FILED
April 19, 2013
Data Center
Missouri Public
Service Commission

Missouri Public Service Commission

Judge or Division:	Appellate Number:
Appellant: AG Processing, Inc. vs.	Missouri Public Service Commission File Number: HC-2010-0235 HC-2012-0259
Respondent: KCP&L Greater Missouri Operations Company	

3:35 PM

(Date File Stamp)

Notice of Appeal

Notice is given that Ag Processing, Inc appeals to the Missouri Court of Appeals ☒ Western ☐ Eastern ☐ Southern District.

4-19-2013
Date Notice of Appeal Filed
(to be filled in by Secretary of Commission)

Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. **Please make checks or money orders payable to the Missouri Court of Appeals.** At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney.

CASE INFORMATION

Appellant Name / Bar Number:	Respondent's Attorney / Bar Number:
Stuart W. Conrad, MBN 23966, C. Edward Peterson MBN 42398	Shelley Brueggemann, MBN 52173
Address: Finnegan, Conrad & Peterson, LC 3100 Broadway, Suite 1209, Kansas City, MO 64111	Address: Missouri Public Service Commission P.O. Box 360, Jefferson City, MO 65102
Telephone: 816-753-1122 Fax: 816-756-0373	Telephone: 573-751-2690 Fax: 573-751-9285

Date of Commission Decision:	Date of Application for Rehearing Filed:	Date Application for Rehearing Ruled On:
February 27, 2013	March 4, 2013	March 20, 2013

DIRECTIONS TO COMMISSION

A copy of the notice of appeal and the docket fee shall be mailed to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on April 19, 2013 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.

See attached service list

Appellant or Attorney for Appellant

Certificate of Service

Party/Position/Attorney of Record

Missouri Public Service Commission
(Party as a matter of right per statute)
Kevin Thompson
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Kevin.Thompson@psc.mo.gov

Missouri Public Service Commision
(Party as matter of right per statute)
Office of General Counsel
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounselservice@psc.mo.gov

Missouri Public Service Commission
Sarah Kliethermes
200 Madison Street, Suite 800
P.O. box 360
Jefferson City, MO 65102
sarah.kliethermes@psc.mo.gov

Office of Public Counsel
(Intervenor)
Lewis Mills
200 Madison, Box 2230
Jefferson City, MO 65102

AG Processing Inc.
(Appellant/Complainant)
Stuart Conrad
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

KCP&L Greater Missouri Operations Company
(Respondent)
Lisa A. Gilbreath
4520 Main, Suite 1100
Kansas City, MO 64111

KCP&L Greater Missouri Operations Company
(Respondent)
James M. Fisher
101 Madison Street
Jefferson City, MO 35101
jfisherpc@aol.com

KCP&L Greater Missouri Operations Company
(Respondent)
Karl Zobrist
4520 Main Street, Suite 1100
Kansas City, MO 64111
karl.zobrist@snldenton.com

KCP&L Greater Missouri Operations Company
(Respondent)
Roger W. Steiner
1200 Main Street, 16th Floor
P.O.Box 418679
Kansas City, MO 64105-9679

Triumph Foods, LLC
(Intervenor)
Ryan Harding
235 East High Street, Suite 200
P.O. Box 1251
Jefferson City, MO 65102
ryan.harding@huschblackwell.com

Triumph Foods, LLC
(Intervenor)
Lowell D. Pearson
235 East High Street
P.O. Box 1251
Jefferson City, MO 65102
lowell.pearson@huschblackwell.com

ATTACHMENT 1

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 27th day of February, 2013.

Ag Processing, Inc., a Cooperative,	)	
	)	
Complainant,	)	
	)	
v.	)	**File No. HC-2010-0235**
	)	
KCP&L Greater Missouri Operations Company,	)	
	)	
Respondent.	)	
AG Processing, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	**File No. HC-2012-0259**
	)	
KCP&L Greater Missouri Operations Company,	)	
	)	
Respondent.	)	

ORDER REGARDING REMAND

Issue Date: February 27, 2013 Effective Date: March 5, 2013

Background on file No. HC-2010-0235

Prior to the merger between Great Plains Energy Incorporated and Aquila, Inc. d/b/a Aquila Networks – L&P ("Aquila"), which then became KCP&L Greater Missouri Operations Company ("GMO"), a sister subsidiary of Kansas City Power and Light Company, Aquila had a program in place to hedge natural gas price volatility for its steam operations.[1]

[1] The merger was approved by the Commission in File No. EM-2007-0374, *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief* in its Report and Order issued on July 1, 2008, Effective, July 11, 2008.

Aquila engaged in this program because they used two fuels to generate steam – coal was the primary fuel and natural gas was used as a swing fuel when load exceeded the capacity of the coal-fired boiler. Natural gas prices were highly volatile, in part, because of the effects of Hurricanes Rita and Katrina in 2005. The hedging program was a 1/3rd, 1/3rd, 1/3rd program. Thus, 1/3rd of the required natural gas was not hedged and was to be bought on the spot market; 1/3rd was hedged with futures contracts and 1/3rd was hedged with call options. In 2006-2007, the hedging program resulted in losses because the amount of natural gas was over-hedged based upon forecasts for usage from Aquila's customers and because the price of gas fell.

Aquila has five industrial steam customers: AG Processing, Inc. ("AGP"), Triumph Foods, L.L.C. (a new customer coming on line just before the 2006 hedges were placed), Albaugh Chemical, Nestle/Purina PetCare, and Land O' Lakes - Omnium Division (a chemical company). A sixth customer, Silgan Containers, left the system towards the end of 2006, apparently after the 2006 hedges were placed. Gains and losses from the hedging program were passed through to Aquila's customers by means of Quarterly Cost Adjustments ("QCA") for fuel expenses. The pass through is an 80/20 adjustment where the customers pick up 80% of the fuel costs. The QCA is similar to a fuel adjustment clause mechanism.

