**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| **AG PROCESSING INC., A COOPERATIVE,** | ) | |
| | ) | |
| **Complainant,** | ) | |
| | ) | |
| **v.** | ) | **Case No. HC-2010-0235** |
| | ) | |
| **KCP&L GREATER MISSOURI OPERATIONS COMPANY,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**RESPONDENT'S OPPOSITION TO COMPLAINANT AG PROCESSING INC.'S MOTION TO STRIKE**

Respondent KCP&L Greater Missouri Operations Co., formerly known as Aquila, Inc. ("GMO" or "Company") hereby responds to the Motion to Strike of Complainant Ag Processing, Inc. ("Ag Processing" or "AgP"):

Ag Processing asserts that certain statements in Gary L. Clemens' Direct Testimony, filed on October 22, 2010, concern the privileged "**content** of settlement discussions" and should be stricken. See AgP's Motion to Strike at 4 (original emphasis). However, the portions of Mr. Clemens' testimony that AgP requests be stricken do not disclose privileged settlement negotiations.

Even if the portions of Mr. Clemens' testimony that AgP moves to strike refer to settlement negotiations, such testimony falls within well-defined exceptions to the prohibition on the admission of settlement negotiations.

In any event, AgP has waived any claim of privilege with respect to such testimony, given the allegations contained in the Direct Testimony of AgP's witness Donald E. Johnstone.

## I. A Fair Reading of Mr. Clemens' Direct Testimony Shows it Does Not Relate to Settlement Negotiations.

The eleven portions of Mr. Clemens' testimony that AgP seeks to strike are as follows:

(1) Item (a) at page 2, lines 13-20:

"Q: In the Direct Testimony of AGP witness Donald Johnstone at pages 5 and 31, Mr. Johnstone suggests that the Company did not discuss the hedging program with the steam customers prior to implementing the program. Is this true?

"A: No. I was heavily involved in Aquila's 2005 Steam Rate Case and have personal knowledge of the involvement of AGP and its representatives in the course of that case and in its ultimate resolution. I can state without qualification that AGP played an integral part in the development of the QCA in that case, which was designed to include a program for natural gas hedging."

(2) Item (b) at page 3, lines 10-14:

"The parties to the case discussed and understood the term 'financial instruments' to mean the futures contracts and option contracts that had been used in Aquila's natural gas hedging program that Aquila had used for certain of its electric operations, and that would be used for its steam operations in St. Joseph."

(3) Item (c) at page 4, line 18:

" … as well as Aquila's discussions with the parties to the case, especially AGP …."

(4) Item (d) at page 5, lines 3-4:

"The program had been discussed on several occasions with Staff, AGP, and other parties, beginning in the summer of 2004."

(5) Item (e) at page 5, lines 16-20:

"No party to the 2005 Steam Rate Case, including AGP, raised any objections to the hedging strategy employed by Aquila or requested that Aquila enter into a different hedging program. The signatory parties to the Stipulation were Aquila, Commission Staff, AGP, and the City of St. Joseph. The Stipulation was approved by the Commission without change on February 28, 2006, effective March 6, 2006."

(6) Item (f) at page 5, line 21 through page 6, line 14:

"Q: In addition to the information on Aquila's hedging program that was distributed to the parties to the 2005 Steam Rate Case, how else was AGP made aware of and involved in the decision to hedge natural gas for the industrial steam customers of the Lake Road Plant?

"A: AGP participated in numerous discussions during the course of the 2005 Steam Rate Case during which the parties exchanged documents regarding what became the QCA process. For example, AGP consultant and expert witness Mr. Johnstone circulated a proposal on January 16, 2006 which contained a proposed Section 4.1 that stated: 'The cost of gas will include the cost of physical gas deliveries and financial instruments associated with gas delivered

in the quarterly period.' See Schedule GLC-3 at 4. This concept was eventually reflected in Section 8.1 of the Stipulation, quoted above, as well as in the QCA tariff sheets themselves. Numerous revisions were discussed during the settlement process, but the above referenced wording remained largely unchanged and was included in the final Stipulation as well as the tariff, with the minor addition that the cost of gas will include the cost of physical gas deliveries and financial instruments 'when settled.' See Schedule GLC-1 at 5."

(7) Item (g), page 7, lines 7-9:

"Finally, the parties to the Stipulation, particularly Aquila and AGP, contemplated that a program of financial instruments and hedging would be an integral part of the overall QCA mechanism."

(8) Item (h), page 7, lines 17-20:

"Mr. Johnstone's testimony ignores the positions taken by AGP in the 2005 Steam Rate Case, including discussions in which I participated. It also is contrary to the plain language of Section 8.1 of the Stipulation."

(9) Item (i), page 8, lines 19-21:

"Beginning in the fall of 2007, Aquila asked AGP for its feedback on the hedging program, including whether it should be changed or discontinued. In response to these requests and after some discussion, …."

(10) Item (j), page 9, lines 7-19:

"We discussed AGP's opinions with regard to possible new hedging programs and reviewed proposals that AGP had discussed with Commission Staff members and then presented to Aquila.

"At one meeting in the spring of 2008, Aquila representatives met with AGP representatives to discuss the current state of the gas hedging portfolio. No new hedges had been placed since November 2007 and in mid-2008 the portfolio was 'in the money,' meaning that it had positive value. On previous occasions in 2007, the portfolio had been 'out of the money,' meaning that it had a negative value. We sought AGP's opinions with regard to what it wanted Aquila to do. We were advised by Mr. Johnstone and Mr. Conrad to do nothing at this time and, therefore, Aquila did not take any action to sell or liquidate the hedges. In June 2008, Aquila did receive from AGP several proposals with regard to a hedging program, but they were never acted upon as Aquila was soon thereafter acquired by Great Plains Energy."

(11) Item (k), referred to on page 6, lines 5-8:

Schedule GLC-3, designated as **HC** and filed as such.

It is unfair to characterize Mr. Clemens' testimony as disclosing the content of settlement negotiations. Mr. Clemens is testifying to AgP's knowledge of Aquila, Inc.'s ("Aquila") hedging program and to AgP's desire that Aquila's steam customers at the Lake Road Plant be included in such a hedging program. Disclosure of AgP's knowledge of Aquila's hedging program and of the intent of the QCA (which Mr. Johnstone himself addressed in his Direct Testimony) does not constitute disclosure of settlement discussions. Mr. Clemens does not testify about the give and take on settlement positions or dollars. He discloses no privileged "facts" or "settlement offers" as prohibited by 4 CSR 240-2.090(7). Furthermore, many of these conversations occurred either outside of the context of Case No. HR-2005-0450 ("2005 Steam Rate Case") or outside of any settlement discussions regarding the same. None of these conversations occurred in the context of this litigation.

The desire of customers to be included in a hedging program was discussed in public testimony filed by Ag Processing in the 2005 Steam Rate Case. See Direct Testimony of Maurice Brubaker at pages 4-5, Case No. HR-2005-0450 (Oct. 14, 2005).[1] Clearly, AgP itself does not consider this "content" to be privileged. In any case, these facts are "fully substantiated by other evidence," and thus are not privileged pursuant to 4 CSR 240-2.090(7).

Additionally, discussion of any non-privileged facts during settlement negotiations does not transform them into privileged facts. Thus, even if the "content" of Mr. Clemens' testimony took place during settlement discussions, the fact that financial instruments and hedging were discussed with Aquila's steam customers is not suddenly a privileged fact.

Ag Processing appears to conclude that because such non-privileged discussions were purportedly conducted during settlement negotiations, those non-privileged discussions are cloaked with the same privilege as the facts that the rules contemplate as privileged. Following

[1] Attached to Direct Testimony of GMO Witness Wm. Edward Blunk at Sched. WEB-6.

this line of thought, *everything* discussed about *any* issue *every* time a utility meets with a customer and a customer's attorney about a tariff, a rate, or a regulatory matter would be privileged. This clearly is not contemplated by the rules of evidence.

The cases AgP cites in support of its proposition that the Commission should protect settlement negotiations from disclosure are not relevant to the facts discussed in Mr. Clemens' testimony. AgP first cites an Order of the Commission in Staff v. Suburban Water & Sewer Co., Case No. WC-2008-0030 (Sept. 6, 2007), which granted motions by Staff and the Public Counsel to strike the utility's unilateral filing of a settlement offer. See AgP Motion to Strike at 5. In that case, the Motion for Nonunanimous Stipulation and Agreement filed by the utility attached a document that was entitled "Stipulation and Agreement" even though no one except the utility had agreed to the terms. Since the filing constituted only an offer by that party, signed only by that party, and contained settlement terms that had not been agreed to by Staff or any other party to that case, the Commission properly granted the motions to strike. This is clearly not the situation here, where GMO is offering evidence of the fact that conversations were held with customers and of mutually agreed upon language included in a jointly signed Stipulation and Agreement that was approved by the Commission in the 2005 Steam Rate Case on February 28, 2006 ("Stipulation").

AgP next cites at page 6 of its Motion an order striking an amendment to a late-filed exhibit that contained a document describing ongoing settlement negotiations and calculations which had previously been circulated only among non-utility parties. See Order Extending Time for Reponses to Late-Filed Exhibits and Striking Amendment to Late-Filed Exhibit, In re Missouri-American Water Co., Case No. WR-2007-0216 (Aug. 27, 2007). The rationale behind the Commission's decision to strike this portion of the exhibit was that a party making a

settlement offer should not be penalized by revealing an offer to the jury if the negotiations fail. Id., n. 5 at 3. However, Mr. Clemens' testimony does not reveal or discuss any settlement offers.

Finally, AgP cites KCP&L's motion to strike portions of prefiled testimony that were offered as evidence of the meaning of a technical term in In re Kansas City Power & Light Co., Case No. ER-2007-0291. See AgP Motion to Strike at 7. While GMO agrees with the general proposition that privileged communications should not be preserved in the record, the communications that Mr. Clemens discussed in his testimony are not privileged. They either occurred outside the context of any settlement negotiations or do not concern privileged facts disclosed during any settlement negotiations.

**II. Even if the Portions of Mr. Clemens' Testimony that AgP Moves to Strike Contain References to Settlement Negotiations, Such Testimony Falls Within Well-Defined Exceptions to the Inadmissibility of Such Negotiations.**

While evidence concerning settlement negotiations is generally excluded at trial, "that general rule, like most, is subject to many exceptions and qualifications." Owen v. Owen, 642 S.W.2d 410, 414 (Mo. App. S.D. 1982).

Mr. Clemens' testimony concerns admissions of fact independent of the details of any settlement discussions between the parties. It is well-settled Missouri law that "if an offer of settlement also constitutes an admission of an independent fact relevant to an issue between the parties, the offer of settlement will be deemed admissible on that issue." Ullrich v. Cadco, Inc., 244 S.W.2d 772, 780 (Mo. App. E.D. 2008). See Vogt v. Emmons, 181 S.W.3d 87, 95 (Mo. App. E.D. 2005) (holding that "there is an exception to this general rule [that evidence procured from settlement is to be excluded at trial] when the evidence constitutes an admission of independent fact relevant to an issue between the parties" and thus correspondence containing evidence of settlement discussions was admissible).

Each and every statement of Mr. Clemens that AgP seeks to strike constitutes an independent fact that is pertinent to the case at hand. These facts demonstrate that:

(1) AgP played an integral part in the development of the QCA in the 2005 Steam Rate Case;

(2) The parties to the Stipulation understood the term "financial instruments" to include hedging;

(3) Aquila decided to use its electric hedge program for steam based on discussions with parties to the 2005 Steam Rate Case;

(4) Aquila had discussed its electric hedging program with Staff and customers beginning in the summer of 2004;

(5) No party to the 2005 Steam Rate Case raised objections to Aquila's electric hedging strategy;

(6) Discussions between Aquila and AgP in 2005 demonstrate that AgP was aware of and involved in the discussion of hedging;

(7) The parties to the Stipulation contemplated that hedging would be part of the QCA;

(8) 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; and

(9) Aquila maintained open lines of communication with its steam customers throughout the life of its steam hedging program.

These are all independent facts relevant to the present controversy between Ag Processing and GMO.

Because AgP has asserted in this case that it was not kept informed of the hedging practices of Aquila, proof that AgP was not only aware that Aquila was hedging but was in favor

of including hedging practices in the QCA constitutes an admission and a statement against AgP's interest, and is thus admissible. See McKeown v. John Nooter Boiler Works, Co., 237 S.W.2d 217, 223 (Mo. App. St. L. 1951) (holding that the trial court did not err in admitting offers of settlement as such offers were admissible as admissions against interest which are admissions of an independent fact pertinent to an issue between the parties). Mr. Clemens' Testimony concerns the state of mind of AgP representatives, and is thus admissible as an independent fact.

Evidence of settlement discussions is generally inadmissible because of "the public policy favoring the settlement of disputes." Ullrich v. Cadco, Inc., 244 S.W.2d 772, 780 (Mo. App. E.D. 2008). Were admissions of liability admissible upon the deterioration of settlement discussions, parties likely would not enter in to settlement discussions in the first place. Thus, where the public policy encouraging settlements is not undermined, exceptions to the general inadmissibility of settlement discussions are permitted. Lindsey Masonry Co. v. Jenkins & Assocs., 897 S.W.2d 6, 18 (Mo. App. W.D. 1995).

In this instance the public policy encouraging settlement discussions is not upset by Mr. Clemens' testimony. Indeed, if every discussion held with a customer's representative and/or lawyer is considered privileged, and the knowledge of facts imparted and reviewed never see the light of day, the free flow of information would likely cease and productive discussions would come to an end. Striking Mr. Clemens' testimony on these grounds would ironically have the same chilling effect that the prohibition on the use of settlement negotiations during litigation seeks to prevent.

Finally, AgP has suffered no prejudice by Mr. Clemens' testimony. Each of the eleven statements that it has moved to strike describe AgP's knowledge of and opinions regarding Aquila's hedging program. There is no issue of a failed settlement as the Commission approved

the Stipulation to which AgP was a signatory. That Stipulation ultimately adopted the term "financial instruments" in the QCA provision that was supported by Mr. Johnstone.

### III. Even if the Portions of Mr. Clemens' Testimony that AgP has Moved to Strike Relate to Settlement Negotiations, AgP has Waived any Privilege with Respect to Such Testimony.

Ag Processing waived any privilege regarding settlement negotiations by putting otherwise privileged communications at issue. "Missouri courts have found waiver to exist in a number of circumstances, and the 'at issue' waiver is prominent among them." State ex rel. St. John's Reg'l Med. Ctr. v. Dally, 90 S.W.3d 209, 215 (Mo. App. S.D. 2002).

"At issue" waiver occurs "when the privilege holder makes assertions in a litigation context that put its otherwise privileged communications in issue." Id. Because Mr. Johnstone specifically asserts in his Direct Testimony that Aquila did not discuss a hedge program with its steam customers before implementation of that program, that Aquila did not give customers any opportunity for review or comment during the program, and that a hedge program is unnecessary because the QCA independently mitigates price volatility, AgP has put any purported privileged communications at issue.

Mr. Johnstone states that "Aquila could have easily discussed a hedge program with all six of its customers before implementation and should have done so. . . . Aquila's pass on the opportunity for important customer input contributes to my opinion of imprudence." See Johnstone Direct Testimony at 5. In response to a question about whether Aquila had any discussions regarding hedging with persons outside of the Company, Mr. Johnstone replied: "Based on information I have seen, it appears not. There is no indication of any consultation with anyone, including customers, Staff, or the Commission. Thus, there was no opportunity for review or comment, and no opportunity for approval or disapproval, by anyone outside of the Company." Id. at 31.

Mr. Johnstone cannot make such allegations while AgP simultaneously seeks to protect those exact conversations between AgP and Aquila that Mr. Johnstone asserts never occurred. Clearly, by stating that Aquila could have, but did not, discuss a hedge program with customers and gave customers no opportunity for approval or disapproval, Mr. Johnstone has put in issue the exact statements that AgP now seeks to strike from Mr. Clemens' testimony:

a. "Q: In the Direct Testimony of AGP witness Donald Johnstone at pages 5 and 31, Mr. Johnstone suggests that the Company did not discuss the hedging program with the steam customers prior to implementing the program. Is this true?

"A: No. I was heavily involved in Aquila's 2005 Steam Rate Case and have personal knowledge of the involvement of AGP and its representatives in the course of that case and in its ultimate resolution. I can state without qualification that AGP played an integral part in the development of the QCA in that case, which was designed to include a program for natural gas hedging." [Motion to Strike 1.a.]

b. " … as well as Aquila's discussions with the parties to the case, especially AGP …." [Motion to Strike 1.c.]

c. "The program had been discussed on several occasions with Staff, AGP, and other parties, beginning in the summer of 2004." [Motion to Strike 1.d.]

d. "No party to the 2005 Steam Rate Case, including AGP, raised any objections to the hedging strategy employed by Aquila or requested that Aquila enter into a different hedging program. The signatory parties to the Stipulation were Aquila, Commission Staff, AGP, and the City of St. Joseph. The Stipulation was approved by the Commission without change on February 28, 2006, effective March 6, 2006." [Motion to Strike 1.e.]

e. "Q: In addition to the information on Aquila's hedging program that was distributed to the parties to the 2005 Steam Rate Case, how else was AGP made aware of and involved in the decision to hedge natural gas for the industrial steam customers of the Lake Road Plant?

"A: AGP participated in numerous discussions during the course of the 2005 Steam Rate Case during which the parties exchanged documents regarding what became the QCA process. For example, AGP consultant and expert witness Mr. Johnstone circulated a proposal on January 16, 2006 which contained a proposed Section 4.1 that stated: 'The cost of gas will include the cost of physical gas deliveries and financial instruments associated with gas delivered in the quarterly period.' See Schedule GLC-3 at 4. This concept was eventually reflected in Section 8.1 of the Stipulation, quoted above, as well as in the QCA tariff sheets themselves. Numerous revisions were discussed during the settlement process, but the above referenced wording remained largely unchanged and was included in the final Stipulation as well as the tariff, with the minor addition that the cost of gas will include the cost of physical gas

deliveries and financial instruments 'when settled.' See Schedule GLC-1 at 5." [Motion to Strike 1.f.]

f. "Beginning in the fall of 2007, Aquila asked AGP for its feedback on the hedging program, including whether it should be changed or discontinued. In response to these requests and after some discussion," [Motion to Strike 1.i.]

g. "We discussed AGP's opinions with regard to possible new hedging programs and reviewed proposals that AGP had discussed with Commission Staff members and then presented to Aquila.

"At one meeting in the spring of 2008, Aquila representatives met with AGP representatives to discuss the current state of the gas hedging portfolio. No new hedges had been placed since November 2007 and in mid-2008 the portfolio was 'in the money,' meaning that it had positive value. On previous occasions in 2007, the portfolio had been 'out of the money,' meaning that it had a negative value. We sought AGP's opinions with regard to what it wanted Aquila to do. We were advised by Mr. Johnstone and Mr. Conrad to do nothing at this time and, therefore, Aquila did not take any action to sell or liquidate the hedges. In June 2008, Aquila did receive from AGP several proposals with regard to a hedging program, but they were never acted upon as Aquila was soon thereafter acquired by Great Plains Energy." [Motion to Strike 1.j.]

h. Schedule GLC-3, designated as **HC** and filed as such. [Motion to Strike 1.k.]

Mr. Johnstone also testifies that "AGP asked Aquila to suspend the program in October, 2007 and Aquila did so." See Johnstone Direct Testimony at 31. This is evidence of continuing discussions between the parties concerning hedging, contradicting AgP's position that steam customers were kept in the dark about hedging throughout the program's existence. The Johnstone testimony further puts at issue whether Aquila gave customers the opportunity for review and comment on its hedging program. Mr. Clemens' testimony is directly responsive to those issues:

a. "Beginning in the fall of 2007, Aquila asked AGP for its feedback on the hedging program, including whether it should be changed or discontinued. In response to these requests and after some discussion …." [Motion to Strike 1.i.]

b. "We discussed AGP's opinions with regard to possible new hedging programs and reviewed proposals that AGP had discussed with Commission Staff members and then presented to Aquila.

"At one meeting in the spring of 2008, Aquila representatives met with AGP representatives to discuss the current state of the gas hedging portfolio. No new hedges had been placed since November 2007 and in mid-2008 the portfolio was 'in the money,' meaning that it had positive value. On previous occasions in 2007, the portfolio had been 'out of the money,' meaning that it had a negative value. We sought AGP's opinions with regard to what it wanted Aquila to do. We were advised by Mr. Johnstone and Mr. Conrad to do nothing at this time and, therefore, Aquila did not take any action to sell or liquidate the hedges. In June 2008, Aquila did receive from AGP several proposals with regard to a hedging program, but they were never acted upon as Aquila was soon thereafter acquired by Great Plains Energy." [Motion to Strike 1.j.]

Mr. Johnstone also claims that "the QCA, because of its design, mitigates the underlying volatility in the costs." See Johnstone Direct at 7. Mr. Johnstone asserts that the QCA's "intended effect" was to mitigate volatility in the cost of fuels. Id. He further testifies that "[t]o the extent that fuel cost volatility is addressed by the QCA, it is not necessary to incur the risks and costs of a hedge program for the same purpose," and that "Aquila proceeded as though the QCA mechanism did not exist." Id. at 11. Thus, AgP's expert witness Mr. Johnstone has attacked Aquila's hedging program by testifying that it was never intended to be a part of the QCA, while AgP now attempts to hide from the Commission any contrary evidence that a hedging program was intended to be an element of the QCA. This cannot be permitted.

Mr. Clemens' testimony regarding the purpose of the QCA, its inclusion of hedging costs, and AgP's participation in the development and mutual understanding of the "intended effect" of the QCA (including Mr. Johnstone's term "financial instruments" in the QCA) is responsive to the Johnstone Direct Testimony. Without a doubt, by stating that no hedging program was needed because the QCA mitigated price volatility independent of any hedging program, Mr. Johnstone has put at issue the exact statements that AgP now seeks to strike from Mr. Clemens' Direct Testimony:

a. "The parties to the case discussed and understood the term 'financial instruments' to mean the futures contracts and option contracts that had been used in Aquila's natural gas hedging program that Aquila had used for certain of its electric operations, and that would be used for its steam operations in St. Joseph." [Motion to Strike 1.b.]

b. "Q: In addition to the information on Aquila's hedging program that was distributed to the parties to the 2005 Steam Rate Case, how else was AGP made aware of and involved in the decision to hedge natural gas for the industrial steam customers of the Lake Road Plant?

"A: AGP participated in numerous discussions during the course of the 2005 Steam Rate Case during which the parties exchanged documents regarding what became the QCA process. For example, AGP consultant and expert witness Mr. Johnstone circulated a proposal on January 16, 2006 which contained a proposed Section 4.1 that stated: 'The cost of gas will include the cost of physical gas deliveries and financial instruments associated with gas delivered in the quarterly period.' See Schedule GLC-3 at 4. This concept was eventually reflected in Section 8.1 of the Stipulation, quoted above, as well as in the QCA tariff sheets themselves. Numerous revisions were discussed during the settlement process, but the above referenced wording remained largely unchanged and was included in the final Stipulation as well as the tariff, with the minor addition that the cost of gas will include the cost of physical gas deliveries and financial instruments 'when settled.' See Schedule GLC-1 at 5." [Motion to Strike 1.f.]

c. "Finally, the parties to the Stipulation, particularly Aquila and AGP, contemplated that a program of financial instruments and hedging would be an integral part of the overall QCA mechanism." [Motion to Strike 1.g.]

d. "Mr. Johnstone's testimony ignores the positions taken by AGP in the 2005 Steam Rate Case, including discussions in which I participated. It also is contrary to the plain language of Section 8.1 of the Stipulation." [Motion to Strike 1.h.]

e. Schedule GLC-3, designated as **HC** and filed as such. [Motion to Strike 1.k.]

AgP has further waived any privilege regarding the purported content of settlement negotiations by invoking this privilege in a fundamentally unfair manner. "Privilege may also be waived when invoked in some fundamentally unfair way." State ex rel. St. John's Reg'l Med. Ctr. v. Dally, 90 S.W.3d 209, 215 (Mo. App. S.D. 2002). AgP cannot claim that Aquila was not discussing hedging with its customers and simultaneously conceal those exact discussions that occurred between Aquila and its customers. Likewise, AgP cannot claim that the QCA effectively mitigates price volatility independent of any hedging program and simultaneously seek to conceal not only the fact that the QCA contemplates and incorporates hedging programs, but also the fact that AgP was aware of this and was instrumental in the QCA's design.

Because AgP has raised issues regarding Aquila's customer communications and the "intended effect" of the QCA, it is only fair that the Company be able to defend itself. GMO can only defend an assertion that Aquila never discussed hedging with its customers with evidence of those discussions. GMO also can only defend an assertion that the QCA was intended to mitigate price volatility independent of hedging with evidence that AgP was aware of the QCA's inclusion of financial instruments which included hedges. "Accordingly, a privilege may be waived when a party asserts a claim that in fairness requires examination of protected communications." State ex rel. St. John's Reg'l Med. Ctr. v. Dally, 90 S.W.3d 209, 215 (Mo. App. S.D. 2002). Fundamental fairness requires that the Commission consider Mr. Clemens' testimony in its entirety. By raising these factual issues, AgP has waived any right to rely on the privilege.

Although AgP claims that Mr. Clemens' plain-spoken testimony is "astounding,"[2] the Company finds it unusual, to say the least, that AgP would claim Aquila did not discuss hedging and financial instruments with its customers, but now balks at GMO's attempt to defend itself with evidence that such discussions did, in fact, occur. To the contrary, GMO finds it astounding that AgP claims that hedging is unnecessary because there is an independent QCA and then protests the Company's attempt to defend itself with testimony that hedging is integral to the QCA. The Commission should not permit AgP to assert such claims through the testimony of Mr. Johnstone, and then conceal the very evidence that effectively destroys those claims by crying privilege.

[2] Motion to Strike at 7.

WHEREFORE, GMO respectfully requests that the Commission deny AgP's Motion to Strike, and for such other relief as this Commission believes just and reasonable.

Respectfully submitted,

/s/ Karl Zobrist

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## Certificate of Service

A copy of the foregoing has been served by e-mail this 5th day of November 2010 upon counsel of record in this proceeding.

/s/ Lisa A. Gilbreath
Attorneys for KCP&L Greater Missouri Operations Co.