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.	)	

REPLY TO SUGGESTIONS OPPOSING MOTION TO STRIKE

COMES NOW Complainant Ag Processing Inc a Cooperative (AGP), and timely replies to the Suggestions in Opposition to AGP's Motion to Strike filed by KCP&L Greater Missouri Operations Company (GMO) as follows:

1. AGP ***withdraws*** the portion of its Motion to Strike that is identified in paragraphs 1.a. through 1.h..[1/]

2. However, the material in Mr. Clemens' Prepared Direct Testimony that is identified in paragraphs 1.i., 1.j., and 1.k. should still be struck from the record.

3. GMO bases its argument on a contention that Mr. Clemens' testimony does not reveal the content of privileged settlement discussions. But GMO confuses settlement discussions in HR-2005-0450 that, in its view, resulted in the ***original*** Stipulation and Agreement establishing the Quarterly Cost Adjust-

[1/] When reference is made herein to "paragraphs," the reference should be taken to be to those paragraphs in AGP's Motion to Strike, filed herein on October 27, 2010.

ment (QCA) with ***later*** settlement discussions that arose only because of the dispute that is addressed in this complaint.

4. Obviously antecedent settlement discussions occurred resulting in the HR-2005-0450 Stipulation. As it has throughout this proceeding, GMO overlooks that an agreement that addresses how ***financial*** costs associated with hedging (if incurred) should be handled and includes a price volatility mitigation mechanism does not explain or justify (a) whether ***additional*** hedging to mitigate price volatility is needed or (b) justify ***imprudent*** hedging activities. Both are the points in this case.

5. The material referenced in paragraph 1.i. of AGP's original Motion to Strike discusses the content of settlement negotiations that occurred only ***after*** this dispute arose and were convened by the parties (as noted in our original Motion) in an attempt to resolve this dispute short of a formal complaint. Several meetings were held in an attempt to resolve differences. These discussions, however, were ***not*** the same as preceded the HR-2005-0450 Stipulation. Yet GMO repetitively argues about those earlier discussions in an attempt to obscure the difference.

6. Further, Exhibit GLC-3 HC (paragraph 1.k.), to which GMO offers no "exception," is clearly labeled as a confidential settlement proposal. Circulation of such a document is entirely consistent with the series of extended settlement discussions of this dispute. But it is unclear to counsel how a confidential settlement proposal that is clearly labelled as such can be used in this context. Given that AGP has freely

acknowledged participation in HR-2005-0450, the document is essentially irrelevant based on GMO's arguments. Indeed, even the several cases that GMO cites would recognize this document as a settlement proposal, initiating from AGP, the content of which is privileged. Obviously AGP participated in HR-2005-0450, but we seek here to protect the settlement privilege. AGP has previously alleged that these settlement meetings occurred; but their content remains privileged and certainly documents that are labelled as "Confidential and Privileged Settlement Proposal" cannot be parsed so as to be something else.

7. Contrary to GMO's assertions beginning on page 4 of their Response, Mr. Clemens' ***does*** testify about the "give and take of settlement positions or dollars," and discloses "'facts' or 'settlement offers' as prohibited by 4 CSR 240-2-090(7)." See the material identified in paragraph 1.i. of AGP's original Motion to Strike as well as the material identified in paragraph 1.k..

8. GMO's argument that "these conversations occurred either outside of the context of Case No. HR-2005-0450 . . . ." or were not "in the context of this litigation" is not factual. The HR-2005-0450 Stipulation did not simply appear out of midair. And the later settlement discussions were part and parcel of "this litigation." Apparently GMO would prefer AGP to have initially filed a complaint so that settlement discussions of the complaint could be in the "context of this litigation" rather than seek to resolve the matter before a formal complaint became

necessary. Complainant should not be penalized or disadvantaged because it sought to resolve this dispute before filing a complaint. Indeed, the Commission's own complaint resolution process anticipates a prior informal effort to negotiate a solution before turning to formal procedures. 4 CSR 240-2.070(2) and in particular subparagraph (F) dealing with informal complaint processing. Certainly 4 CSR-2.070(3) authorizes a customer who remains dissatisfied with any resolution to file a "formal" complaint with the Commission.

9. GMO also sets up a strawman argument, then noisily tilts away at it. AGP is not arguing that "*everything* discussed about *any* issue *every* time a utility meets with a customer . . . ." (Emphasis in GMO Opposition). But discussions that are about ***resolution of a dispute*** and are explicitly identified as "Confidential and Privileged Settlement Proposal[s]" must be protected if the integrity of the settlement process is to be preserved. For example, each page of Exhibit GLC-3 contains an explicit label that it is a confidential and privileged settlement document. Short of ***not*** engaging in settlement discussions at all or ***not*** circulating a "Confidential and Privileged Settlement Proposal," counsel can do no more.

10. Moreover, the material identified in paragraph 1.j. even begins with "we discussed" and then proceeds to disclose the content of those discussions, including an incomplete recitation of a proposal that was rejected -- if it even transpired -- which is not admitted.