During the period of April 2006 through December 2007, Aquila purchased hedge positions for approximately 2,000,000 mmBtus of natural gas for steam production. During the same period, its actual burn was 1,500,000 mmBtus. The net cost of the hedging program for 2006 was $1,164,960 and for 2007 was $2,441,861. Consequently, with the 80% pass through, Aquila's customers paid $936,968 of these costs for 2006, and $1,953,488 for 2007. The hedging program ceased in October of 2007.

On January 28, 2010, AGP filed its complaint in File No. HC-2010-0235 claiming that GMO was imprudent for initiating such a hedging program and that the program was imprudently designed and imprudently managed or operated. AGP sought a refund of the money lost in the hedging program.

The Commission issued its Report and Order in HC-2010-0235 on September 28, 2011, effective October 8, 2011. In that order, the Commission determined that:

(1) it was not imprudent for GMO to adopt a natural gas hedging program;

(2) GMO's hedging program was prudently designed,

but

(3) GMO failed to meet its burden to prove that it operated its hedging program in a prudent manner.

When reaching its decision that GMO failed to meet its burden to prove that it operated its hedging program in a prudent manner, the Commission examined the presumption of prudence the utility receives in relation to its expenses. That presumption is applied as follows in a general rate case:

> A utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt[2] as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.[3]

Applying the presumption, the Commission determined that:

(1) AGP had raised serious doubt about the prudence of GMO's decisions regarding the hedging program;

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[2] The legal standard for overcoming a presumption is the production of substantial controverting evidence. It should be noted that in HC-2010-0235 the Commission did not articulate this standard when finding that AGP raised serious doubt so that finding is not adequately supported. On remand this won't necessarily matter, because the Court of Appeals made it clear that the Complainant, AGP, has the burden of proof at the preponderance of the evidence standard. The burden-shifting presumption is not applicable.

[3] This presumption is routinely applied in rate cases, but it should be kept in mind that legal presumptions are not the same as a burden of proof. A full legal analysis of the burden of proof in a "prudence review" versus a complaint case appears in the Report and Order in File No. EO-2011-0390 that was issued on September 4, 2012.

(2) GMO had the burden of proving it operated its hedging program in a prudent manner;

and

(3) GMO failed to meet that burden.

The Commission went on to say that GMO failed to establish that any part of the cost of operating the hedging program was prudently incurred and the entire net cost of operating its natural gas price hedging program for steam production in 2006 and 2007 was imprudently incurred.

The Commission made another important decision in HC-2010-0235. The Commission decided that since this action was a full prudence review, it applied to all of GMO's steam customers, and the relief ordered by the Commission, a refund, should apply to all of Aquila's steam customers, not just AGP, the only party that complained.

GMO pursued an appeal of the Commission's decision to the Missouri Court of Appeals, Western District. By November 12, 2012, while awaiting the issuance of the mandate of the Court of Appeals, GMO had completed the Commission-ordered refund of the entire amount at issue to its customers through the QCA.

The Court of Appeals reversed the Commission's decision, finding that the Commission incorrectly applied the burden of proof. The Court determined that AGP, as the complainant who initiated the action, had the burden to prove its claims of imprudence regarding the company's expenditures on the natural gas hedging program at the preponderance of the evidence standard. The court stated: "Granting relief without requiring Ag Processing to prove the allegations in its complaint is reversible error." "Accordingly, we reverse the order and remand the cause for further consideration under the appropriate burden of proof."

The Court of Appeals Mandate was issued on November 21, 2012, making its order final. The Court had overruled motions for rehearing filed by the Commission and AGP. No motions for transfer to the Supreme Court of Missouri were filed.

Background on file No. HC-2010-0235

File Number HC-2012-0259 is another complaint initiated by AGP against GMO raising allegations of imprudence with GMO's hedging program, but it involves a different quarterly cost adjustment period - 2009. It also involves different allegations of imprudence. This case was nearing its hearing date when GMO filed a motion to stay it pending the Court of Appeals decision in HC-2010-0235. The Commission granted that motion and stayed the case because the proper burden of proof will be identical for both of these cases.

The Commission's Review Following Remand

After discussing these two matters at the Commission's December 5, 2012 Agenda session, the Commission decided the initial step was to have the parties to HC-2010-0235 re-brief that case, based on the present record, applying the preponderance of the evidence standard. Those briefs were filed on January 7, 2013. GMO responded to AGP's brief on January 15, 2013. AGP replied to GMO's response on January 25, 2013. In that reply, AGP raised another argument claiming that even if it failed to meet the burden of proof, the customers cannot be compelled to refund the money to GMO as a matter of law. The Commission set a response deadline for February 4, 2013 to give the parties an opportunity to respond to this new legal argument. Responses were filed by GMO on February 8, 2013, and by the Commission's Staff on February 11, 2013.

On February 12, 2013, AGP filed a notice of its intent to reply to GMO's and Staff's responses. And on February 13, 2013, following a case discussion on these matters at the

Commission's Agenda session, the Commission established a response deadline for AGP of March 19, 2013.[4]

Following the re-briefing of HC-2010-0235, the Commission undertook an extensive review of its September 28, 2011 Report and Order. When reviewing its prior decision, the Commission kept in mind the preponderance of the evidence standard, the prudence standard and the proof of harm standard as articulated below.

