BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

RESPONSE TO ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission, and for its *Response to the Commission's Order of January 28, 2013,* states as follows:

1. On January 28, 2010, AG Processing Inc., a Cooperative, ("AGP") filed a complaint against Aquila, Inc., d/b/a Aquila Networks – L&P, now known as KCP&L Greater Missouri Operations Company ("GMO"), complaining that it was overcharged for the provision of industrial steam service to AGP's soybean processing plant in St. Joseph, Missouri, in that the charges rendered and paid included imprudently incurred natural gas price hedging costs.[1]

2. On September 28, 2011, the Commission issued its *Report & Order,* holding that AGP had raised doubts concerning GMO's hedging program sufficient to require GMO to prove the prudence of the same, that GMO had failed to establish that any part of the cost of operating its natural gas price hedging program for steam production in 2006 and 2007 was prudently incurred, and, consequently, that GMO must refund the entire net cost of that program to its steam customers through the

[1] For convenience and clarity, the Respondent will be referred to throughout as "GMO."

Quarterly Cost Adjustment ("QCA") mechanism. Those costs amount to $931,968 for 2006 and $1,953,488 for 2007.

3. GMO pursued an appeal of the Commission's decision to the Missouri Court of Appeals, Western District, and on October 23, 2012, that Court reversed the Commission because it had incorrectly applied the burden of proof.

4. Effective November 21, 2012, the Court's mandate issued and this matter was remanded to the Commission for further proceedings.

5. By November 12, 2012, GMO had already refunded the entire amount at issue to its customers through the QCA.

6. On December 5, 2012, the Commission directed the parties to rebrief the case for a new Commission decision based upon the existing record and, in particular, to "address the issue as to whether AGP has satisfied the preponderance of the evidence standard with regard to its allegation of imprudence."

7. On January 7, 2013, the parties timely filed the requested briefs. In its brief, AGP stated:[2]

> The record will show by a preponderance of unrefuted proof that Aquila's actions were imprudent and resulted in charges through the QCA to ***all*** steam customers, not just AGP. Imprudent costs should not be passed to customers. Pursuant to the stipulation and the resulting tariff, these amounts were collected subject to refund. The collection of the amounts subject to refund was not questioned by Aquila. And, pursuant to the Commission's earlier Order, that refund has now been made through the mechanism of the QCA.
>
> Indeed, it is not entirely clear that a change in outcome by the Commission could cause amounts that were collected under an obligation of refund and, in fact, refunded, to be recovered. The costs were incurred some time ago. As this, by Aquila's contention, is a complaint case, the Commission is without authorization to order charges to customers for services and costs that were provided or incurred in prior periods. GMO

[2] At pp. 5-6, 8-9.

> did not seek a stay of the Commission's earlier order nor did it provide a suspending bond under Section 386.520 and thus any rights that GMO/Aquila might have had have been vitiated by its own arguments that this is a complaint case.
>
> * * *
>
> On September 28, 2011 the Commission issued its Report and Order in this case, directing that Aquila (now GMO) refund the amounts that were imprudently collected by Aquila under an obligation of refund, pursuant to the QCA rate schedule. In its new name of GMO, Aquila appealed using the newly established procedure of direct appeal (Section 386.510) but did not seek a stay or seek to provide an appeal bond. Accordingly, the earlier Commission decision is conclusive as to the refunded amounts. Section 386.550. The amounts that were originally found by the Commission to have been imprudently incurred and collected from the Aquila's steam customers under an obligation of refund have now been fully refunded to the steam customers through the mechanism of the QCA.

8. On January 15, 2013, GMO filed a response to AGP's brief, explaining that "AGP addressed additional issues in its brief[.]" In particular, GMO responded to the portions of AGP's brief set out above. GMO stated:[3]

> If the Commission were to find that AGP failed to carry its burden of proof under this standard, the Commission must refund to GMO through the Quarterly Cost Adjustment ("QCA") Rider the amount that was refunded to steam customers pursuant to the 2011 Report and Order. AGP has argued to the contrary at pages 5-6 and 8 of its brief that the Commission has no authority to return any amounts to GMO. However, the plain language of the QCA Rider states that "[o]ther fuel cost refunds, or credits related to the operation of this rider may also flow through this reconciliation process, as ordered by the Commission." See QCA Rider Sheet No. 6.2. Therefore, if the Commission finds that AGP has failed to meet its burden of proof, the funds improperly refunded must be restored to GMO through the QCA.

9. On January 25, 2013, AGP replied to GMO, providing a detailed explication of its argument that, even if the Commission determines that AGP failed to meet the burden of proof the Court of Appeals directed the Commission to apply, the

[3] At ¶ 8, on page 3 of its *Response.*

money GMO refunded to its customers through the QCA cannot lawfully be collected from them again.

10. On January 28, 2013, the Commission directed Staff to file a legal analysis, on or before February 4, 2013, as to the opinion expressed by counsel for AG Processing, Inc. ("AGP"), that "even if the Commission determines that AGP failed to meet the burden of proof the Court of Appeals directed the Commission to apply, no return of the money refunded to GMO's customers is allowed as a matter of law."

11. On February 4, 2013, the Commission granted Staff's motion for an extension of time[4] until February 11, 2013.

12. Following is Staff's legal analysis.

Staff's Legal Analysis

Question presented: The issue is whether or not GMO will be able to recover the amounts that it has refunded to its steam customers through the QCA pursuant to the Commission's *Report & Order,* should it prevail on remand.

Short answer: If GMO prevails on remand, the Commission may order that GMO collect the amounts previously refunded from its steam customers through the QCA.

Detailed answer: In the traditional world of public utility regulation, the Commission was without authority to order any entity to pay money to another because, as an administrative agency, the Commission was -- and still is -- unable to issue a money judgment. As the Missouri Supreme Court explained in a case concerning a railroad crossing and an attempt by the State Highway Commission to induce the

[4] Filed on February 4, 2013, with the consent of all parties.

Commission to order the removal from the intersection of structures belonging to the American Petroleum Exchange:[5]

> The American Petroleum Exchange is a private corporation and the Public Service Commission did not have and could not exercise any jurisdiction over it. The Public Service Commission is not invested with the power of eminent domain and cannot subject private property to public use. The commission has no power to declare or enforce any principle of law or equity and as a result it cannot determine damages or award pecuniary relief. Neither may the commission abate a nuisance or award consequential damages.

It follows that monies paid by utility customers to a utility for services rendered belong to the utility and cannot be refunded by order of the Commission: "When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions."[6] The Court emphasized the distinction between money paid unconditionally, which cannot be refunded, and money paid conditionally, which can be:[7]

> We are of the opinion that Springfield Gas and Electric Company, and defendants-appellants, City and Board of Public Utilities of Springfield, lawfully and unconditionally came into the possession, custody and control of the moneys paid by respondents for gas furnished them in intrastate commerce pursuant to lawful rates fixed by rate-making authorities of Missouri. There was no encroachment upon the rights of respondents. They have paid no more than the rates lawfully in effect. In our opinion the money so unconditionally paid as prescribed by the lawfully promulgated and effective rates became and was the property of the distributors, appellants. We cannot ignore our regulatory laws, and we will give effect to constitutional provisions as we understand them. We have said that when the established rate of a utility has been followed, the

[5] ***American Petroleum Exchange v. Public Service Commission,*** 172 S.W.2d 952, 955 (Mo. 1943).

[6] ***Lightfoot v. City of Springfield,*** 361 Mo. 659, 671, 236 S.W.2d 348, 354 (Mo. 1951); ***Straube, et al., v. Bowling Green Gas Company,*** 360 Mo. 132, 142, 227 S.W.2d 666, 671 (1950).

[7] ***Lightfoot,*** *supra,* 361 Mo. at 671, 236 S.W.2d at 354.

> amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or court action without violating the due process provisions of the state and federal constitutions.

In the leading case on this question, the Missouri Supreme Court considered the question of refunds with respect to a Fuel Adjustment Clause ("FAC") contained in the tariffs of certain electric utilities.[8] The Court concluded that the FAC was illegal and that the Commission had erred in approving the tariffs containing it.[9] Nonetheless, the Court further held that no refund of the monies paid under the illegal FAC was possible where the funds were paid directly to the utilities and not into the registry of a court:[10]

> The Commission has the authority to determine the rate *to be charged,* § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery[.] It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.

However, the Court reached a different result where money was paid under protest and held in a separate fund by a court pending the resolution of the controversy: "***Lightfoot*** does not control the present case because the Industrials did contest the PSC order and they did establish a stay fund. Their money was not unconditionally paid and therefore it did not become the property of [the utility]."[11] The controlling point is whether or not payments to the utility are made conditionally or unconditionally. It should be noted that the finality of payment under the traditional regulatory scheme was beneficial to both company and customer. Just as the customer could not obtain a

[8] ***St. ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission of Missouri,*** 585 S.W.2d 41, 47 (Mo. banc 1979).

[9] *Id.,* at 56-8. FACs are now lawful pursuant to SB 179 (2005), codified at § 386.266, RSMo.

[10] *Id.,* at 58 (emphasis in the original; internal citations omitted).

[11] ***State ex rel. Monsanto Co. v. Public Service Commission,*** 716 S.W.2d 791, 794 (Mo. banc 1986).

refund if the amount paid under the tariff happened to exceed the cost of the service received, so likewise the company could not seek additional payments from its customers if the revenue produced by the tariff was less than the cost of the service provided.

Turning to the present case, the starting point of the analysis must be that the provisions of the Commission-approved tariff in effect at the time the transactions in question occurred are controlling. Under the "Filed Rate Doctrine," a utility's relationship with its customers is governed by the tariff on file with the state regulatory agency.[12] "A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature."[13] As state law, a tariff is binding on the utility, the customer and the Commission. A tariff is subject to the same rules of construction as statutes.[14]

Aquila's steam tariff in 2006 and 2007 included a Quarterly Cost Adjustment ("QCA") Rider, which provided in pertinent part:[15]

> AVAILABILITY:
>
> This Quarterly Cost Adjustment (OCA) Rider applies to all sales of steam service provided under all steam rate schedules and contracts.
>
> The Company will file rate adjustments quarterly to reflect eighty percent (80%) of the change in the actual fuel costs above or below a

[12] ***Bauer v. Southwestern Bell Tel. Co.,*** 958 S.W.2d 568, 570 (Mo. App., E.D. 1997).

[13] ***A.C. Jacobs and Co., Inc. v. Union Electric Co.*****,** 17 S.W.3d 579, 582 (Mo. App., W.D. 2000); ***Bauer v. Southwestern Bell Telephone Company*****,** 958 S.W.2d 568, 570 (Mo. App., E.D. 1997).

[14] ***A.C. Jacobs,*** *supra,* 17 S.W.3d at 584.

[15] Aquila Networks L&P, P.S.C. MO. No. 1, Original Sheet 6.1 (effective March 6, 2006; cancelled August 8, 2008), 1st Revised Sheet 6.2 Cancelling Original Sheet 6.2 (effective June 19, 2006; cancelled August 8, 2008) and Original Sheet 6.2 (effective March 6, 2006; cancelled June 19, 2006), Original Sheet 6.3 (effective March 6, 2006; cancelled August 8, 2008), and Original Sheet 6.4 (effective March 6, 2006; cancelled August 8, 2008); these sheets are maintained on file at the Missouri Public Service Commission.

base amount of $3.0050 per million BTU. The sum of the Current Quarterly Cost Adjustment (CQCA), plus the three (3) preceding CQCAs, plus reconciling adjustments, if any, plus the Reconciliation Rate will be billed in addition to all other charges under applicable tariff provisions.

* * *

Reconciling Adjustments and the Reconciliation Rate:

At the end of the twelve (12) months of collection of each COCA, the over- or under-collection of the intended revenues (the numerator of the COCA) will be applied to customers' bills thru *[sic]* a Reconciliation Rate. The Company shall use a collection/refund/credit amortization period of twelve (12) months, provided that an amortization period of twenty-four (24) months may be used, if needed in the Company's discretion, to minimize any extraordinary increases in energy charges. Other fuel cost refunds, or credits related to the operation of this rider may also flow through this reconciliation process, as ordered by the Commission. The Reconciliation Rate shall be calculated similarly to the COCA, except that the amount shall not be multiplied by the Alignment Mechanism again. Any remaining over- or under-collection from the Reconciliation Rate shall be applied to the next Reconciliation Rate.

DETAILS:

* * *

4. There are provisions for prudence reviews and the true-up of revenues collected with costs intended for collection. The reconciliation account shall track, adjust and return true-up amounts and any prudence amounts not otherwise refunded. Fuel costs collected in rates will be refundable based on true-up results and findings in regard to prudence. Adjustments, if any, necessary by Commission order pursuant to any prudence review shall also be placed in the reconciliation account for collection unless a separate refund is ordered by the Commission. A reconciliation rate shall be established at a level designed to bring the reconciliation account to zero over a period of not less than twelve (12) months, provided that an amortization period of twenty-four (24) months may be used, if needed in the Company's discretion, to minimize any extraordinary increases in energy charges. Other fuel cost refunds, or credits related to the operation of this rider may also flow through this reconciliation process, as ordered by the Commission. The Reconciliation Rate shall be calculated similarly to the CQCA, except that the amount shall not be multiplied by the Alignment Mechanism again. Any remaining over- or under-collection from the Reconciliation Rate shall be applied to the next Reconciliation Rate.

* * *

6. In consideration of the sharing provision of this Rider, and the intent to rely on an alignment of customer and Company interests in efficient operations, a two (2) step approach to the review of prudence review will be followed. In Step One, Commission Staff will review to ascertain:

6.1. that the concept of aligning of Company and customer interests is working as intended; and,

6.2. that no significant level of imprudent costs is apparent.

* * *

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.

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.

The QCA Rider in GMO's tariff describes a milieu in which adjustments are applied to redress over-collections and under-collections of revenue.[16] It follows that all payments and bills are therefore conditional, because none are final. Adjustments also specifically include "[o]ther fuel cost refunds or credits related to the operation of this rider may also flow through this reconciliation process, as ordered by the Commission."[17] In particular, adjustments include those "necessary by Commission order pursuant to any prudence review shall also be placed in the reconciliation account

[16] *See* 1st Revised Sheet 6.2.

[17] *Id.*

for collection unless a separate refund is ordered by the Commission."[18] An adjustment may either collect money from customers or return money to customers.[19]

Turning to AGP's argument, AGP states:

> The Court of Appeals decision is now the "law of the case" and the *GST* case controls as GMO insisted. Consequences flow from that decision, but GMO seeks to escape the resulting implications of the *GST* decision, *i.e.*, GST involved a final rate that could only be challenged through the complaint process. The fact remains that GMO now seeks to recover amounts that it returned through a Quarterly Cost Adjustment ("QCA") credit to its steam customers pursuant to the Commission's earlier unanimous order. GMO sought neither a stay from the Commission of that order, nor did it seek a stay nor post a refunding bond with the Court of Appeals as is clearly required by Sections 386.510 and 386.520. These amounts have already been refunded by QCA credit to customers. Any effort to recapture them would violate not only the terms of the Stipulation, but would also violate GMO's tariff and Missouri Law.

