BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

LEGAL ANALYSIS OF KCP&L GREATER MISSOURI OPERATIONS COMPANY

KCP&L Greater Missouri Operations Company ("GMO"), pursuant to the Commission's January 28, 2013 Order Directing Staff to File a Legal Analysis and Setting a Deadline for Responses, responds to Complainant Ag Processing, Inc.'s ("AGP") argument that the Commission has no authority to return the amounts GMO refunded to its steam customers pursuant to the Commission's September 28, 2011 Report and Order ("Report and Order") in this case:

I. No Stay Was Available in This Case.

1. Without citing any relevant caselaw support, AGP incorrectly points to Sections 386.510[1] and 386.520 as somehow requiring an appellant to acquire a stay and post a bond with the Court of Appeals. See AGP Counter-Response at 2-3. On remand, AGP raises for the first time its erroneous claim that, because GMO did not seek a stay of the Commission's order, this case has somehow become moot. See AGP Counter-Response at 1, 5-6. However, a plain reading of Section 386.520 demonstrates that no stay was available in this case and, even if it were, such stay is not mandatory.

2. Furthermore, AGP's reference to Section 386.510 is baffling. Section 386.510 only mentions a stay and bond in the context of an exception to the requirement that no new or

[1] Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2000), as amended.

additional evidence may be introduced in the appellate court. In other words, pursuant to Section 386.510, an appellant may introduce new or additional evidence on appeal when litigating a request for a stay under Section 386.520.1. Section 386.510 lends no support to AGP's contention that a stay and bond was required in this case.

A. Amended Section 386.520.2 Is the Relevant Statute.

3. Section 386.520 was amended a few months prior to the Commission's September 28, 2011 decision in this case. Effective July 1, 2011, amended Section 386.520 in subsection 1 permits a circuit court, in its "discretion," to stay or suspend the operation of a Commission order that does *not* involve the establishment of new rates or charges, only if "great or irreparable damage would otherwise result to the appellant." See § 386.520.1.

4. Where a Commission order *does* involve the establishment of new rates or charges, amended Section 386.520 in subsection 2 plainly provides, "there shall be no stay or suspension of the commission's order." See § 386.520.2 (emphasis added). Despite the lack of an available stay, that subsection goes on to allow adjustments to the rates or charges made pursuant to the unlawful or unreasonable Commission order in a general rate case or complaint. See § 386.520.2(1)-(4).

5. Because this case is a complaint that involves adjustments to rates and charges made through the Company's Quarterly Cost Adjustment ("QCA") Rider, it clearly falls under subsection 2 of Section 386.520. Thus, no stay was available to GMO. Subdivisions (2) to (4) of subsection 2 set forth the procedures through which the Commission shall adjust rates or charges found to be unlawful or unreasonable in a general rate case or complaint case, either because the Commission unlawfully or unreasonably increased the utility's rates (subdivision 2), decreased the utility's rates (subdivision 3), or allocated too much of a rate increase or too little of a rate decrease to a customer class (subdivision 4).

6. The relevant portion of subsection 2 provides:

> 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:
>
> (1) In the event a final and unappealable judicial decision determines that a commission order or decision unlawfully or unreasonably decided an issue or issues in a manner affecting rates, then the court shall instruct the commission to provide **temporary rate adjustments** and, if new rates and charges have not been approved by the commission before the judicial decision becomes final and unappealable, **prospective rate adjustments**. . . .
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> (3) If the effect of the unlawful or unreasonable commission decision was 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 [See § 386.520.2(1), (3) (emphasis added)].

7. The Missouri Court of Appeals has, in no uncertain terms, determined that this is a complaint case initiated under and subject to the provisions of the Nonunanimous Stipulation and Agreement in Case No. HR-2005-0450 ("Stipulation") and its QCA Rider. Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., 2012 WL 5199664 at *4 (Mo. App. W.D. 2012). That determination puts this case squarely in subsection 2 of Section 386.520. Furthermore,

while the Commission erroneously found this case to be "more complicated than a straight-forward complaint" (id. at *3), it ordered its refund in a manner largely consistent with the provisions of Section 386.520.2.

8. After finding imprudence using an improper burden of proof, the Commission ordered GMO to "refund to its steam customers, through operation of the Quarterly Cost Adjustment, the net cost of operating its natural gas price hedging program for steam production in the amount of $931,968 for 2006 and $1,953,488 for 2007." See Report and Order at 20. See also In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, Order Rejecting Tariff and Requiring the Filing of a New Tariff, No. HT-2011-0343 (Nov. 22, 2011). GMO's compliance tariff sheet, filed on November 23, 2011 in File No. HT-2011-0343, complied with this Order. See In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, Order Approving Compliance Tariff Sheet, No. HT-2011-0343 (Nov. 29, 2011).

9. The QCA is a quarterly "rate adjustment" made by GMO pursuant to the Stipulation and QCA Rider. See Stipulation §8 et seq. at 4-7. Through the reconciliation account, GMO tracks the difference between costs to be recovered and revenues collected, including any "adjustments" pursuant to Commission order. See Stipulation §8.4 at 6-7. "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." Id. See also PSC MO. No. 1, Original Sheet No. 6.3, paragraph 4.

10. Pursuant to the QCA Rider, such "rate adjustment" is to occur through customers' bills. See PSC MO. No. 1, Original Sheet No. 6.2. "At the end of the twelve (12) months of collection of each CQCA, the over- or under-collection of the intended revenues . . . will be applied to customers' bills thru a Reconciliation Rate." Id. (emphasis added).

11. That the refunded amounts constitute a change to rates or charges subject to Section 382.520.2 is further evidenced by the fact that AGP requested, and the Commission rejected, an immediate refund of the whole amount ordered refunded. See In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, AGP Response to Staff Recommendation at 4, No. HT-2011-0343 (Nov. 16, 2011). The Commission found that "the current tariff . . . expresses a preference for making a refund through customer bills." Id., Order Rejecting Tariff and Requiring the Filing of a New Tariff at 4 (Nov. 22, 2011). Therefore, the Commission ordered refund of the steam hedging costs to be applied to customers' bills through the reconciliation rate. Id.

12. Because the Missouri Court of Appeals properly found this case to be a complaint case according to the provisions of the QCA Rider, and the Commission ordered the refund to occur through the QCA rate adjustment mechanism's reconciliation rate and to be applied to customers' bills, this case "involves the establishment of new rates or charges" such that no stay was available to GMO under Section 386.520.2. Indeed, the Section 386.520.2 adjustments to rates or charges made pursuant to an unlawful or unreasonable Commission order function almost as a statutory QCA. Accordingly, this case is not moot, as AGP claims. See AGP Counter-Response at 1, 5-6.

B. The Cases AGP Cites Are Inapposite.

13. All of the cases AGP cites for its claim that a stay and bond are required in this case precede the current statute by at least a decade. Id. at 6-7. AGP cites no case that stands for the proposition that abiding by a Commission order moots the case. Furthermore, the facts of each case AGP cites clearly distinguish their holdings from the case currently before the Commission on remand.

14. AGP first points to State ex rel. Monsanto Co. v. Public Service Commission, 716 S.W.2d 791 (Mo. en banc 1986), which concerned a challenge by a group of industrial customers ("Industrials") to a rate design under a 1983 tariff. See AGP Counter-Response at 5-6. The Circuit Court of Cole County reversed the challenged rate design under a writ of review brought by the Industrials. Id. at 791. The Court of Appeals reversed the circuit court, holding that the challenge to the 1983 tariff was mooted when a 1984 tariff containing the same rate design method came into effect without challenge by the Industrials. Id. On transfer to the Missouri Supreme Court, the Supreme Court disagreed, holding that the Industrials, by agreeing to 1984 tariff containing same rate design, did not render moot issues regarding reasonableness and unlawfulness of the 1983 rate design. Id. at 794. While the Industrials did establish a stay fund for the amounts paid under the contested 1983 rate design, such fund was established pursuant to the predecessor to the current Section 386.520, which permitted a stay where the challenge involved the establishment of new rates or charges. Id. Such is not the case here, where a stay is unavailable. Monsanto lends no support to AGP's assertions.

15. AGP next points to Midwest Gas Users' Ass'n v. Public Service Commission, 996 S.W.2d 608 (Mo. App. W.D. 1999), noting itself that this case "construed the predecessor statute to current Section 386.520.1." See AGP Counter-Response at 6. While the statute being construed has been superseded, and is inapplicable to this case, Midwest Gas Users' did not stand for the proposition that Section 386.520 has ever required a stay, as AGP implies. Rather, the Court in Midwest Gas Users' considered whether the previous Section 386.520 authorized a stay and bond when the Commission granted a rate increase, or whether that statute authorized a stay and bond only when there has been a rate decrease. Id. at 612-613.

16. As is evident from the predecessor statute quoted in Midwest Gas Users', a stay was discretionary under that law. See §386.520.1 (1949) (". . . during the pendency of such writ,

the circuit court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision."); §386.520.2 (1949) ("The circuit court, in case it stays or suspends the order or decision of the commission . . ."); §386.520.3 (1949) ("In case any circuit court stays or suspends the order or decision of the commission . . ."). In interpreting the predecessor statute, the Court stated, "This language refers back to and is a continuation of the language of subsection one, under which a stay or suspension of an order of the Commission may be had in both rate increase cases and rate decrease cases." 996 S.W.2d at 616. The Court goes on to explain that "when there is such a stay or suspension" a bond is required. Id. at 616-17. Thus, while an appeal bond is a prerequisite to staying the execution of a Commission order, a stay is not a prerequisite to the filing of an appeal and in no way affects the rights preserved on appeal. Clearly, Section 386.520 has never required a stay, as AGP implies.

17. Finally, AGP points to State ex rel. Gas Service Co. v. Public Service Commission, 536 S.W.2d 491 (Mo. App. K.C. 1976), in support of its suggestion that the predecessor Section 386.520 required a stay. See AGP Counter-Response at 6-7. However, nowhere in its holding did the court address a stay, bond, or Section 386.520. This case, like Monsanto, is inapposite as it addressed whether a gas utility's appeal from the Commission's denial of an interim rate increase was mooted by its later granting of a permanent increase. Because the permanent rate increase terminated the interim period for which the gas utility sought a temporary increase, the court dismissed the appeal from the Commission's denial of the interim rate increase, finding that a grant of the interim rate increase would constitute retroactive ratemaking. Id. at 492. The Supreme Court similarly held in State ex rel. Utility Consumers Counsel of Missouri v. Public Service Commission, 585 S.W.2d 41, 49-50 (Mo. 1979) ("UCCM"), finding that it could not redetermine rates already established, as AGP points out in its Counter-Response. See AGP Counter-Response at 4. However, AGP's mootness arguments

in the present case concern the QCA mechanism, by which the Commission is expressly permitted to make adjustments to rates. Furthermore, amended Section 386.520 explicitly authorizes prospective rate changes if the Commission has erred. Gas Service and UCCM plainly are irrelevant.

II. The QCA Rider Contemplates Adjustments in Both Directions.

18. If the Commission were to find that AGP failed to carry its burden of proof under the appropriate standard, the Commission must restore to GMO through the QCA Rider the amount that was refunded to steam customers pursuant to the 2011 Report and Order. 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.

19. The QCA unmistakably is not a "one-way process," as AGP contends. See AGP Counter-Response at 3. As a "rate adjustment" mechanism, the QCA contemplates the return of trued-up amounts in both directions -- both to customers and to the utility. A reconciliation account was created to track "the difference between the costs intended for recovery and revenues collected." See Stipulation §8.4 at 6-7. "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." Id. See also PSC MO. No. 1, Original Sheet No. 6.3, paragraph 4. No such separate refund was ordered here. The Commission clearly ordered GMO to "refund to its steam customers, through operation of the Quarterly Cost Adjustment, the net cost of operating its natural gas price hedging program for steam production." See Report and Order at 20.

20. The Merriam-Webster Dictionary defines an "adjustment" as "a correction or modification to reflect actual conditions." Merriam-Webster's Collegiate Dictionary 16 (11th

ed. 2005). Through the QCA process, GMO adjusts rates both upwards and downwards to reflect actual conditions. Pursuant to the QCA Rider, "the over- or under-collection of the intended revenues . . . will be applied to customers' bills thru a Reconciliation Rate." See PSC MO. No. 1, Original Sheet No. 6.2 (emphasis added).

21. Furthermore, the cost-shifting provisions of the QCA Rider evidence the Commission's power to redress a previous erroneous order, and direct that the one receiving a benefit as the result of its erroneous judgment restore that benefit. Without a doubt, an appellant's right of restitution on reversal of judgment is well-recognized under Missouri law. See State ex rel. Kansas City v. PSC, 362 Mo. 786, 796 (Mo. 1951); State ex rel. Abeille Fire Ins. Co. v. Sevier, 73 S.W.2d 361, 366 (Mo. en banc 1934); Aetna Ins. Co. v. Hyde, 34 S.W.2d 85, 88 (Mo. en banc 1930).

22. Finally, AGP criticizes GMO's citation to State ex rel. Laclede Gas Co. v. PSC, 156 S.W.3d 513, 522-23 (Mo. App. W.D. 2005), in its January 15 Response to AGP's Supplemental Initial Brief. See AGP Counter-Response at 5. GMO cited to Laclede as precedent for a reversal of refunds through a process similar to GMO's QCA Rider. In that case, Laclede did seek a stay pursuant to the predecessor Section 386.520, which permitted a stay where the Commission order involved the establishment of new rates or charges (relief not available under the current statute). However, Laclede did not "retain the amounts" as AGP suggests, but paid them to the circuit court. See AGP Counter-Response at 5. On remand the Commission directed Laclede to adjust its Actual Cost Adjustment account balances so that it "may retain those proceeds" that the Commission erroneously ordered to be refunded to customers and that the court impounded. In re Laclede Gas Co. Purchased Gas Adjustment Tariff Revisions, Order on Remand at 2, No. GR-2001-387 (Apr. 7, 2005).

23. Clearly, the Commission has the authority to order an adjustment through the QCA process to account for the return of those funds it erroneously ordered returned to customers, just as it so ordered in Laclede. See also State ex rel. Southwestern Bell Tel. Co. v. PSC, 645 S.W.2d 44, 47-49, 56 (Mo. App. W.D. 1982) (where the court reversed the Commission's rate refund order with no mention of any stay or impounding of the disputed funds).

III. Even if Section 386.520.1 Were Applicable, Such Stay is Discretionary.

24. While this complaint case clearly falls within the purview of Section 386.520.2, GMO notes in the alternative that, even if Section 386.520.1 were applicable to the case at hand (as AGP appears to contend), its provision concerning a stay is in no uncertain terms discretionary. The Court in Midwest Gas Users', cited by AGP, explained the basic premise of statutory construction, stating that it is "first and foremost required to determine the intent of the legislature. In determining the intent of the legislature, statutes are interpreted according to the words used in their plain and ordinary meaning." 996 S.W.2d 608, 614 (Mo. App. W.D. 1999). "The legislature has made the issuance of a stay discretionary, and the circuit court may not issue a stay unless there is a finding of great or irreparable damage." State ex rel. City of Joplin v. PSC, 186 S.W.3d 290, 296 (Mo. App. W.D. 2005). Indeed, the Commission's Notice of Appeal form, available at http://psc.mo.gov/CMSInternetData/Forms/Notice_of_Appeal.pdf, does not even mention an appeal bond, as does the form 8-A Notice of Appeal for use in civil appeals from circuit courts.

25. Moreover, unlike the posting of a supersedeas bond relating to judgments in the circuit courts under Missouri Rule of Civil Procedure 81.09, stays of Commission orders are only granted upon a showing "that great or irreparable damage would otherwise result to the

appellant." This further evidences that a stay is not necessary in every appeal, nor may a stay even be possible in certain appeals.

26. Accordingly, a stay likely would not have been available to GMO in this case, were Section 386.520.1 applicable. The Commission itself found no persuasive support for the argument that GMO would suffer any harm in refunding the ordered amounts over the 12-month period as prescribed in the QCA. See In re KCP&L Greater Mo. Operations Co. for Authority to File Tariffs Changing the Steam QCA, Order Rejecting Tariff and Requiring the Filing of a New Tariff at 3-4, No. HT-2011-0343 (Nov. 22, 2011). For a company as large as GMO, payment of the $931,968 and $1,953,488 ordered to be refunded likely would not be considered "great or irreparable damage." Thus, it is not entirely certain that GMO would have been able to obtain the stay that AGP claims to be mandatory. See State ex rel. City of Joplin v. PSC, 186 S.W.3d 290, 296-97 (Mo. App. W.D. 2005) (holding that it is not certain that the city of Joplin would have been able to obtain a stay in a rate case, as the new rates made no changes to existing rates, but rather changed the rate design).

27. Nevertheless, AGP would have this Commission believe that, were a party to move for a stay and be overruled on the ground that such party did not demonstrate the necessary "great or irreparable damage," should that party go on to secure a reversal of the challenged Commission order, its case would nevertheless be moot as no stay issued and no bond was posted for the disputed amounts. Such a result is illogical.

IV. Conclusion.

28. AGP cites no case that supports the proposition that abiding by a Commission order moots the case. AGP points to no statute mandating a stay in any case, let alone a case that involves the establishment of rates or charges. Instead, AGP cites cases that precede the current statute by at least a decade and whose holdings are irrelevant to the facts at hand. As this case

involved the establishment of rates or charges and was plainly held to be a complaint case by the Court of Appeals, subsection 2 of Section 386.520 controls and no stay was available to GMO. This case is not moot, as AGP suggests, and the Commission has the authority to order any amounts erroneously returned to GMO's customers through the QCA to be returned to the Company through the same rate adjustment mechanism.

WHEREFORE, GMO respectfully requests that the Commission find that the operation of the gas hedging program was not imprudent and to reverse the refunds previously ordered.

Respectfully submitted,

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Certificate of Service

A copy of the foregoing has been emailed this 8th day of February 2013 to all counsel of record.

/s/ Lisa A. Gilbreath
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