BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AG PROCESSING INC A COOPERATIVE
RESPONSE TO GMO AND STAFF FILINGS

I. INTRODUCTION AND BACKGROUND.

On February 17, 2006, Aquila, Inc., the Staff of the Missouri Public Service Commission, AG Processing, Inc., and the City of St. Joseph filed a nonunanimous stipulation and agreement resolving Case [or file] number HR-2005-0450. ("Stipulation and Agreement").[1/] AGP was involved in the steam rate case.[2/]

The Commission issued an Order effective March 6, 2006, approving the Stipulation and Agreement, directing compliance and authorizing Aquila to file the attached *pro forma* tariffs.[3/]

We are before the Commission on a remand from the Western District of the Missouri Court of Appeals in Case No.

[1/] The Stipulation and Agreement, after approval by the Commission on February 28, 2006, was embodied in a compliance tariff promptly filed by Aquila. References to either are generally intended to be references to both.

[2/] Ex. 108, pp. 96-97.

[3/] On March 2, 2006 the Commission approved the compliance tariffs that Aquila filed.

WD74601.[4] The court decided that the Commission had employed a standard that placed the burden of proof on the utility when that burden should have remained on customers. The case continues to concern imprudence on the part of Aquila (now GMO)[5] in implementing a hedging program for its steam system in St. Joseph, Missouri.

II. ARGUMENT.

As directed by the Commission AGP submitted a Supplemental Brief on Remand, to which GMO filed a brief response to which AGP responded. The Commission then requested its Staff to submit a report. Staff responded to the Commission's directive, joined by GMO. AGP now also responds to these "analyses."

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[4] Ag Processing Inc a Cooperative ("AGP") did and does not agree with the Court of Appeals' decision. We believe the Court became misdirected by the titling of the proceeding as a "complaint" when it fact is was review of GMO's prudence in implementing and effectuating a steam hedging program. Moreover, the Court's decision would adversely impact other parties seeking to challenge prudence of a utility's purchasing decisions, including Commission Staff. The decision exalts form over the substance of the proceeding, but that has been litigated and the matter remanded to the Commission. The Commission decision was remanded for reconsideration in light of a different standard of proof. Other points raised by GMO in its appeal were not addressed. AGP will argue herein that the ultimate result should not change in that the standard of proof was sustained.

[5] We will endeavor to use the terms "Aquila" and "GMO" in a manner that is consistent with the relevant time frame.

A. A Stay Was Available But Was Not Requested.

GMO describes AGP's reference to the new Section 386.510.[6] as "baffling." Section 386.510 now provides that an appeal from the Commission goes to the Missouri Court of Appeals with the appropriate "territorial jurisdiction" thereby bypassing circuit court review. In large measure, Section 386.510 is as it was prior to the recent amendment with the words "appellate court" substituted for "circuit court." The new statute limits review authority to the "supreme court or the court of appeals." The Section also states: "Except with respect to a stay or suspension pursuant to subsection 1 of section 386.520, no new or additional evidence may be introduced in the appellate court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it."

Given that, cases decided under the prior law should still be precedent for similar decisions under this new law particularly given that in virtually all appellate court decisions is found the phrase: "We review the Commission's Order, not the circuit court's judgment, to determine whether the Order was lawful and, if so, whether it was reasonable."[7] There are, obviously, no decisions that directly construe the new law, but we do not believe that jurisprudence regarding stays has dramati-

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[6] GMO Analysis, p. 1.

[7] *See, e.g., State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. banc 2003).

cally changed. GMO and Staff must agree since both relied on prior case law in their recently-filed appellate briefs on this matter.

Section 386.520.1 ***IS*** in play; GMO’s parsing of this new statute does not control. Here is the text of that portion of the new statute:

> 386.520. 1. ***The pendency of an appeal under section 386.510 shall not of itself stay or suspend the operation of the order or decision of the commission***, but with respect to commission orders or decisions issued on and after July 1, 2011, ***that do not involve the establishment of new rates and charges*** for a public utility, the appellate court may in its discretion, or upon the recommendation of a special master appointed for such purpose, and after the posting of an appropriate appeal bond, stay or suspend the operation of the order or decision of the commission, in whole or in part, if in its discretion it determines that great or irreparable damage would otherwise result to the appellant. (Emphasis added).

GMO urges that this case suddenly involves "new rates and charges"[8/] but, there were no new or proposed tariffs filed and thus there were no new rates or charges. Both GMO and Staff continue to cite to the HR-2005-0450 stipulation and the resulting tariff as authoritative. Section 386.520.1 controls.

[8/] Which, of course, would be inconsistent with the Court of Appeals decision.

B. GMO Confuses Stay With An Appeal.

GMO was entitled to appeal the Commission's decision. It was not *required* to seek or obtain a stay in order to do so. But Section 386.510 and 385.520 succinctly state that an appeal, by itself, does not stay effectiveness of the Commission order. Here the moneys were returned to the steam customers and are now in their hands pursuant to a final, and unstayed, Commission order. There is no mechanism at this point by which GMO can recover them again from the customers. GMO sought neither a stay of the Commission order from the Commission, nor did it seek to obtain a judicial stay. This is simply the other side of *Lightfoot v. Springfield.*[9] GMO filed its appeal, but failed to protect its position.

C. "Discretion" Does Not Substitute For GMO's Failure to Request a Stay.

It is a fact that GMO neither sought a stay from the Commission nor from the court. GMO's argument boils down to asserting that it could not have obtained a stay because granting a stay was "discretionary" with the court. We will never know, as GMO did not seek a stay.

This argument has a simple response: GMO did not request a stay from the Commission, which it clearly could have done. Had it succeeded, it could have deferred distribution of the funds. On appeal, it did not request a stay from the reviewing court, which it also could have done. Arguments about

[9] 236 S.W.2d 348 (Mo. 1951).

whether or not the court might or might not have granted a stay are irrelevant.

GMO apparently decided on its own that it was not entitled to a stay. So what? It never requested one. GMO's sophistry does not defeat that simple fact. GMO does not dispute its failure. GMO is entitled to its own opinion, but not to its own facts. Instead, GMO tries to rationalize and obfuscate by arguing that grant of a stay is not a right and that it is "discretionary." This argument is meaningless. GMO never requested a stay.

It is not a valid argument to claim that it did not seek a stay because such a stay would be "discretionary." In so arguing, GMO concedes the telling point. A stay was never requested. We are unaware of a single case where either the Commission or the reviewing court issued a stay *sua sponte*. The irony here is that GMO, while acknowledging that it did not seek a stay, nevertheless argues that it is still entitled to the same benefits. This argument has no merit.

Nor should GMO blame the Commission's recently-crafted Notice of Appeal that "does not even mention an appeal bond."[10/] The Commission's form also does not mention the size of type that is currently required for briefs at the court of appeals and the contents of those briefs. Those things are addressed elsewhere. The Commission's form is not to blame for GMO's failure.

[10/] GMO Legal Analysis, p. 10.

The General Assembly changed the law and directed Commission appeals away from the circuit court. Section 386.510 states what it does, plainly and simply. Apparently GMO found it baffling.

GMO's strawman argument in its paragraph 27[11] was never even suggested by AGP and GMO cites no point in AGP's filings where such an argument was made.

D. The QCA Tariff Does Not Provide the Commission With Authority to Allow Collection of Costs That Are Years Old.

Staff asserts that the QCA tariff has the force of law - and that it is to be interpreted based on the plain and ordinary meaning of its language.[12] This is a fundamental point with which AGP takes no exception. But this then leads to examination of the QCA tariff in a search for authority to raise rates at this juncture. There Staff and GMO's arguments collapse.

Both Staff and GMO now suggest that the utility has an unfettered ability to collect money from its customers based on provisions of the QCA that, by their interpretations, would make rates forever interim. The ability to collect money from customers is not, in fact, unfettered. It is circumscribed by carefully drawn language that was part of the 2005 agreement between

[11] GMO Legal Analysis, p. 11.

[12] Staff Analysis, p. 7, citing *A.C. Jacobs and Co. v. Union Electric Co.*, 17 S.W.3d 579 (Mo. App., W.D. 2000) and *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568 (Mo. App., E.D. 1997).

AGP and Aquila and that was approved and adopted by the Commission and has been enshrined in Commission-approved tariff language. The Commission's approval was not appealed and became final long ago. GMO's ability to collect revenues is determined and limited by the plain language of the QCA tariff - which, as Staff and GMO now agree, has the force of law. This is that language:

> Reconciling Adjustments and the Reconciliation Rate: At the end of the twelve (12) months of collection of each CQCA, the over- or under-collection of ***the intended revenues (the numerator of the CQCA)*** will be applied to customers' bills thru a Reconciliation Rate. The Company shall use a collection/refund/credit amortization period of twelve (12) months, provided that an amortization period of twenty-four (24) months may be used, if needed in the Company's discretion, to minimize any extraordinary increases in energy charges. ***Other fuel cost refunds, or credits*** related to the operation of this rider may also flow through this reconciliation process, as ordered by the Commission. The Reconciliation Rate shall be calculated similarly to the CQCA, except that the amount shall not be multiplied by the Alignment Mechanism again. Any remaining over or under-collection from the Reconciliation Rate shall be applied to the next Reconciliation Rate. (Emphasis added).

There is no expansive unfettered authority to make upward adjustments. This is not a PGA. It is not governed by Commission Rules regarding PGAs, or, more recently, FACs. It is governed by the plain language of the parties agreement in HR-2005-0450 and the resulting Commission-approved tariff. There are only two narrowly drawn ways to reach an adjustment as a part of the reconciliation rate.

The first is a comparison to be performed "at the end of the 12 months of collection of each CQCA" of "intended revenues (the numerator of the CQCA)." The monies GMO would like to now collect are ***not*** a part of the numerator of a CQCA. ***CQCA is explicitly defined by a mathematical formula and there is no term in the numerator of CQCA formula that provides for adjustment or reconciliation.*** The parenthetical is plainly used to define intended revenues according to the basic rules of statutory construction. Thus the term "intended revenues" is explicitly defined and provides no room for after the fact adjustments to the CQCA and intended revenues. This term was designed to deal with variations in collections that occur when actual steam sales differ from those used in the divisor. In fact the adjustments due to this factor, as one would expect, historically have been small.

The second avenue for an adjustment is through this plain language of the tariff, to wit: "Other fuel cost refunds, or credits related to the operation of this rider . . .". By definition, the amount in question would at this time be a "charge" and is neither an "other fuel cost refund" nor a "credit." There is no ambiguity or space in this language. By the plain meaning of the words and the rules of statutory construction "charge" is the opposite of a refund or credit. Language that explicitly provides for the flow of refunds or credits to customers does not provide for a charge. The plain language controls.

Staff's legal analysis would grant the Commission unfettered authority to increase or decrease charges to customers, apparently in perpetuity. This authority is not present in the tariff language and is not found in the law. No amount of argument can overcome the plain language of a tariff which - as the Staff's legal analysis also argues - has the force of law. When language is not ambiguous, there is no need for interpretation.

Both GMO and Staff apparently now consider the QCA in the tariff as permitting charges for costs that occurred in 2006 and 2007 (more than 5 years ago) to be included in a current QCA. It does not. The QCA, short for *Quarterly* Cost Adjustment, is directed to a ***quarterly*** adjustment, not a retroactive charge for long-past costs. Among other things, it states: "the cost of gas will include the cost of physical gas deliveries and financial instruments associated with gas delivered in the ***quarterly period***."[13] "Aquila will make quarterly rate filings with the Commission to adjust the Quarterly Cost Adjustment Rider. Each ***quarterly*** rate adjustment ***will include the fuel costs from the preceding quarter***."[14]

The QCA mechanism certainly does allow changes to rates but only downward adjustments. A "credit" or a "refund" is authorized in the tariff but not an upward adjustment. Again, the only way that GMO could have preserved this right was to have

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[13] Original Sheet No. 6.2 (emphasis added).