Staff does not agree with AGP's argument that the application of "the *GST* case"[20] to this matter or GMO's pursuit of a complaint has somehow returned it to the traditional public utility regulatory milieu where unconditional payments and bills are final.[21] Neither does Staff agree with AGP's statement that "[t]he Stipulation and the tariff both authorize a one-way process."[22] As noted previously, this matter is necessarily controlled by the tariffs effective at the time the transactions occurred, pertinent portions of which have been set out above. All payments and bills are conditional under those tariffs and adjustments may either return money to customers or take money from them. AGP's citations of cases prohibiting retroactive rate increases

[18] Original Sheet 6.3, ¶ 4.

[19] *See* the reference to "collection/refund/credit" at 1st Revised Sheet 6.2.

[20] ***GS Technologies Operating Co. v. Public Service Commission,*** 116 S.W.3d 680 (Mo. App., W.D. 2003).

[21] The most significant effect of the fact that this action is brought as a complaint is that the company is not accorded any presumption of prudence as it is in a rate case in which a prudence issue arises.

[22] AGP's *Reply,* p. 3.

or involving stay funds as a condition precedent to refunds are not pertinent here. Neither a stay, stay fund nor a "refunding bond" are necessary here because all payments under the QCA Rider are conditional, adjustments flow both ways, and those adjustments expressly include any "necessary by Commission order pursuant to any prudence review."[23] This matter is a prudence review and, should GMO prevail, the Commission can order an adjustment for the purpose of returning the refunded money to GMO.

The Commission has applied the reasoning described here in other cases involving conditional payments. Case No. EO-2008-0216 involved the original implementation of GMO's Fuel Adjustment Clause ("FAC").[24] In determining that an over-collection could be refunded to GMO's customers, the Commission explained, "[u]nder the FAC statute, FAC amounts are always conditional and subject to adjustment on a continuous cycle."[25] The Commission relied on a statutory provision that described a milieu identical to that described by Aquila's QCA Rider tariff:[26]

> . . . The commission may approve [an FAC tariff if] it finds that the adjustment mechanism set forth in the schedules:
>
> * * *
>
> (2) Includes provisions for an annual true-up which shall accurately and appropriately remedy any over- or under- collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds.

[23] Original Sheet 6.3, ¶ 4.

[24] ***In the Matter of KCP&L Greater Missouri Operations Company,*** Case No. EO-2008-0216 (***Report & Order,*** issued August 30, 2011).

[25] *Id.,* at p. 14.

[26] § 386.266.4, RSMo.

Similarly, Case No. ER-2010-0274 involved an under-collection of fuel costs by Ameren Missouri through its FAC due to an erroneous calculation.[27] In determining that Ameren Missouri could prospectively collect the required amount from its customers through the FAC, the Commission stated:[28]

> The FPA_C rate that is charged to customers under the FAC is calculated after the fact based upon a retrospective examination of the net fuel costs actually incurred in an accumulation period compared to an assumed based. When the FPA_C rate is charged to customers it is not expected to be final. Rather, it is by definition an interim rate. Therefore, it is expected that an adjustment based on what actually happened in the past will be made when the true-up is completed.

Conclusion: The present proceeding is a prudence review pursuant to Aquila's QCA Rider tariff, now remanded to the Commission after reversal by the Court of Appeals. Should GMO prevail, the Commission has authority under the controlling tariff to order an adjustment that will return to GMO those amounts previously refunded to customers at an earlier stage of the case because all payments and charges under the QCA Rider are interim, subject to adjustment.

WHEREFORE, Staff prays that the Commission will accept its legal analysis set out above as the legal analysis required by its order of January 28, 2013.

[27] ***In the Matter of Union Electric Co. d/b/a Ameren Missouri,*** Case No. ER-2010-0274 (***Report & Order,*** issued June 29, 2011).

[28] *Id.,* at p. 7.

Respectfully submitted,

s/ Kevin A. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **11th day of February, 2013,** to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson