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	))))))	**HT-2013-0456**

AG PROCESSING INC A COOPERATIVE
REPLY TO GMO FILING

KCP&L Greater Missouri Operations Company ("GMO") has submitted a response ("Response") to Ag Processing Inc a Cooperative ("AGP")'s Protest, Request to Suspend, Request for Hearing and Application to Intervene.

At no point in its Response does GMO dispute the basic facts. *First*, this case is ***not*** a prudence challenge under the Quarterly Cost Adjustment ("QCA"). It is a challenge laid under Section 393.150.2 to a change in rate ahead of implementation. The statutory burden of proof on the utility fully applies. Section 393.150.2. The Commission must set or establish rates to be charged. Section 386.266 does not control here. Even the caption for this case, employed by GMO, indicates that it is a request for "authority to file tariffs changing the steam QCA." Section 393.150.2 clearly puts the burden of proof upon GMO to justify this change. That burden has not been met.

Second, the Commission may not avoid its obligation to consider all relevant factors in any decision. *United Consumers Council of Missouri v. Public Service Commission ("UCCM")*, 585

S.W.2d 41, 49 (Mo. 1979) requires that even when there is a decision ***not*** to suspend a tariff proposed by a public utility subject to the Commission's jurisdiction, the Commission must still consider all relevant factors. In discussing adjustment clauses and suspension of disputed rates for proper review, the *UCCM* court plainly stated:

> As such, it [the adjustment clause] is a radical departure from the usual practice of approval or disapproval of filed rates, in the context of a general rate case. Even under the file and suspend method, by which a utility's rates may be increased without *requirement* of a public hearing, the commission ***must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended.*** *See State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 718-19, 720 (Mo. 1957). However, a preference exists for the rate case method, at which those opposed to as well as those in sympathy with a proposed rate can present their views. *See State ex rel. Laclede Gas Co. v. Public Service Comm'n, 535 S.W.2d at 574.*

(Italics in original; bolded emphasis added). Overearning and the accompanying excessive rate of return are relevant factors that must be considered by the Commission. *UCCM*.

The original QCA agreement was a deferral of the prudence of utility expenditures to another procedure, not a shift in the burden of proof. The Commission's disregard of the terms and conditions of the QCA takes this case out of the QCA and puts it back where it becomes nothing more than an extension of the original rate case. GMO equally disregards the terms and conditions of the QCA.

The current adjustment would, without the recoupment, represent an even greater refund of excess fuel costs to steam customers. Cynically, GMO seeks to shelter its overearning in the negotiated terms and conditions of the QCA that it otherwise ignores. GMO cannot have its cake and eat it too.

GMO does not dispute its overearning. Instead, it seeks to explain or excuse its overearning and avoid Commission investigation through an affidavit from Mr. Rush. Beyond acknowledging its overearning, Mr. Rush boldly asserts that its overearning will only increase in the future. Rush Affidavit, paragraph 7. GMO's pleading oscillates between attempting to explain the overearning as a result of a 15% sharing and effecting the unlawful Commission-directed refund. Mr. Rush's affidavit, however, speaks to the sharing mechanism. Rush affidavit, paragraph 8. AGP does not object to the sharing mechanism, but that mechanism should not be used to justify overearning. Mr. Rush makes no attempt to justify -- nor does he even mention -- the interest charge. His affidavit tries to explain or excuse GMO's overearning but ***does not deny it***. GMO's overearning is "primarily" due to one things, and then to another, but is never denied or quantified.

Mr. Rush claims that "GMO's steam business for the period November 2011 through October 2012 showed negative earnings." Rush Affidavit, paragraph 7. He attributes this to the earlier refund to the steam customers. But the period cited in the surveillance report noted by Mr. Johnstone included many

months when these refunds were being provided, when GMO still reported substantial overearning. A hearing is needed to sort out the facts.

Third, to the extent that GMO's Response ascribes the "refund" to an unlawful order from this Commission, that order far exceeded any Court mandate and has been challenged by AGP. The Commission's order approved recoupment of interest charges, but the QCA does not provide for the recovery of interest charges in either direction. The Commission's order apparently relies upon new 386.510 for such an interest charge, but no interest was collected from the customers originally. Hence this charge is completely unfounded even under the Commission' erroneous interpretation of the Court's mandate. GMO's claim that the Commission "found that Aquila was prudent . . . ." (Response, p. 4) was vacated by the Commission, an action challenged by GMO, thus GMO apparently agrees with AGP that the Commission exceeded the judicial mandate.

Fourth, utility overearning requires investigation by this Commission, not abdication. No Court mandate could excuse this regulatory responsibility. Absent a judicial mandate, there is no authority for the Commission to issue the order that it did. This earlier order has been and continues to be challenged by AGP at the Court of Appeals. The briefing schedule is ongoing.

Fifth, the original case is not this case. In that case the Court of Appeals erroneously exalted form over substance

and decided that, because AGP's prudence challenge had been identified as a "complaint" (a designation that was originally applied by the Commission when it redocketed the case), that a complaint burden of proof should be applied. That case is over, however. Here AGP's protest is lodged up front as a challenge to a rate change and falls well within Section 393.150.2 and *UCCM*. This is not a retroactive challenge (similar to the PGA true-up process), but is an up front request for suspension and an investigation in the face of undenied utility overearning. Accordingly, the Commission now must either ignore unrefuted evidence from its own surveillance records, accept GMO's unquantified excuses, and justify its decision not to suspend through a demonstrated consideration of all relevant factors, or it must suspend the proposed tariff and order an investigation and a hearing. The Commission may not ignore the pertinent case law (*UCCM*) and the applicable statute (Section 393.150.2). *UCCM* stated:

> Such a system of regulation is necessary, despite the expense and time required to investigate utility costs, hold hearings and fix rates because:
>
> > "despite the existence of substantial competition [between types of utilities], actual as well as theoretical, . . . some alternative to price determination by the laws of supply and demand plainly is necessary. Regulation of rates and standards of service is the only technique we have evolved for dealing with the problem, short of [government operation]." Priest, 1 Principles of Public Utility Regulation 2 (1969).

> "***This system is designed to protect consumers against exploitation where competition is inherently unavailable or inadequate***, and to insure that these industries will serve the public interest. At the same time it provides these companies necessary assurance of an opportunity to earn a reasonable return on their investment and to attract capital for expansion." Id. at 4, quoting Joseph C. Swidler, Chairman, Federal Power Comm'n, speech (February 4, 1965).

UCCM, *supra*, at 48 (emphasis added). The Commission was not established to provide protection for the utility. It was created to protect customers against exploitation by a monopoly utility, specifically against overearning.

Sixth, neither GMO nor the Commission may have it both ways. Neither can legitimately claim that the Commission's order restores the parties, because it plainly does not, *i.e.*, GMO does not in any manner respond to AGP's contentions regarding recoupment of interest that never was paid. Nor does it respond, other than incorporation by reference, of its earlier pleading in which it attempted to justify its failure to seek a stay of the original refund order. Nor can GMO have it both ways now, and claim on one hand that the earlier application was a "new rate" and now claim that it is still proceeding under the original QCA whose provisions it has ignored.

GMO applies the QCA inconsistently. There is no provision for interest, yet the Commission imposed one, supposedly to put the parties back in their original positions. The QCA does not permit recovery of fuel expenses that are not incurred

in the prior calendar quarter. Yet the Commission sought to do exactly that.

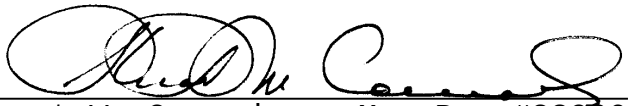
Seventh, the QCA is not an adjustment clause established by Section 386.266. As acknowledged by GMO (Response, p. 1), this provision is entirely created by an agreement between AGP and Aquila. Just as the Commission was not originally empowered to substitute terms that it preferred for those that were negotiated, it may not do so now. Instead it is limited to the terms of the QCA. It cannot with impunity ignore them.

WHEREFORE, AGP again moves and again requests: (1) that this protest be received and the matter be set at issue in a contested case; (2) that the proposed tariff be suspended for an appropriate period including the maximum period of suspension to permit investigation, a hearing and other appropriate process; (3) that AGP be permitted to intervene in the matter so as to protect its interests as a steam customer; (4) that proper notice to steam customers be issued by or at the direction of the Commission; and (5) a hearing and initial procedural schedule be set by the Commission and a scheduling conference be established

so that the Commission and all appropriate parties may develop such other procedural schedule as may be necessary in the premises.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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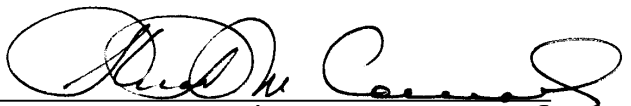
ATTORNEYS FOR AG PROCESSING INC.

SERVICE CERTIFICATE

I certify that I have served a copy of the foregoing pleading upon identified representatives of the parties hereto per the EFIS listing maintained by the Secretary of the Commission by electronic means as an attachment to e-mail, all on the date shown below.



Stuart W. Conrad, an attorney for
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August 27, 2013