[14] Original Sheet No. 6.3 (emphasis added).

obtained a stay which deferred its obligation to comply with the Commission order. Absent such a stay, GMO could appeal, but its failure to obtain a stay has consequences. Both GMO and Staff agree that the QCA mechanism is part of the GMO tariff and is treated as statutory law. That tariff does not permit recovery.

E. The Commission Does Not Have The Authority of a Reviewing Court.

The only place left for authority to raise the revenues from customers can be the statutes. GMO expends much ink to make its analysis of 386.510 and 386.520. The question, rather, is whether these sections provide a grant of authority to the Commission to raise utility revenues and the answer is clear: No such authority is granted to the Commission. Authority for a rate increase to implement a court decision resides in a grant limited to an order of the courts. And, of course, GMO did not request such. Section 386.520.2.1 in pertinent part provides:

> In the event a final and unappealable judicial decision determines that a commission order or decision unlawfully or unreasonably decided an issue or issues in a manner affecting rates, ***then the court shall instruct*** the commission to provide temporary rate adjustments and, if new rates and charges have not been approved by the commission before the judicial decision becomes final and unappealable, prospective rate adjustments. (Emphasis added)

Neither GMO nor the Commission filed the reconciliation required by Section 386.510.[15/]

[15/] "The notice of appeal shall include the appellant's application for rehearing, ***a copy of the reconciliation required***
(continued...)

Each of the subdivisions of new Section 386.520 is similar. Each reserves to the court the ability to "instruct the commission."

Only the court is granted this authority. It may direct the Commission to make adjustments, based on the absent reconciliation. It did not. There is no grant of authority that empowers Commission with authority that the General Assembly granted only to the court. The Commission cannot usurp an authority given to the court alone. Its powers are only those granted by the statutes, no more.

At p. 8 GMO claims that "amended Section 386.520 explicitly authorizes prospective rate charges if the Commission has erred." It certainly does authorize the court to direct such changes, but the statute does not authorize the Commission to make such changes based on the reconciliation that GMO also failed to request or file with the court.

F. Laclede v. PSC Is Not The "Precedent" GMO Claims.

Having originally cited *Laclede v. PSC* as "precedent," GMO now runs away from its own "precedent." AGP simply pointed out that it was Laclede that obtained a judicial stay so that it could defer refund of the disputed amounts. Of course, GMO did not do this. Setting aside the question that *Laclede* was a 2005 case under the old version of the statute which GMO now claims

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[15/](...continued)
by subsection 4 of section 386.420 . . . . " Section 386.510 RSMo 2000 (as modified by A.L. 2011 S.B. 48, A.L. 2012 S.B. 628).

should, therefore, be rejected (at least for the several cases that were cited by AGP), GMO's version of the case differs from that reported. GMO now claims that "Laclede did not 'retain the amounts' as AGP suggests, but paid them to the circuit court."[16/] We attach a copy of the case report from Lexis. At page 515. the *Laclede* court stated:

> At issue in this appeal is approximately $ 4.9 million that Laclede kept as its share of incentive proceeds realized from the program. In its Report and Order ("the Commission's Order"), the Commission concluded that Laclede was required to flow back to its customers the $ 4.9 million.
>
> Laclede petitioned for [**2] a writ of review in the Circuit Court of Cole County. The circuit court held that the Commission's Order was both unlawful and unreasonable, so it vacated the Order and remanded the cause to the Commission. The Commission then filed its notice of appeal to this court.
>
> For the reasons set forth below, we affirm the trial court's judgment reversing the Commission's Order and remand.

Continuing, at page 517:

> On June 28, 2002, Staff filed its recommendation in the 2001 case, in which it proposed that Laclede be required to flow through to its customers the $ 4.9 million that Laclede had retained under the Overall [*518] Cost Reduction Incentive. Staff recognized that the Overall Cost Reduction Incentive remained in effect. Nevertheless, Staff claimed that a new methodology demonstrated that Laclede had not achieved any savings under the Program. Laclede opposed the adjustment on the grounds, among others, that this new methodology was unauthorized by, and

[16/] GMO Legal Analysis, p. 9.

> flatly inconsistent with, the express language of the PSP Tariff.
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> In its April 29, 2003 Order, the Commission concluded as a matter of law that Laclede was ***"not entitled to retain*** approximately $ 4.9 million in proceeds from the sale of call options in the winter of 2000-2001, under the Overall Cost Reduction Incentive provisions of the Company's Price Stabilization Program." (Emphasis added).

And, at page 520:

> On June 18, 2003, Laclede filed its Petition for Writ [**17] of review in the Circuit Court of Cole County. After briefing, the circuit court heard oral argument on October 10, 2003. ***At the conclusion of the oral argument, the circuit court stayed the Commission's order pending completion of proceedings on the Petition for Writ of review, including any appeals.***
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> On November 5, 2003, the circuit court issued its Findings of Fact, Conclusions of Law, Order and Judgment, vacating the Commission's Order because its decision was unlawful, unreasonable, arbitrary and capricious, and an abuse of discretion. The court concluded that under the plain language of the PSP Tariff, ***Laclede was entitled to retain the $ 4.9 million***. (Emphasis added)

There is no reference in the report to Laclede "pa[ying] them to the circuit court" as GMO asserts, of course without any citation. GMO may be privy to information that goes beyond the report of the case, but we are not. Instead, it appears to us that Laclede sought and obtained a stay of the Commission order from the Circuit Court and continued to retain the funds and deferred, because of the stay, refunding them to customers. *Laclede*, as reported, provides no precedent for taking funds retroactively from customers where a stay of the Commission’s order has ***NOT*** been obtained.