Preponderance of the Evidence Standard

In order to meet the preponderance of the evidence standard, AGP must convince the Commission it is "more likely than not" that its allegations of imprudence against Aquila/GMO are true.[5] There must be enough evidence to tip the scales in favor of a party in order for them to meet this burden. The preponderance of the evidence must support the complainant's allegations and demonstrate that GMO violated the prudence standard in relation to the company's hedging program.

If the evidence is equally balanced, the litigant having the burden of proof loses.[6] Similarly, a submissible case is not made if it depends solely on evidence which equally supports two inconsistent and contradictory inferences.[7]

Prudence Standard

The "prudence standard" further qualifies how AGP must meet its burden of proof in relation to its allegations. To determine if GMO's conduct was imprudent, the Commission looks at whether the utility's conduct was reasonable at the time, under all of the

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[4] Responses were filed by both AGP and GMO. Neither response adds to the analysis.

[5] *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 746 (Mo. App. 2005); *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

[6] *Dill v. Dill*, 304 S.W.3d 738, 743 (Mo. App. 2010).

[7] *Steward v. Baywood Villages Condominium Ass'n* 134 S.W.3d 679, 682 (Mo. App. 2004).

circumstances, considering that the company had to solve its problem **prospectively** rather than in reliance on hindsight.[8] More specifically, AGP must prove, by the preponderance of the evidence, that GMO's conduct was unreasonable at the time, under all of the circumstances, from a prospective viewpoint, not in hindsight. Additionally, "[i]f the company has exercised prudence in reaching a decision, the fact that external factors outside the company's control later produce an adverse result do not make the decision extravagant or imprudent."[9]

Proof of Harm

In order for the Commission to direct a refund for any alleged imprudently incurred costs, it must apply a two-part test. The Commission must find both that: (1) the utility acted imprudently when incurring those costs and, (2) such imprudence resulted in harm to the utility's ratepayers.[10] Harm to ratepayers in relation to imprudently incurred costs requires proof of causation, i.e., that the increased costs recovered from the ratepayers were causally related to the alleged imprudent action, and evidence as to the amount those expenditures would have been if the utility acted prudently.[11]

Analysis and Decision

After a complete review of the evidence in HC-2010-0235, the Commission determines that it will vacate its Report and Order in its entirety as a matter of due process. When AGP presented its case to the Commission it was operating under the assumption

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[8] *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n*, 116 S.W.3d 680, 694 (Mo. App. 2003); *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 954 S.W.2d 520, 528 -529 (Mo. App. 1997).

[9] *State ex rel. Missouri Power and Light Co. v. Public Service Comm'n*, 669 S.W.2d 941, 947 -948 (Mo. App. 1984).

[10] *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 954 S.W.2d 520, 529 -530 (Mo. App. 1997).

[11] *Id.*

that the burden of proof would shift to GMO if it raised serious doubt as to GMO's adoption and management of the hedging program. To ensure due process, the Commission will reopen the evidentiary record in HC-2010-0235 to take **additional** evidence[12] with all of the parties being fully informed of the proper burden of proof and who bears that burden.[13] AGP bears the burden of proof of its allegations at the preponderance of the evidence standard. All of the parties will be afforded the opportunity to present evidence so there will be no unfair advantage to any party.

Additionally, the Commission failed to properly apply the proof of harm standard. The Commission even noted this in its decision stating: "The record is not clear about how much net hedging costs Aquila would have incurred if it had properly forecast the amount of natural gas it need to purchase supply steam to its customers." There was no evidence produced as to what the hedging costs might have been if more accurate forecasted load had been used, but presumably there still would have been costs passed through the customers. There was also no evidence produced providing a breakdown of each customer's portion of the hedging costs. Consequently, when the Commission ordered the refund in HC-2010-0235, it did not have any evidence in the record to determine the correct amount of the award.

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[12] The parties do not have to re-introduce evidence already admitted into the record.

[13] As the Court of Appeals has elucidated:

> The trial court is afforded wide discretion in determining whether to reopen a case to allow the admission of additional evidence. The trial court's decision as to whether to reopen a case will be reversed only upon a showing of abuse of discretion. However, when there is no inconvenience to the Court or unfair advantage to one of the parties, there is an abuse of discretion and a new trial will be directed upon a refusal to reopen a case and permit the introduction of material evidence, that is evidence that would substantially affect the merits of the action and perhaps alter the Court's decision. (Internal citations omitted).

Foster v. Village of Brownington, 76 S.W.3d 281, 287 (Mo. App. W.D. 2002).

Because the Court of Appeals has reversed and remanded this case to the Commission, the Commission believes that it has the same discretionary authority as the courts to re-open the evidentiary record.

Current Status of the Quarterly Cost Adjustment

Having determined the Commission must reopen the record in HC-2010-0235, and having determined that its prior decision was in error because it did not apply the proper burden of proof, the Commission must make a determination with regard to the refund the Commission ordered to GMO's customers. The Commission must make this ruling now pursuant to Section 386.520.2(3), RSMo Supp. 2011, which provides:

> 2. 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:
>
> (3) **If the effect of the unlawful or unreasonable commission decision was to** increase the public utility's rates and charges by a lesser amount than what the public utility would have received had the commission not erred or 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.** (Emphasis added).

The Commission determines that additional time, beyond 60 days, is necessary to properly calculate the temporary rate adjustment that must be made in relation to its September 28, 2011 Report and Order determined to be unlawful by the Court of Appeals. It required more than 60 days to allow the parties to re-brief the matter and allow the Commission to fully review the evidentiary record applying the proper burden of proof.

Even though the Commission has decided that the record must be reopened, Section 386.520.2(3) RSMo Supp. 2011, mandates the Commission to make a determination on rate adjustments within a maximum deadline of 120 days upon remand. Because the Court of Appeals' mandate issued on November 21, 2012, the Commission must make this adjustment no later than March 21, 2013. There is insufficient time for the Commission to conduct a new hearing in this matter and render a new decision within that time frame, so the Commission will order a rate adjustment during the pendency of the new hearing. This rate adjustment will not prejudice any party because the QCA is a two-way cost adjustment mechanism.[14] If it is later determined that GMO actions were imprudent, any amounts returned to GMO that should have been retained by the customers can simply be flowed back through the QCA to the customers.

Consolidation with HC-2012-0259

File No. HC-20120-0259 has been stayed pending a determination in HC-2010-0235. Because the Commission is going to reopen the record in HC-2010-0235, as a matter of administrative economy and to prevent unnecessary delay and avoid unnecessary costs, the Commission will consolidate the two actions. While the allegations in the two complaints advance different theories of imprudence, they involve related questions of law and fact.[15]

Procedural Schedule

The parties will need to coordinate the presentation of the evidence for these two matters and the Commission is unaware of potential conflict dates for counsel to the

[14] The Commission has reviewed all of the parties' filings in relation to this issue and agrees with the positions of its Staff and GMO, as articulated fully in their filings. See EFIS Docket Entry No. 120, Legal Analysis of KCP&L Greater Missouri Operations Company, filed on February 8, 2013 and EFIS Docket Entry No. 121, Response to Order Directing Filing, filed on February 11, 2013. EFIS is the Commission's electronic Information and Filing System. The Commission adopts these legal analyses as if fully set out in this order.

[15] See Commission rule 4 CSR 240-2.110(3).

parties. Consequently, the Commission will direct the joint filing of a proposed procedural schedule.

THE COMMISSION ORDERS THAT:

1. The Commission's September 28, 2011 Report and Order in HC-2010-0235 is vacated.

2. The Commission re-opens the evidentiary record in HC-2010-0235 for further proceedings as delineated in the body of this order.

3. KCP&L Greater Missouri Operations Company shall, within 20 days of the effective date of this order, file a new Quarterly Cost Adjustment Tariff that initiates the return of the improvidently ordered refund to its steam customers in the manner described in Section 386.520.2(3), RSMo Supp. 2011, which states: "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's Staff shall review the company's tariff filing to ensure statutory compliance and file a recommendation on whether to approve it as being in conformity with this order no later than five days after the tariff filing is made.

4. The Commission lifts the stay and reactivates File Number HC-2012-0259.

5. File Numbers HC-2010-0235 and HC-2012-0259 are consolidated. File No. HC-2012-0259 shall be designated as the lead case and File No. HC-2010-0235 shall be closed. All future filings in these matters shall be made in File NO. HC-2012-0259.

6. No later than March 14, 2013, the parties shall jointly file a proposed procedural schedule for the consolidated cases.

7. This order shall become effective on March 5, 2013.

BY THE COMMISSION

Shelley Brueggemann
Acting Secretary

Gunn, Chm., Jarrett, R. Kenney,
Stoll, and W. Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge

ATTACHMENT 2

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., Complainant,	)	
v.	)	HC-2012-0259
KCP&L Greater Missouri Operations Company, Respondent.	)	

AG PROCESSING INC A COOPERATIVE
APPLICATION FOR REHEARING[1/]

COMES NOW AG PROCESSING INC A COOPERATIVE ("AGP") and applies for rehearing of the Order Regarding Remand of February 27, 2013 in the above file ("Order") on the following grounds:

1. The Commission has provided insufficient time between the issuance date of this Order and its effective date of the Order for a complete and thorough Application for Rehearing to be filed. In so acting the Commission has acted unlawfully in

[1/] This pleading is captioned in both the HC-2010-0235 and HC-2012-0259 files without prejudice to AGP's contention that the consolidation of these two cases is neither warranted nor justified as noted herein. The consolidation exceeds the mandate of the reviewing court and is, itself, unlawful.

a manner calculated to deny AGP due process. The Commission's action is, therefore, unlawful.

2. It is not disputed that GMO failed to seek or obtain a stay from either the Commission or from the Court. The Order ignores the implications of this failure and attempts to restore to GMO moneys that have been finally returned to steam customers. In so doing the Commission acts contrary to law and its decision is unlawful and void.

3. The Order does not comply with the reviewing court's mandate that did not order either a vacation of the earlier order or a temporary adjustment. In so doing the Commission Order is unlawful and void.

4. The is no evidentiary support for consolidation of this case with File No. HC-2012-0259. Consolidation was also not ordered or directed by the mandate of the reviewing court. The two matters address entirely different periods of time and raise and will raise different evidentiary issues. Accordingly the Commission Order is both unlawful and unreasonable.

4. The Commission Order creates a requirement regarding damage that is not properly part of the Commission's authorization. The Commission is not a court and cannot in any event order or direct damages. The Order also ignores that damage to ratepayers was shown by collection from all steam ratepayers through the Quarterly Cost Adjustment ("QCA") and that the utility acted toward these steam customers as a class or group of customer based on their utilization of the steam distribution

system and each customer was charged these amounts based on their usage. Further, refunds were made through the QCA to all steam customers based on their usage of steam in as is shown by collection through the QCA and was not a specific charge to each individual customer. Accordingly the Commission Order is both unlawful and unreasonable.

5. The Commission Order appears to find that 2006-2007 program resulted in losses because the amount Aquila over-hedged was based on forecasts for usage from Aquila customers. There is no citation to the record regarding such finding insofar as such basis or forecasts were causative of or for Aquila's actions. There is no competent and substantial evidence on the whole record that supports this conclusion and it is contrary to the competent and substantial evidence on the whole record that does exist. Accordingly the Commission Order is both unlawful and unreasonable.

6. The original hearing examiner who heard the witnesses and the evidence in this case, and was in a position to judge the credibility of such witnesses left the Commission before an order was drafted. A second hearing examiner was assigned to write an order which the Commission then issued. Now a third hearing examiner has drafted yet another order which the Commission has issued. The Order was then prepared by this hearing examiner while only three of the existing Commissioners had possibly heard any of the evidence in this matter. All this procedure has resulted in a violation of the principle of *Morgan*

v. US,[2/] that he who decides must hear and has further resulted in an Order that is unlawful, unreasonable and void.

7. The Order proceeds on the basis that the QCA is similar to a FAC. It is not. Not only is there no evidence to support this assertion it is contrary to the evidence that even the Commission so acknowledges in the Order. The QCA is entirely dependent upon its terms and it is not at all similar to a FAC which is a matter regulated by Commission rule. The terms of the QCA govern its operation, including without limitation, the provision that the "complaint mechanism" is to be used to initiate a prudence challenge. The Order imposes upon the steam customers, including without limitation, AGP, provisions that were not bargained for and are not part of the QCA process or the tariff clause. That clause, enshrined as a tariff, has the force of law and cannot be arbitrarily or unilaterally changed either by the Commission or by Aquila. Accordingly the Commission Order that attempts to effect such change by setting up a system for GMO to charge its 2013 steam customers costs that it claims were incurred in 2006 and 2007 and previously completely refunded to them is unlawful, unreasonable, and void.

8. The Order attempts to state that there was a claim for "money lost." There was no claim for money "lost" but rather a claim pursuant to the QCA for a determination of prudence as to charges that were collected from steam customers at a time that was consistent with the operation of the QCA, *i.e.*, the prior

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[2/] 298 U.S. 468, 480 (1936).

quarter. Correctly or incorrectly, those amounts were fully refunded to steam customers and cannot now be recovered from their hands. No stay was sought from the Commission and no stay was sought or obtained from the reviewing court under applicable law. Accordingly no remedy can be granted to the utility under the QCA as the Order attempts to do because it pertains only to costs that were incurred in the prior quarter. Accordingly, the Order, to the extent that it attempts to exceed the terms and conditions of the QCA is unlawful, unreasonable and void.

9. Charges under the QCA were originally recovered from all steam customers based on their utilization of the steam system. The QCA was not limited to a specific "complaining" customer. Attempts by the Commission to limit relief to only those specific customers who complained is not only unlawful but without evidentiary support, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence on the whole record. It is, therefore, unlawful, arbitrary, capricious, and unreasonable.

10. The Order acknowledges that Aquila's successor GMO fully completed the Commission ordered refund to steam customers, but fails to note that GMO did not seek or obtain a stay at either the Commission level or the level of the reviewing court. Therefore the Order attempts to direct GMO to recover amounts that were not retained by GMO or placed in any impoundment ordered by either Commission or reviewing court and attempts to

provide to GMO relief that the Commission is without power to order. It is, therefore, unlawful and unreasonable and void.

11. The Order exceeds the mandate of the reviewing court in that the reviewing court did not order consolidation. Nor did the reviewing court order a temporary adjustment. The matter was remanded only for "further consideration under the appropriate burden of proof." "Further consideration" is not a license to "reopen" and existing and established record. To the extent that the Order exceeds this directive it is in excess of the mandate of the reviewing court and is neither lawful nor reasonable.

12. The Order treats this matter as a general rate case. The Commission has not provided adequate notice and time to all potentially impacted steam customers. The retroactive rate increase would be a violation of due process for all steam customers. In so doing the Order is unlawful and unrasonable.

13. The Order relies upon *State ex rel. Associated Natural Gas CO. v. Public Service Comm'n*,[3/] case for certain claims of authority. However, the reviewing court has determined that this case is not applicable. Proof of harm was not required by the mandate of the reviewing court nor is a showing of causation required by the mandate of the reviewing court. There was no dispute by GMO regarding how the original charges were applied to customer bills. No notice has been sent to potentially affected steam customers who may have their rates raised by

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3/ 954 S. W.2d 520 (Mo. App. 1997).

reason of the Order and no timely notice may now be sent to them retroactively. In so doing and in failing to do, the Order is unlawful and unreasonable.

14. The Order asserts that the Commission is acting pursuant to the QCA but the QCA does not permit recovery of costs that were incurred, if at all, outside of the most recent quarter. Accordingly the Order asserts that the Commission has the power to make rates retroactively and is therefore unlawful and unreasonable and void.

15. The mandate of the reviewing court does not make the Commission into a court nor does it empower the Commission with powers that were reserved to the reviewing court by the legislature. In attempting to substitute for the reviewing court, the Order is unlawful, arbitrary, capricious and unreasonable.

16. The Order states that there was no evidence as to particular customers' portions of the hedging costs, however there was no evidence that charges were based on any other variable than steam usage which was the same for all customers and charges were made by Aquila to all steam customers based on their usage. Not only does the Order exceed the mandate of the reviewing court in this aspect but it attempts to impose a different standard than that used by the utility to charge the costs in the first instance. Accordingly the Order is unlawful and unreasonable and void.

17. The mandate from the reviewing court did not instruct the Commission to do other on remand than to give further consideration to its order in view of the shifted burden of proof. The Commission grants to GMO relief that GMO failed to seek or obtain on its own in the form of a stay and attempts to recover retroactively from customers amounts that have been returned to them through a final and unstayed Commission decision. In so doing the Order is unlawful and unreasonable and void.

18. In asserting that the Commission has authority to make a temporary rate adjustment when the utility neither sought nor obtained a stay of the Commission's original order from the Commission nor sought nor obtained a stay from the reviewing court, and failed to comply with the requirements of the controlling statute. The Commission attempts to grant to the utility relief that it neither requested nor obtained from the original issuing Commission nor from the reviewing court. In so doing the Order is unlawful and unreasonable.

19. The QCA does not permit retroactive rate increases but only allows recovery of costs from the prior quarter. In attempting to allow the utility to recover costs from customers that were incurred if at all several years prior, the Commission attempts to give retroactive effect to the QCA which is not provided by its terms. The Commission cannot lawfully impose upon customers a retroactive rate increase. In so doing the Order is unlawful, arbitrary and capricious, and unreasonable.

20. The QCA is not an FAC but is entirely based on the terms and conditions of the QCA agreement. That agreement was approved by the Commission and is not subject to having its terms unilaterally altered by the Commission. The ability of GMO to impose charges upon its steam customers is entirely based on the terms and conditions of the QCA and those terms and conditions may not be altered by the Commission without entirely vitiating the agreement or without the consent of AGP and other a steam customers. The Commission cannot supplant one agreement that the Commission earlier approved with an agreement that the Commission did not approve and that the parties did not accept. To the extent that the Order seeks to do that and to alter the terms and conditions of the QCA in a manner that was not agreed and was not accepted by the Commission, the Order is unlawful, arbitrary and capricious and unreasonable.

21. The Order states that the Commission must make a decision at this time arguing that it is compelled to do so by Section 386.520.3. the Commission is miskaken as to the applicable law in that it was not "instructed on remand to approve temporary rate adjustments." The reviewing court did not issue any such instructions (and could not have done so because of the failure of both GMO and the Commission to provide a reconciliation, and the Commission's effort through this Order to leapfrog around the requirement that GMO obtain a stay from either the Commission or the reviewing court and either retain the funds or pay them into an appropriate respository grants to GMO relief

that it did not request and is not now entitled to have. The Commission thus appears to consider Section 386.520.3 as controlling. As a result of the Commissino's mistake of law, the Order is unlawful, arbitrary and capricious and unreasonable.

22. The Order assumes that "the QCA is a two-way cost adjustment mechanism" and attempts to substitute a different version of the QCA than that agreed upon by the parties, accepted by the Commission, restated into tariff form and approved by the Commission. In concluding that the agreed upon and approved QCA contains terms that permit GMO to rebill long past amounts that have already been refunded to steam customers without benefit of a judicial or adminstrative stay creates terms and condititions that were not part of the QCA as agreed upon by the parties, seeks retroactively to modify the terms and conditions of the QCA and retroactively apply a rate increase to customers that is in violation of the terms and conditions of the QCA. There is no evidence of records that can support such a determination. In so doing the Order is unlawful, arbitrary, capricous and unreasonable.

23. The Order attempts to predetermine a result by ignoring unrefuted evidence that Aquila failed to comply with its own conditions and terms of its "hedging strategy," which the Commission also predetermins to have been effected. In so doing the Order is not supported by competent and substantial evidence of record and is contrary to the substantial competent evidence

that is of record and is, thereofore, arbitrary, capricious and unreasonable.

24. The Order seeks to redetermine facts that are already in the evidentiary record, exceeds the direction of the mandate of the reviewing court in so doing, when facts and evidence in file HC-2010-0235 were established in a noticed hearing in which all parties were provided an opportunity to present all evidence they desired. The mandate of the reviewing court did not direct the Commission to "reopen the record" but rather simply required that the Commission reconsider the evidence that was already provided in the record with respect to file/case No. HC-2012-0235. In going beyond this mandate the Commission attempts to act as a court and to exercise powers that were not provided to it by the legislature. In so doing the Order is unlawful, arbitrary, capricious and unreasonable.

25. The Order attempts to predetermine results by stating a standard that was not directed by the reviewing court, and is not law as regards the facts supported by the evidence of record. The initial decision reviewed found that Aquila had acted imprudently in implementing its hedging program and the Order's effort to shift the question to "external factors that are beyond [Aquila's] control" is an effort to redetermine the standard of proof in a manner calculated to prejudice the steam customers in their effort to retain funds already restored to them through an unstayed Commission order. In so doing the Order is unlawful, arbitrary, capricious and unreasonable.

26. Ordered 3 of the Order references a new Quarterly Adjsutment Clause Tariff that inititate the "return of the improvidently ordered refund" to its steam customers. The use of the terms "improvidently ordered" demonstrates that the Commission has alrady reached a decision regarding the return of these refunds making even before evidence has been introduced or reconsidered. Accordingly the Order is unlawful, arbitrary, capricious and unreasonable.

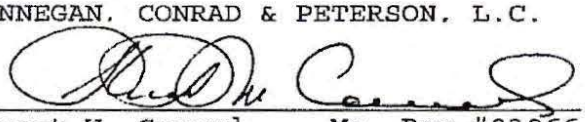
27. Section 386.420.4 RSMo requires that a reconciliation be filed so that the reviewing court could determine how the utility's rates and charges would need to be temporarily adjusted. A reconciliation was neither requested nor filed by GMO in its appeal nor did the Commission comply with the requirements of the statute (". . . the commission shall cause to be prepared. . . and shall approve . . . ." The Commission defaulted on this requirement and neither the Commission nor GMO submitted such a reconciliation to the court. It cannot be retroactively supplied. Only the reviewing court could direct such an adjustment. It did not. The Commission has no power granted by the legislature to substitute its whims for the authority of the reviewing court. The reviewing court did not order a temporary adjustment and the Commission has repetively been told that it is not a court and does not have the powers of a court. The Commission has no power to provide this reconciliation retroactively. The Order constitutes a collateral attack upon the mandate of the reviewing court. Accordingly the Order has no basis on which it

can proceed to grant relief and the Order is unlawful, arbitrary, capricious and unreasonable.

WHEREFORE for the foregoing reasons, rehearing should be granted.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

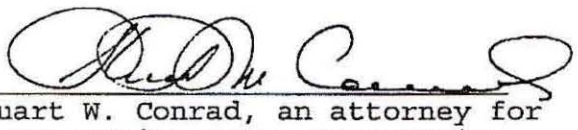


Stuart W. Conrad Mo. Bar #23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

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

March 4, 2013

ATTACHMENT 3

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., Complainant,	)	
v.	)	HC-2012-0259
KCP&L Greater Missouri Operations Company, Respondent.	)	

AG PROCESSING INC A COOPERATIVE
MOTION FOR STAY OF COMMISSION ORDER[1/]

COMES NOW AG PROCESSING INC A COOPERATIVE ("AGP") and moves that the Commission Order of February 27, 2013 in the above file be stayed pending appeal and in support there of states:

1. AGP incorporates as though fully and completely set forth each of the grounds stated in its Application for Rehearing filed contemporaneously herewith in the above files.

[1/] AGP is captioning this Motion in both files even though the pertinent portions of the requested relief pertain to file No. HC-2012-0235, but we do so without prejudice to our position that the consolidation that was ordered exceeds the mandate that was issued by the reviewing court, is not justified by either the evidence or law and is, therefore, unlawful in itself.

2. Funds have already been returned to steam customers pursuant to a prior Commission order as to which the utility neither sought nor obtained a stay from this Commission nor sought nor obtained a stay from the reviewing court. Accordingly those funds have now been finally distributed to the steam customers and this Commission is without power to order that the utility charge these customers again pursuant to the terms of the QCA Stipulation or under the approved tariff.

3. Pending determination of the authority of the Commission to enter such an order, the above Order should be stayed.

WHEREFORE for the foregoing reasons, a stay should be granted.

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.

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

March 4, 2013

ATTACHMENT 4

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
MOTION FOR APPROVAL OF RECONCILIATION

COMES NOW AG PROCESSING INC A COOPERATIVE ("AGP") and moves that the following reconciliation be approved and in support thereof states:

1. AGP incorporates herein as fully as though set out its Application for Rehearing and its Motion for Stay filed herein on even date.

2. Section 386.420.4 in relevant part provides:

> In any proceeding resulting in the establishment of new rates for a public utility that is not classified as a price-cap or competitive company, the commission shall cause to be prepared, with the assistance of the parties to such proceeding, and shall approve, after allowing the parties a reasonable opportunity to provide written input, a detailed reconciliation containing the dollar value and rate or charge impact of each contested issue decided by the commission, and the customer class billing determinants used by the commission to calculate the rates and charges approved by the commission in such proceeding. Such information shall be sufficient to permit a reviewing court and the commission on remand from a reviewing court to determine how the public utility's rates and charges, including the rates and charges for each customer class, would need to be

> temporarily and, if applicable, permanently adjusted to provide customers or the public utility with any monetary relief that may be due in accordance with the procedures set forth in section 386.520. In the event there is any dispute over the value of a particular issue or the correctness of a billing determinant, the commission shall also include in the reconciliation a quantification of the dollar value and rate or charge impact associated with the dispute.

3. Without prejudice to AGP's other contentions in the aforesaid Application for Rehearing and its Motion for Stay, AGP states that the Commission's Order Regarding Remand of February 27, 2013 would establish new rates for the GMO steam utility in the St. Joseph service territory. Accordingly, a reconciliation in the form that follows is submitted for approval pursuant to said statute.

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

March 4, 2013

Suggested Reconciliation for Purposes of RSMO 386.420

Costs Earlier Refunded to Steam Customers

For 2006 $936,968

For 2007 $1,953,488

Billing Determinants:

Billing determinants are not presently known.

Rate:

Also presently unknown based on the absence of billing determinants.

Note:

AGP files this Suggested Reconciliation solely to comply with Section 386.420 RSMo., for the purpose of filing a notice of appeal if needed, and to preserve its rights with respect to potential implementation of the Commission's order in this matter that was issued February, 27, 2013 and is made without prejudice to AGP's position that such charges should not be implemented and are, themselves, in excess of the mandate of the reviewing court and are unlawful.

ATTACHMENT 5

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 20th day of March, 2013.

AG Processing, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. HC-2012-0259
	)	
KCP&L Greater Missouri Operations Company,	)	
	)	
Respondent.	)	

ORDER REGARDING MOTION FOR RECONSIDERATION, MOTION FOR STAY OF COMMISSION ORDER, AND MOTION FOR APPROVAL OF RECONCILIATION

Issue Date: March 20, 2013 Effective Date: March 20, 2013

On March 4, 2013, AG Processing, Inc. ("AGP") filed what it captioned as an "Application for Rehearing," a "Motion for Stay of Commission Order," and a "Motion for Approval of Reconciliation" (collectively, "March 4th Filings"). AGP claims, in its application for rehearing, that the Commission's February 27, 2013 "Order Regarding Remand" ("Order") is unlawful. No other party sought reconsideration of the Commission's Order, or responded to AGP's motions.

AGP's initial complaint is that it had insufficient time between the issuance date of the Order and its effective date in order for it to file a complete and thorough "Application for Rehearing." The Commission must begin by noting that its Order is an interlocutory, procedural order. It is not a final order and does not dispose of this file, HC-2012-0259; nor

does it dispose of the consolidated file, HC-2010-0235.[1] Because it addresses an interlocutory order, AGP's "Application for Rehearing" is incorrectly captioned.[2] Consequently, the Commission will treat AGP's application appropriately as an application for reconsideration.[3] Commission Rule 4 CSR 240-2.160(2) provides:

> Motions for reconsideration of procedural and interlocutory orders may be filed within ten (10) days of the date the order is issued, unless otherwise ordered by the commission. Motions for reconsideration shall set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable. At any time before a final order is issued, the commission may, on its own motion, reconsider, correct, or otherwise amend any order or notice issued in the case.

AGP was mistaken about the deadline for seeking reconsideration. The deadline for filing a motion for reconsideration of the Commission's Order was March 9, 2013. Because the deadline fell on a Saturday, by operation of Commission Rule 4 CSR 240-2.050(1), the deadline was automatically extended until Monday, March 11, 2013. Moreover, AGP could have filed a request for an extension of time and sought even more time to complete its motion.[4]

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[1] These two files were consolidated in the Order. Interlocutory orders are not final orders under Section 386.510, RSMo 2000, and not subject to judicial review. Interlocutory orders are tentative, provisional, contingent and subject to recall, revision or reconsideration until such time as the agency arrives at a terminal, complete resolution of the case before it. *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Comm'n of State of Mo.*, 26 S.W.3d 396, 398-401 (Mo. App. 2000).

[2] Commission Rule 4 CSR 240-2.160(1).

[3] Commission Rule 4 CSR 240-2.160(2).

[4] Regardless of AGP's mistaken belief on the filing deadline, it should be noted that the time elapsing between the Mandate of the Court of Appeals and the Commission's Order was 98 days. The time elapsing between when the parties filed their new briefs and the Commission's Order was 51 days. During that 51-day interval the parties were allowed to file responsive pleadings six times. The Commission discussed these two matters at four Agenda sessions – three of which were prior to it issuing its Order. The parties were familiar with the issues after the Court of Appeals remanded HC-2010-0235. The parties were aware of the direction the Commission was following when it issued its Order. More importantly, the parties has already fully briefed and reargued the issues. A motion for reconsideration could be easily crafted before the effective date of the order given the parties had previously reduced all of their arguments to writing. AGP amply demonstrated this with its March 4th Filings.

The deadline for reconsideration of a procedural or interlocutory order has no bearing on the effective date of the order. Such orders could be made effective immediately upon issuance and that would have no impact on the deadline to seek reconsideration.

Although AGP had more time to seek reconsideration and it may believe its requests were somehow truncated, AGP's March 4th Filings are extensive, comprising twenty pages in total. With regard to the merit of those filings, the Commission finds no sufficient basis articulated to reconsider its Order or grant the additional relief requested. If AGP feels it needs to amend or add to its requests, it is welcome to file a motion seeking leave for such.

THE COMMISSION ORDERS THAT:

1. AG Processing, Inc.'s motion for reconsideration, motion for stay of the Commission's February 27, 2013 "Order Regarding Remand" and motion for approval of a reconciliation are denied.

2. This order shall become effective immediately upon issuance.

BY THE COMMISSION

Shelley Brueggemann

Shelley Brueggemann
Acting Secretary

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 20th day of March 2013.

Shelley Brueggemann

Shelley Brueggemann
Acting Secretary

MOPSC Digitally signed by MOPSC
DN: cn=MOPSC, o=Public Service Commission, ou=Missouri, email=DataCenter-PSC@psc.mo.gov, c=US
Date: 2013.03.28 11:42:12 -05'00'

MISSOURI PUBLIC SERVICE COMMISSION

March 20, 2013

File/Case No. HC-2012-0259

Missouri Public Service Commission
Sarah Kliethermes
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
sarah.kliethermes@psc.mo.gov

Missouri Public Service Commission
Office General Counsel
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounselservice@psc.mo.gov

Office of the Public Counsel
Lewis Mills
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Triumph Foods, LLC
Ryan Harding
235 East High Street, Suite 200
PO Box 1251
Jefferson City, MO 65102
ryan.harding@huschblackwell.com

Triumph Foods, LLC
Lowell D Pearson
235 East High Street
P.O. Box 1251
Jefferson City, MO 65102
lowell.pearson@huschblackwell.com

AG Processing, Inc
Stuart Conrad
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

KCP&L Greater Missouri Operations Company
Lisa A Gilbreath
4520 Main, Suite 1100
Kansas City, MO 64111
lisa.gilbreath@snrdenton.com

KCP&L Greater Missouri Operations Company
Karl Zobrist
4520 Main Street, Suite 1100
Kansas City, MO 64111
karl.zobrist@snrdenton.com

KCP&L Greater Missouri Operations Company
Roger W Steiner
1200 Main Street, 16th Floor
P.O. Box 418679
Kansas City, MO 64105-9679
roger.steiner@kcpl.com

Enclosed find a certified copy of a/an ORDER in the above-numbered matter(s).

Sincerely,

Shelley Brueggemann

Shelley Brueggemann
Acting Secretary

Individuals listed above with a valid e-mail address will receive electronic service. Individuals listed above without a valid e-mail address will receive paper service.