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FOR: Staff of the Missouri Public
Service Commission.

1 P R O C E E D I N G S

2 JUDGE DIPPELL. This is Case No.
3 HC-2010-0235, Ag Processing, Incorporated, a cooperative,
4 Complainant versus KCP&L Greater Missouri Operations
5 Company, Respondent.

6 My name is Nancy Dippell. I'm the
7 Regulatory Law Judge assigned to this case. We have come
8 here today for a prehearing conference, and we're going to
9 begin by allowing the attorneys to make their entries of
10 appearance, and we'll begin with the Complainant.

11 MR. CONRAD: Your Honor, let the record,
12 please show the appearance of Stuart W. Conrad and also
13 David L. Woodsmall of the law firm of Finnegan, Conrad &
14 Peterson. Main address is 235 -- I'm sorry, 3100
15 Broadway, Suite 1209, Kansas City, Missouri 64111.
16 Mr. Woodsmall's address is local, 300 East Capitol Street,
17 Suite 300. And I have entered an appearance form with the
18 court reporter.

19 JUDGE DIPPELL: Thank you. Mr. Fischer.

20 MR. FISCHER: On behalf of KCPL Greater
21 Missouri Operations Company, let the record reflect the
22 appearance of James M. Fischer, Fischer & Dority, PC,
23 101 Madison Street, Suite 400, Jefferson City, Missouri
24 65101.

25 JUDGE DIPPELL: And Staff.

1 MR. THOMPSON: Kevin Thompson for the Staff
2 of the Missouri Public Service Commission, Post Office Box
3 360, Jefferson City, Missouri 65102.

4 JUDGE DIPPELL: And I don't see anyone from
5 Public Counsel, which I wouldn't have really expected them
6 to be here.

7 Okay. We came here today for a prehearing
8 conference. There are some outstanding motions to dismiss
9 that I had hoped to get the Commission to consider before
10 we came here for a prehearing conference, but the
11 scheduling didn't work out that way, so going along today
12 assuming that things are not going to be dismissed. I
13 will ask you to consider your discussions and further
14 procedural issues and scheduling along those lines.

15 But I did want to -- in reviewing the
16 motions to dismiss, I wanted to make sure that I
17 understood all of the arguments and could therefore get
18 those things ruled on and get this case proceeding. This
19 case originally began as part of the QCA process, the
20 quarterly adjustment process, and we split it off into a
21 separate complaint matter in hopes that that would keep it
22 procedurally clearer. I hope that is the case.

23 So let me begin by asking a couple of
24 questions about the complaint and about the motion to
25 dismiss, and then if you-all have anything further you

1 want to bring up, this will be a good opportunity for
2 that, too.

3 So one of the main arguments in the motion
4 to dismiss is that the Complainant hasn't cited any
5 authority or law or rule that has been violated.
6 Mr. Conrad, are you basically saying that this is a
7 violation of the Commission order in that previous rate
8 case in 2005?

9 MR. CONRAD: Essentially, yes. If you --
10 by your leave, I may just quickly summarize if that would
11 be helpful.

12 JUDGE DIPPELL: All right.

13 MR. CONRAD: The periods involved are
14 essentially 2006 and 2007 that related to the, I believe
15 it was the HR-2007-0028 case and the HR-2007-0399 cases.
16 I think those are really the two periods that are involved
17 here. There may yet be others, but those are the two that
18 are focused on.

19 In connection therewith, the Aquila entity,
20 predecessor to this one, engaged in a hedging program
21 which we believe, although it gets -- I don't want to get
22 too far in the weeds, but we believe that was unnecessary
23 because that was addressed in the original settlement
24 document. I can't remember the year, but it was like 0450
25 is the original --

1 JUDGE DIPPELL: Right. 2005.

2 MR. CONRAD: -- settlement stipulation.

3 And they essentially overdid that, and then as a result of
4 that what we contend was unnecessary and then overdone, we
5 ended up with settlement costs that were pushed into those
6 two periods, and I think there's -- I can't remember
7 precisely the numbers, but across the two periods there's
8 roughly about \$4 million that have been passed through
9 subject to refund, we believe, from the same customers,
10 one of which is AGP.

11 And that's -- that's essentially what this
12 is about, that in doing that, in going into the hedging
13 program and hedging in the manner in which they did and
14 failing to react to changing circumstances in a hedging
15 program, that they resulted in a totality of imprudence.

16 And that's what -- now, I understand they
17 want to argue that, but they have pretty well thus far
18 blocked discovery of facts by saying, well, you're out of
19 time. There's that issue involved, which does not apply
20 to AGP. Might apply to Staff, but it does not apply to
21 AGP or to any other steam customer per that agreement.

22 We have thus far not been able to unpeel
23 the onion, as I call it, to get into the facts of this and
24 make it more specific. I will be perfectly amenable to at
25 an appropriate time, once we get through discovery, once

1 we get that issue set aside, to get into a more specific
2 set of facts. But at this point in time, it's -- it's
3 kind of notice pleading.

4 They know what has been going on. We've
5 had two or three meetings with these people. We had a
6 bunch of meetings with the Aquila predecessor. So they
7 know very well what the issue is. And it's to me a little
8 bit disingenuous to want to whine and say, well, we're
9 still allowed to be imprudent in what we do. That's
10 essentially their argument.

11 Mine is essentially that you can't be
12 imprudent. That's -- that's implicit in the whole panoply
13 of the law, public utility regulation is saying you don't
14 get to recover expenses that you incurred on an imprudent
15 basis, and you don't get to do that for hedging costs, you
16 don't get to do that for getting into building a power
17 plant in an imprudent manner, you don't get to do that for
18 buying a stack of pipe at an imprudent price that wouldn't
19 bear scrutiny.

20 But I can't seem to get into the facts yet
21 because they want to say, well, you're out 255 days or
22 some such like that, which doesn't apply to us. So at a
23 high level, that's kind of where we -- that's kind of
24 where we are.

25 JUDGE DIPPELL: If it weren't for the

1 settlement agreement in the 450 case, what mechanism would
2 Ag Processing have to allege imprudent or recover
3 imprudent --

4 MR. CONRAD: A complaint. Had there not
5 been that and that mechanism set up, and I would point out
6 that the mechanism had a 10 percent tolerance factor in it
7 to recognize that, you know, the perfect is the enemy of
8 the good. And there was an understanding that 10 percent
9 fudge, if you will, was probably going to be acceptable,
10 but this is well beyond that.

11 And it was intended to be a self-policing
12 mechanism, but the backstop was that if it went over
13 10 percent, then we would have the ability to raise a
14 complaint.

15 Now, I think your question goes, if you
16 hadn't had that, then you would have had a series of
17 cases, steam cases in which you had a settlement perhaps
18 or litigated result out of each one in which they would
19 have been either allowed or precluded or partly precluded
20 from recovering some portion of fuel expenses. This is
21 intended to recover fuel expenses, but not imprudently
22 incurred fuel expenses and not backstops.

23 Again, this is not, Judge, recovering for
24 fuel. This is recovering for hedging costs on a hedging
25 program that they didn't adjust, they didn't react to, and

1 that they didn't need to do in the first place.

2 JUDGE DIPPELL: So this is not for any fuel
3 costs that would --

4 MR. CONRAD: Well, forgive me. Maybe I'm
5 making it too broad and general, but it is fuel. You have
6 to have fuel, coal, natural gas, perhaps a little oil, to
7 raise steam, and the steam from the Lake Road Plant in
8 St. Joe is -- that's diverted to the steam customers is
9 essentially byproduct steam. It's a very complicated set
10 of headers, and I'm not sure I could understand and
11 explain it to you.

12 But it's essentially the steam that is
13 raised -- excuse me. Some of it goes to the steam
14 customers. Some of it goes directly to the steam
15 customers because of pressure requirements. Some of the
16 rest of it comes off, if you will, the tail of the
17 turbine. I'm not exactly sure where all that merges
18 together.

19 But in a sense, you have to have fuel to
20 raise the steam. You burn coal, gas, oil. This is
21 essentially a gas hedging issue, not so much coal. So to
22 answer your question, it is involving fuel, but it's --
23 it's the hedging costs associated with a hedging program
24 for gas that really didn't need to be there in the first
25 place and was done when it was done imprudently and then

1 imprudently not adjusted.

2 JUDGE DIPPELL: Maybe I need it broken down
3 just a little simpler for me. You allege certain amounts
4 of settlement costs. What is a settlement cost?

5 MR. CONRAD: Okay. That is essentially
6 where a contract to purchase excessive amounts of natural
7 gas had to be settled and was settled financially, to our
8 understanding.

9 JUDGE DIPPELL: Okay.

10 MR. CONRAD: So that's not part of -- use
11 the term settlement in two different ways. The settling
12 of a hedge is the ultimate resolution of that, which you
13 can either do by buying and selling it or you essentially
14 financially negotiate your way out of it.

15 JUDGE DIPPELL: Okay. One of the other
16 arguments in the motion to dismiss is a pretty well-known
17 concept that the Commission can't do equity. How is
18 requesting a refund and interest on that refund, how is
19 that not a request for the Commission to do equity?

20 MR. CONRAD: It's collected under refund
21 subject to what? It's collected under refund subject to a
22 prudence review. Staff, bless their hearts, was out of
23 time. We're not. This is that prudence review. So it
24 doesn't have anything to do with either damages or equity.
25 It has to do with overcharges of amounts that were

1 collected subject to refund.

2 JUDGE DIPPELL: And the interest?

3 MR. CONRAD: Well, I think in the interest
4 charge, when you do a refund, you calculate the interest
5 from the time the excess charge was made, and that comes
6 back to the customers. It's the other side of the
7 equation. If the customer doesn't pay their bill, they
8 would have either a late charge or an interest fee.

9 JUDGE DIPPELL: But what authority does the
10 Commission have to order that interest?

11 MR. CONRAD: The refund and the settlement
12 itself.

13 JUDGE DIPPELL: Okay.

14 MR. CONRAD: And settlement again is the
15 0450 settlement, and that's -- I'm sorry if I --

16 JUDGE DIPPELL: No. I understood that, but
17 it's good to have it clear on the record.

18 Okay. I've been letting Mr. Conrad do all
19 the talking. Do you have some response to some of those
20 questions, Mr. Fischer?

21 MR. FISCHER: Well, I think our March 15
22 and April 5th pleading laid out our positions pretty
23 clearly. We think the Commission should dismiss the
24 complaint on a number of grounds, some of the ones that
25 you've mentioned.

1 And also, contrary to Ag Processing's
2 position, we think the 225-day limitation on getting a
3 prudence review done applies not only to the Staff but
4 also to Ag Processing or any other customer for that
5 matter. And in this case Ag Processing waited 1,123 days
6 after the 2006 period and 758 days after the 2007 period
7 ended before it filed this complaint, and we think they're
8 out of time and those provisions would apply.

9 But a number of the other arguments they
10 have raised includes that we're unauthorized to do
11 hedging, which is clearly incorrect. The settlement
12 document itself refers to the hedging program, and the
13 Commission in context of natural gas cases have certainly
14 encouraged hedging.

15 Sometimes natural gas companies and
16 sometimes in this case the steam company are in the money,
17 so to speak, whenever they hedge and the prices react in a
18 certain way. These two particular times, the market was
19 such that they were out of the money. And now as I
20 understand the AGP complaint is they're suggesting, well,
21 we shouldn't have to pay for those settlement costs.

22 JUDGE DIPPELL: So going back to the 225
23 days in the settlement agreement in 450, you would read
24 that agreement as saying that the customers of GMO have to
25 decide before the Staff has completed an audit whether

1 they would file a complaint?

2 MR. FISCHER: No. Whoever is doing the
3 prudence review, whether it's the Staff or someone else,
4 they have 225 days under the tariff to do that. That's
5 our reading of that tariff.

6 JUDGE DIPPELL: Is that in the tariff or
7 in --

8 MR. FISCHER: That's in the tariff. It's
9 attached to the settlement with AGP that created this
10 QCA mechanism.

11 JUDGE DIPPELL: Is the language the same in
12 the tariff as it is in the settlement agreement?

13 MR. FISCHER: I think it's virtually the
14 same, yeah. It really refers to the tariff is my memory,
15 and the tariff has that language in it.

16 JUDGE DIPPELL: I was thinking I read the
17 language in the settlement agreement and not in the
18 tariff.

19 So if the Commission has approved these
20 charges as interim subject to refund, what does that
21 mean -- saying they're not out of time, saying that they
22 have time and can file a complaint?

23 MR. FISCHER: I think it did contemplate
24 that there would be a prudence review within that 225-day
25 period. If there were problems that were found, that

1 during that period it could be refunded back. However,
2 today when you're outside that period, if we hadn't had
3 that, if they -- if they had been, you know, within that
4 time period, then it could have been refunded.

5 But now you're basically in a situation
6 where that time has lapsed, the Commission has no
7 authority on its own just to refund back, and we're now in
8 a period where that tariff would not apply and there's
9 nothing interim anymore, so to speak.

10 JUDGE DIPPELL: So you agree that if it
11 weren't for them being out of time, that they could have
12 filed a complaint, and if the Commission found --

13 MR. FISCHER: No. We raised a number of
14 issues there. I'm just saying that's a threshold issue
15 that I think is clearly a fatal flaw to the complaint.

16 A lot of the other things they've alleged
17 is we didn't have authority to hedge and, therefore, we
18 were imprudent. We disagree with that. We find no basis
19 for the fact that we've somehow been imprudent in our gas
20 purchasing or hedging practices themselves, and we
21 disagree with those allegations.

22 JUDGE DIPPELL: But those arguments would
23 go toward the facts of, if you made it over those first
24 hurdles that there is an allegation and it stands that a
25 complaint could be filed --

1 MR. FISCHER: There's an allegation that we
2 weren't authorized to enter into a hedging program and
3 that that's a fatal problem. That's clearly a legal issue
4 which we think is addressed and we were -- we responded to
5 in the motions and the pleadings.

6 JUDGE DIPPELL: Mr. Conrad?

7 MR. CONRAD: Well, two quick points.
8 Page, I believe it's -- it's kind of small and my eyes are
9 a little -- page 8, paragraph 8.8, any Aquila steam
10 customer or group of steam customers may make application
11 to initiate a complaints, blah, blah, blah. The
12 application for the complaint and the complaint proceeding
13 will not be prejudiced by the absence of a step two
14 prudence review by Staff. That pretty well means what it
15 says.

16 As to Mr. Fischer's contention about facts,
17 he has obfuscated, his company has obfuscated -- I won't
18 make the assertion against Mr. Fischer personally, but his
19 client has obfuscated discovery up to this point. But
20 importantly, when you deal with a motion to dismiss, the
21 old rule is still in place that all the allegations are to
22 be deemed as true for purposes of the dismissal.

23 Now, you know, he raises a number of fact
24 issues, which we'll be happy to get into at an appropriate
25 time, and I am certainly amenable to -- I think your order

1 of, let's see, May 17 suggested that the prehearing
2 conference come up with a procedural schedule and include
3 a date for filing a list of witnesses and order of issues
4 and the usual stuff there, and we're certainly amenable to
5 that, and we can do that obviously ahead of hearing and
6 perhaps, you know, week or ten days ahead of it. Depends
7 on how the discovery works.

8 JUDGE DIPPELL: There are some legal issues
9 as well as some factual issues that will need to be
10 determined before --

11 MR. CONRAD: But the fact issues are gone
12 for purpose of this motion. It used to be called a
13 demurrer, and it's essentially put under the heading if
14 you look in the case books of a dilatory pleading.

15 JUDGE DIPPELL: Mr. Thompson, did you have
16 anything from Staff's perspective that you wanted to add?

17 MR. THOMPSON: Nothing, your Honor. Thank
18 you.

19 JUDGE DIPPELL: Was there anything else
20 that anybody needed to bring up on the record?

21 MR. FISCHER: Judge, I just wanted to
22 clarify, I guess, your intention. You would like for us
23 to file a procedural schedule within a week, I believe?

24 JUDGE DIPPELL: Is that what I ordered? I
25 was being ambitious and thinking that I was --

1 MR. CONRAD: Procedural schedule by
2 June 30, which I don't think we have a problem with at
3 this point.

4 MR. FISCHER: Is there any hearing dates
5 that we need to know about, say, a few months down the
6 road?

7 JUDGE DIPPELL: I'd be happy to get you a
8 copy of the Commission's calendar for your discussions. I
9 should have brought that down when I came down, but I
10 didn't.

11 MR. CONRAD: Judge, if it helps any, we
12 have been just penciling, and obviously subject to
13 discussion with counsel, hearing in the latter part of
14 October, which is about four months out from now, which
15 would allow, at least by my figures, testimony and some
16 front end discovery.

17 JUDGE DIPPELL: Just off the top of my
18 head, I think that's probably a pretty clear time in the
19 Commission's calendar. I'm looking at Mr. Thompson to see
20 if he has anything. I can't recall what the various rate
21 cases, but you-all are usually involved in those, too. So
22 I'll be happy to go up and get a copy of the Commission's
23 calendar and bring it down to you.

24 MR. CONRAD: If you'll leave your telephone
25 number, we can call, too.

1 JUDGE DIPPELL: Yes, I guess in answer, I
2 think the question was, yeah, if you-all are available to
3 go ahead and without having the motion to dismiss ruled
4 on, assuming that something survives the motion to dismiss
5 and go forward with that assumption, then figure out a
6 procedural schedule, I think that would be a good use of
7 your time today, as well as, of course, any settlement
8 discussions you can have.

9 MR. FISCHER: Your Honor, I would also
10 mention that on the telephone I have Tim Rush and Linda
11 Haynes from the company, and they are available to
12 participate in such discussions.

13 JUDGE DIPPELL: Okay. Great. Is there
14 anything else that anyone wants to bring up while we're on
15 the record?

16 All right, then. Seeing nothing further,
17 we can conclude the prehearing conference and go off the
18 record.

19 WHEREUPON, the recorded portion of the
20 prehearing conference was concluded.

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C E R T I F I C A T E

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

I, Kellene K. Feddersen, Certified

Shorthand Reporter with the firm of Midwest Litigation Services, do hereby certify that I was personally present at the proceedings had in the above-entitled cause at the time and place set forth in the caption sheet thereof; that I then and there took down in Stenotype the proceedings had; and that the foregoing is a full, true and correct transcript of such Stenotype notes so made at such time and place.

Given at my office in the City of Jefferson, County of Cole, State of Missouri.

Kellene K. Feddersen, RPR, CSR, CCR