11. In short, the assertions made at page 6 of GMO's opposing suggestions that the disclosures "occurred outside the context of any settlement negotiations"[2/] or "do not concern privileged facts disclosed during any settlement negotiations" is simply not factual. Carefully read, GMO's Suggestions confirm this.

12. The Commission, however, has a different problem. The Commission has its own rule, 4 CSR 240-2.090(7) that provides:

> (7) ***Facts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless substantiated by other evidence.*** (Emphasis added)

GMO has brought forward no independent evidence of the disclosure identified in paragraphs 1.i. and 1.j. nor of the "Confidential and Privileged Settlement Proposal" that is sought to be disclosed in Exhibit GLC-3 identified in paragraph 1.k.. Even under a strained reading of GMO's "exceptions," these disclosures do not pass muster as exceptions and should be struck from this record.

13. The Commission's Rule finds an analog in the Federal Energy Regulatory Commission's Rule 602[3/] which in subpart (e)(2) provides that "any discussion of the parties with

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[2/] Indeed, Exhibit GLC-3 HC (paragraph 1.k.), in addition to being identified as a "Privileged and Confidential Settlement Proposal" is explicitly identified ***with respect to Case No. HR-2005-0450***. To assert otherwise is plainly disingenuous.

[3/] 18 CFR 385.602.

respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence." The rule is enforced. *See, e.g.*, *Montana-Dakota Utilities Co. v. Colorado Interstate Gas Co.*, 25 FERC ¶61.330 (1983) (Since evidence concerning settlement discussions is privileged and inadmissible under the Rule, exhibits pertaining to such evidence can be stricken from the record). *And see*, *Tennessee Gas Pipeline Co.*, 28 FERC ¶61,313 (1984) where a hearing was ruled "inappropriate" as a means of gathering evidence related to the intent of settlement participants where the 11-year old settlement agreement was clear.

14. Without regard to the Commission's Rule, at page 7 of its Suggestions, GMO begins a litany of what it believes are "facts." We will address them all:

a. GMO asserts: "AgP played an integral part in the development of the QCA in the 2005 Steam Rate Case[.]" In fact Mr. Johnstone notes AGP involvement and, as shown on one of the attachments to AGP's complaint, AGP was a signatory to the Stipulation. Again, the Stipulation resolving the HR-2005-0450 case did not materialize out of thin air. This is a manufactured issue.

b. GMO asserts: "The parties to the Stipulation understood the term 'financial instruments' to include hedging." Indeed, at the initial prehearing conference, AGP counsel noted

to the Regulatory Law Judge that this was a "financial" case.[4/] Hedges were imprudently purchased, and imprudently implemented, then settled and the costs passed to customers. That's what this case is about.

c. GMO asserts: "Aquila decided to use its electric hedge program for steam based on discussion with parties to the 2005 Steam Rate Case." Although asserting this, GMO has offered no independent facts that substantiate its claim. References in GMO's Suggestions are to the ***electric*** case and ***not*** the ***Steam Rate Case***. Fact not proved and no independent evidence justifies the disclosure.

d. Moreover, GMO points to no independent evidence that this "decision" was discussed with steam customers. Indeed, Mr. Clemens' statement is, itself, an admission of how Aquila went about implementing the steam hedging program. These were discussions about the ***electric***, not the steam program. There is ***no*** automatic equivalency between the two programs as both deal with radically different loads and quantities. Yet Aquila apparently expended no effort to analyze the nature and quantities of its steam load, resulting in part of the problem addressed in this complaint.

e. GMO asserts: "Aquila had discussed its electric hedging program with Staff and customers beginning the summer of 2004." Again, the reference is to the ***electric*** case

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[4/] Transcript of Prehearing Conference, June 21, 2010, page 10, ll. 2-14.

and no showing has been made that there was any discussion with "customers" (GMO's reference to "customers" isn't clear) regarding any implementation of whatever was being done in the *steam* case.

f. GMO asserts: "No party to the 2005 Steam Rate Case raised objections to Aquila's ***electric*** hedging strategy." The Steam Rate Case concerned the steam rates, not the electric rates and this complaint concerns hedging costs passed through to steam customers. Keep in mind that this was all before there was an FAC on the electric side or, for that matter, a QCA on the steam side. There would have been no reason, and no suggestion from Aquila, that it was going to implement an ***electric*** strategy in the steam case. The two items are radically different.

g. GMO asserts: "Discussions between Aquila and AgP in 2005 demonstrate that AgP was aware of and involved in the discussion of hedging." At one level, given that the Stipulation in HR-2005-0450 addressed how the financial costs of hedging should be treated, this statement is obvious. But, look carefully as GMO's adroit wording: What discussion of hedging? In the separate ***electric*** case? In the Steam case?

h. GMO asserts: "The parties to the Stipulation contemplated that hedging would be part of the QCA." Certainly there was a provision made to address financial costs. But we cannot (nor can, we think, GMO) address what the "parties" (there

were several) "contemplated." GMO's fuzzy wording appears an effort to leave an impression that is not factually supported.

i. GMO asserts: "Mr. Johnstone ignores the positions that AgP took in the 2005 Steam Rate Case as independently substantiated by AgP's filed testimony in that case." AGP attached the Stipulation to our complaint. The testimony to which GMO refers ***predated*** the negotiations that resulted in the Stipulation in the Steam Rate Case.

j. GMO asserts: "Aquila maintained open lines of communication with its steam customers through the life of its steam hedging program." If the entire case is examined, only GMO has seemed to dispute that there were settlement discussions after AGP discerned that GMO's implementation of a hedging program was imprudently conceived, imprudently planned, and imprudently executed. If by the phrase Aquila "maintained open lines of communication" with its customers, refers to Aquila attending settlement conferences, so be it. Of course, GMO fails to note that those settlement discussions were interrupted by the acquisition of Aquila and were not restarted until PSC Staff intervened. Apparently to GMO/Aquila' "open" communication is simply the discussion of a customer's complaint with the customer, nothing more.

