STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 27th day of February, 2013.

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

AG Processing, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	**File No. HC-2012-0259**
	)	
KCP&L Greater Missouri Operations Company,	)	
	)	
Respondent.	)	

ORDER REGARDING REMAND

Issue Date: February 27, 2013 Effective Date: March 5, 2013

Background on file No. HC-2010-0235

Prior to the merger between Great Plains Energy Incorporated and Aquila, Inc. d/b/a Aquila Networks – L&P ("Aquila"), which then became KCP&L Greater Missouri Operations Company ("GMO"), a sister subsidiary of Kansas City Power and Light Company, Aquila had a program in place to hedge natural gas price volatility for its steam operations.[1]

[1] The merger was approved by the Commission in File No. EM-2007-0374, *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief* in its Report and Order issued on July 1, 2008, Effective, July 11, 2008.

Aquila engaged in this program because they used two fuels to generate steam – coal was the primary fuel and natural gas was used as a swing fuel when load exceeded the capacity of the coal-fired boiler. Natural gas prices were highly volatile, in part, because of the effects of Hurricanes Rita and Katrina in 2005. The hedging program was a 1/3rd, 1/3rd, 1/3rd program. Thus, 1/3rd of the required natural gas was not hedged and was to be bought on the spot market; 1/3rd was hedged with futures contracts and 1/3rd was hedged with call options. In 2006-2007, the hedging program resulted in losses because the amount of natural gas was over-hedged based upon forecasts for usage from Aquila's customers and because the price of gas fell.

Aquila has five industrial steam customers: AG Processing, Inc. ("AGP"), Triumph Foods, L.L.C. (a new customer coming on line just before the 2006 hedges were placed), Albaugh Chemical, Nestle/Purina PetCare, and Land O' Lakes - Omnium Division (a chemical company). A sixth customer, Silgan Containers, left the system towards the end of 2006, apparently after the 2006 hedges were placed. Gains and losses from the hedging program were passed through to Aquila's customers by means of Quarterly Cost Adjustments ("QCA") for fuel expenses. The pass through is an 80/20 adjustment where the customers pick up 80% of the fuel costs. The QCA is similar to a fuel adjustment clause mechanism.

During the period of April 2006 through December 2007, Aquila purchased hedge positions for approximately 2,000,000 mmBtus of natural gas for steam production. During the same period, its actual burn was 1,500,000 mmBtus. The net cost of the hedging program for 2006 was $1,164,960 and for 2007 was $2,441,861. Consequently, with the 80% pass through, Aquila's customers paid $936,968 of these costs for 2006, and $1,953,488 for 2007. The hedging program ceased in October of 2007.

On January 28, 2010, AGP filed its complaint in File No. HC-2010-0235 claiming that GMO was imprudent for initiating such a hedging program and that the program was imprudently designed and imprudently managed or operated. AGP sought a refund of the money lost in the hedging program.

The Commission issued its Report and Order in HC-2010-0235 on September 28, 2011, effective October 8, 2011. In that order, the Commission determined that:

(1) it was not imprudent for GMO to adopt a natural gas hedging program;

(2) GMO's hedging program was prudently designed,

but

(3) GMO failed to meet its burden to prove that it operated its hedging program in a prudent manner.

When reaching its decision that GMO failed to meet its burden to prove that it operated its hedging program in a prudent manner, the Commission examined the presumption of prudence the utility receives in relation to its expenses. That presumption is applied as follows in a general rate case:

> A utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt[2] as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.[3]

Applying the presumption, the Commission determined that:

(1) AGP had raised serious doubt about the prudence of GMO's decisions regarding the hedging program;

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[2] The legal standard for overcoming a presumption is the production of substantial controverting evidence. It should be noted that in HC-2010-0235 the Commission did not articulate this standard when finding that AGP raised serious doubt so that finding is not adequately supported. On remand this won't necessarily matter, because the Court of Appeals made it clear that the Complainant, AGP, has the burden of proof at the preponderance of the evidence standard. The burden-shifting presumption is not applicable.

[3] This presumption is routinely applied in rate cases, but it should be kept in mind that legal presumptions are not the same as a burden of proof. A full legal analysis of the burden of proof in a "prudence review" versus a complaint case appears in the Report and Order in File No. EO-2011-0390 that was issued on September 4, 2012.

(2) GMO had the burden of proving it operated its hedging program in a prudent manner;

and

(3) GMO failed to meet that burden.

The Commission went on to say that GMO failed to establish that any part of the cost of operating the hedging program was prudently incurred and the entire net cost of operating its natural gas price hedging program for steam production in 2006 and 2007 was imprudently incurred.

The Commission made another important decision in HC-2010-0235. The Commission decided that since this action was a full prudence review, it applied to all of GMO's steam customers, and the relief ordered by the Commission, a refund, should apply to all of Aquila's steam customers, not just AGP, the only party that complained.

GMO pursued an appeal of the Commission's decision to the Missouri Court of Appeals, Western District. By November 12, 2012, while awaiting the issuance of the mandate of the Court of Appeals, GMO had completed the Commission-ordered refund of the entire amount at issue to its customers through the QCA.

The Court of Appeals reversed the Commission's decision, finding that the Commission incorrectly applied the burden of proof. The Court determined that AGP, as the complainant who initiated the action, had the burden to prove its claims of imprudence regarding the company's expenditures on the natural gas hedging program at the preponderance of the evidence standard. The court stated: "Granting relief without requiring Ag Processing to prove the allegations in its complaint is reversible error." "Accordingly, we reverse the order and remand the cause for further consideration under the appropriate burden of proof."

The Court of Appeals Mandate was issued on November 21, 2012, making its order final. The Court had overruled motions for rehearing filed by the Commission and AGP. No motions for transfer to the Supreme Court of Missouri were filed.

Background on file No. HC-2010-0235

File Number HC-2012-0259 is another complaint initiated by AGP against GMO raising allegations of imprudence with GMO's hedging program, but it involves a different quarterly cost adjustment period - 2009. It also involves different allegations of imprudence. This case was nearing its hearing date when GMO filed a motion to stay it pending the Court of Appeals decision in HC-2010-0235. The Commission granted that motion and stayed the case because the proper burden of proof will be identical for both of these cases.

The Commission's Review Following Remand

After discussing these two matters at the Commission's December 5, 2012 Agenda session, the Commission decided the initial step was to have the parties to HC-2010-0235 re-brief that case, based on the present record, applying the preponderance of the evidence standard. Those briefs were filed on January 7, 2013. GMO responded to AGP's brief on January 15, 2013. AGP replied to GMO's response on January 25, 2013. In that reply, AGP raised another argument claiming that even if it failed to meet the burden of proof, the customers cannot be compelled to refund the money to GMO as a matter of law. The Commission set a response deadline for February 4, 2013 to give the parties an opportunity to respond to this new legal argument. Responses were filed by GMO on February 8, 2013, and by the Commission's Staff on February 11, 2013.

On February 12, 2013, AGP filed a notice of its intent to reply to GMO's and Staff's responses. And on February 13, 2013, following a case discussion on these matters at the

Commission's Agenda session, the Commission established a response deadline for AGP of March 19, 2013.[4]

Following the re-briefing of HC-2010-0235, the Commission undertook an extensive review of its September 28, 2011 Report and Order. When reviewing its prior decision, the Commission kept in mind the preponderance of the evidence standard, the prudence standard and the proof of harm standard as articulated below.

Preponderance of the Evidence Standard

In order to meet the preponderance of the evidence standard, AGP must convince the Commission it is "more likely than not" that its allegations of imprudence against Aquila/GMO are true.[5] There must be enough evidence to tip the scales in favor of a party in order for them to meet this burden. The preponderance of the evidence must support the complainant's allegations and demonstrate that GMO violated the prudence standard in relation to the company's hedging program.

If the evidence is equally balanced, the litigant having the burden of proof loses.[6] Similarly, a submissible case is not made if it depends solely on evidence which equally supports two inconsistent and contradictory inferences.[7]

Prudence Standard

The "prudence standard" further qualifies how AGP must meet its burden of proof in relation to its allegations. To determine if GMO's conduct was imprudent, the Commission looks at whether the utility's conduct was reasonable at the time, under all of the

[4] Responses were filed by both AGP and GMO. Neither response adds to the analysis.

[5] *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 746 (Mo. App. 2005); *Holt v. Director of Revenue, State of Mo*., 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999*); Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

[6] *Dill v. Dill*, 304 S.W.3d 738, 743 (Mo. App. 2010).

