BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of KCP&L Greater Missouri Operations Company for Authority to File Tariffs Changing The Steam QCA for Service Provided To Customers in its Service Territory	)))))	File No. HT-2013-0456

RESPONSE OF KCP&L GREATER MISSOURI OPERATIONS COMPANY

KCP&L Greater Missouri Operations Company ("GMO"), pursuant to the Missouri Public Service Commission's ("Commission") May 21, 2013 Order Directing Filing, responds to the Protest, Application to Intervene, Request to Suspend and Request to Set Hearing and Suggestions in Support ("Protest") of Ag Processing Inc. ("AGP") filed May 17, 2013:

1. Background.

The rate adjustment in the GMO tariff sheet that AGP's protests arises out of Case No. HC-2010-0235, where AGP complained about the costs of the natural gas hedging program for steam operations in St. Joseph that was established in 2006 by GMO's predecessor Aquila, Inc. ("hedging program"). After an evidentiary hearing, the Commission issued its Report and Order in September 2011 and ordered a $2,885,456 refund to customers. However, that decision was reversed by the Missouri Court of Appeals, which remanded the case to the Commission after holding that it employed the wrong burden of proof. The Commission, thereafter, determined to return the parties to their original position and directed GMO to file tariffs to accomplish that goal. See Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., Report and Order, No. HC-2010-0235 (2011), rev'd and remanded, 385 S.W.3d 511, 516 (Mo. App. W.D. 2012), Order Regarding Remand at 10-11 (Mo. P.S.C., Feb. 27, 2013).

It is the return of the erroneous refund that is at the heart of AGP's Protest.

In its complaint AGP alleged that Aquila was imprudent in the adoption, design, and operation of the hedging program, and raised those claims in Quarterly Cost Adjustment ("QCA") proceedings, HR-2007-0028 and HR-2007-0399. The Commission separated the complaint from the QCA rate adjustment cases and docketed it as an independent case, No. HC-2010-0235. Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., Report and Order at 3, No. HC-2010-0235 (2011) ("Report and Order"). On September 28, 2011 the Commission issued its Report and Order where it found that Aquila was prudent in adopting a hedging program, that Aquila's hedging program was prudently designed, but that Aquila's hedging program was imprudently operated. Id. at 10-11, 16, 19.

The Commission, thereafter, ordered that GMO refund the $2,885,456 that it determined to be imprudent through the QCA Tariff. See Report and Order at 20; In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, Order Rejecting Tariff and Requiring the Filing of a New Tariff, No. HT-2011-0343 (Nov. 22, 2011). GMO thereafter submitted a tariff sheet that complied with the Report and Order. In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, Order Approving Compliance Tariff Sheet, No. HT-2011-0343 (Nov. 29, 2011).

Because the Commission's Report and Order involved the establishment of new rates under the QCA, GMO could not seek a stay of that order because Section 386.520.2[1] states that "there shall be no stay or suspension of the commission's order" under such circumstances.

GMO appealed the Report and Order, which the Court of Appeals reversed, finding that the Commission applied the incorrect burden of proof and remanding the case to the Commission. Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., 385 S.W.3d 511, 516 (Mo. App. W.D. 2012).

[1] All statutory references are to the Missouri Revised Statutes (2000), as amended.

The Commission issued its Order Regarding Remand on February 27, 2013, vacating the Report and Order, and reopening the record to take additional evidence. The Commission also ordered a rate adjustment through the QCA Tariff to return the parties to their pre-decision status in the case. Accordingly, on April 15, 2013 GMO filed a QCA tariff sheet which reflects the adjustment ordered by the Commission on February 27, 2013, and which AGP now protests.

2. GMO May Recover Costs Outside of the Prior Quarter Through the QCA.

AGP alleges that the QCA "does not provide for recovery of costs that have not been incurred during the previous calendar quarter." See AGP Protest at ¶ 5. However, a plain reading of the QCA Tariff demonstrates that this is not true. See State ex rel. Midwest Gas Users' Ass'n v. PSC, 996 S.W.2d 608, 614 (Mo. App. W.D. 1999) (tariffs, which have the force and effect of a statute, are "interpreted according to the words used in their plain and ordinary meaning").

The QCA Tariff requires that GMO file rate adjustments quarterly, but those adjustments are not limited to the costs incurred during the most recent quarter. Rather, the quarterly rate adjustments are "[t]he sum of the Current Quarterly Cost Adjustment ('CQCA'), plus the three (3) preceding CQCAs, plus reconciling adjustments, if any, plus the Reconciliation Rate." See PSC Mo. No. 1, Original Sheet No. 6.1. The CQCA is the component of the QCA that reflects the variation in fuel costs for the most recent quarter. Id. The "reconciling adjustments," however, do not. See PSC Mo. No. 1, Original Sheet No. 6.2. Such adjustments include "other fuel cost refunds, or credits related to the operation of this rider" which "may also flow through this reconciliation process, as ordered by the Commission." Id.

As explained in the "Details" section of the QCA Tariff: "Each quarterly rate adjustment will include the fuel costs from the preceding quarter." See PSC Mo. No. 1, Original Sheet No. 6.3 at ¶ 3. The term "will include" in no way limits the QCA to include only the past quarter's

fuel costs. That paragraph of the QCA Tariff goes on to describe the CQCA component of the QCA.

The next paragraph in the "Details" section of the QCA Tariff explains the reconciliation process. "The reconciliation account shall track, adjust and return true-up amounts and any prudence amounts not otherwise refunded." See PSC Mo. No. 1, Original Sheet No. 6.3 at ¶ 4. Because it permits full prudence reviews by Staff that may concern a prior 12-month period, and must be completed no later than 225 days after the end of the year that is the subject of the review, the QCA contemplates the flow of costs incurred outside of the most recent quarter. See PSC Mo. No. 1, Original Sheet No. 6.4 at ¶ 7. Costs that may flow through the reconciliation process include "[a]djustments, if any, necessary by Commission order pursuant to any prudence review." See PSC Mo. No. 1, Original Sheet No. 6.3 at ¶ 4 (emphasis added).

AGP initiated the underlying complaint case years after the hedging costs had been incurred through the QCA, and requested that those costs be refunded through the QCA process. The hedging program costs that will be returned to GMO through its April 15, 2013 QCA tariff filing were originally charged to customers in the 2006 and 2007 QCA periods. See AGP Complaint, ¶¶ 50, 71. In its January 28, 2010 Complaint, filed nearly four years after those costs were initially incurred, AGP stated that "the costs incurred by Aquila with respect to the 2006 QCA Period and the 2007 QCA Period and recovered from Aquila customers ... should be refunded to steam customers in St. Joseph, Missouri in the same manner as they were originally excessively charged." See AGP Complaint, ¶ 77.

Because the QCA contemplates the flow of costs outside of the most recent quarter, as well as costs flowing both to customers and the utility, the Commission's Order Regarding Remand properly ordered a rate adjustment through the QCA Tariff. It, therefore, returned the parties to their original positions in the complaint case. See Order Regarding Remand at 10-11.

3. The Commission Properly Ordered the Return of the Amounts Refunded.

AGP alleges that the Commission is not a court and does not have the power to enter a money judgment. See AGP Protest at ¶ 8. The foundation of AGP's argument lies in a misinterpretation of Missouri law and of the QCA Tariff, which the Court of Appeals found governs the underlying complaint case. Ag Processing, 385 S.W.3d at 516. Contrary to the statements by AGP, Section 386.520.2 is the relevant statute, and the QCA Tariff clearly contemplates adjustments that flow to both the customer and the utility.

A. The Commission Properly Ordered the Return of the Amounts Refunded as No Stay Was Available Under Section 386.520.2.

AGP alleges that because GMO failed to obtain a judicial stay of the Report and Order which ordered the refund, the Commission may not now return the refunded amounts to GMO pursuant to the Court of Appeals' decision. See AGP Protest at ¶¶ 7, 16. However, it is clear from the language of Section 386.520.2 that the flow of funds through the QCA Tariff constitutes rate adjustments. Accordingly, no stay was available to GMO. Due process issues do not arise in this context because the QCA tariff contemplates the return of amounts in both directions -- to customers and to the utility. Section 386.520 itself explicitly authorizes prospective rate changes if the Commission has erred.

AGP raised for the first time on remand its claim that because GMO did not seek a stay of the Commission's order, this case has somehow become moot. The Commission soundly rejected AGP's arguments. See Order Regarding Remand at 10 & n. 14.[2] AGP now argues that, for the same reason, the Commission has acted in excess of its jurisdiction by ordering the return

[2] On January 28, 2013, the Commission ordered Staff and any other party to file a legal analysis of AGP's claim that the Commission cannot flow back to GMO the amounts it refunded to customers through the QCA, pursuant to the now-reversed Report and Order. Both GMO and Staff filed legal analyses on February 8 and February 11, 2013, respectively, which the Commission subsequently adopted. See Order Regarding Remand at 10, n. 14.

of amounts GMO refunded through its QCA. However, a plain reading of Section 386.520 demonstrates that no stay was available in this case.

Section 386.520 was amended on July 1, 2011, a few months prior to the Commission's decision in September. With regard to the availability of a stay, the prior statute made no distinction between appeals that involved changes to rates and those that did not. However, the amended statute explicitly distinguishes appeals that involve adjustments to rates and charges from those that do not. It permits a stay only in the latter instance, pursuant to Section 386.520.1.

Because this matter originated from a complaint that "involve[d] the establishment of new rates or charges" made through GMO's QCA Tariff, it falls under Section 386.520.2 which explicitly contemplates "temporary rate adjustments" on remand of a Commission order. AGP admits as much when it stated that "these are new charges." See AGP Protest at ¶ 20. Thus, no stay was available to GMO. Furthermore, the Court of Appeals' determination that this is a complaint case initiated under and subject to the provisions of the Stipulation and its QCA Tariff puts this case squarely in Subsection 2 of Section 386.520, which explicitly applies to charges "approved by the commission as a result of a ... complaint." Ag Processing, 385 S.W.3d at 516.

The QCA is a quarterly "rate adjustment" made by GMO pursuant to the QCA Tariff. See PSC Mo. No. 1, Original Sheet No. 6.1. Through the reconciliation account, GMO tracks the difference between costs to be recovered and revenues collected, including any "adjustments" pursuant to Commission order. See PSC Mo. No. 1, Original Sheet No. 6.3 at ¶ 4. Under the QCA Tariff, such "rate adjustment" is to occur through customers' bills. See PSC Mo. No. 1, Original Sheet No. 6.2. "At the end of the twelve (12) months of collection of each QCA, the over- or under-collection of the intended revenues ... will be applied to customers' bills thru [sic] a Reconciliation Rate." Id. (emphasis added).

The refund ordered by the Commission in late 2011 also constituted a change to rates or charges subject to Section 382.520.2. AGP requested an immediate payment of the whole amount ordered refunded, which the Commission rejected. See In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, AGP Response to Staff Recommendation at 4, No. HT-2011-0343 (Nov. 16, 2011). The Commission found that "the current tariff ... expresses a preference for making a refund through customer bills." Id., Order Rejecting Tariff and Requiring the Filing of a New Tariff at 4 (Nov. 22, 2011). Therefore, the Commission ordered refund of the steam hedging costs to be applied to customers' bills through the reconciliation rate. Id.

Because the Court of Appeals found AGP's claims to be a complaint case under the provisions of the QCA Tariff, and the Commission ordered the refund to occur through the QCA rate adjustment mechanism, the 2011 tariff sheet containing the refund "involve[d] the establishment of new rates or charges" such that no stay was available to GMO under Section 386.520.2.

Finally, interest charges are properly included in the QCA filing[3] because Section 386.520.2(3) is the controlling statute regarding adjustments in favor of the utility. Accordingly, the Commission properly ordered that the refunded amounts be returned to GMO through its QCA, which the subject tariff filing accomplishes.

B. The Commission Properly Ordered the Return of the Amounts Refunded Through GMO's QCA Tariff.

The QCA provides the basis for the Commission's action, contrary to the contention of AGP. See AGP Protest at ¶ 8. The plain language of the QCA Tariff states that "[o]ther fuel cost refunds, or credits related to the operation of this rider may also flow through this

[3] Section 386.520.2(3) "allow[s] the public utility to recover from its then existing customers the amounts it should have collected plus interest at the higher of the prime bank lending rate minus two percentage points or zero."

reconciliation process, as ordered by the Commission." See PSC Mo. No. 1, Original Sheet No. 6.2. This includes "the over- or under-collection of the intended revenues." Id. The QCA Tariff uses the words "rate" and "adjustment" both together and separately throughout the QCA tariff. Id., Sheet 6.1-6.3. The goal of the QCA was to establish a mechanism that sends dollars between customers and the utility, depending on the nature of the adjustment and subsequent reconciliations.

Furthermore, the 2-way cost adjustment provisions of the QCA Tariff evidence the Commission's power to redress a previous erroneous order by reversing the flow of costs through a rate change. Without a doubt, an appellant's right of restitution on reversal of judgment is well-recognized under Missouri law. See State ex rel. UCCM v. PSC, 585 S.W.2d 41, 59-60 (Mo. en banc 1979); State ex rel. Kansas City v. PSC, 244 S.W.2d 110, 116 (Mo. 1951); McPherson v. U.S. Physicians Mutual Risk Retention Group, 99 S.W.3d 462, 478 (Mo. App. W.D. 2003). Clearly, the Commission has the authority to order an adjustment through the QCA process to return amounts that were erroneously refunded.

C. The Commission's Action Does Not Deny Customers Fair Notice and Does Not Constitute Retroactive Ratemaking.

Because the Commission acted properly in ordering the return of the amounts refunded through the QCA, it did not deny any customer fair notice or an opportunity to be heard. See AGP Protest at ¶¶ 12, 13, 20. The plain language of the QCA Tariff expressly permits the Commission to make adjustments to rates. Furthermore, Section 386.520 explicitly authorizes prospective rate changes if the Commission has erred.

Customers have notice that rate adjustments may occur through the QCA Tariff, which is on file with the Commission. As a regulated public utility, GMO is bound by its tariffs which have the force and effect of law. See Bauer v. Southwestern Bell Tel. Co., 958 S.W.2d 568, 570

(Mo. App. E.D. 1997). GMO's customers are presumed to know and are bound by the content and effect of the published tariffs. Id.

What's more, AGP received specific notice of the QCA filing. On April 15, 2013, the same day the QCA filing was made with the Commission, GMO sent an email entitled "Quarterly Cost Adjustment Filing for First Quarter 2013" to members of Staff, counsel for AGP, and AGP's consultant (among others) with the proposed QCA tariff sheet, its associated workpapers, and a cover letter. The cover letter specifically noted that the QCA tariff sheet reflected the return of the refunded hedging program costs made pursuant to the Order Regarding Remand. AGP cannot now claim lack of notice with regard to this QCA filing and the return of the refunded costs.

AGP also cannot show that it is prejudiced by the return of the refunded costs to GMO. Because the Commission failed to apply the proof of harm standard and therefore had no evidence in the record to determine the correct amount of the award, it properly ordered a return to the status quo by directing that the amounts determined to be imprudent under the wrong burden of proof be flowed back to GMO through the QCA. See Order Regarding Remand at 8-10.

The Commission noted that such "rate adjustment will not prejudice any party because the QCA is a two-way cost adjustment mechanism." Id. at 10. In other words, customers will receive any amounts ultimately determined to be imprudent after the hearing on remand. Id. Thus, while the remanded case is pending before the Commission, the parties are returned to the position they were in before the Commission made the decision that was reversed by the Court of Appeals. While AGP will be bound by the Commission's determination in this tariff filing, its claim that it will be adversely affected is incorrect. See AGP Protest at ¶14.g. Should the

Commission ultimately find on remand that the steam hedging program costs reflected in this QCA filing are imprudent, it can flow such costs back to AGP.

The return of refunded amounts through the QCA also does not constitute retroactive ratemaking, as AGP alleges. See AGP Protest at ¶¶ 7, 9. Retroactive ratemaking violates the filed rate doctrine, which "precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency." State ex rel. Ag Processing, Inc. v. PSC, 311 S.W.3d 361, 365 (Mo. App. W.D. 2010). Section 393.140(11) provides that a utility may only impose rates and charges for its services "as specified in its schedules filed and in effect at the time." Because the Commission is authorized to flow refunds to customers or credits to GMO through the cost adjustment mechanism in the QCA Tariff, no retroactive ratemaking will occur. Furthermore, Section 386.520 explicitly authorizes prospective rate changes if the Commission has erred. The Commission will not violate any customer's due process rights in approving the QCA tariff filing before it in this case.

4. GMO's QCA Filing Does Not Initiate a Rate Case.

AGP requests that the Commission suspend GMO's April 15, 2013 QCA tariff sheet and set the matter for hearing. See AGP Protest at ¶¶ 14(f), 15, 21. AGP appears to characterize this QCA tariff sheet filing as if it were a rate case that is initiating an entirely new rate proceeding. In reality, it is an adjustment that occurs quarterly and does not require the process and procedure of a full rate case. See AGP Protest at ¶¶ 10, 19, 20.

Under Section 393.150, the Commission has a maximum of 11 months to implement new rates when a change to rates has been proposed under the "file-and-suspend" ratemaking method. The Commission's initial review period is 30 days, but may be suspended for up to 120 days in the Commission's discretion. See § 393.150.1. If the Commission has not held a hearing on the tariffs within the 120-day suspension, the Commission may "in its discretion" order a second

suspension and "extend the time of suspension for a further period not exceeding six months." See § 393.150.2.

However, this statutory suspension period applies only when a new tariff has been proposed under the "file-and-suspend" ratemaking method, and does not apply to a quarterly adjustment to rates that occurs through a tariff that has been established and in operation for years. AGP points to Case No. HR-2005-0450, the rate case that was resolved in the 2006 stipulation that established the QCA process. See AGP Protest at ¶19. That was a full rate case proceeding, initiated by the filing of new tariffs. However, the QCA filing here merely reflects the change in actual fuel costs above or below a base amount calculated on a quarterly basis. See PSC Mo. No. 1, Original Sheet No. 6.1. Application of an 11-month suspension period to the quarterly adjustments that are made pursuant to the well-established QCA tariff would render them meaningless.

5. AGP's Protest is an Impermissible Collateral Attack on the Opinion of the Court of Appeals.

In requesting that the QCA tariff filing be suspended and set for a hearing, AGP couches its Protest as a prudence review of a tariff that occurs prior to its implementation. See AGP Protest at ¶¶ 6, 10, 21. This is a thinly veiled attempt to circumvent the order of the Court of Appeals regarding the burden of proof as it relates to the hedging program costs that were erroneously refunded. Id.

AGP first complained about these costs when it filed its Complaint in the underlying proceeding, No. HC-2010-0235. In its review of the Report and Order in that case, the Court of Appeals determined in no uncertain terms that AGP had filed a complaint case that was subject to the provisions of the 2006 stipulation and its QCA Tariff. Ag Processing, 385 S.W.3d at 516.

As such, the burden of proof lay with complainant AGP. The Court remanded the case to the Commission, which consolidated it with No. HC-2012-0259.

Nevertheless, AGP now claims that it is "singularly inappropriate, incorrect and not consistent with either the Commission's rate adjustment mechanism and its preexisting purchased gas adjustment clause to impose a burden of proof upon customers." See AGP Protest at ¶10. It claims this is so because "the utility -- and the utility alone -- has access to the data on which its claims would be based." Id.

However, AGP disregards the fact that the costs it now protests were refunded to customers after its complaint case was fully litigated before the Commission. Those costs are now being returned to GMO pursuant to the reversal of the Commission's Report and Order that erroneously ordered the refund. AGP cannot through this QCA filing initiate a second prudence review of the very same costs that it litigated in No. HC-2010-0235 and which is now pending on remand in No. HC-2012-0259.

Finally, AGP cannot force the application of a different burden of proof than that determined by the Court of Appeals. AGP's relentless re-litigation of these tariff costs at the Commission, as well as at the Court of Appeals where it has filed a notice of appeal[4] (in addition to a petition for a writ of prohibition which was recently denied[5]), constitutes an impermissible collateral attack on the holding of Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., 385 S.W.3d 511 (Mo. App. W.D. 20120). AGP cannot continue to litigate burden of proof issues which have been fully and finally decided by the Court of Appeals.

[4] Notice of Appeal, Ag Processing v. PSC, No. WD76353 (filed Apr. 19, 2013).
[5] Order, State ex rel. Ag Processing Inc. v. PSC, No. WD76402 (Mo. App., May 15, 2013) (denying petition for writ of prohibition).

WHEREFORE GMO respectfully requests that the Commission deny AGP's Protest, Application to Intervene, Request to Suspend and Request to Set Hearing and Suggestions in Support, and that the Commission approve the Quarterly Cost Adjustment Tariff Sheet filed on April 15, 2013.

Respectfully submitted,

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Certificate of Service

A copy of the foregoing has been emailed this 28th day of May, 2013 to all counsel of record.

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