BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Ag Processing, Inc., a Cooperative, Complainant,	)	
	)	
v.	)	**HC-2010-0235**
	)	
KCP&L Greater Missouri Operations Company, Respondent.	)	

GMO'S REPLY TO RESPONSE BY AG PROCESSING INC IN OPPOSITION TO MOTION TO DISMISS

COMES NOW KCP&L Greater Missouri Operations Company ("GMO" or "Respondent"), pursuant to Missouri Public Service Commission ("Commission") Rule 4 CSR 240-2.080, and respectfully submits its Reply to the Response By Ag Processing Inc A Cooperative In Opposition To Motion to Dismiss filed by Ag Processing, Inc. ("AGP") on March 25, 2010. In support of its Reply, GMO respectfully states as follows:

INTRODUCTION

Following GMO's exercise of its contractual right to terminate a Special Contract with AGP, AGP filed a Complaint in Case Nos. HR-2007-0028 and HR-2007-0399. Subsequently, the Commission severed the matter into Case No. HC-2010-0235.

The AGP Complaint alleges that GMO's use of hedging to mitigate fuel price volatility for its steam operations was "imprudent" during the 2006 and 2007 Quarterly Cost Adjustment ("QCA") periods. Without explaining in the Complaint the manner in which GMO's hedging program was imprudent, AGP seeks an order from the Commission requiring GMO to refund the sum of $1,164,960 and $2,441,860 with

interest to AGP (or perhaps other steam customers) for whose benefit the hedging program was adopted in the 2006 and 2007 QCA periods.

On March 15, 2010, GMO filed its Motion To Dismiss, Answer, And Affirmative Defenses, and moved to dismiss the Complaint on the various grounds fully set forth therein.

On March 25, 2010, AGP filed its Response to In Opposition To Motion To Dismiss ("AGP Response"). The purpose of this pleading is to reply to the erroneous arguments raised in the AGP Response.

REPLY TO AGP RESPONSE

1. In the AGP Response (like the Complaint itself), AGP does not identify any provision of law or any rule or order or decision of the Commission which GMO has allegedly violated. Instead, AGP suggests that the "gravamen of AGP's complaint is about GMO's prudence, or lack thereof." (AGP Response, p. 3) However, AGP never identifies in its Complaint exactly what AGP believes is "imprudent" about GMO's hedging activities.

2. Instead, AGP makes the unfounded and unsupported statement that "the Settlement Agreement in Case No. HR-2005-0450 . . . made no provision for hedging." (*Id*.) Contrary to the assertions of AGP, both the Nonunanimous Stipulation And Agreement in Case No. HR-2005-0450 and the tariffs themselves which implemented the Quarterly Cost Adjustment (QCA) mechanism, refer to GMO's hedging program. On page 5 of the Nonunanimous Stipulation and Agreement (attached to AGP's Complaint), it clearly states: "The cost of gas in Account 501 will include the cost of physical gas deliveries and financial instruments, when settled, associated with gas delivered in the

quarterly period." (*Emphasis added*) The reference to "financial instruments, when settled" refers to GMO's hedging program which utilizes various financial instruments to hedge the price of its gas supplies.

In addition, Original Sheet No. 6.2 (also attached to AGP's Complaint at Appendix A, page 7 of 10) states as follows:

> 1. The cost of fuel will be the amounts expensed in account 501. The amounts expensed will continue to be based on the cost definitions currently used for the inclusion of costs in these accounts and on the currently used cost allocation methods, as explained in some additional detail: the cost of gas will include the cost of physical gas deliveries and financial instruments associated with gas delivered in the quarterly period. (*Emphasis added*)

If AGP's complaint is that "the Settlement Agreement in Case No. HR-2005-0450 . . . made no provision for hedging," then the Complaint should be dismissed for failure to state a claim upon which relief may be granted since AGP's allegation is clearly mistaken and completely without merit, based upon the exhibits attached to the Complaint itself.

3. AGP's Response also erroneously argues that GMO did not have authority to enter into a hedging program, but "GMO hedged anyway." (*Id*. at 3) AGP's Complaint should be dismissed for failure to state a claim upon which relief may be granted because, even if the Nonunanimous Stipulation And Agreement and the accompanying tariffs did not authorize a hedging program (which they do), there is no provision of law or any rule or order or decision of the Commission which requires GMO, or any other public utility, to seek approval from the Commission before a public utility initiates a hedging program.[1] However, as explained in GMO's Motion To Dismiss, the Commission requires public utilities to "undertake diversified natural gas

[1] The Commission's Order Regarding Stipulation And Agreement issued on February 28, 2006 in Case No. HR-2005-0450 specifically authorized GMO to file the implementing tariffs, and ordered the parties, including GMO, "to comply with the terms of the Stipulation and Agreement." (Order, p. 3)

purchasing activities as a part of a prudent effort to mitigate upward natural gas volatility and secure adequate natural gas supplies for their customers." *See* 4 CSR 240-40.018. To the extent that AGP's Complaint is based upon the allegation that "GMO hedged anyway" (AGP Response, p. 3), it should be dismissed for failure to state a claim upon which relief may be granted.

4. Although AGP's Complaint (and its Response) fails to cite any "statute, rule, order or decision within the commission's jurisdiction" which GMO has allegedly violated as mandated by 4 CSR 240-2.070(1), AGP erroneously argues for the second time that "the HR-2005-0450 Settlement certainly did not provide for the recovery of hedging settlement costs. Yet, GMO has sought to recover, and has recovered, subject to refund, hedging settlement costs." (AGP Response, p. 3). As demonstrated in paragraph 2 above, both the Nonunanimous Stipulation And Agreement in Case No. HR-2005-0450 and the tariffs themselves which implemented the Quarterly Cost Adjustment (QCA) mechanism, provide for the recovery of hedging settlement costs. *See* Nonunanimous Stipulation And Agreement p. 5, para. 8.1 ("The cost of gas in Account 501 will include the cost of physical gas deliveries and financial instruments, when settled, associated with gas delivered in the quarterly period.") and Original Sheet No. 6.2, Appendix A, page 7 of 10. ("[T]he cost of gas will include the cost of physical gas deliveries and financial instruments associated with gas delivered in the quarterly period.")

5. Next, rather than citing any "statute, rule, order or decision within the commission's jurisdiction" which GMO has allegedly violated, AGP's Response alleges that "Aquila failed to adjust the amounts of gas it was purchasing despite knowledge of an explosion at a major steam customer. . . and 'hedged gas supplies in quantities greater

than those needed to support steam usage on the steam system.'" (AGP Response, p. 4) This allegation also does not provide a lawful basis for a refund. The "explosion at a major steam customer" occurred on October 12, 2005 (*See* Paragraph 54 of AGP Complaint), prior to the time that GMO's hedging program was commenced on February 16, 2006. Aquila discussed with the steam customers their expected loads and determined the appropriate quantities of gas supplies to be hedged, based upon best information known at the time the program was initiated in 2006. AGP's allegation that "Aquila failed to adjust the amounts of gas it was purchasing despite knowledge of an explosion at a major steam customer" (*emphasis added*) is without merit since this information provided by the steam customers themselves was already taken into account at the time the hedging program was commenced four months after the explosion occurred. As a result, this allegation does not provide a basis upon which relief may be granted.

6. Finally, rather than citing any "statute, rule, order or decision within the commission's jurisdiction" which GMO has allegedly violated, the AGP Response argues that "Aquila was also imprudent in attempting to mitigate price changes already addressed through a mechanism in the negotiated HR-2005-0450 Settlement underlying the QCA mechanism." (AGP Response, p. 4) This allegation does not form the basis upon which relief may be granted either. Contrary to the allegations of AGP, the existence of the QCA mechanism does not itself mitigate price volatility in the natural gas market. Just as the Commission requires natural gas companies to enter into hedging programs to mitigate price volatility despite the fact that gas costs are passed through the Purchased Gas Adjustment (PGA) clause, so too it was reasonable and prudent for GMO

to commence a hedging program to mitigate the cost of natural gas pricing volatility for the benefit of its customers. The existence of the QCA mechanism does not remove the need to protect customers from pricing volatility, as alleged by AGP, and this allegation does not form the basis upon which a refund could be ordered in this proceeding.

7. AGP's complaints regarding the authorization and implementation of GMO's hedging program are particularly disingenuous in light of the fact that Aquila and GMO have discussed the expected loads of the steam customers, the Company's hedging program itself, and even suggested improvements to the Company's hedging programs with representatives of the steam customers prior to, during and since the conclusion of GMO's hedging program. In fact, GMO has made available the KCPL/GMO personnel who plan and implement the hedging program for discussions with AGP representatives, prior to the filing of the Complaint. It is therefore amazing that AGP's Complaint seems to give the impression that the hedging program was totally unknown to AGP at its commencement and since that time.

8. In the AGP Response, AGP does not dispute the fact that AGP did not complete its prudence review within 225 days of the end of the QCA period, as required by the terms of GMO's steam tariff, Original Sheet No. 6.4, Paragraph 7. Instead, AGP attempts to shift the blame for its dilatory actions to Aquila and GMO. Contrary to AGP's assertions, GMO is not aware of anytime it has delayed settlement discussions or other informal resolution of Case Nos. HR-2007-0028 and HR-2007-0399 or this Complaint proceeding. Whatever the reason that AGP waited for 1,123 days after the end of the 2006 QCA period, and 758 days after the end of the 2007 QCA period, to file its Complaint, it does not cure this fatal defect in the Complaint. The Commission can

not grant relief to AGP based upon a prudence review that was not completed within the 225 days of the end of the QCA period, as required by the terms of the GMO steam tariff. Therefore, the Commission should dismiss the Complaint since AGP's Complaint was filed more than 3 years late for the filing of a Complaint related to the 2006 QCA period, and more than 2 years late for the filing of a Complaint related to the 2007 QCA period. While AGP may not be prejudiced by the fact that Staff has not completed a prudence review, this fact does not excuse AGP from completing its own prudence review within the time frame required by the QCA tariffs. (*See* Exhibit B to Complaint, Appendix A, page 9 of 10)("Such full prudence review, if pursued, shall be complete no later than 225 days after the end of each year.")

9. Similarly, the Commission has recognized that parties may not delay taking actions if its delay works to the disadvantage or injury of other parties. *See Re Union Electric Company*, Case No. EM-96-149, 2001 WL 1448572 (July 22, 2001); *Re Southwestern Bell Telephone Company*, Case No. TR-95-342, 1996 WL 527186 (March 6, 1996). In this instance, AGP waited for 1,123 days after the end of the 2006 QCA period and 758 days after the end of the 2007 QCA period to file its Complaint to the detriment of GMO and its other steam customers. As a result, AGP's claims are barred after such a long delay after the end of the 2006 and 2007 QCA periods.

10. The AGP Response does not dispute that the Commission has no authority to award money to AGP. *See Report & Order*, *GS Technology Operating Company d/b/ GST Steel v. Kansas City Power & Light Company*, 9 Mo.P.S.C.3d 185, 198 (July 13, 2000); *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo.1943). Instead, AGP argues that this fundamental principle of law "is not

germane" since money is being "held by GMO subject to refund and subject to claims of imprudence by AGP or other steam customers." (AGP Response, p. 9) It may be arguable that GMO's revenues were collected subject to refund in Case Nos. HR-2007-0028 and HR-2007-0399 pending a final review of the Company's fuel costs within 225 days of the end of the respective QCA periods. However, in the context of this Complaint proceeding, the Commission has no authority to award money damages to AGP. Even in the context of Case Nos. HR-2007-0028 and HR-2007-0-399, the Commission has no authority to order refunds to customers based upon prudence audits that occurred years after the deadline for the completion of prudence reviews required by the Company's tariffs. As a result, AGP's Complaint should be dismissed for failure to state a claim upon which relief may be granted.

11. Similarly, the AGP Response confuses the relief that might be available in Case Nos. HR-2007-0028 and HR-2007-0399, pending a final and proper review of the Company's fuel costs within 225 days of the end of the respective QCA period, with the unlawful relief that AGP is requesting in this Complaint proceeding. Contrary to the position espoused by AGP, the Commission has no authority to recalculate the charges to AGP for steam service already rendered, as though GMO had not incurred hedging costs as a part of its cost of service. *See Report & Order, GS Technology Operating Company d/b/ GST Steel v. Kansas City Power & Light Company*, 9 Mo.P.S.C.3d 185, 199 (July 13, 2000). Such a recalculation of the charges would constitute retroactive ratemaking.

12. The AGP Response asserts that "GMO claims that AGP's complaint does not include a signature, telephone, facsimile or electronic mail address. This argument is utterly without merit." (AGP Response, p. 10). GMO has not suggested that the

complaint does not include the signature, telephone, facsimile or electronic mail address of AGP's counsel. However, the AGP Response misses the point. 4 CSR 240-2.070(5)(A) requires that the following information be included in any formal complaint: a) signature of the complainant; b) telephone number of the complainant; c) facsimile number of the complainant; and d) electronic mail address of the complainant.[2] Pursuant to 4 CSR 240-2.070(6), the AGP Complaint should therefore be dismissed for failure to follow the Commission's rules related to the filing of a formal complaint.

13. GMO renews its motion to dismiss on the ground that AGP's Complaint fails to comply with the requirements of 4 CSR 240-2.070(5)(c) because it fails to state the nature of the complaint and the complainants' interest in the complaint, in a clear and concise manner. Again, AGP's Complaint fails to clearly state if the counsel for AGP is pursuing this Complaint on behalf of AGP only, or upon the behalf of other steam customers that have never had a Special Contract with GMO. It is simply unclear from the Complaint if AGP is asserting that it is entitled to a refund on behalf of itself, or if it is seeking a refund on behalf of other steam customers which have not filed a complaint against GMO. AGP has no standing to represent other steam customers without their consent or approval. Pursuant to 4 CSR 240-2.070(6), the AGP Complaint should therefore be dismissed.

WHEREFORE, having replied to the AGP Response, the Respondent respectfully renews its requests that the Commission dismiss the Complaint with

[2] 4 CSR 240-2.070(5)(A) states:

> 5. The formal complaint shall contain the following information:
>
> (A) The name, street address, signature, facsimile number and electronic mail address, where applicable, of each complainant, and if different, the address where the subject utility service was rendered. (*Emphasis added*)

prejudice, and requests that the Commission grant whatever additional relief that the Commission finds to be reasonable and appropriate.

Respectfully submitted,

FISCHER & DORITY, P.C.

/s/ James M. Fischer

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ATTORNEYS FOR KCP&L GREATER MISSOURI OPERATIONS COMPANY

CERTIFICATE OF SERVICE

I hereby certify that the undersigned has caused a complete copy of the attached document to be electronically filed and served by email, hand-delivered or mailed on all parties of record in this matter on this 5th day of April, 2010.

/s/ James M. Fischer

James M. Fischer