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.	)	

SUMMIT NATURAL GAS OF MISSOURI'S RESPONSE IN OPPOSITION TO MPGA MOTION TO FILE SUPPLEMENTAL TESTIMONY

COMES NOW Summit Natural Gas of Missouri, Inc. ("Summit") and submits its Response in Opposition to the Missouri Propane Gas Association's ("MPGA") Motion to File Supplemental Direct Testimony of Ronald G. Smith.

Summary of Response

MPGA's motion to file supplemental testimony lacks any legal basis whatsoever, lacks any proof of good cause for its dilatory actions, would unnecessarily delay resolution of this action, seeks to inject into the record unreliable hearsay to the obvious prejudice to Summit and should be denied. MPGA's motion seeks a Commission "order that requires" MPGA to supplement its case-in-chief. This motion is really a "Hail Mary" request for a "do-over" to save MPGA's case from dismissal on summary determination. The rules of the Commission, and indeed of all courts, prohibit the introduction of new evidence in response to motions for summary determination. Now that Summit has revealed the fatal deficiencies in MPGA's case, MPGA wants a new set of rules to apply so that it can attempt to cure the deficiencies. MPGA makes this request all the while denying, quite incorrectly, "that Ronald G. Smith's

Direct Testimony is in any way deficient, given the narrow scope of the one remaining issue in the case." Of course if that were true, there would be no reason for MPGA to request that the rules be bent so as to allow another chance to create its direct case. Summit's motion is well-taken and MPGA should not be permitted to avoid summary determination by offering new direct testimony in brazen violation of the rules.

Argument

1. MPGA's motion lacks a legal basis

MPGA invokes Commission Rule 4 CSR 240-2.130(10) as a basis for its request, but this rule affirmatively prohibits supplementation of a direct case and does not support the motion. This cited subsection is part of the rule that *requires* a party to file its entire case in chief in its direct testimony and *prohibits* any party from supplementing pre-filed testimony unless ordered to do so by the Commission or a presiding officer. MPGA asks the Commission to permit an end-run around the rule through the expedient of an "order" that MPGA be required to file new testimony. Of course, there is no basis for the Commission to participate in such a tortured subterfuge that is contrary to the purpose of the rule.

MPGA also invokes Commission Rule 4 CSR 240-2.117(1)(C), which rule simply provides that a response to a motion for summary determination may include "any testimony, discovery or affidavits not previously filed that are relied on in the response." This rule does not support the proposition that supplemental *direct* testimony is permitted for the purpose of bolstering a case in chief that was defective as filed. The rule is simply not intended to allow a party to add facts to its case in chief so that it can then say that those new facts are in dispute, and to so interpret it would be undermine the fairness of the Commission's adjudicatory process. The purpose of the rule allowing testimony and other evidence in

support of a response to a motion for summary determination is simply to allow a party to clarify what is or is not in dispute and to explain how the facts in the record should be viewed, but it is not a means for a party to correct the defects of its case-in chief as identified by the other party. If this were the case, then summary disposition would never be granted because the opposing party would always seek to introduce, as "supplementation," additional evidence meant to create a disputed issue of fact that it did not introduce in the first instance. 4 CSR 240-2.130(10) allows the Commission to order supplemental testimony when doing so is fair and just, which in this case precludes supplementation.

2. <u>MPGA's motion lacks good cause</u>

MPGA had ample opportunity in the 16 months this case has been pending to develop and file its direct testimony on the remaining "narrow issue" in this case. After its Motion for Summary Disposition was denied, MPGA asked for a testimony filing date of January 19, 2017, affording it 71 days to prepare its direct testimony. Summit did not object. On January 20, 2017, MPGA requested yet additional time to prepare its direct testimony. Again, Summit did not object. At every turn, Summit has agreed that MPGA should be permitted to take whatever amount of time it believed was necessary to prepare and file its case-in-chief. MPGA finally filed its direct case, consisting of the testimony of a single witness, on February 1, 2017, nearly a year and a half after the initial filing of its Complaint. And now, after it is plain to MPGA that all of its case is deficient, it seeks leave of the Commission for a "do-over" in the form of the supplementation of its *expert witness's* testimony.