GMO also complains that AGP cites cases under the "old" law. There are no others. The General Assembly only recently changed this law and there are no cases interpreting it. Section 386.510 was simply the former statute with appellate court substituted for circuit court. Incidentally, GMO seems confused and wrongly states that it concerns circuit court matters but it plainly does not.[17/]

Undercutting its argument, however, when GMO filed its Appellant’s Brief in the Western District, it cited cases under the "old" statutory section, each one of which was apparently relevant at that point in time. Now, however, GMO claims that the case law that had developed under the judicial review statutes is no longer applicable.

Search of case law reveals no judicial construction of the "new" version of Section 386.510 nor of Section 386.520, Jurisprudence hasn’t changed. Case law that developed under the old version of the statute is certainly applicable and in point. Missouri regulatory law did not suddenly start over with the new statute. Ironically, the case that GMO cited as "precedent,’ in its earlier pleadings, *i.e.*, *Laclede v. PSC*, was decided under the "old" law. It is "precedent" when GMO cites it, but magically becomes "inapplicable" when AGP examines it.

[17/] GMO Legal Analysis, p. 2. GMO also incompletely quotes from Section 386.520.1, truncating the rather significant "however:" at the end of the segment.

In fact, the requirements for a judicial stay will be the same under both statutes; only the court and the process (including appointment of a special master) has changed.

Of course, all this is beside the point because GMO never sought or requested a stay from the court nor, prior to its appeal, from the Commission. Nothing in the responses filed by either Staff or GMO disputes this elemental fact: GMO did not seek to stay the effect of the Commission's order. The refunds were made in compliance with the Commission's unstayed order. The absence of that stay is decisive. It has nothing to do with GMO's ability to maintain an appeal, but, rather, whether GMO can charge customers again for money that was paid to them by an unstayed Commission order without any authority.

III. SUMMARY AND CONCLUSION.

GMO and Staff ask the Commission to ignore explicit provisions of the approved and operative QCA tariff as well as the governing statute. Both would have the Commission exercise powers that are reserved to the court. GMO argues that it doesn't matter that it didn't apply for a stay, claiming it couldn't have gotten one anyway and thereby admits that it did not request a stay either from the court or Commission. Nevertheless, GMO argues, that it should have the benefit of a stay that it couldn't obtain. Ridiculous.

GMO just wants the money and makes its arguments to that end. Staff, however, would confer boundless authority to adjust the QCA rates, regardless of restrictive tariff language.

Under the Staff approach the tariff language would become camouflage for unfettered rate "adjustments" unlimited in time, direction, or magnitude. There is no such power. The QCA was entered upon agreement of the parties and the resulting tariffs were approved by the Commission. It is now also the "law of the case."

The Commission need not struggle for authority that it does not have nor twist the QCA tariff to say what it does not. The plain language of the stipulation governs. The Commission simply does not have the authority to grant the relief sought by GMO. Whether or not the court did is now irrelevant; GMO did not seek it. GMO had the right to appeal but simply failed to seek a stay of the Commission order. This had nothing to do with filing an appeal, but as explicitly stated in Section 386.510, filing an appeal does not operate to stay the Commission order. That requires an additional step that GMO chose, for whatever reason, not to take.

GMO’s arguments about what Section 386.520 allows, ring hollow. Section 386.520 might have empowered the court to make directions (based on a reconciliation that GMO chose not to file), but the court did not. GMO’s failures do not magically turn Section 386.520 into a grant of authority to the Commission. *GMO simply did not preserve any inchoate claim to the refunded amounts and the Commission has no authority to retroactively repair GMO’s error.*

This result also happens to align with a decision on the merits. This the Commission ***CAN*** do based on this record.

GMO was unable to rebut AGP's substantial showing of Aquila imprudence. AGP witness Johnstone found six separate considerations supporting his conclusion of imprudence. (Johnstone Direct p. 5; Johnstone Rebuttal pp. 3-25). Johnstone's showing of Aquila imprudence is not dependent upon a single Aquila act, but rather, to the totality of many dubious actions summarized in the six separate considerations first identified in Johnstone's direct testimony, later affirmed in his rebuttal testimony. There was no successful GMO challenge to this showing in its cross-examination. Testimonies of GMO witnesses substantiated Aquila's corporate failures that proving its imprudence.

These six points also contribute to and further support the conclusion of imprudence and AGP again commends this reasoning to the Commission. (Johnstone Rebuttal at pp. 28-29). While many issues have been discussed and briefed, these six summary points and Aquila's corporate failures collectively provide proof of Aquila's imprudence based on a preponderance of the evidence.

AGP has proven Aquila imprudence. GMO failed to seek a stay either at the Commission or at the court and must now forgo the recovery of Aquila's imprudently incurred cost. Aquila was shown to have been imprudent by the preponderance of the evidence. The imprudent costs have been refunded and it is time to put this case behind us.

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

February 19, 2013

STATE OF MISSOURI EX REL. LACLEDE GAS COMPANY, Respondent v. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant

WD 63563

COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

156 S.W.3d 513*; *2005 Mo. App. LEXIS 343

March 1, 2005, Opinion Filed

PRIOR HISTORY: **[**1]** Appeal from the Circuit Court of Cole County, Missouri. The Honorable Richard G. Callahan, Judge.

DISPOSITION: Reversed and remanded.

COUNSEL: Thomas R. Schwarz, Jr., Jefferson City, MO, Attorney for Appellant.

Michael Charles Pendergast and Lawrence Carl Friedman, St. Louis, MO, Attorneys for Respondent.

JUDGES: Before: Howard, P.J., Ulrich and Breckenridge, JJ. Ulrich and Breckenridge, JJ., concur.

OPINION BY: Victor C. Howard

OPINION

[*515] The Public Service Commission approved a tariff implementing a three-year incentive hedging program, under which Laclede Gas Company was permitted to purchase and sell natural gas call options on future natural gas deliveries to manage the risk of fluctuations in natural gas market prices and create cost savings. The program provided certain incentives to Laclede to achieve the price protection and cost reduction benefits to its customers.

At issue in this appeal is approximately $ 4.9 million that Laclede kept as its share of incentive proceeds realized from the program. In its Report and Order ("the Commission's Order"), the Commission concluded that Laclede was required to flow back to its customers the $ 4.9 million.

Laclede petitioned for **[**2]** a writ of review in the Circuit Court of Cole County. The circuit court held that the Commission's Order was both unlawful and unreasonable, so it vacated the Order and remanded the cause to the Commission. The Commission then filed its notice of appeal to this court.

For the reasons set forth below, we affirm the trial court's judgment reversing the Commission's Order and remand.

Facts [1]

1 The Commission explicitly accepted Laclede's Statement of Facts in its brief, so we borrow in large part from Laclede's Statement of Facts without further attribution.

A. The Price Stabilization Program: Laclede is a public utility that distributes, transports, and sells natural gas to approximately 630,000 retail customers in eastern Missouri. In July of 1999, the Commission approved a tariff implementing a three-year incentive hedging program called the Price Stabilization Program ("PSP Tariff" or "the Program"). [2] Under the Program, Laclede was authorized to engage in the purchase and sale of natural **[**3]** gas call options as a means of hedging the price of its gas supply to provide its gas customers some protection against increased market gas prices. [3] The PSP Tariff allowed Laclede to collect $ 4 million annually from its customers to fund the Program.

2 The Commission initially approved the Program in 1997, and then extended and substantially modified the Program in its Report and Order issued June 15, 1999. That modified Program is the subject of this appeal.

3 A call option is a financial instrument sold on the New York Mercantile Exchange (NYMEX). In exchange for paying a specific amount, the call option entitles, but does not require, the buyer to receive a specific amount of natural gas in a future month at a predetermined "strike price." As the Commission explains in its Order:

> The hedging function of call option trading works this way. The gas company pays a premium to purchase a call option at a specified strike price. If the price of natural gas goes up above the strike price, the company can sell the call option at a profit and use the proceeds to offset the increased cost of natural gas. For that quantity of gas, the customer effectively pays the strike price, even if the actual cost of natural gas is higher. If the price of natural gas stays below the strike price and the call option expires valueless, the customer is out the cost of the premium but has obtained the value of having the price protection in place in case it were needed. This situation is similar to the purchase of car insurance. If a car owner purchases insurance and does not have an accident, the owner is out the cost of the premium. However, for the premium, the owner has received the intangible value associated with a reduction of risk.

[4]** Additionally, the PSP Tariff specified that a significant share of the gains realized **[*516]** by Laclede from call option trading would be passed through to Laclede's customers in the form of lower prices. Laclede was entitled to retain a specified share of such gains as an incentive to achieve such benefits for its customers. The PSP Tariff had two separate incentive features: (1) The Overall Cost Reduction Incentive; and (2) The Price Reduction Incentive.

1. **Overall Cost Reduction Incentive:** This portion of the PSP Tariff authorized Laclede to retain a specified percentage of any gains (40% or 60% depending upon how much customer savings had been generated) realized from "intermediate" trading activities, in which the call options were *sold prior to the last three business days* of NYMEX trading.

2. **Price Reduction Incentive:** This portion of the PSP Tariff authorized Laclede to retain a specified portion of the proceeds realized when the call options were *sold during the last three business days* of NYMEX trading. If the hedged price exceeded a certain level, Laclede was required to give its customers credits. The Price Reduction Incentive also included an "opt-out" **[**5]** provision, under which Laclede would be permitted to opt-out of the Price Reduction Incentive if there were radical changes in the market price for natural gas during the first 90 days of any Program year. The Cost Reduction Incentive did not contain an opt-out provision.

B. Stipulation and Agreement: In March of 2000, the second year of the incentive program, the price of natural gas rose quickly and steeply to unprecedented levels. Accordingly, on June 1, 2000, Laclede exercised its right to opt out of the Price Reduction Incentive for the 2000-2001 heating season. Laclede also applied to the Commission for a number of temporary changes in the Program. For example, Laclede requested the elimination of the Program's requirement that Laclede purchase options covering 70% of its winter supply, an increase in the amount Laclede could collect from its customers to fund the Program, and an expansion of the type of financial instruments Laclede could procure. The Staff of the Commission ("Staff") recommended the Commission grant only part of the relief requested by Laclede. Public Counsel recommended that the Commission reject

Laclede's application and instead instruct the Company **[**6]** to comply with the terms of the Program.

Ultimately, on September 1, 2000, Staff, Public Counsel, and Laclede filed a "Unanimous Stipulation and Agreement." The Stipulation and Agreement stated that the parties were only able to agree that Laclede's request to eliminate the 70% coverage requirement should be granted. The Stipulation and Agreement provided in relevant part:

> By permitting Laclede to obtain price protection for lesser volumes, such a revision will help to reduce the price at which such protection will be triggered for these volumes. Since the winter heating season is only slightly more than two months away, it is critical that such provisions be approved as soon as possible. Accordingly, the undersigned Parties recommend that the Commission issue its Order adopting these modifications at the earliest practical time.
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> . . . Since the Parties were unable to agree on [Laclede's] other proposed revisions to the PSP, *all remaining provisions of the existing PSP currently in effect will remain in full force and effect*."

(Emphasis added.)

On September 28, 2000, the Commission approved the Stipulation and Agreement. On October 5, 2000, Laclede filed a **[**7]** compliance tariff implementing the changes to **[*517]** the PSP Tariff as reflected in the Stipulation and Agreement. Staff subsequently reviewed and recommended the Commission's approval of the compliance tariff. On October 12, 2000, the Commission approved the compliance tariff, which explicitly stated that Laclede's purchase of call options under the PSP was:

> subject to the incentive features described [in the PSP Tariff]. Except as modified by the terms of the September 1, 2000 Unanimous Stipulation and Agreement approved by the Commission [temporarily modifying the original 70% coverage requirement], and subject to [Laclede]'s notice of opting out of the price protection incentive features in year two. . . .

During the 2000-2001 heating season, Laclede operated as provided in the compliance tariff. In addition to the approximately $ 4 million received from customer billings for Program funding, Laclede used approximately $ 5 million from its gains on trading to purchase more call options as authorized by the Overall Cost Reduction Incentive. Laclede's total gains from options trading in the 2000-2001 year were approximately $ 33.5 million. After taking into account the **[**8]** $ 5 million in reinvested gains, the trading resulted in a net gain of $ 28.5 million, $ 11.5 million of which was realized from the sale of call options during the last three business days of NYMEX trading -- the period of trading subject to the Price Protection Incentive. Because Laclede had exercised its right to opt out of the Price Protection Incentive, it immediately flowed through to its customers the entire $ 11.5 million in the form of reductions to the Company's Purchased Gas Adjustment rates pursuant to expedited procedures requested by Laclede and approved by the Commission.

The remaining $ 17 million of proceeds was realized from Laclede's sale of call options prior to the last three days of NYMEX trading (intermediate trades). These proceeds were subject to sharing between Laclede ($ 8.9 million) and its customers ($ 8.1 million) pursuant to the terms of the Overall Cost Reduction Incentive. Laclede immediately passed the $ 8.1 million through to its customers. Laclede also requested and obtained approval from the Commission to contribute $ 4 million of the Overall Cost Reduction Incentive to fund the Program's third year. Laclede sought to retain the remaining $ 4.9 **[**9]** million in proceeds, which are at issue in this appeal.

C. The Commission's Order: Pursuant to the provisions of the Program, the Commission annually reviewed Laclede's recovery of gas costs to determine whether such costs had been prudently incurred and/or otherwise accounted for in compliance with Laclede's approved tariffs. Thus, the Commission initiated Case No. GR 2001-387 ("2001 case") to review Laclede's recovery of gas costs during the 2000-2001 Actual Cost Adjustment ("ACA") period. This period ended September 30, 2001, so it included the second year of the

Program. [4]

4 At the parties' request, the Commission consolidated the 2001 case with Case No. GR-2000-622, which the Commission had initiated for review of 1999-2000 ACA period. The Commission's Order indicates that "ultimately, Staff and Laclede agreed upon all issues relating to the 1999-2000 Actual Cost Adjustment and nothing regarding that [case was] presented to the Commission for resolution." Thus, only the 2001 case is at issue in this appeal.

[10]** On June 28, 2002, Staff filed its recommendation in the 2001 case, in which it proposed that Laclede be required to flow through to its customers the $ 4.9 million that Laclede had retained under the Overall **[*518]** Cost Reduction Incentive. Staff recognized that the Overall Cost Reduction Incentive remained in effect. Nevertheless, Staff claimed that a new methodology demonstrated that Laclede had not achieved any savings under the Program. Laclede opposed the adjustment on the grounds, among others, that this new methodology was unauthorized by, and flatly inconsistent with, the express language of the PSP Tariff.

In its April 29, 2003 Order, the Commission concluded as a matter of law that Laclede was "not entitled to retain approximately $ 4.9 million in proceeds from the sale of call options in the winter of 2000-2001, under the Overall Cost Reduction Incentive provisions of the Company's Price Stabilization Program."

The Commission interpreted the meaning of the Program and PSP Tariff that implemented it to determine the intent of Laclede in creating the Program and the Commission's intent in approving the Program. In doing so, the Commission analyzed what it referred to as "two, **[**11]** closely interrelated incentive features that were designed to maximize the protection afforded to customers, while minimizing the cost of that protection." The Commission held:

> When both incentive clauses were working the program and tariff made sense. Both Laclede and its customers could benefit from the sale of call options. Both could receive a share of profits, but more importantly, Laclede's customers received the benefit of having price protection against an unexpected increase in natural gas prices. Unfortunately, when natural gas prices skyrocketed beginning in May of 2000, Laclede was in a position where it had to withdraw from the Price Protection Incentive portion of the [PSP] Program. Consumers were left without the price protection to which they were entitled under the program.

The Commission openly acknowledged Laclede's argument that the Overall Cost Reduction incentive remained in effect after it opted out of the Price Protection Incentive, and Staff did not dispute this argument. But, the Commission concluded:

> . . . Without the price protection function of the Price Protection Incentive element of the program, the Overall Cost Reduction Incentive **[**12]** was merely a meaningless vestige. Intermediate trading of call options did not necessarily provide any price protection to Laclede's customers. Laclede could sell its hedge positions at any time and collect and keep a portion of the proceeds. Meanwhile, the price of natural gas used by those customers could keep rising after Laclede had sold out of its hedge position, leaving the customers unprotected. For example, the selling price of natural gas may have been $ 1.00 above the strike price ten days before the expiration of the call option. If the call option is sold on that date, Laclede and its customers would get to share in a profit of $ 1.00. However, if by the expiration date of that call option the price of gas has risen to $ 3.00 above the strike price, can it still be said that Laclede's customers have profited? Laclede has its share of the profit from the sale of the call option and it can pass the increased cost of natural gas on to its customers. The customers, however, have to pay for the gas out of their own pockets.
>
> What is more, when Laclede withdrew from the Price Protection Incentive clause it no longer had any incentive to hold call options until near

> their expiration, **[**13]** and thereby provide some protection to its customers against rising gas **[*519]** costs. Instead, Laclede actually had a perverse incentive to sell its call options early, before the last three trading days, when it could still share in the proceeds of the sale.
>
> The Commission can only conclude that neither the Commission, nor Laclede intended to create such an unlikely and unfair outcome when they created the [PSP] Program. There is no reason to believe that Laclede was in any way blameworthy because of its decision to withdraw from the Price Protection Incentive element of the program. Certainly, Laclede was not responsible for the spike in natural gas prices that shocked consumers in the winter of 2000-2001. However, there is no reason to believe that Laclede should be allowed to share in the illusory profits it made from trading in call options while the price that consumers had to pay for natural gas soared.
>
> There was only one Price Stabilization Program. To permit the [PSP] Program and its enabling tariff to operate as proposed by Laclede would frustrate the intent of the Commission and Laclede in creating the program and approving the tariff. Therefore, the Commission concludes **[**14]** that as a matter of law, the Overall Cost Reduction Incentive element of the [PSP] Program ceased to function at the same time that Laclede exercised its right to withdraw from the Price Reduction Incentive element of the program. Therefore, Laclede is not entitled to claim a share of the proceeds from the sale of call options under the terms of that incentive element.

The Commission noted that its conclusion "must bump up against the Stipulation and Agreement." It explicitly recognized that the Stipulation and Agreement provided, "'since the parties were unable to agree on the Company's other proposed revisions to the PSP, all remaining provisions of the existing PSP currently in effect will remain in full force and effect.'" But, the Commission concluded:

> [This] language does not affirmatively state that any particular element of the Price Stabilization Program is in effect. It simply states that this Stipulation and Agreement does not change the effectiveness of any provision of the Program. Thus, if, as the Commission has found, the Overall Cost Reduction Incentive element became ineffective at the same time as did the Price Reduction Incentive element, then this **[**15]** Stipulation and Agreement does nothing to resuscitate that element.

The Commission's focus, in its decision, on the lapse of the overall cost reduction incentive is in sharp contrast with the evidence presented at the hearing. Throughout the entire Commission proceeding, both Laclede and Staff maintained that the Overall Cost Reduction Incentive remained in effect during the 2000-2001 heating season. The testimony and briefing before the Commission focused on the disputed question of how savings under the Overall Cost Reduction Incentive were to be calculated and divided between Laclede and its customers. After the record was closed, Staff suggested, for the first time, in its April 10, 2003 Proposed Findings of Fact, that the Commission could find that the Overall Cost Reduction Incentive terminated when Laclede opted out of the Price Protection Incentive. Laclede sought permission to reopen the record to address this argument. The Commission denied Laclede's request, stating it its Order:

> The Commission is mindful of the fact that it is deciding this case on the basis of a theory that has not been argued by any party. Laclede, of course, argues that it should be allowed to **[**16]** retain its **[*520]** share of proceeds under the Overall Cost Reduction Incentive. Staff has consistently offered the theory that the Overall Cost Reduction Incentive remained in effect, but that savings under that incentive had to be calculated in a more restrictive manner. Laclede contends

that by deciding this case on a different theory, the Commission has denied it an opportunity to present evidence to refute the allegations against it, thereby denying it its right to due process of law.

In other circumstances, Laclede might be correct. However, in this case the Commission is reaching its decision entirely upon the basis of its conclusions of law about the meaning of the words of a tariff and a stipulation and agreement. Those documents clearly are in the record of this case and both parties have presented extensive information about them. Laclede has presented evidence and argument about both documents, and no additional testimony could change the words of either the tariff or the Stipulation and Agreement. As a result, in this case, Laclede's due process rights have not been compromised.

D. The Circuit Court's Judgment: On June 18, 2003, Laclede filed its Petition for Writ **[**17]** of review in the Circuit Court of Cole County. After briefing, the circuit court heard oral argument on October 10, 2003. At the conclusion of the oral argument, the circuit court stayed the Commission's order pending completion of proceedings on the Petition for Writ of review, including any appeals.

On November 5, 2003, the circuit court issued its Findings of Fact, Conclusions of Law, Order and Judgment, vacating the Commission's Order because its decision was unlawful, unreasonable, arbitrary and capricious, and an abuse of discretion. The court concluded that under the plain language of the PSP Tariff, Laclede was entitled to retain the $ 4.9 million.

This appeal follows.

Standard of Review

We review the Commission's Order, not the circuit court's judgment, to determine whether the Order was lawful and, if so, whether it was reasonable. *§ 386.510*; [5] *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n, 120 S.W.3d 732, 734 (Mo. banc 2003)*. As the adverse party, Laclede has the burden of proof "to show by clear and satisfactory evidence that the . . . order of the commission complained of is unreasonable or unlawful as the **[**18]** case may be." *§ 386.430*; *AG Processing, 120 S.W.3d at 734*. If statutory authority for the Commission's Order exists, then it is "lawful." *Id.* If we determine the Commission's Order is lawful, we must then consider whether it is reasonable, that is, whether the Order "was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious, or unreasonable, or whether the [Commission] abused its discretion." *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997)*.

5 Statutory references are to the Revised Statutes of Missouri (2000).

Discussion

Although Laclede challenges the Commission's Order as "unlawful" in its first point on appeal, neither party argues the Commission lacked statutory authority to act, which is the test for determining whether the Order is "lawful." There is no dispute that pursuant to Chapters 386 and 393, the Commission **[**19]** has the authority to regulate Laclede, which is a public utility.

[*521] Confusion may arise as to reviewing for "lawfulness" because the Commission explicitly decided the issue based on its legal interpretation of the language of the PSP Tariff and the Stipulation and Agreement. Indeed, as pointed out by Laclede, in determining the lawfulness of the Commission's Order, we will "correct erroneous interpretations of the law." *State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n, 40 S.W.3d 381, 388 (Mo. App. W.D. 2001)*. But at this stage of review, we would only review an erroneous interpretation of law governing the Commission's statutory authority. The propriety of the Commission's legal interpretation of the PSP Tariff and the Stipulation and Agreement pertains to the reasonableness of the Order, not its lawfulness. Because the Commission's Order is lawful in that it was statutorily authorized, we next examine the Order's reasonableness.

The issue in this case is whether the Overall Cost Reduction Incentive automatically terminated when Laclede exercised its right to opt-out of the Price Protection Incentive for the 2000-2001 heating season. The Commission concluded in its **[**20]** Order that despite the unambiguous language of the PSP Tariff and the Stipulation and Agreement, it would be so illogical for the Overall Cost Reduction Incentive to survive Laclede's rightful decision to opt out of the Price Protection Incentive that, *as a matter of law*, a different result must have been intended. Our review of legal issues is *de novo*, with no deference to the Commission. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n, 120 S.W.3d 732, 734 (Mo. banc 2003)*.

Once the Commission approved the PSP tariff, it became Missouri law. *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co., 937 S.W.2d 314, 317 (Mo. App. E.D. 1996)*. Thus, the PSP Tariff has "the same force and effect as a statute directly prescribed from the legislature," so we interpret the tariff in the same manner we interpret a statute. *Id.* Accordingly, our role in interpreting the PSP Tariff is to "ascertain the intent of [Laclede and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29, 31* **[**21]** *(Mo. banc 1988)*. We can look beyond the plain and ordinary language of the PSP Tariff "only when the meaning is ambiguous or [acceptance of the plain and ordinary language] would lead to an illogical result defeating the purpose of the [tariff]." *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell, 736 S.W.2d 383, 387 (Mo. banc 1987)*. The Commission recognized this standard for interpreting the PSP Tariff and duly noted:

Of course, when dealing with a tariff, there is no legislative intent to be discerned.

> However, when interpreting the meaning of the Price Stabilization Program and the tariff that implemented it, it is necessary to discern the intent of Laclede in creating the program, as well as the intent of the Commission in approving the program.

The Commission openly agreed that the plain and ordinary language of the PSP Tariff and the Stipulation and Agreement confirmed that the Overall Cost Reduction Incentive survived Laclede's opting out of the Price Protection Incentive. But a 3-2 majority of the Commission found that the parties did not "intend" the PSP Tariff and the Stipulation and Agreement to mean what the plain language said.

[22]** In arriving at this conclusion, the Commission set forth hypothetical calculations of how market fluctuations could have effected Laclede's trading of call options at **[*522]** different times before querying, "can it still be said that Laclede's customers have profited?" During proceedings before the Commission, Staff advanced similar hypothetical calculations in support of its argument that a new methodology demonstrated that Laclede had not achieved any savings under the Program. Laclede argued those calculations were improperly based on hindsight. The Commission addressed Laclede's argument in its Order as follows:

> Laclede suggested for Staff to sit back two years after the fact, examine the results and find occasions where Laclede could have made more money by trading earlier or later. But Laclede was trading without the benefit of hindsight, and it contended that it did the best job that it could. Laclede argued that it should be allowed to keep the share of savings to which it would be entitled under the Overall Cost Incentive.
>
> After carefully considering the question, the Commission finds that Laclede is correct. Staff's hypothetical calculations of what might have been the **[**23]** result if Laclede had chosen to trade call options differently is entirely based on hindsight and is not to be found anywhere in the description of the Price Stabilization Program or the tariff designed to implement the program. Staff was not able to provide a reasonable calculation to determine how savings could have been calculated under the Overall Cost Reduction Incentive after the Price Reduction Incentive was no longer operable. This is not a criticism of Staff or its witness because there is probably no formula that could create such a calculation with any certainty.
>
> *The formula contained in Laclede's tariff indicates that Laclede is entitled to keep the $ 4.9 million in proceeds under the Overall Cost Reduction Incentive.* The question then becomes whether the Overall Cost Reduction Incentive of that

> tariff was still effective after Laclede opted out of the Price Reduction Incentive.

(Emphasis added.)

The Commission's reasoning for concluding, as a matter of law, that contrary to the plain language of the PSP Tariff, the parties did not intend for the Overall Cost Reduction Incentive to remain effective, is similarly based entirely on hypothetical calculations. **[**24]** We reject the Commission's hypothetical calculations for the same reasons that it rejected the Staff's hypothetical calculations.

The purpose of the Program was to stabilize natural gas prices. To achieve this purpose, the Program had two incentive components: (1) price protection, and (2) cost reduction. The plain and ordinary meaning of the tariff indicates that despite Laclede's rightful decision to opt out of the price protection component in light of unprecedented increases in natural gas prices, the cost reduction component remained viable. The customers continued to benefit from the cost reduction component of the Program. This is confirmed by the explicit language in the Stipulation and Agreement that except for the elimination of the 70% coverage requirement and Laclede's decision to opt out of the Price Protection incentive, "*all* remaining provisions of the existing PSP currently in effect will remain in full force and effect." (Emphasis added.) The Commission's attempts to harmonize this explicit language of the Stipulation and Agreement with its legal conclusion that the parties did not intend for the Overall Cost Reduction Incentive to persist are unpersuasive. The **[**25]** PSP Tariff is clear and unambiguous and cannot be given another meaning by the Commission's hypothetical envisioning of an "illogical result."

[*523] The Commission fails to cite any evidence in its Order or in its brief on appeal supporting a finding that there was an "unlikely and unfair outcome" or that the profits realized by Laclede were merely "illusory." In fact, the actual evidence presented in the case supports the opposite conclusion, i.e. that Laclede did not take advantage of any "perverse incentive" to conduct only intermediate trading so it could share in the profits under the Overall Cost Reduction Incentive. Both Laclede and the Staff agreed that the Overall Cost Reduction Incentive remained after Laclede opted out of the Price Protection Incentive. During the 2000-2001 heating season at issue, Laclede realized total gains of approximately $ 33.5 million from options trading. $ 11.5 million of the gains was realized from the sale of call options during the last three business days of NYMEX trading -- the period of trading subject to the Price Protection Incentive. Because Laclede had opted out of the Price Protection Incentive, it immediately flowed through to its customers **[**26]** the entire $ 11.5 million. Laclede sought only to retain $ 4.9 million of the $ 17 million it realized from intermediate trading, which the Commission acknowledged it was entitled to under the plain language of the tariff.

Conclusion

Under the plain language of the PSP Tariff and the compliance tariff implementing the Stipulation and Agreement, the Overall Cost Reduction Incentive remained operable during the 2000-2001 heating season. Thus, Laclede was entitled to retain the $ 4.9 million of proceeds.

We affirm the circuit court's judgment reversing the Commission's Report and Order and remand to the circuit court with directions to remand this cause to the Commission for further proceedings consistent with this opinion.

Victor C. Howard, Presiding Judge

Ulrich and Breckenridge, JJ., concur.