15. GMO's next statements are worthy of review. They present both a *non sequitur* and a bootstrap. GMO argues that because the Stipulation in the Steam Rate Case referenced "hedging," it became a license to imprudently adopt, imprudently

implement and imprudently administer a steam hedging program while passing the bulk of the cost to customers. Nor does "state of mind" play in this at all. GMO's argument is sophistry.

16. The only apparent reference that GMO's Suggestions make to the fully labeled "Confidential and Privileged Settlement Proposal" that was filed as Exhibit GLC-3 HC (paragraph 1.k.)[5/] is that it is included in GMO's count of "eleven" items referenced near the bottom of page 8 of their Suggestions. Examination of the Exhibit by the Regulatory Law Judge will reveal that it addresses many other matters beyond the QCA including revenue requirement, AGP reliability concerns, customer meetings, and other issues that had arisen in the HR-2005-0450 Steam Rate Case.

17. If GMO's argument is that prior discussions that are part of what becomes a final Stipulation are somehow admissible, then this argument should be rejected, not only on the basis of the settlement privilege but as irrelevant on the basis of the parol evidence rule. A settlement agreement is a contract construed by the same rules used to construe any other contract.[6/] The goal of construing contracts is to determine the parties' intent, and where the language used in a contract is plain and unambiguous, the parties' intent is to be gleaned from

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[5/] Filing this material as Highly Confidential does not alleviate AGP's concern.

[6/] *Baker-Smith Sheet Metal, Inc. v. Building Erection Services Co.*, 49 S.W.3d 712, 715 (Mo.App. W.D., 2001).

that language alone.[7] "An ambiguity in a contract arises only from the terms susceptible to fair and honest differences, not mere disagreements as to construction."[8] Parol evidence may not be used to create an ambiguity in order to distort the clear language of the document.[9] No ambiguity appear here and GMO has not asserted any ambiguity in the Stipulation. All prior discussions are incorporated into the final document. Inconsistent material is legally privileged and consistent material is cumulative and should be rejected on that basis. 4 CSR 240-2.130(3).

18. In summary, the items identified as paragraphs 1.i., 1.j., and 1.k. in AGP's original Motion to Strike concern the ***content*** of settlement discussions, ***not*** the fact that discussions occurred. These discussions either lead up to and concluded with the QCA Stipulation in Case No. HR-2005-0450, or were settlement discussions in subsequent meetings between Aquila, AGP and, in some instances, Staff, after the dispute arose in an effort to reach a compromise that could have avoided this complaint. That these settlement discussions occurred is not privileged (even though GMO has not wanted to recognize that AGP met numerous times with Aquila seeking a resolution); their content is privileged, certainly documents that are ***clearly***

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[7] *Id.* at 715-6.

[8] *CB Commercial Real Estate Group, Inc. v. Equity Partnerships Corp.*, 917 S.W.2d 641, 646 (Mo. App., W.D. 1996).

[9] *JCBC, L.L.C. v. Rollstock, Inc.*, 22 S.W.3d 197, 204 (Mo. App., W.D. 2000)

marked as "Confidential and Privileged Settlement Proposal[s]." Indeed, if such an explicit reservation is not respected, parties cannot have the confidence necessary to exchange confidential written proposals in a settlement negotiation in any matter before the Commission. As we concluded our original Motion to Strike, quoting KCPL, that unilateral disclosure of privileged information establishes a "horrible precedent" for the future and will have a "chilling effect." on frank and candid exchanges of information and compromise positions in the settlement process.

WHEREFORE AGP prays that the material identified in paragraphs 1.i., 1.j., and 1.k. in the Prepared Testimony of Gary L. Clemens should be struck from the record of this proceeding and not referred to in any manner herein.

Respectfully submitted,

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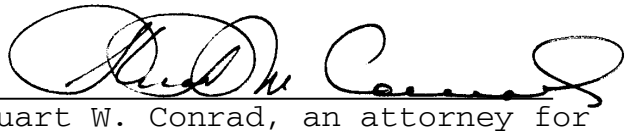
SERVICE CERTIFICATE

I certify that I have served a copy of the foregoing pleading upon identified representatives of KCP&L Greater Missouri Operations Company, and upon representatives of the Staff of the Missouri Public Service Commission by electronic means as an attachment to e-mail, all on the date shown below.



Stuart W. Conrad, an attorney for
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Dated: November 10, 2010