BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

AG PROCESSING INC A COOPERATIVE, Complainant,	)	
	)	
vs.	)	**HC-2010-0235**
	)	
KCP&L GREATER MISSOURI OPERATIONS COMPANY, Respondent.	)	

AG PROCESSING INC A COOPERATIVE
COUNTER-RESPONSE IN OPPOSITION
TO GMO FILING OF JANUARY 15, 2013

1. On January 15, 2013 KCP&L Greater Missouri Operations Company ("GMO") filed an unscheduled response to AGP's Initial Brief on Remand and also to AGP's Proposed Findings of Fact on Remand. GMO, though it now argues that AGP should have the burden of proof, seems unable to deal with the Commission's Order to rebrief the matter in consideration of the Court of Appeals decision.

2. GMO confines the major thrust of its pleading to AGP's comments that this case may, in fact, be moot, in that the Commission may not direct that steam customers pay again for GMO's demonstrated imprudence during the short period of 2006 and 2007.

3. At the Court of Appeals, with respect to the burden of proof, GMO insisted that the appropriate case was not *State ex. rel. Associated Natural Gas Co. v. Public Service Commission*, 954 S.W.2d 520 (Mo. App., W.D. 1997) ("*Associated*

Natural") but, rather, was *State ex rel. GS Technologies Operating Co. v. Public Service Commission*, 116 S.W.3d 680 (Mo. Ct. App., W.D. 2003) ("*GST*").[1/] *GST* involved a final rate which was challenged through a complaint brought by GST. KCPL was not collecting rates from GST on a subject to refund basis. GST thus had no choice other than filing a complaint and properly assumed the burden of proving that KCPL's actions regarding its Hawthorne Station were imprudent. In this case, however, the Western District court became confused with the ***form*** of AGP's challenge (a complaint, per the Stipulation and GMO's tariff) and overlooked the ***substance*** of the transaction at issue (a prudence review of amounts that were originally collected subject to refund). Regardless, the Court determined that *GST* controlled.

4. GMO is correct in only one sense: 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

---

[1/] The Commission, through its General Counsel, also argued that *Associated Natural* was the correct precedent.

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.

5. *First*, such an effort would violate the terms of the Stipulation (which, of course, was the source of the confusion regarding the form of prudence challenge). That Stipulation, now embodied in GMO's steam tariff, provides that "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."[2/] The Stipulation and the tariff both authorize a one-way process. Neither the Stipulation nor GMO's subsequently-filed tariff provides for rebilling or recovery of credits previously provided to customers. Further, "Each quarterly rate adjustment will include the ***fuel*** costs ***from the preceding quarter***." Stipulation, p. 6, paragraph 8.3; Original Sheet 6.3, paragraph 3 (emphasis added). There is no provision for the recovery of refunds previously credited from a long-past calendar quarter. Indeed, fuel costs to be recovered are limited to those "from the preceding quarter." Additionally,

> 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

---

[2/] Original Sheet 6.2.

> prudence review shall also be placed in the reconciliation account for collection unless a separate ***refund*** is ordered by the Commission."[3/]

6. *Second*, both the Missouri Supreme Court and the Court of Appeals have determined that the Commission does not have authority to order retroactive rate increases. *State ex rel. Capital City Water Co. v. Public Service Commission*, 298 Mo. 524, 252 S.W. 446 (*en banc* 1923); *State ex. rel. The Gas Service Company v. Public Service Commission*, 536 S.W.2d 491 (Mo. App., K.C.D. 1976). More recently, in *State ex rel. Utility Consumers Council of Missouri, Inc., et. al. v. Public Service Commission of Missouri et. al.*, 585 S.W.2d 41 (Mo. 1979) ("*UCCM*") the Supreme Court stated:

> However, to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. 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, see *State ex rel. General Telephone Co. of the Midwest v. Public Service Comm'n*, 537 S.W.2d 655 (Mo. App. 1976). ***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.***[4/]

[3/] Stipulation, pp. 6-7, paragraph 8.4; Original Tariff Sheet No. 6.3, paragraph 4 (emphasis added).

[4/] *Id.*, at 49-50 (emphasis added).

7. The relevant case is not *State ex rel. Laclede Gas Company v. Public Service Commission*, 156 S.W.3d 513 (Mo. App., W.D. 2005) ("Laclede") cited by GMO. Rather it is *UCCM*. GMO parses its wording in describing *Laclede* as "precedent for a reversal of refunds . . . ."[5/] It does nothing of the sort. As is plainly identified in *Laclede*, there had been no refund. Laclede ***retained*** the amounts that were in dispute pursuant to a stay granted by the circuit court. "At issue in this appeal is approximately $ 4.9 million that Laclede ***kept*** as its share of incentive proceeds realized from the program."[6/] Laclede, unlike GMO here, ***obtained a stay order from the circuit court pending its [writ] appeal***. "At the conclusion of the oral argument, the circuit court stayed the Commission's order pending completion of proceedings on the Petition for Writ of review, including any appeals."[7/] The Commission's order directing Laclede to return the $4.9 million to its customers was ***stayed*** pending appeal. Had this not been the case, Laclede would have been required to make the refund. Section 386.520.

8. GMO cited only to *Laclede*, a case that GMO erroneously claimed established its right to recover refunds paid despite neither stay nor refunding bond. That case is inapposite as even a cursory review will reveal. There are, however, numerous cases that establish that both a stay and a refunding

---

[5/] GMO Pleading, p. 3, paragraph 9.

[6/] *Laclede*, at 515 (emphasis added).

[7/] *Id.*, at 520.

bond (or an impoundment that creates a fund) are required for relief by an appellate court. As was noted in *State ex. rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791 (Mo. 1986):

> A case on appeal becomes moot when circumstances change so as to alter the position of the parties or subject matter so that the controversy ceases ***and a decision can grant no relief***. *Fugel v. Becker*, 2 S.W.2d 743, 746 (Mo. banc 1928); *Grogan v. Hays*, 639 S.W.2d 875, 877 (Mo. App. 1982).[8/]
>
> . . . .
>
> [R]elief can be granted by virtue of the stay entered and the suspending bond established by the circuit court pursuant to § 386.520.[9/]

Even Judge Blackmar's dissent did not question the Court's ruling on mootness.[10/]

9. The Commission might also look to *State ex. rel. Midwest Gas Users' Ass'n, et. al. v. Public Service Commission*, 996 S.W.2d 608 (Mo. App. W.D. 1999) that construed the predecessor statute to current Section 386.520.1 to require a bond and court-issued stay in both rate increases and decreases.[11/]

10. Yet another case in accord with AGP's suggestion is *State ex. rel. The Gas Service Company v. Public Service*

[8/] *Monsanto*, supra, at 793 (emphasis added).

[9/] *Id.*, at 794.

[10/] *Id.*, at 797.

[11/] *Midwest Gas, supra*, at 615.

Commission, 536 S.W.2d 491 (Mo. App., K.C.D. 1976) concerning whether the utility could, simply by filing an appeal (as GMO argues here), preserve its rights where no relief was possible save through a retroactive charge, and there had been neither stay nor appeal bond supplied. The court stated:

> As already noted, a permanent increase was granted to Gas Service a year and a half ago, thereby terminating the interim period for which Gas Service had sought a temporary increase. Therefore the interim increase requested has become impossible, unless it could be granted retroactively. The law of this state is clear that this cannot be done. *State ex rel. Capital City Water Co. v. Public Service Commission*, 298 Mo. 524, 252 S.W. 446 (banc 1923); *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (Mo. 1951).[12/]

11. GMO is incorrect that the filing of an appeal bond or obtaining a judicial (or Commission) stay "does not affect the rights preserved on appeal," a proposition for which GMO cited no authority. The failure to obtain a stay of the Commission's order does not affect the ***ability*** to appeal, but it certainly affects the ***relief*** that any court (or the Commission, for that matter) may grant (and, thus, mootness). Here, the refund has been made and no fund was preserved. Simply filing an appeal does not operate as a stay,[13/] otherwise a statute providing an

---

[12/] *Id.*, at 492.

[13/] GMO also cites Section 512.080.19(2) (pertaining to execution of judgments), but GMO finds no help there. That statute provides:

> 512.080. 1. Appeals shall stay the execution in the following cases:

(continued...)

opportunity for a appellant to obtain such a stay would have been unnecessary. GMO cannot bootstrap itself past the stay (and bond) requirement (of which GMO did not avail itself) through the simple filing of an appeal as has been repeatedly held.

12. GMO is represented by experienced counsel that doubtless is familiar with the provisions of Missouri statutes and the rules and regulations of the Commission. GMO counsel should also be familiar with the statutory effect of Commission orders and admits compliance with the Commission's order in this case.[14/] GMO could have sought a stay from the Commission of its order pending appeal. It did not. Following the procedure in the newly-amended statute (§ 386.520), GMO could have sought a stay from the Court of Appeals. It did not.

[13/](...continued)

. . . .

> (2) When the appellant, at or prior to the time of filing notice of appeal, ***presents to the court for its approval a supersedeas bond*** which shall have such surety or sureties as the court requires. . . . ***and such appeal bond,*** approved by the court or clerk and filed within the time specified in such order, ***shall have the effect to stay the execution thereafter.*** If any execution shall have been taken prior to the filing of the bond as so approved by the court or clerk, the same shall be released. (Emphasis added)

As stated explicitly in this statute, just "filing an appeal" stays neither execution nor, here, a Commission order directing refunds through QCA credits.

[14/] GMO Pleading, p. 4, paragraph 10.

13. In this case, GMO sought neither a stay from the Commission nor a stay from the reviewing court. No bond was posted. The amounts were credited and refunded to the customers under an effective Commission order. Recovery of these amounts under the Stipulation and GMO's tariffs cannot now be effected.

14. Of course, the Commission may avoid this entire issue by simply determining that AGP more than met its burden of showing that GMO's charges were imprudently incurred as a result of its undisputed actions as suggested by our Supplemental Brief on Remand. The facts of this case have not changed.

Respectfully submitted,

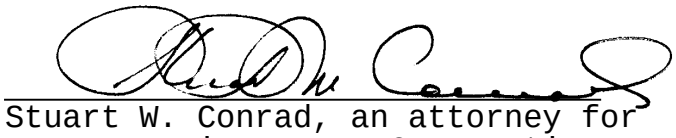
FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad Mo. Bar #23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR AG PROCESSING INC.

SERVICE CERTIFICATE

I certify that I have served a copy of the foregoing pleading upon identified representatives of the parties hereto per the EFIS listing maintained by the Secretary of the Commission by electronic means as an attachment to e-mail, all on the date shown below.



Stuart W. Conrad, an attorney for
Ag Processing Inc a Cooperative

January 25, 2013