[7] *Steward v. Baywood Villages Condominium Ass'n* 134 S.W.3d 679, 682 (Mo. App. 2004).

circumstances, considering that the company had to solve its problem **prospectively** rather than in reliance on hindsight.[8] More specifically, AGP must prove, by the preponderance of the evidence, that GMO's conduct was unreasonable at the time, under all of the circumstances, from a prospective viewpoint, not in hindsight. Additionally, "[i]f the company has exercised prudence in reaching a decision, the fact that external factors outside the company's control later produce an adverse result do not make the decision extravagant or imprudent."[9]

Proof of Harm

In order for the Commission to direct a refund for any alleged imprudently incurred costs, it must apply a two-part test. The Commission must find both that: (1) the utility acted imprudently when incurring those costs and, (2) such imprudence resulted in harm to the utility's ratepayers.[10] Harm to ratepayers in relation to imprudently incurred costs requires proof of causation, i.e., that the increased costs recovered from the ratepayers were causally related to the alleged imprudent action, and evidence as to the amount those expenditures would have been if the utility acted prudently.[11]

Analysis and Decision

After a complete review of the evidence in HC-2010-0235, the Commission determines that it will vacate its Report and Order in its entirety as a matter of due process. When AGP presented its case to the Commission it was operating under the assumption

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[8] *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n*, 116 S.W.3d 680, 694 (Mo. App. 2003); *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 954 S.W.2d 520, 528 -529 (Mo. App. 1997).

[9] *State ex rel. Missouri Power and Light Co. v. Public Service Comm'n*, 669 S.W.2d 941, 947 -948 (Mo. App. 1984).

[10] *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 954 S.W.2d 520, 529 -530 (Mo. App. 1997).

[11] *Id*.

that the burden of proof would shift to GMO if it raised serious doubt as to GMO's adoption and management of the hedging program. To ensure due process, the Commission will reopen the evidentiary record in HC-2010-0235 to take **additional** evidence[12] with all of the parties being fully informed of the proper burden of proof and who bears that burden.[13] AGP bears the burden of proof of its allegations at the preponderance of the evidence standard. All of the parties will be afforded the opportunity to present evidence so there will be no unfair advantage to any party.

Additionally, the Commission failed to properly apply the proof of harm standard. The Commission even noted this in its decision stating: "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 need to purchase supply steam to its customers." There was no evidence produced as to what the hedging costs might have been if more accurate forecasted load had been used, but presumably there still would have been costs passed through the customers. There was also no evidence produced providing a breakdown of each customer's portion of the hedging costs. Consequently, when the Commission ordered the refund in HC-2010-0235, it did not have any evidence in the record to determine the correct amount of the award.

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[12] The parties do not have to re-introduce evidence already admitted into the record.

[13] As the Court of Appeals has elucidated:

> The trial court is afforded wide discretion in determining whether to reopen a case to allow the admission of additional evidence. The trial court's decision as to whether to reopen a case will be reversed only upon a showing of abuse of discretion. However, when there is no inconvenience to the Court or unfair advantage to one of the parties, there is an abuse of discretion and a new trial will be directed upon a refusal to reopen a case and permit the introduction of material evidence, that is evidence that would substantially affect the merits of the action and perhaps alter the Court's decision. (Internal citations omitted).

Foster v. Village of Brownington, 76 S.W.3d 281, 287 (Mo. App. W.D. 2002).

Because the Court of Appeals has reversed and remanded this case to the Commission, the Commission believes that it has the same discretionary authority as the courts to re-open the evidentiary record.

Current Status of the Quarterly Cost Adjustment

Having determined the Commission must reopen the record in HC-2010-0235, and having determined that its prior decision was in error because it did not apply the proper burden of proof, the Commission must make a determination with regard to the refund the Commission ordered to GMO's customers. The Commission must make this ruling now pursuant to Section 386.520.2(3), RSMo Supp. 2011, which provides:

> 2. With respect to orders or decisions issued on and after July 1, 2011, that involve the establishment of new rates or charges for public utilities that are not classified as price-cap or competitive companies, there shall be no stay or suspension of the commission's order or decision, however:
>
> (3) **If the effect of the unlawful or unreasonable commission decision was to** increase the public utility's rates and charges by a lesser amount than what the public utility would have received had the commission not erred or to **decrease the public utility's rates and charges in a greater amount than would have occurred had the commission not erred, then the commission shall be instructed on remand to approve temporary rate adjustments designed to allow 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.** Such amounts shall be calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new permanent rates and charges consistent with the court's opinion became effective or when new permanent rates or charges otherwise approved by the commission as a result of a general rate case filing or complaint became effective. Such amounts shall then be reflected as a rate adjustment over a like period of time. **The commission shall issue its order on remand within sixty days unless the commission determines that additional time is necessary to properly calculate the temporary or any prospective rate adjustment, in which case the commission shall issue its order within one hundred twenty days.** (Emphasis added).

