STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 21st day of July, 2010.

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

ORDER DENYING MOTION TO DISMISS

Issue Date: July 21, 2010 Effective Date: July 21, 2010

Ag Processing, Inc., a Cooperative, filed a complaint against KCP&L Greater Missouri Operations Company (GMO)[1] alleging that GMO had no authority to conduct a hedging program or charge hedging settlement costs with regard to natural gas costs for steam customers; that GMO imprudently conducted a hedging program for the 2006 and 2007 Quarterly Cost Adjustment (QCA) periods; and that as a result of the imprudent hedging program, steam customers paid $1,164,960 and $2,441,860 in hedging settlement costs in 2006 and 2007, respectively. Ag Processing requests that the amount of the hedging settlement costs, plus interest, be refunded to steam customers.

[1] GMO is the successor utility in interest to Aquila, Inc. d/b/a Aquila Networks-L&P.

GMO filed a Motion to Dismiss, Answer, and Affirmative Defenses in which it requests that the Commission dismiss Ag Processing's complaint for several reasons. Ag Processing filed a response to the motion, and GMO filed a further reply. A prehearing conference was held on June 21, 2010, at which further discussions and arguments were made about the motion to dismiss.

First, GMO requests the complaint be dismissed for failure to state a claim upon which relief may be granted to the extent that the complaint is alleging that GMO's hedging program resulted in net fuel costs that were higher than if GMO had no hedging program. Ag Processing makes three main allegations in its complaint: 1) that the programs were not authorized by the Commission's order approving the settlement in HR-2005-0450; 2) that it was not prudent to enter into a hedging program; and 3) that the hedging programs were not conducted prudently.

The Commission agrees with GMO that no claim can arise from the allegation that GMO did not have authority to enter into a hedging program. Original Sheet No. 6.2 of the tariff attached to the complaint states that the cost of gas will include the "financial instruments associated with gas delivered in the quarterly period." In addition, the nonunanimous stipulation and agreement,[2] approved in HR-2005-0450 used identical language to the tariff and contains no provision prohibiting hedging. And finally, Ag Processing has cited no law or order of the Commission which would prohibit a prudent hedging program. Therefore, no claim upon which relief may be granted can exist from an allegation that GMO did not have authority to conduct a hedging program.

[2] At page 5, paragraph 8.1.

With regard to Ag Processing's other allegations, however, it is a factual determination as to whether it was prudent to enter into a hedging program and whether the program was run prudently. Thus, a determination as to prudency is a factual determination for the Commission.

GMO's second argument is that the Commission should dismiss the complaint for failure to state a claim upon which relief may be granted because Ag Processing fails to set out any provision of law, rule, or order of the Commission which GMO has allegedly violated. While it is true that no specific statutory citation is listed in the complaint, Ag Processing does allege that the hedging program was conducted imprudently because adjustments were not made to the program because of the explosion at one steam customer's facility (Triumph Foods) and because the QCA already takes into account gas cost volatility. The approved stipulation and agreement in HR-2005-0450 provides for prudence reviews as does the tariff. Thus, the Commission will not dismiss the complaint for failure to set out a rule of law or Commission order which GMO has allegedly violated.

GMO's third argument is that the complaint must be dismissed because GMO's tariff requires that any prudence review must be completed no later than 225 days after the end of the QCA year, and Ag Processing did not meet that deadline.[3] The 225-day deadline to which GMO refers, however, does not apply to a prudence review brought by a customer. The tariff at Sheet 6.9 states in part:

> 7. . . . 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. . . .

[3] Sheet 6.4, Section 7.

> 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.

Thus, the tariff sets out that a "full prudence review" must be completed within 225 days. The tariff contemplates that a "full prudence review" is one that is conducted by Staff. The tariff goes on to state that any customer may initiate a complaint to pursue "a prudence review" and that the customer will not be prejudiced by the lack of a "full prudence review." The Commission interprets these provisions as clearly setting out two different types of prudence reviews. One that may be initiated by Staff within 225 days of the end of the year; and one that may be initiated by a customer through the complaint process without a specific time limitation and without prejudice by Staff having not conducted a "full prudence review." Therefore, the Commission determines that this prudence review is not precluded by the terms of the tariff.

GMO also requests that the complaint be dismissed because Ag Processing asks for only equitable remedies in that it requests that monies be refunded to steam customers. During the prehearing conference, counsel for GMO agreed that the rates set through the Quarterly Cost Adjustment mechanism are considered "interim subject to refund." Therefore, while the Commission may not be able to give an award of money damages, it can establish rate mechanisms such as the QCA and has approved this tariff which provides for prudence reviews and refunds in the manner of rate adjustments. In addition, the Commission may determine whether the hedging programs were prudent. Therefore, the Commission will not dismiss the complaint on this ground.

Finally, GMO requests that the complaint be dismissed for failure to comply with the Commission's rule 4 CSR 240-2.070(5)(A) which requires the signature, telephone

number, facsimile number and electronic mail address of the complainant to be included in the complaint. The complaint includes the full address and primary place of business for the complainant, but is signed by counsel for the complainant and includes electronic contact information only for counsel.

The purpose of the rule cited is to inform the respondent in a complaint exactly who is complaining against it, to inform the Commission of who to contact with procedural matters, and so that the respondent knows who to contact in order to satisfy the complaint. These are parties intimately familiar with one another and the Commission. In addition, the attorney for the complainant has signed the complaint and provided full contact information, so that GMO should be apprised of who to contact in order to satisfy this complaint. The Commission does not find the attorney's signature and contact information in place of the complainant's to be in violation of the rule, nor would dismissal of the complaint be an appropriate remedy if it were. Therefore, the Commission will not dismiss the complaint for this reason.

The Missouri Supreme Court indicates a motion to dismiss for failure to state a cause of action:

> assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.[4]

[4] *State ex rel Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo. 2008), *quoting, Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002).

If the allegations in Ag Processing's application are accepted as true, as they must be for purposes of considering the motion to dismiss, it is apparent that Ag Processing has stated a cause upon which the Commission can grant relief.

The Commission may hear complaints alleging a violation of a Commission order or of any statute or rule.[5] Ag Processing is only required to set forth "any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission."[6] Ag Processing has essentially alleged that GMO violated the order approving the stipulation and agreement in HR-2005-0450 which directed the parties to abide by its terms. It is only after hearing the evidence and arguments of the parties that the Commission can determine whether there has been a violation. Therefore, the Commission will deny GMO's motion to dismiss.

THE COMMISSION ORDERS THAT:

1. The motion to dismiss the complaint filed by KCP&L Greater Missouri Operations Company is denied.

[5] Section 386.390, RSMo 2000.

[6] Section 386.390.1, RSMo 2000.

2. This order shall become effective upon issuance.

BY THE COMMISSION

Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett,
Gunn, and Kenney, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge