BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Missouri Propane Gas Association,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. GC-2016-0083**
	)	
Summit Natural Gas of Missouri, Inc.,	)	
	)	
Respondent.	)	

MEMORANDUM OF SUMMIT NATURAL GAS OF MISSOURI IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION OR DISMISSAL

COMES NOW Summit Natural Gas of Missouri, Inc. ("Summit"), pursuant to 4 CSR 240-2.116(4) and 4 CSR 240-2.117(1), and for its Memorandum in Support of its Motion for Summary Determination or Dismissal states as follows:

Introduction and Summary

The Missouri Propane Gas Association ("MPGA") asserts in this case that the Commission should interpret an agreement in a prior case between the parties, Case No. GR-2014-0086 ("the Rate Case)." In the Rate Case MPGA intervened claiming it was improper to convert vent-free appliances from propane to natural gas. That case resulted in a "Partial Stipulation and Agreement as to Dual Fuel and Conversion of Appliances," ("the Agreement"). The Agreement, filed on August 18, 2014 specifically states:

> "For converting appliances from propane to natural gas, [Summit] agrees to follow all applicable ... manufacturers' specifications relating to the conversion of appliances."

Even though the Agreement expressly *envisions* conversions and does not *prohibit* conversions of any kind (*e.g.*, it does not contain language such as "Summit agrees not to

convert vent-free appliances," or "Summit shall not convert vent-free fireplaces"), MPGA claims that the Agreement should be interpreted to prohibit the conversion of four vent-free fireplaces that Summit converted for its customers. MPGA does not claim the language applies to all appliances, just "vent-free" appliances (even though the agreement does not say that either). Specifically, in this case MPGA asks the Commission to interpret the language "for converting appliances from propane to natural gas" and "relating to the conversion of appliances" to mean: "do not convert vent-free appliances at all." Summit submits that MPGA's claim is illogical and contrary to the plain language of the Agreement.

In fact, rather than asking for an interpretation of the Agreement, this action appears to be an effort to "undo" the Agreement in the Rate Case. At the time the parties entered into the Agreement, MPGA was well aware that Summit competes in the heating fuel market by helping Missouri consumers who desire to benefit from safe, clean-burning natural gas by converting their existing, propane-fueled appliances. Of course, this activity naturally results in fewer propane customers in MPGA's service area – a fact that likely explains MPGA's repeated attacks on Summit at the Commission. For instance, in the Rate Case, MPGA took the position that Summit should generally be prohibited from converting vent-free appliances if "code" and "manufacturer's instructions" prohibit such conversions.[1] The Agreement that emerged as part of the settlement of the Rate Case did not, however, prohibit the practice of converting vent-free appliances; instead it envisioned conversions and Summit agreed to follow "manufacturers' specifications relating to conversions" when those conversions

[1] In its pre-filed testimony of Brian Brooks in the Rate case, he recommended that Summit "should be required to convert only appliances that are approved and listed to be converted by, but not limited to, national codes, certification agencies, and manufacturers." (Brooks Rebuttal Testimony, page 5). See also MPGA's Statement of Positions "national and local codes and **manufacturer's instructions** relating to the fuel conversion of appliances." (MPGA Statement of Position, page 2; emphasis added.)

occurred. Now, in a new attack, MPGA attempts to achieve what it did not in the Rate Case – a wholesale prohibition on the conversion of vent-free appliances from propane to natural gas.

As the Commission is aware, MPGA previously asserted in *this case* a variety of other claims, including assertions that conversions of vent-free appliances are unsafe, violate industry codes and regulations, and violate ANSI standards. However, MPGA voluntarily abandoned those claims, dismissing them *with prejudice* and they are not at issue here. What remains is a claim about whether Summit's conversions of four appliances (vent-free fireplaces) were performed *contrary* to "manufacturer's specifications relating to conversions." MPGA has now filed its direct testimony which utterly fails to support this single, narrow claim. In fact, the single piece of testimony that MPGA filed as its direct case does not even address two of the four appliances at issue. As to the third appliance, the testimony *mentions* it (by reference to photograph of a "rating plate" attached as an exhibit to the testimony), but does not offer any proof about its specifications at all. As to the one and only fireplace addressed with more than a passing glance, the direct testimony lacks sufficient proof to support the proposition that the conversion of that fireplace was improper or contrary to manufacturer specifications relating to conversions.

For these reasons more fully discussed below, Summit asks the Commission to grant summary determination and to dismiss this action.

Procedural Background

In its First Amended Complaint, filed on October 30, 2016, MPGA presented numerous allegations, including claims that Summit's conversions of vent-free propane appliances to natural gas were unsafe, that they violated Summit's tariff, and further that they violated industry codes and regulations including ANSI standards. Among the various materials Summit provided to the Commission's Gas Safety Staff and MPGA on these issues

was a demonstration of its conversion process for vent-free fireplaces, its conversion protocol for these fireplaces and the results of an audit that Summit conducted to check on the status of vent-free fireplaces converted over the past several years for customers in Missouri. These materials show the safety of Summit's conversion practices. Following Summit's production of all this material, MPGA abandoned its claims in this case regarding the safety of the conversions, the alleged violation by Summit of its tariff and the purported violation of industry codes and regulations (including ANSI standards), dismissing them *with prejudice*. Consequently, these issues are no longer germane to this case.

On May 13, 2016, MPGA filed a Motion for Partial Summary Disposition on what is now its sole remaining claim, namely that Summit "violated this Commission's September 3, 2014, Order approving the Partial Stipulation and Agreement as to Dual Fuel and Conversion of Appliances by failing to follow the manufacturers' specifications <u>in converting four unvented heating products</u> from propane to natural gas."[2] The four unvented heating products at issue are all fireplaces manufactured by three separate manufacturers and are identified here as:

1. DESA model number VGF28PT; ("Fireplace 1");
2. Sure Heat model number BIVFMV ("Fireplace 2");
3. SHM International Corp model number BIVFMV ("Fireplace 3")
4. DESA model number VMH26PRB/EFS26PRA; ("Fireplace 4")

In its Motion for Partial Summary Disposition, MPGA sought to establish that there existed no issue of material fact on the question of whether conversion of these four appliances violated manufacturer's specifications. In support, MPGA submitted an affidavit of one of its members, Brian Brooks of Brooks Propane.

[2] Motion for Partial Summary Disposition, filed May 13, 2016, page 1; emphasis added.

In Opposition to the Motion for Summary Determination, Summit challenged the expertise, proof and conclusions of Brooks and presented the affidavit of David Meyers, an expert who explained the meaning of "manufacturers' specifications" and addressed the "critical operational points" of the units such as supply pressure, operating pressure, dimensions of openings as the few technical differences in the propane/ natural gas versions of the appliances. After reviewing the evidence, the Commission denied MPGA's motion for partial summary disposition finding that there was a factual issue remaining: namely what are the "applicable manufacturers' specifications relating to the conversion of appliances." The Commission clearly identified this salient issue in its order denying summary disposition, and thus MPGA was on notice that it needed to produce evidence in its case in chief to carry its burden of proof.

MPGA has now filed its case in chief, which consists solely of the testimony of a new witness, Ronald G. Smith, a Florida resident employed by an Illinois engineering consulting firm, Global Engineered Solutions Group, and who claims expertise based on having worked for "various manufacturers globally." Mr. Smith apparently did not understand the issue presented in this case because he spends the bulk of his time discussing his view of ANSI standards that are not at issue here. As discussed above, MPGA's claim that the conversions are contrary to ANSI standards was abandoned and dismissed *with prejudice*. That claim cannot now be revived through the sleight of hand that Mr. Smith attempts in his testimony. (Direct Testimony page 2, line 23; page 6, line 4; page 7, page 8).

The only portions of Mr. Smith's testimony that are directed to the issue at hand, namely what are the relevant "manufacturer's specifications" relating to conversions, consists at most of a little more than three pages. (pages 6-9). Yet even the limited testimony Mr.

Smith offers here is both general and vague and fails to answer the questions necessary to meet MPGA's burden of proof. Mr. Smith does not identify, much less support, what the manufacturer's specifications "relating to conversions" are for the four fireplaces. Although he apparently reviewed Summit's list of 109 unvented gas products converted in the past five years (only four of which are at issue in this action), he addresses the purported "manufacturers' specifications" of just a single unvented fireplace (Schedule RSG-2), a DESA model fireplace (Fireplace 4). He includes a photo of a rating plate for a second fireplace, manufactured by SHM (Fireplace 3), but does not address what are the "manufacturer's specifications" relating to the conversion of that unit. Further, nowhere in his testimony or the materials does Mr. Smith address Fireplaces 1 or 2 at all.

Even more incredibly, Mr. Smith's testimony does not identify any particular manufacturer's specification for any of the four units. Instead, he flatly asserts that propane fireplaces simply should not be converted to natural gas at all. This assertion is also unsupported, and the testimony does not address the proof required to establish what are the specific "manufacturer's specifications" relating to conversions for each of the four fireplaces. This is precisely the issue raised by MPGA's complaint and that the Commission identified in its order denying MPGA's Motion for Summary Determination. And finally, nowhere does Mr. Smith address Summit's conversion practice on any of the four fireplaces, much less criticize its process or show how it failed to follow "manufacturers' specifications relating to conversions."

MPGA has failed to carry its burden of proof in its direct case and therefore Summit is now entitled to summary determination or dismissal in its favor.

Summary of Grounds for the Motion

Summit moves for summary determination or dismissal on the single remaining claim of the Complaint on the grounds that MPGA has failed to meet its burden to prove: 1) the identification of the manufacturers' specifications for converting appliances from propane to natural gas for each of the four fireplaces; 2) the meaning of those specifications for each of the four fireplaces; 3) how those specifications could be "followed" by Summit in converting appliances ; and 4) how Summit purportedly failed to follow those specifications. The few pages of Mr. Smith's testimony that are even arguably directed to these issues lack any substance, and contain no citations or objective basis sufficient to support a decision for MPGA on its claims. MPGA's direct case fails to present the proof on which it bears the burden. Therefore, Summit is entitled to summary determination or dismissal in its favor.

The Legal Standard for Summary Determination and Dismissal

Pursuant to Commission Rule 4 CSR 240-2.117(1)(E), the Commission may grant a motion for summary determination if:

> the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines it is in the public interest.

Commission Rule 4 CSR 240-2.116(4) provides that: "A case may be dismissed for good cause found by the commission after a minimum of ten (10) days notice to all parties involved."

Summit makes its motion for summary determination or dismissal at this time because, having reviewed MPGA's case in chief, it is apparent that the interests of judicial efficiency will be best served by summarily disposing of the sole remaining allegation. MPGA has so completely failed to support its case in its direct testimony that the Commission should find that MPGA has not carried its burden of proof even without entering any opposing evidence

into the record. This motion, brought after the submission of MPGA's direct testimony, is akin to a defendant's motion for a judgment as a matter of law in federal court made after the plaintiff rests.

In civil cases tried without a jury, Missouri Supreme Court Rule 73.01(b) provides that:

> After the plaintiff has completed presentation of plaintiff's evidence, the defendant may move by motion for a judgment on the grounds that upon the facts and the law the plaintiff is not entitled to relief. The filing of such motion does not constitute a waiver of defendant's right to offer evidence.

In civil court, a judge presented with a motion for involuntary dismissal under Rule 73.01(b) does not view the evidence in the light most favorable to the non-moving party, and should not deny the motion simply because a *prima facie* case has been established. Rather, the court must weigh and evaluate the evidence that the plaintiff has presented and will grant the motion for involuntary dismissal if it is convinced that the evidence preponderates against the plaintiff. In Wyrozynski v. Nichols, 752 S.W.2d 433 (Mo. App. 1988), the Missouri Court of Appeals, Eastern District, explained the proper reasoning that the trier of fact should follow when faced with a motion for dismissal upon the closing of the moving party's case in chief:

> When a court sitting without a jury has heard all of the plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has convincingly shown a right to relief. It is not reasonable to require a judge, on motion to dismiss ... to determine merely whether there is a *prima facie* case, such as in a jury trial should go to the jury, when there is no jury—to determine merely whether there is a *prima facie* case sufficient for the consideration of a trier of the facts *when he is himself the trier of facts.* To apply the jury trial practice in non-jury proceedings would be to erect a requirement compelling a defendant to put on his case and the court to spend the time and incur the public expense of hearing it if the plaintiff had, according to jury trial concepts made "a case for the jury," even though the judge had concluded that on the whole of the plaintiff's evidence the plaintiff ought not to prevail. A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution,

> to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is [a] *prima facie* one in the jury trial sense of the term.[3]

While the Commission's rules do not specifically adopt or follow Rule 73.01(b), the rules (4 CSR 240-2.116(4)) do allow the Commission to dismiss an action "for good cause." Because Summit herein and in the accompanying motion definitively shows that MPGA has not demonstrated that it has a satisfied its burden of proof, the Commission should follow the Rule 73.01(b) procedures and dismiss MPGA's last remaining claim for good cause.

Argument

1. "Manufacturers' Specifications' Relating to Conversions" for the Four Fireplaces

A. *Manufacturer's Specifications for the Four Fireplaces*

As discussed above, MPGA bears the burden to identify and establish for the record the manufacturer's specifications "relating to conversions" for the four fireplaces that it claims *should have been* followed by Summit. This basic threshold issue lays the groundwork for the more nuanced issues of a) whether these specifications "relate to the conversions" and b) whether these specifications *could or should have been, but were not followed* pursuant to the Agreement. But MPGA fails even on the basic threshold issue of what are the applicable manufacturer's specifications.

Mr. Smith's testimony provides only a general statement purporting to manufacturer's specifications, which really appears to be a description of an owners' manual. Mr. Smith's proffered definition of "manufacturer's specifications" is:

> "A document that provides critical defining information about a product and *can* include identification of the manufacturer; a list of rules, bans and standards that apply to the item; and design specifications and product images that visually illustrate the product and note distinguishing characteristics."

[3] Wyrozynski v. Nichols, 752 S.W.2d 433, at 435 (Mo. Ct. App. 1988); citing United States v. Gypsum Co., 67 F.Supp. 397, 418 (D.C.Dist.Ct.1946).

(page 7, lines 8-12; emphasis added)[4]

This definition is apparently of Mr. Smith's own making as he provides no citation or other support to demonstrate that it is a definition that, in his words, is "widely accepted." (page 7, lines 12-14). This definition also provides no discussion of the difference between the various information in an owner's manual and true "specifications" which is at issue here. Smith ignores the specific evidence on this issue that Summit previously provided on this exact issue. See David Meyer affidavit in Support of Opposition to Motion for Summary Disposition (explaining the many types of information contained in owner's manuals that are not manufacturer's specifications.) Smith apparently claims, again without citation or other factual support, that *all warnings* contained in owner's manuals are manufacturer's specifications (page 7, lines 15-18) even though his own definition makes distinctions about the variety of items in an owners' manual such as "lists, design specification, images and illustrations." This deficiency is fatal since Mr. Smith never identifies the actual "manufacturer's specifications" he believes are at issue, and owners' manuals and "specifications relating to conversions" are obviously not identical. The Commission can find without requiring the filing of responsive testimony that much of RGS-2 (the DESA owner's

[4] First, it is axiomatic that owner's manuals are just that – manuals provided to owners of appliances. While the manuals commonly contain certain manufacturer's limited specifications concerning the appliance, they also contain information that is not considered "specifications," but instead informs consumers about usage and safety. While owner's manuals do contain some specifications (design, manufacturing, converting), warnings to homeowners about tinkering with gas-supplied appliances are not "specifications." The Business Dictionary defines "manufacturers' specifications" as a "Documented description of performance specifications of a component, subassembly, or system that are to be met during the manufacturing process, as well as the procedure by which those specifications will be assessed."[4] Merriam-Webster's dictionary defines "specifications" as "a detailed description of work to be done or materials to be used in a project: an instruction that says exactly how to do or make something."[4] Neither of these definitions supports MPGA's interpretation that all statements in owner's manuals constitute specifications and they show that much more is required for MPGA to identify "specifications relating to conversions" as called for in the Agreement.

manual) consists of the manufacturer's **instructions, illustrations, lists** and other materials—not manufacturer's **specifications**.

Notwithstanding his broad definition of the term "manufacturer's specifications," Mr. Smith's testimony identifies only one owners' manual and for just one of the four fireplaces, Fireplace 4. Mr. Smith notes that the manual identifies "the type of gas that the product is designed to use," which he claims is a manufacturer's specification that prohibits conversion to natural gas of Fireplace No. 4 (page 7, lines 20-21.) But the type of gas for which the fireplace was originally designed is clearly a "design specification" and it is *silent* about conversions. Yet, it is the only specification Mr. Smith discusses in all of his testimony. There is no discussion of any specifications – whether a "design specification" or otherwise – for any of the three other appliances. In fact, Mr. Smith does not in his testimony address Fireplaces 1 and 2 at all. Regarding Fireplace 3, Mr. Smith points to a "rating plate" which he alleges prohibits conversion, but nowhere in his testimony does Mr. Smith so much as assert that a "rating plate" is equivalent to a manufacturer's specification. Indeed, even the unsupported definition of "manufacturer's specification" that Mr. Smith advances and which includes a litany of things that in his view constitute a "manufacturer's specification" does not itself mention rating plates. And, of course, the Agreement itself does not reference rating plates. Review of Mr. Smith's testimony reveals that for Fireplaces 1, 2 and 3, no proof is offered to support MPGA's claim because the testimony simply does not identify any specification published by the manufacturers of those products (SMH International Inc., Sure Heat and DESA.) These products are not all the same, and evidence proffered in an attempt to establish the purported manufacturer's specifications for one product (DESA Fireplace 4) cannot lawfully constitute proof of other manufacturers' specifications for entirely different

products. Therefore, MPGA has failed to provide the most basic evidence that is at least necessary to support its claims regarding the manufacturer's specifications of the other three fireplaces. MPGA cannot possibly prove its case without even identifying the manufacturer's specifications it claims *should have been* but were purportedly not followed by Summit when it converted those units to natural gas. MPGA's proof fails for three of the four fireplaces (1, 2 and 3) on the threshold requirement that MPGA identify the particular manufacturer's specifications it claims Summit purportedly failed to follow when it converted those three appliances.

B. Manufacturer's Specifications "Relating to Conversions"

Even if it had proved what the manufacturers' specifications are, MPGA carries the additional burden of proving which of these specifications "relate to conversions" within the meaning of the Agreement. On that critical issue Mr. Smith's testimony is devoid of any proof even as to the one product, Fireplace 4, for which MPGA provided a modicum of evidence. This failing is made plain in the answers to the two relevant questions addressed to the issue in the testimony:

> Q21: Are the unvented gas product manufacturers' warnings that appear throughout the Owners' Manuals considered by the industry to be a manufacturer's specification for the product?
>
> A21: Yes, they are considered specifications for the unvented gas-fired heating products. Also it is important to note that the type of gas that the product is designed to use is considered a design specification (see the specifications page, page 32 of Schedule RSG-2).
>
> Q22: Why are the unvented gas product manufacturers' warnings that conversions of the products from one gas to another consider a manufacturer's specification?
>
> A22: Well, again besides the fact that it is a verbatim requirement of the ANSI Z21.11.2 safety standard, ***there can be*** product design differences between an unvented gas-fired heater equipped for propane gas and one equipped for natural gas ***that could*** render the product unsafe and out of compliance with the safety

> standard if only the burner injector, pilot and regulator were changed. There are subtle design differences between natural gas and propane gas appliances, ***in some cases*** internal to the burner and or other components which are not detectable and would require combustion testing equipment equal to the certifying National Recognized Testing Laboratory (NRTL) in order to assure performance equal to the original performance specifications.

(page 7, line 15 to page 8, line 8; emphasis added)

The only purported specification that Mr. Smith identifies is a "design specification" for Fireplace 4 which states that the product was designed for use with propane. Mr. Smith does not even allege that this "design specification" is a "specification relating to conversions" within the meaning of the Agreement. And he certainly does not offer competent or substantial evidence to prove such a proposition. At most, Mr. Smith asserts that there "*can be* design differences" (page 7, line 25) that "*could* render the product unsafe and out of compliance with the *safety standard, if*…" certain components are the only ones changed. He then claims, again without support, that there "*are* subtle design differences" "internal to the burner or other components" (page 8, lines 3-5) between the natural gas and propane versions of the same appliance, *in some cases*….."

