements were reflected in the forecasts, and would make adjustments to Mr. Nelson’s forecasts if needed. (Tr. [Fangman] at 276-77, 288 at 3-23; Ex. 103, Schedules JGF-2 at 9-14, JGF-3, and JGF-13).

26. Furthermore, Mr. Nelson discussed budget information every month or two with Mr. Gottsch, who made Aquila’s hedge purchases. (Tr. [Gottsch] at 252). However, because the steam customers did not significantly change their stated volume requirements, there was no reason and no data upon which to change Aquila’s forecast or hedge purchases outside of its annual update (other than the update that occurred in February 2006, just prior to the purchase of hedge positions for 2006).

27. Nevertheless, and without any citation to the record, the Commission concluded that “Aquila knew that those customer estimates were not reliable.” (Report and Order ¶ 48 at 16). This finding is not supported by the record. Furthermore, the record is replete with evidence regarding Mr. Fangman’s contacts with customers, the fact that there was little historical data upon which to judge customers’ needs, and the process of forecasting. AGP has not shown by a preponderance of the evidence that Aquila operated its hedging program imprudently by basing its hedged volumes on the requirements forecasted by its steam customers.

(2) Aquila Had a Duty To Rely on Its Customers’ Estimates.

28. Based on evidence that one industrial customer failed to increase production to anticipated levels, the Commission concluded Aquila was aware that its customers’ estimates of steam usage were unreliable. See Report and Order ¶ 47 at 15-16. Such evidence is not only an

inadequate basis from which to draw the conclusion that Aquila should not trust any of its customers, but also runs contrary to Aquila's duty to ensure reliable steam service, which the Commission recognized. Id., ¶ 48 at 16.

29. While Mr. Fangman acknowledged that customers' forecasts were not always accurate, these forecasts were nevertheless based on the five steam customers' best estimates at the time they were provided. Significantly, Aquila's duty to provide safe and adequate service prevented it from second guessing its customers' needs. The evidence shows that it was critical for Aquila to meet its steam customers' capacity and operational needs. (Tr. [Fangman] at 294; Ex. 104 at 7-8). Such steam customers had no backup source of steam if Aquila did not meet their needs. (Tr. [Fangman] at 294; Ex. 103 at 5-10; Ex. 104 at 11). For this reason, Aquila had an obligation to pay attention to the anticipated load growth of its steam customers. (Tr. [Johnstone] at 85). See MO. REV. STAT. § 393.130.1 (obligation to provide "safe and adequate" service and facilities). If customers advised of an anticipated significant increase in their steam load and Aquila failed to meet it, all steam customers could suffer. (Ex. 104 at 11). Consequently, Mr. Fangman testified that Aquila spent a great deal of time with the customers in order to gain an understanding of their needs. (Ex. 103 at 4-7).

30. The weight of the evidence shows that Aquila reasonably relied upon the forecasts of load requirements provided by its five steam customers because Aquila has a duty to meet the anticipated needs of those customers.

(3) Aquila's Forecasts and Purchases Were Adjusted Prudently, in Light of Customer Requirements.

31. Furthermore, the evidence shows that when steam customers advised Aquila of load changes, Aquila was able to and did adjust its forecast and hedges to reflect such changes. As stated in Aquila's response to AGP's Data Request No. AGP-0013 in HR-2007-0028: "If variations [between budget and actual natural gas volumes] are expected to be temporary, no

changes in the program are taken. If long-term and significant, these revisions may be reflected in either a forecast revision (AGP-0009) or incorporated into the next budget.” (Ex. 11). As explained in Aquila’s response to AGP’s Data Request No. AGP-0009, “forecasts may be prepared upon request to reflect significant changes.” (Ex. 13).

32. In 2005 Mr. Fangman was in contact with officials at steam customer Triumph Foods shortly after the October 12, 2005 fire at its facility regarding updates on its anticipated startup schedule. (Ex. 103 at Schedule JGF-4). Mr. Fangman provided Mr. Nelson with updated information from Triumph Foods regarding its anticipated load growth following the October 2005 fire (Tr. [Fangman] at 275), although the fire did not have a substantial effect on supply issues in 2006 (Ex. 103 at 9-10 & Schedules 4, 8, 14-16). Mr. Fangman also provided Mr. Nelson with an update on steam load projections for Albaugh Chemicals and Nestlé/Purina PetCare in October 2005. (Tr. [Fangman] at 275; Ex. 103 at 8).

33. On February 6, Mr. Fangman initiated conversations with all Lake Road Plant steam customers regarding their plans for the next few years. (Ex. 103 at Schedule JGF-5). On February 7, 2006 and February 15, 2006, Mr. Fangman sent updates regarding the steam customers’ expected load growth to Aquila’s John Modlin, Mike Smith, and Tim Nelson, as well as others. (Tr. [Fangman] at 275; Ex. 103 at Schedule JGF-6). This included information from AGP that it was looking into the possibility of expanding its St. Joseph facility, and that this expansion would require additional steam service from Aquila. (Ex. 103 at Schedule JGF-7 & Schedule JGF-11). The February 15, 2006 volumes were updated volumes for all of Aquila’s steam customers. (Tr. [Fangman] at 275).

34. Mr. Gottsch made Aquila’s 2006 natural gas hedge purchases on February 16, 2006 using the best available volume estimates that had just been updated the day before. (Tr. at 229-30, 252 [Gottsch]; Tr. at 274, 285-86 [Fangman]; Ex. 102 at 13; Ex. 102 at Schedule GLG-

2). Aquila's hedge purchases for 2006 were thus made with the most recent volume information possible that had been updated outside of Aquila's annual forecast and budget process.

35. Upon receiving the annual updated volumes from Mr. Nelson and the Resource Planning Group in 2006 and 2007, Mr. Gottsch adjusted natural gas hedge purchases to meet the new budgeted volumes. His actions reflected volume increases as ratable increases in purchases for the balance of the buying cycle and accounted for volume decreases by unwinding existing positions or by reducing purchases for the balance of the buying cycle. (Tr. [Gottsch] at 230; Ex. 102 [Gottsch Direct] at 12 & Schedule GLG-3).

36. In June 2006, Mr. Fangman provided Mr. Nelson with an update on the steam load projections for three Lake Road steam customers: Triumph Foods, Albaugh, and Silgan Containers. (Ex. 103 at Schedule JGF-8). When the annual budget was released in July 2006, Mr. Gottsch adjusted the 2007 hedge positions to reflect the new budget information. (Tr. [Gottsch] a 230, 239-40). Indeed, Aquila's steam hedge program had a positive value in July 2006. Id. at 251-52).

37. In June 2007, Mr. Fangman reviewed the Nelson steam forecast and provided Mr. Nelson with an update on AGP's growth in 2007 and 2008. (Ex. 103 at Schedule JGF-13). When the annual budget was released in July 2007, Mr. Gottsch adjusted the 2008 hedge positions, liquidating certain of the positions to meet the budgeted volumes. (Tr. [Gottsch] at 253).

38. Aquila had no incentive not to run its hedge program according to the best information it had regarding expected volumes. Id. at 247. It therefore purchased hedges according to the most up-to-date data that it was receiving from customers. Aquila annually reviewed and updated its forecast in 2006 and 2007, adjusting its hedge purchases upon release of the annual forecast to reflect that forecast. It also adjusted its forecasts when there was a

significant change in steam customer anticipated load requirements one day before any hedges were purchased. Mr. Nelson further discussed budget information with Mr. Gottsch every month or two, ensuring that the hedged volumes accurately reflected the volumes that steam customers were telling Aquila they would require. Id. at 252. Thus, the weight of the evidence shows that Aquila prudently managed its steam hedging program, making adjustments where appropriate. AGP has presented no evidence to the contrary.

(4) Aquila Did Structure its Hedging Program to Account for Volume Uncertainty.

39. The steam hedging program's One-Third Strategy accommodated uncertainty in volumes because it had the capacity to manage downward variances by as much as 66%. (Ex. 105 at 11, 18). Nevertheless, the Commission relied on an unsupported statement that Aquila "had an obligation to structure its hedging program to account for the uncertainty of volumes of gas" in reaching its conclusion that Aquila was negligent in relying on its customers' estimates and that, consequently, the operation of its hedging program was imprudent. See Report and Order ¶ 48 at 16.

40. The evidence in the record plainly demonstrates that Aquila's One-Third Strategy did account for such uncertainty. As explained by Mr. Blunk, only the one-third consisting of fixed-price futures contracts locked Aquila into gas purchases. (Ex. 105 at 11, 18). Because one-third of the forecast volume requirements was not hedged and one-third of the forecast volume was hedged using options, 66% of the forecast had the ability to float with fuel requirements. (Ex. 105 at 18). If volumes fell, the Company was not required to exercise its options contracts and the remaining third that was left open for as-needed purchases on the spot market. Thus, by design and in operation, Aquila's One-Third Strategy provided for the chance of reduced load and properly managed any variance between steam customers' projected load requirements and actual usage. Id. Importantly, the Commission appears to have forgotten its

earlier conclusion that Aquila's hedging program was prudently designed. See Report and Order ¶ 31 at 11.

41. The evidence shows that Aquila's steam hedging program clearly managed the risk of actual burn below forecasted volumes. As illustrated in Exhibit A to GMO's January 11, 2011 Initial Post-Hearing Brief, Aquila's steam hedge program performed quite well in protecting its steam customers from upward volatility of the price of natural gas while managing the variance between the steam customers' projected load requirements and actual usage.

42. Exhibit A (attached) shows that for the period of April 2006 through December 2007, actual hedged amounts were 2,020,000 MMBtus, consisting of 1,010,000 in futures contracts and 1,010,000 in options contracts (puts and calls). The one-third of the 2006-2007 steam hedges that was purchased using futures contracts fell well within the actual burn of steam customers, as did the exercised put options for the same time period. The remainder of the actual burn was protected by Aquila's options contracts, which do not need to be exercised above the actual burn. Additionally, the one-third of Aquila's forecast that was covered by the spot market need not be purchased if natural gas is not required. Thus, Aquila protected 66% of its steam customers' anticipated load requirements against upward price volatility with futures and options contracts, but when actual load did not meet forecasted load, Aquila did not need to exercise its remaining options contracts or purchase natural gas on the spot market. (Ex. 105 at 18 [Blunk Direct]).

43. Furthermore, Exhibit A demonstrates that Aquila's steam customers were far better protected from upward price volatility than they would have been had Aquila made hedge purchases based upon historical volumes, as has been suggested by AGP. (Tr. [Johnstone] at 84). This is largely due to the fact that the steam load of Aquila's steam customers was expected to grow considerably in fewer than two years, with the addition of Triumph Foods and the

expansion of the plant facilities of Ag Processing, Albaugh, and Nestlé. (Tr. [Johnstone] at 84-85; Ex. 103 [Fangman Direct] at 5-10; Ex. 104 [Rush Direct] at 10). Because this load growth was new, Aquila lacked historical load data upon which to judge its customers' expanding needs. (Tr. [Johnstone] at 85). Furthermore, historical levels are not necessarily a better predictor of requirements than is a deliberate effort by Aquila to use up-to-date information provided by its steam customers.

44. For comparison purposes, Aquila conducted a study of what the results would have been if it had used a gas hedging program administered by an independent firm, Kase & Company. The results from Kase's EZ Hedge program would have produced significantly higher losses. For 2006, the losses would have been \$281,120 greater than the One-Third Strategy. The losses in 2007 would have exceeded the One-Third program by \$1,244,590. (Ex. 105 [Blunk Direct] at 12).

45. Aquila's steam hedging program was prudently administered because: (a) Aquila was in frequent contact with its steam customers regarding their load requirements; (b) Aquila hedged according to these anticipated load requirements so as to ensure highly reliable steam service; (c) Aquila properly adjusted forecasts and hedge purchases where needed; and (d) Aquila's steam hedging program managed the risk of actual burn below forecasted volumes.

46. Nevertheless, and without any citation to the record or law, the Commission determined that "it was Aquila's responsibility to determine the reasonableness of its customer's estimates" and concluded that "Aquila knew that those customer estimates were not reliable and had an obligation to structure its hedging program to account for the uncertainty of volumes of gas." See Report and Order, ¶ 48 at 16. Such a finding is not supported by the evidence on the record as a whole, and lends no support to a finding that AGP met its burden of proof in this case.

B. AGP Presented No Evidence on Damages.

47. The Commission also improperly ordered GMO to refund the cost of the steam hedging program borne by all of its steam customers at the Lake Road Plant in St. Joseph during the two relevant years, despite the fact that no other customer joined this complaint, that there is no evidence as to AGP's discrete damages, and that there is no evidence about what the costs of the program would have been had forecasts matched actual volumes or if the amount hedged had been within a "reasonable" variance to actual volumes.

48. First, the Commission improperly and unlawfully expanded the scope of the Complaint to other steam customers in violation of the Quarterly Cost Adjustment Rider ("QCA Rider"). (Report and Order ¶ E at 17, ¶ J at 19). As explained by the Court of Appeals, the QCA Rider provides for two different types of prudence reviews. See Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., 2012 WL 5199664 at \*3-4 (Mo. App. W.D. 2012). This case concerns a complaint filed by a single customer, which the Court of Appeals found to be distinct from a "full" prudence review initiated by Staff. Id. at \*4. The pertinent part of the QCA Rider is attached to the Direct Testimony of Company witness Tim M. Rush. (Ex. 104, Schedule TMR-1).

49. There is nothing in the QCA Rider, any tariff, any regulation, or in Missouri law that gives the Commission the authority to grant a special preference to AGP to represent the interests of non-complaining customers and to enlarge the standard complaint procedures set forth in Section 386.390 and 4 CSR 240-2.070. Therefore, the Commission's finding that "this case is more complicated than a straight-forward complaint" (Report and Order ¶ A at 16), and is not an "ordinary" or "typical complaint" (Report and Order ¶¶ E, H at 17-18) has no legal or factual support.



50. The record is clear that no other customer has joined this complaint. (Tr. [Johnstone] at 104; Tr. [Rush] at 297). Nevertheless, the Commission improperly ordered a refund of steam hedging costs to all of Aquila's steam customers because it found this to be a "full" prudence review, a finding rejected by the Missouri Court of Appeals. (Report and Order ¶ J at 19, Ordered ¶ 1 at 20).

51. Second, the record contains no evidence as to AGP's separate and discrete damages. A complainant such as AGP "had the burden of proving the existence and amount of damages with reasonable certainty." American Laminates, Inc. v. J.S. Latta Co., 980 S.W.2d 12, 23 (Mo. App. W.D. 1998). Any calculation of damages must be "reasonably certain and not speculative." Total Economic Athletic Mgmt. of America, Inc. v. Pickens, 898 S.W.2d 98, 107 (Mo. App. W.D. 1995). Given AGP's failure to provide evidence to the Commission of its own losses, there are no facts in the record to support any calculation of costs that were incurred solely by AGP as a result of Aquila's steam hedging program during 2006 and 2007.

52. Finally, the record contains no evidence about what the costs of the program would have been had forecasts matched actual volumes or if the amount hedged had been within a reasonable variance to actual volumes. The Commission erroneously ordered a refund of the entire net cost of Aquila's natural gas hedging program for steam production without any evidence that imprudence in operation of the program necessarily results in a refund of the entire cost of the program. (Report and Order Decision at 19-20).

53. The Commission admitted on pages 19-20 of its Decision:

The record is not clear about how much net hedging costs Aquila would have incurred if it had properly forecast the amount of natural gas it needed to purchase to supply steam to its customers. Perhaps it would have incurred some costs even if it had been completely accurate in its forecasting. Neither party presented any evidence that would allow the Commission to make that determination.

54. In awarding the entire net cost of the hedging program, the Commission assumed that the costs of the program had it been operated to perfect volumes would have been zero, without any supporting evidence of record. It, therefore, overcompensated AGP by refunding the entire net cost of the program without any regard to the losses that AGP would have had to pay even if the volumes had been more accurately forecasted, such as when the price of natural gas sharply declined in October 2006.

55. Any calculation of damages must be “reasonably certain and not speculative.” Total Economic Athletic Mgmt. of America, Inc., 898 S.W.2d at 107. Nevertheless, the Commission improperly ordered GMO to refund steam hedging costs to all of its customers without any evidence as to any customer’s discreet damages and without any evidence as to what the costs of the program would have been had forecasts matched actual volumes. AGP has not met its burden of proving damages.

### III. Conclusion.

56. A review of the record in this case demonstrates that AGP has not met its burden of proof. Furthermore, any inferences of imprudence AGP has created do not conclusively establish imprudence, as the Commission is free to reject any inferences. State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, (Mo. App. W.D. 2003). AGP has neither proven that it is more likely than not that GMO operated its hedging program imprudently, nor presented evidence from which the Commission may properly infer that it is more likely than not that GMO operated its hedging program imprudently. At best, AGP has presented evidence suggesting imprudence on the part of Aquila, which has been thoroughly rebutted and fully explained. If the Commission finds that it can equally infer imprudence or prudence, AGP has not met its burden. Farnham v. Boone, 431 S.W.2d 154, 156 (Mo. 1968); Edwards v. Business Men’s Assur. Co., 168 S.W.3d 82, 89 (Mo. 1942); Dills v. Dills, 304 S.W.3d 738, 743 (Mo. App.

S.D. 2010); Sigmund v. Lowes, 236 S.W.2d 14, 17 (Mo. App. St. Louis 1951). Balancing the evidence provided by AGP and GMO, it is clear that the weight of the evidence demonstrates that Aquila acted properly.

57. Because AGP failed to meet its burden of proof, the Commission must dismiss the Complaint. See Johnson v. State, 366 S.W.3d 11, 33 (Mo. en banc 2012); State ex rel. Office of Pub. Counsel v. PSC, 367 S.W.3d 91, 110 (Mo. App. S.D. 2012). The Commission must also order returned to GMO the amounts that were refunded to steam customers pursuant to the original Report and Order. State ex rel. Southwestern Bell Tel. Co. v. PSC, 645 S.W.2d 44, 47-49, 56 (Mo. App. W.D. 1982) (rate refund order set aside). See L&R Distributing, Inc. v. Missouri Dep't of Revenue, 529 S.W.2d 375, 376, 379 (Mo. 1975) (return of sales taxes); West Lake Quarry & Material Co. v. Schaffner, 451 S.W.2d 140, 143 (Mo. 1970) (refund of sales tax).

58. The Commission may not reopen the record to consider additional evidence by AGP, which is not entitled to a second chance. See Peine v. Peine, 200 S.W.3d 567, 578 (Mo. App. W.D. 2006). AGP had the burden of proving imprudence, “failed in that burden and, as a matter of due process, should not be allowed a second bite of the apple on remand.” Windsor v. Windsor, 166 S.W.3d 623, 636 (Mo. App. W.D. 2005).

Respectfully submitted,

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**Certificate of Service**

A copy of the foregoing has been emailed this 7th day of January 2013 to all counsel of record.

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