Nowhere in its response does MPGA explain what caused it to file a paltry 9 pages of testimony to support its case, (only 3 of which are even on point,) as its case-in-chief. MPGA never provides even a clue as to the reason it did not file more proof and further MPGA

asserts that its case-in-chief is not "in any way deficient." How can the Commission find good cause to take the *extraordinary* step of ordering MPGA to supplement its case in chief, when MPGA affirmatively and decisively declares that case to be in no way deficient?

And even more outrageous is MPGA's bold claim that supplementation is somehow in the "public interest." MPGA does not represent the public interest. It represents the interests of unregulated suppliers of heating fuels who compete for business with Summit – a regulated utility. MPGA abandoned its pretense of being the representative of the public interest when it abandoned, on its own motion, any claim based upon the safety of the conversion of vent free fireplaces. MPGA's case is now about four alleged conversions that MPGA claims violate the disputed terms of an agreement between MPGA and Summit which on the face of the Agreement does not prohibit anything. But in any event, MPGA's claim is parochial – it does not concern the public interest.

3. <u>The proffered testimony MPGA seeks the Commission to "order" is improper</u>

The new testimony proffered for Mr. Smith is itself improper and should not be allowed, much less "ordered." As is plain from the document itself, the "testimony of Mr. Smith" isn't even his own testimony—it is an affidavit of Mr. Brooks with the name changed. There is nothing "expert" in such a submission of the repackaged affidavit of a non-witness (Mr. Brooks did not supply direct testimony), let alone a non-expert witness. There is nothing in the testimony demonstrating that Smith even spoke to Brooks or determined for himself that the affidavit is accurate. Indeed, on its face the testimony shows why this slipshod proposal cannot be accepted or "ordered" by the Court. For example, MGPA now proffers as Mr. Smith's testimony that he "was in attendance at a meeting in SNGMO's office in Sunrise Beach, MO, where [he] witnessed SNGMO convert an unvented heating product from

propane to natural gas."[1] This is patently untrue. Mr. Smith was not present and cannot truthfully offer testimony suggesting that he was. There is no indication he even has second-hand knowledge of what happened at that demonstration. Mr. Smith's new "testimony" is plainly unreliable and should not be considered.

4. Summit will be prejudiced

MPGA brazenly argues that Summit will not be harmed, which neither establishes good cause nor is it true. Summit had the right to and did rely on the deadlines in the Commission's order and it addressed the testimony MPGA submitted. Summit expended considerable resources to prepare a filing demonstrating the fatal flaws and omissions in MPGA's case. Now, with the benefit of Summit's work product, MPGA wants to "fix" its case and thus avoid the consequence (summary disposition) of having filed insufficient direct testimony. Nothing could be more prejudicial to Summit. Indeed, the hallmark of a prejudicial proceeding in one in which the rules are changed to avoid an inevitable outcome. Summit's motion is well-taken and MPGA's motion proves that point by seeking to derail it and to start its case anew. The request flies in the face of good faith and fair dealing, the Commission's procedures and basic fundamental notions of fairness. MPGA should not be "ordered" this unfair advantage to Summit's great prejudice.

[1] Proposed Supplemental Testimony of Ronald G. Smith, Schedule RGS-5, paragraph 6.

WHEREFORE, Summit respectfully submits that MPGA's request for a Commission order requiring it to supplement its case in chief is not supported, is prejudicial and improper under the rules and requests that the Commission deny MPGA's motion.

Respectfully Submitted,

By: /s/ Lewis Mills

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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 26th day of May, 2017.

/s/ Lewis Mills
Lewis Mills