BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

AG PROCESSING INC A COOPERATIVE, Complainant,	)	
	)	
vs.	)	**HC-2010-0235**
	)	
KCP&L GREATER MISSOURI OPERATIONS COMPANY, Respondent.	)	

RESPONSE BY AG PROCESSING INC A COOPERATIVE
IN OPPOSITION TO MOTION TO DISMISS

COMES NOW Ag Processing Inc a Cooperative (AGP), Complainant, by its attorneys, and responds to the Motion to Dismiss filed herein by KCP&L Greater Missouri Operations Company (GMO), Respondent, as follows:

1. On January 28, 2010, AGP filed a Complaint (Complaint) regarding the Quarterly Cost Adjustment (QCA) component of GMO's charges for steam service provided to AGP at its operations in St. Joseph. This complaint was filed in Commission Cases HR-2007-0028 and in HR-2007-0399. Subsequently, on February 11, 2010, the Commission directed that AGP's complaint be severed from these two cases and a new case established for AGP's complaint. Existing discovery in the two HR cases was preserved. GMO was provided through March 15, 2010 to answer the Complaint.

2. On March 15, 2010, combined in one pleading, GMO submitted a Motion to Dismiss (Motion), an Answer, and Affirmative Defenses. AGP here responds only to GMO's Motion. GMO's

Answer requires no response save through further discovery and an evidentiary hearing. GMO's claims of affirmative defenses will also be disposed of through the hearing process. A Motion to Dismiss is a dilatory pleading and subject to the well-established rule that for consideration of a demurrer, all well-pleaded allegations are taken as true.[1/]

3. GMO's Motion to Dismiss sounds in several areas, all lacking in merit, and will be addressed in sequence. However, GMO incorporates by reference additional assertions that appear in its "Introduction." Those assertions will also be generally addressed here.[2/]

[1/] In considering the sufficiency of the petition on a motion to dismiss, the allegations are to be construed liberally and favorably to the plaintiff, giving it the benefit of all inferences fairly deducible from the facts stated. *Hall v. Smith*, 355 S.W.2d 52 (Mo. 1962); *Scheibel v. Hillis*, 531 S.W.2d 285 (Mo. banc 1976); *Kirkwood-Easton Tire Co. v. St. Louis County*, 568 S.W.2d 267, 269 (Mo. 1978). A petition is sufficient against a motion to dismiss if its allegations invoke substantive principles of law which entitle a plaintiff to relief and if it alleges facts which inform the defendant of what the plaintiff will attempt to prove at trial. *Murray v. Ray*, 862 S.W.2d 931, 933-34 (Mo.App.S.D. 1993); *City of Chesterfield v. Deshetler Homes*, 938 S.W.2d 671, 674 (Mo. Ct. App. 1997). On a motion to dismiss, allegations are presumed to be true. *Phelps v. City of Kan. City*, 272 S.W.3d 918 (Mo. Ct. App. 2009). In reviewing the granting of a motion to dismiss, the allegations of fact contained in plaintiff's petition are treated as true and all reasonable inferences arising therefrom. *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682, 684 (Mo. App. 1992); *Layne, Inc. v. Moody*, 886 S.W.2d 115, 116 (Mo. Ct. App. 1994).

[2/] At the time of the HR-2005-0450 Settlement, the operating company for the Lake Road plant and the supplier of steam for AGP and others' operations, was Aquila Inc., d/b/a Aquila Networks, L&P Division. After Great Plains acquired the Aquila entity (which remains subject to challenge), the name was changed to GMO. The names Aquila and GMO may be used apparently refer to the same entity, but may be both be used in an effort to retain clarity regarding the time events.

4. GMO asserts (in paragraph 2 of its Motion) that AGP has not asserted any provision of law, rule, order or decision of the Commission that GMO has allegedly violated. For the Commission's benefit, we will summarize the elements of the dispute as plead. *First*, AGP noted that the amounts collected were collected subject to refund (Complaint, Paragraph 14) and that any Aquila steam customer may initiate a complaint to pursue a prudence review (Complaint, Paragraphs 15 and 18). GMO might reasonably determine that the gravamen of AGP's complaint is about GMO's prudence, or lack thereof. But AGP's allegations do not stop there. *Second*, as alleged in Paragraph 19 of the Complaint, the Settlement Agreement in Case No. HR-2005-0450 (HR-2005-0450 Settlement) that, upon Commission approval thereof, established the QCA, made no provision for hedging. Instead, the QCA mechanism incorporated a negotiated mechanism to smooth any price volatility. Yet, as demonstrably evident from GMO's "Introduction," GMO hedged anyway. *Third*, as alleged in Paragraph 20 of the Complaint, the HR-2005-0450 Settlement certainly did not provide for the recovery of hedging settlement costs. Yet, GMO has sought to recover, and has recovered, subject to refund, hedging settlement costs. *Fourth*, as alleged in Paragraphs 55 through 59 of the Complaint, Aquila failed to adjust the amounts of gas it was purchasing despite knowledge of an explosion at a major steam customer[3/] and "hedged gas supplies

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[3/] There are only 8 steam "customers," *i.e.*, meters (of which AGP has two) and only 6 companies in the Lake Road Indus-
(continued...)

in quantities greater than those needed to support steam usage on the steam system." *Fifth*, in paragraph 62 of the Complaint, through this failure to adjust its natural gas hedging program in response to alleged events, Aquila was imprudent, and, as alleged in paragraph 63 of the Complaint, the costs that were incurred were imprudently incurred. *Sixth*, Aquila was also imprudent in attempting to mitigate price changes already addressed through a mechanism in the negotiated HR-2005-0450 Settlement underlying the QCA mechanism. *Seventh*, GMO accepted the risk of these imprudent activities when it purchased Aquila (paragraphs 65 and 66 of the Complaint, and paragraphs 69 through 79 of the Complaint regarding the 2007 period).

5. GMO's "Introduction" asserts, among other things, that "natural gas" utilities (although for these operations GMO is operating a certificated steam utility at the Lake Road plant) are permitted to hedge, and indeed, claims that it can hedge as a part of prudent efforts to mitigate volatility. Two quick observations are pertinent: *First*, GMO confirms that hedging efforts must be prudent, which, of course, AGP complains they were not. *Second*, GMO references hedging efforts to "dampen" upward volatility, but does not come to grips with the simple fact that the entire issue of price volatility for the natural gas component of its steam fuel needs was fully addressed through

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[3/] (...continued)
trial Area adjacent to the Lake Road Station. GMO should have known that if it lost a major customer, it was not going to need all the gas it had hedged.

the negotiated mechanism of the QCA. There was, and is, no need for hedging to "dampen" volatility. The "level of stability of delivered fuel prices" that GMO asserts as an excuse for its imprudence had ***been fully addressed*** in the negotiated QCA mechanism. GMO's actions seem speculative and more so with its apparent expectation that the small universe of steam customers would cover GMO's imprudent bets.

6. It is also of interest that GMO's footnote 1 on page 3 of its combined pleading refers to the *Southern Missouri* gas case. *Southern Missouri* has no pertinence here. Southern Missouri Gas had no carefully negotiated QCA mechanism that operated to mitigate price volatility in gas costs. Moreover, Southern Missouri is a gas utility and not a steam utility. GMO's steam utility in St. Joseph is fueled primarily by coal and not by gas. GMO invokes a settlement in another case that involved neither GMO nor AGP and obviously involved different facts.

7. Through Requests for Admissions, GMO was asked to admit: "As a steam utility during 2006 and 2007, Aquila, Inc. and KCPL-GMO continuously had the responsibility to operate the steam business so as to incur only those costs that are prudent for its business purpose," the exculpatory response was as follows:

> GMO objects to Request No. 27 because it calls for a legal conclusion and is vague and ambiguous and calls for speculation in that GMO was not a steam utility in 2006 and 2007. Subject to and without waiving the foregoing objections, GMO denies Request No. 27 because

> it is regulated by the Commission pursuant to numerous statutes, rules, regulations and orders, as well as Missouri judicial case law, which provide, among other things, that its rates be just and reasonable, that its service be safe and adequate, and that it not grant any undue or unreasonable preference to any person or corporation.[4/]

Any steam utility operated in this state -- indeed any public utility -- may only expect reimbursement from its customers for prudent expenses. Even the rules that GMO cites in its "Introduction" make clear that only prudent hedging practices are permitted. If GMO wishes to assert that it is able to incur and pass imprudent expenses to its customers, we believe it will have difficulty in finding supporting precedent. On the other hand, Missouri law, through Section 393.290, makes the following provision applicable to heating companies:

> 393.130. 1. Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

[4/] Response dated September 8, 2009, signed by Karl Zobrist, *et al.*, for GMO.

8. In Paragraph 3 of its Motion to Dismiss, GMO asserts that AGP's claims are time-barred. Yet, these amounts were collected subject to refund, the refund cases (HR-2007-0028 and HR-2007-0399) remain open, and under the terms of the settlement agreement, the provisions that pertain to Staff do not apply to AGP or any other steam customer. In fact, in its assertions, GMO is violating a Commission Order that directed "signatories" to comply with the terms of the HR-2005-0450 Settlement.[5/] AGP pursued numerous meetings with GMO (then Aquila) personnel to attempt to negotiate a resolution of these matters.[6/] Those meetings were summarily cancelled and suspended for a considerable period after the Aquila acquisition (despite efforts by both Staff and AGP to resume them), and even a brief resumption of those meetings quickly made clear that further attempts to resolve the matter short of a formal complaint would not be worth the candle. The provisions quoted by GMO in its Motion to Dismiss explicitly pertain to Staff and have no application to AGP or, for that matter, any other steam customer. Indeed, GMO is disingenuous, even in its selective quotation on page 4 of its Motion. "Such [sic] full prudence review" refers back to the

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[5/] The HR-2005-0450 Order Regarding Stipulation and Agreement, attached as Exhibit A to AGP's Complaint, page 3, ORDERED paragraph 2, directs:

> 2. All signatory parties are ordered to comply with the terms of the Stipulation and Agreement.

[6/] These meetings are confirmed in Staff pleadings in both HR cases.

Commission Staff's ability to proceed with a "full prudence review."[7/]

9. To paraphrase and correct GMO's "Introduction," it is not AGP that "does not recognize" that a prudent hedging program may not always result in savings, but, rather it is GMO that has failed to recognize and address the ***imprudent aspects of the unnecessary hedging program that Aquila had conducted and for***

[7/] As a convenience, but at the risk of burdening this Commission with detail, AGP will quote the entire provision in the tariffs below, so that the context of GMO's quote may be evalulated:

> 7. This review may be entirely a part of surveillance activity. Customers will be given timely notice of the results of the Step One review no later than 75 days after the end of each year. In consideration of Step One results, the Staff may proceed with Step Two, a full prudence review, if deemed necessary. A full prudence review, if pursued, shall be complete no later than 225 days after the end of each year. Such full prudence review shall be conducted no more often than once every twelve (12) months and shall concern the prior twelve (12) month period or calendar year only, provided however that the full prudence review addressing the first partial year, if pursued, will be included with a full prudence review of the first full calendar year of operation of this rate mechanism.
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> 8. Any customer or group of customers may make application to initiate a complaint for the purpose of pursuing a prudence review by use of the existing complaint process. The application for the complaint and the complaint proceeding will not be prejudiced by the absence of a full (Step Two) prudence review by Staff.
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> 9. Pursuant to any prudence review of fuel costs, whether by the Staff process or the complaint process, there will be no rate adjustment unless the resulting prudence adjustment amount exceeds 10% of the total of the fuel costs incurred in an annual review period.

Source: Sheet 6.4.

which Great Plains assumed responsibility when it acquired Aquila. Moreover -- and the Commission should note on page 3 of GMO's "Introduction," the significant omission of the word "prudent" -- a hedging program was unnecessary because of the carefully negotiated provisions of the QCA.

10. Paragraph 4 of the Motion to Dismiss makes a similar claim of laches. Laches is an equitable defense and requires that the party asserting it have "clean hands." GMO does not. After Aquila extended discussions of these matters for many, months, even that leisurely schedule was preempted by Great Plains' acquisition of Aquila, when GMO personnel refused numerous overtures to meet to discuss and seek resolution of these matters. GMO should not be heard to complain of delay caused by its own actions. In any event, the provisions cited pertain to the initiation by the Commission Staff of a prudence review and explicitly do not apply to AGP or other steam customers. Moreover, laches is a question of equity and, as GMO points out, the Commission "cannot do equity."[8/]

11. In Paragraph 5 of its Motion, GMO claims that the Commission is without authority to award money damages to AGP. However, these amounts have been collected and are being held by GMO subject to refund and subject to claims of imprudence by AGP and other steam customers. Whether or not the Commission can make a monetary damage award to AGP is not germane. Refund of the imprudently collected subject-to-refund amounts is the relief

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[8/] Page 6, Motion to Dismiss.

sought. A public utility may not retain imprudently obtained collections that were collected and are held subject to refund.

12. Paragraph 6 of the Motion to Dismiss asserts that state law bars recovery and claims that the Commission lacks authority to recalculate the QCA charges. What then is the purpose of a collection under such a mechanism of amounts that are subject to refund? Indeed, GMO now appears to argue that *ab initio*, these charges were permanently approved and collected and now apparently denies that they were collected and are being held subject to refund. That is what this complaint is about. Moreover, it is internally inconsistent for GMO to here claim that the Commission "cannot do equity," when GMO earlier tried to assert latches as a bar -- an equitable defense.

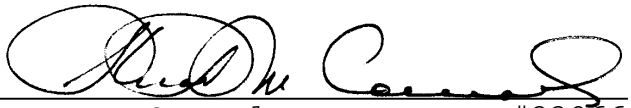
13. In Paragraph 7 of its Motion to Dismiss, GMO claims that AGP's complaint does not include a signature, telephone, facsimile or electronic mail address. This argument is utterly without merit. All that information appears at the bottom of AGP's complaint in essentially the same form as at the bottom of this pleading and, ironically, in the same form as the signature block on GMO's Motion to Dismiss. GMO certainly knows who this complainant is and where it provides AGP with steam service.

14. Paragraph 8 of the Motion to Dismiss, again appears to assert that GMO is unable to discern the problem. The Complaint was explicit (and was summarized in earlier paragraphs of this pleading) in reciting the actions complained of. Refer-

ence again should be made to paragraphs 74 through 79 where for the 2007 QCA period specific settlement costs are noted and their subject-to-refund recovery is alleged to have been the result of imprudent actions by Aquila during these respective periods. These amounts, incidentally, have been admitted by GMO through its answers to interrogatories, so GMO is well aware of the amounts in dispute. Finally, GMO appears puzzled as to whether AGP is asserting this complaint on its own behalf. AGP has every right under the HR-2005-0450 Settlement to make these claims through a complaint, and was authorized by the Commission's approval order to do so.[9/] Refunds as requested should be refunded to steam customers (which certainly includes AGP) in St. Joseph for the respective periods with interest thereon from the date of collection.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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ATTORNEYS FOR AG PROCESSING INC.

SERVICE CERTIFICATE

I certify that I have served a copy of the foregoing complaint upon identified representatives of KCP&L Greater Missouri Operations Company, i.e., James M. Fischer, attorney,

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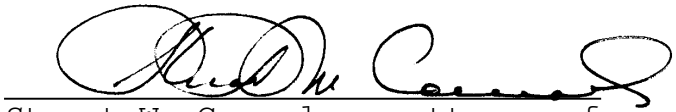
[9/] See, footnote 6, *supra*.

and upon representatives of the Staff of the Missouri Public Service Commission by United States Mail, postage prepaid, and by electronic means as an attachment to e-mail, all on the date shown below.



Stuart W. Conrad, an attorney for
Ag Processing Inc a Cooperative

Dated: March 25, 2010