First, none of these statements are directed specifically to Fireplace 4, *its* specifications, *its* components, or *its possibly* subtle design differences. Second, the mere *possibility* of design differences is not proof of anything with respect to Fireplace 4. Third, Mr. Smith's reasoning hinges on the ANSI safety standard (not referenced in the Agreement and no longer at issue in this case). Fourth, nowhere does Mr. Smith actually discuss any "specifications relating to conversions"—not what they say, how they are relevant to the conversion process and how they should—or could—be followed by Summit "in converting appliances" as allowed by the plain text of the Agreement. All of these statements are speculative, are not proof, and they do not even address the question.

Mr. Smith's testimony appears to be simply that the Commission ought to interpret the Agreement as though it prohibits conversion of all vent-free products—although he offers no proof for that interpretation. He does not address the context for how the Commission should reach such an interpretation when the Agreement plainly permits conversion and makes no distinction between the type (vent-free or vented) of appliance to be converted. Nonetheless, and again without citation or proof, Mr. Smith asserts that "all unvented gas product manufacturers prohibit the conversion of their products." (Q11 at page 5, lines 3-5) Mr. Smith provides no support for this sweeping statement. Certainly the single manual attached to his testimony for Fireplace 4 and the rating plate for Fireplace 3 does not support the proposition that the entire industry has adopted manufacturer's specifications for their vent-free appliances that prohibit conversions. Moreover, Mr. Smith provides no explanation for why the Agreement explicitly recognizes that Summit would be: "converting appliances" or why the Agreement doesn't say: "Summit shall not convert vent-free appliances," if such a blanket prohibition were what was intended. Mr. Smith's testimony simply does not support the conclusion that Fireplace 4 was converted in contravention of the Agreement, and he makes no attempt to make such a showing regarding Fireplaces 1, 2 or 3.

C. Summit's Conversion Process for the Four Fireplaces

Mr. Smith's testimony does not even address Summit's actual conversion of Fireplace 4, or of the other Fireplaces, and whether – as converted – they function according to manufacturers' specifications in compliance with the Agreement. Mr. Smith does not appear to have reviewed or analyzed the conversion protocol, what parts are converted, or whether or not there are, in fact, "subtle design differences" between the propane and natural gas versions of any of the four fireplaces that required Summit to do something in particular when it converted

those units. He appears not to have considered the audit Summit performed to evaluate fireplaces that it has converted and their operating performance, even though a number of them have been operating for several years now. There are only four fireplaces at issue in this case, yet Mr. Smith does not identify anything about any one of those fireplaces that as converted is not operating according to manufacturer's specifications with natural gas rather than propane.

Mr. Smith testifies that "there *can be* design differences" between natural and propane versions of appliances "*that could render* the product unsafe and not in compliance with the safety standard if only the burner injector, pilot and regulator were changed." Setting aside the speculative nature of the testimony, Mr. Smith doesn't offer proof of what Summit changed for any one of the fireplaces. He does not prove any design differences with respect to the four specific appliances at issue here. In fact, the evidence in the record (Schedule RGS-2 attached to Mr. Smith's testimony) proves just the opposite for the one fireplace he addresses: Fireplace 4's natural gas burner is exactly the same part as its propane burner. Additionally, his claim that "there *can be* design differences" between natural gas and propane versions of appliances "*that could render* the product unsafe and not in compliance with the safety standard if only the burner injector, pilot and regulator were changed" does not even refer to manufacturers' specifications. It only refers to safety and standards, neither of which are at issue in this case. In sum, even with respect to Fireplace 4, Mr. Smith's testimony falls far short of what is necessary to satisfy MPGA's burden of proving Summit converted Fireplace 4 in violation of the manufacturer's specifications for that appliance. For this reason alone, Summit is entitled to summary determination.

Notably, Mr. Smith ignores the fact that on its face the owner's manual for Fireplace 4 (RGS-2) covers *both the propane and natural gas versions of this fireplace.* The propane

versions are so similar to the natural gas versions that the parts diagram at page 34 and the parts list at page 35 cover both the propane and the natural gas versions of the appliance. In the parts list on page 35, the parts for the propane version are shown in the column with VMH26PRB and EFS26PRA at the top, and the parts for the natural gas version are shown in the column with VMH26NRB and EFS26NRA at the top. The same burner is used for both the propane and natural gas versions of the appliance. This specific evidence contradicts Mr. Smith's vague and general testimony that "there *can be* design differences" between natural gas and propane versions of appliances "*that could render* the product unsafe and not in compliance with the safety standard if only the burner injector, pilot and regulator were changed," because in the specific instance of Fireplace 4, the same burner is specified for both versions of the unit. In fact, with the exception of a few screws, the oxygen depletion sensor, a regulator and regulator tube on the propane model, the injector, and the valve and pilot tube, the two versions of Fireplace 4 are identical, and the screws, oxygen depletion sensor, regulator and regulator tube, injector, and valve pilot tube are all discrete parts that the manufacturer makes available to anyone who wants to replace them.

Further, the manual for Fireplace 4 lists an "NG Conversion Plate" as part 43 on page 35 – a part which the manufacturer would provide for no other conceivable purpose than to support the conversion of propane appliances by natural gas distribution companies such as Summit. Mr. Smith makes no mention of this in his testimony. The fact that natural gas conversion plates are made generally available directly contradicts MPGA's claim that conversion is inconsistent with the manufacturer's specifications. Indeed, the availability of such a natural gas conversion plate for field replacement is directly at odds with Mr. Smith's testimony that, under his definition of

"manufacturer's specifications," all such conversions are strictly prohibited. For what purpose would a manufacturer provide a "conversion plate" at all if not for a conversion!

MPGA has provided no evidence whatsoever that the converted DESA fireplace does not comport in all respects to the manufacturer's specifications "relating to conversion." Moreover, MPGA has proffered no evidence regarding how Summit converted Fireplace 4 (or any other fireplace), much less to criticize the conversion process Summit employed. Critically, MPGA has failed to demonstrate that once converted, the fireplaces fail to meet any operating or other specifications for the natural gas version of the fireplace. The evidence that MPGA does offer, on the contrary, demonstrates conclusively that it is not only possible, but fairly easy, to convert a propane fireplace with a model number VMH26PRB/EFS26PRA to a unit that is identical to one with a model number of VMH26NRB/EFS26NRA. With the simple replacement of a few discrete parts, the fireplace will meet all applicable manufacturers' specifications for a natural gas fireplace. Finally, according to MPGA's own evidence, even the warning plates (which appear to be what Mr. Smith calls "rating plates") on propane and natural gas versions are identical and bear the same part numbers.

MPGA's case in chief consists exclusively of Mr. Smith's testimony and schedules, and that testimony and evidence utterly fails to meet the burden of proof MPGA bears for this action.

Conclusion

This case has been pending for over sixteen months. MPGA has had ample opportunity to conduct discovery for the purpose of assembling evidence in an attempt to support its case in chief, but it has failed to do so. Instead, MPGA filed a direct case that lacks the necessary proof to carry its burden on the dispositive issue in this case concerning

the conversion of the four fireplaces at issue. Therefore, the Commission should make a summary determination that MPGA failed to meet its burden of proving that Summit failed to follow “manufacturers' specifications relating to conversions” for these fireplaces. As to Fireplace 4, MPGA has provided evidence showing some of the manufacturer's specifications for both the natural gas and propane versions of that product, but MPGA has provided no evidence about how Summit performed the conversion on this fireplace and no evidence about any way in which the appliance converted by Summit fails to meet the manufacturer’s specifications for a natural gas fireplace. In addition, MPGA has provided no evidence about why the very specific phrase “manufacturers’ specifications” used in the Agreement should be considered to be the same as the phrase “manufacturer’s instructions” that MPGA used in its testimony and position statement in the Rate Case. Finally, MPGA provides no rational explanation of why the Agreement, which explicitly envisions the conversion of vent-free appliances, should be interpreted as an absolute prohibition on such conversions. MPGA has had ample time to develop and file its best case to make these points, but it has failed to do so.

There is no reason for the Commission to require this case to proceed, and to require Summit, the Commission Staff and the Commission itself to devote further resources to it.

WHEREFORE, Summit respectfully submits the Memorandum in Support of its Motion for Summary Determination, and requests that the Commission dismiss all remaining allegations and close this case.

Respectfully Submitted,

By: */s/ Lewis Mills*

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ATTORNEYS FOR SUMMIT NATURAL GAS OF MISSOURI, INC.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed to all parties of record this 3rd day of April, 2017.

/s/ Lewis Mills

Lewis Mills