The Commission determines that additional time, beyond 60 days, is necessary to properly calculate the temporary rate adjustment that must be made in relation to its September 28, 2011 Report and Order determined to be unlawful by the Court of Appeals. It required more than 60 days to allow the parties to re-brief the matter and allow the Commission to fully review the evidentiary record applying the proper burden of proof.

Even though the Commission has decided that the record must be reopened, Section 386.520.2(3) RSMo Supp. 2011, mandates the Commission to make a determination on rate adjustments within a maximum deadline of 120 days upon remand. Because the Court of Appeals' mandate issued on November 21, 2012, the Commission must make this adjustment no later than March 21, 2013. There is insufficient time for the Commission to conduct a new hearing in this matter and render a new decision within that time frame, so the Commission will order a rate adjustment during the pendency of the new hearing. This rate adjustment will not prejudice any party because the QCA is a two-way cost adjustment mechanism.[14] If it is later determined that GMO actions were imprudent, any amounts returned to GMO that should have been retained by the customers can simply be flowed back through the QCA to the customers.

Consolidation with HC-2012-0259

File No. HC-20120-0259 has been stayed pending a determination in HC-2010-0235. Because the Commission is going to reopen the record in HC-2010-0235, as a matter of administrative economy and to prevent unnecessary delay and avoid unnecessary costs, the Commission will consolidate the two actions. While the allegations in the two complaints advance different theories of imprudence, they involve related questions of law and fact.[15]

Procedural Schedule

The parties will need to coordinate the presentation of the evidence for these two matters and the Commission is unaware of potential conflict dates for counsel to the

[14] The Commission has reviewed all of the parties' filings in relation to this issue and agrees with the positions of its Staff and GMO, as articulated fully in their filings. See EFIS Docket Entry No. 120, Legal Analysis of KCP&L Greater Missouri Operations Company, filed on February 8, 2013 and EFIS Docket Entry No. 121, Response to Order Directing Filing, filed on February 11, 2013. EFIS is the Commission's electronic Information and Filing System. The Commission adopts these legal analyses as if fully set out in this order.

[15] See Commission rule 4 CSR 240-2.110(3).

parties. Consequently, the Commission will direct the joint filing of a proposed procedural schedule.

THE COMMISSION ORDERS THAT:

1. The Commission's September 28, 2011 Report and Order in HC-2010-0235 is vacated.

2. The Commission re-opens the evidentiary record in HC-2010-0235 for further proceedings as delineated in the body of this order.

3. KCP&L Greater Missouri Operations Company shall, within 20 days of the effective date of this order, file a new Quarterly Cost Adjustment Tariff that initiates the return of the improvidently ordered refund to its steam customers in the manner described in Section 386.520.2(3), RSMo Supp. 2011, which states: "Such amounts shall be calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new permanent rates and charges consistent with the court's opinion became effective or when new permanent rates or charges otherwise approved by the commission as a result of a general rate case filing or complaint became effective. Such amounts shall then be reflected as a rate adjustment over a like period of time." The Commission's Staff shall review the company's tariff filing to ensure statutory compliance and file a recommendation on whether to approve it as being in conformity with this order no later than five days after the tariff filing is made.

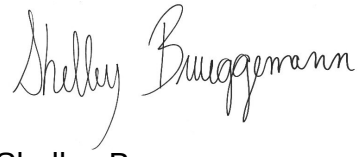
4. The Commission lifts the stay and reactivates File Number HC-2012-0259.

5. File Numbers HC-2010-0235 and HC-2012-0259 are consolidated. File No. HC-2012-0259 shall be designated as the lead case and File No. HC-2010-0235 shall be closed. All future filings in these matters shall be made in File NO. HC-2012-0259.

6. No later than March 14, 2013, the parties shall jointly file a proposed procedural schedule for the consolidated cases.

7. This order shall become effective on March 5, 2013.

BY THE COMMISSION



Shelley Brueggemann
Acting Secretary

Gunn, Chm., Jarrett, R. Kenney,
Stoll, and W. Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge