

**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.)	

**LEGAL MEMORANDUM IN SUPPORT OF SUMMIT NATURAL GAS OF MISSOURI,
INC.'S RESPONSE IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY
DETERMINATION**

COMES NOW Summit Natural Gas of Missouri, Inc. (“Summit”), and for its Legal Memorandum in Support of its Response in Opposition to the Motion for Partial Summary Determination filed by the Missouri Propane Gas Association (“MPGA”) on May 13, 2016, states as follows:

1. 4 CSR 240-2.117(1)(E) provides:

The commission may grant the 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 that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

Under the rule above, before exercising its discretion to grant a motion for summary determination, the Commission must make three determinations: 1) that there are no material facts in dispute; 2) that the moving party is entitled to relief as a matter of law; and 3) that granting summary determination is in the public interest.

Here, MPGA has not come forward with any quantum of evidence that would support these prerequisite determinations, and it has therefore failed to carry its burden on summary disposition. Even if the Commission were able to make each mandatory determination, the remedy of summary disposition is entirely discretionary and has historically been disfavored by the Commission when, as here, the regulated utility has not had an opportunity to present evidence at a hearing. *See* 4 CSR 240-2.117(1)(E) (“commission *may* grant the motion for summary determination”).

2. As discussed in detail in Summit’s Response in Opposition, MPGA’s Motion for Summary Determination raises many questions of material fact, among them: 1) What are “applicable ... manufacturers’ specifications” that must be followed when converting an appliance within the meaning of the Commission’s September 3, 2014 order approving the Agreement in Case No. GR-2014-0086 (the “Agreement”); 2) Has MPGA identified any manufacturers’ specifications in its materials that are intended to apply to natural gas suppliers in performing conversions; 3) What is the basis for MPGA’s interpretation of “manufacturers’ specifications”; 4) Does Mr. Brooks’ affidavit demonstrate that he has the requisite knowledge or expertise to support his testimony about the interpretation of “manufacturers’ specifications”; 5) If the phrases in the owner’s manuals constitute “specifications relating to the conversion of appliances” and they apply to Summit, did the Agreement require Summit to follow them; 6) By their owner’s manual statements, do manufacturers of unvented gas heating products intend to prohibit a natural gas supplier such as Summit from converting propane appliances to natural gas when such conversions are requested by the appliance owner and expressly authorized by the National Fuel Gas Code; 7) Even if the manufacturers do intend to prohibit conversions, do they

have the right? If the Commission determines that there is a genuine dispute as to even one of these questions, it may not grant summary disposition.

3. MPGA has proffered no evidence that any of the owner's manuals on which it rests its entire Motion for Summary Determination contain manufacturers' specifications relating to conversions that apply to Summit or which Summit has failed to follow in converting the four products at issue. Summary determination tests only for the existence, not the extent, of these genuine disputes.¹ The sworn expert witness testimony of David Meyer and other material in the record demonstrates a genuine dispute of material fact, and even the paucity of foundation for MPGA's motion and its partisan, non-expert witness, Brian Brooks, alone shows summary determination is inappropriate here. Granting summary determination under these circumstances would be contrary to the holding of *ITT* that summary determination tests only for the existence of a dispute and does not look to see which evidence might ultimately be most persuasive in that dispute.

4. Additionally, to prevail on its Motion for Summary Determination, MPGA must show it is entitled to its requested relief as a matter of law. "The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question."² Even in the absence of disputed facts (which clearly exist on this record) MPGA's requested relief is inappropriate for summary determination. MPGA has asked the Commission to: 1) determine that Summit has violated the Agreement; 2) order Summit to comply with the Commission's order approving the Agreement; 3) order Summit to "cease and desist from any

¹ *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo. 1993). "ITT is Missouri's 'bible' on summary judgment. Our appellate courts cite it, on average, in at least two opinions per week." *Massie v. Colvin*, 373 S.W.3d 469, 471 n.3 (Mo. Ct. App. 2012).

² *Ibid.*, at 380.

further conversions ... not allowed by manufacturers;” and 4) grant other unspecified relief. As a matter of law, MPGA is not entitled to such findings or relief.

5. The first of MPGA’s requested Commission actions – that it make a finding – is not a prayer for relief. The Commission’s rule on summary determination is closely patterned on Missouri’s rules of civil procedure governing summary judgment,³ which similarly provide that the movant must be entitled to judgment as a matter of law. A finding of fact is not “relief” under the Commission’s rules, nor is it equivalent to a “judgment” as contemplated by the civil rules. A judgment in civil practice or relief in Commission practice means that a party is required to do something: pay damages or money to another party, perform specific actions, or stop performing specific actions. The Commission’s finding of a fact is simply not the type of “relief” that a litigant may obtain by way of a motion for summary determination.

6. MPGA’s second request for relief asks the Commission to order Summit to comply with a Commission order. There are specific provisions of law and Commission rules that would apply if Summit has indeed failed to comply with a Commission order,⁴ but asking the Commission to “re-order” compliance with an existing order is specious because it calls for a redundant, meaningless act on the part of the Commission and MPGA is simply not “entitled as a matter of law” to have the Commission perform a redundant, meaningless act. An adjudicatory body, such as a court or this Commission, should not countenance requests that it perform meaningless acts.

7. The MPGA’s third request for relief asks the Commission to entirely re-write the Agreement. The Agreement, as approved by the Commission, provides that “For converting appliances from propane to natural gas, [Summit] agrees to follow all applicable national and

³ Missouri Rules of Civil Procedure, Rule 74.04.

⁴ See, e.g., Section 386.570 RSMo and 4 CSR 240-2.070.

local codes and manufacturers' specifications relating to the conversion of appliances." That language clearly contemplates the conversion of appliances from propane to natural gas. In a sweeping departure from that language, MPGA now asks the Commission to revise the Agreement so that it would now prohibit future conversions "not allowed by manufacturers of those products." There is an important distinction between conversions that do not follow all applicable manufacturers' specifications (which are prohibited by the Agreement) and those which a manufacturer seeks to "not allow" (which MPGA now asks the Commission to prohibit). The Commission would have to accept MPGA's interpretation of manufacturers' intent and disregard industry practice and the National Fuel Gas Code which expressly permits Summit (and other natural gas suppliers) to convert propane appliances to natural gas. Moreover, there is no basis in the record in this case to indicate a legitimate technical or safety reason for that prohibition that would necessarily negatively impact consumers. MPGA's particular request is so speculative that MPGA cannot reasonably assert that it is entitled to it as a matter of law. It asks the Commission to prejudge future controversies and preemptively determine what Summit can and cannot do without knowing the specific circumstances of future possible conversions. MPGA asks the Commission to go well beyond ruling on a specific controversy and in doing so to exceed its authority. As a matter of law, MPGA is not entitled to such a prejudgment.

8. The MPGA's fourth and final request for relief is just a routine request for "any other relief" which is discretionary and cannot be granted as a matter of law on summary determination.

9. Finally, the third requirement of the Commission's rules is of utmost interest here because the Commission must determine that granting summary disposition in complainant's favor would be "in the public interest." Nothing could be further from the case and MPGA has

not carried its burden on this point. Indeed, MPGA does not even address what public interest would be served by a grant of summary determination. No claims about safety remain in this case. And conversions of these products have been performed at the specific request of the consumer, *i.e.* the public. The public interest is not advanced by an interpretation of disputed language in the context of summary disposition that would prohibit entirely appropriate conversions that allow Missouri consumers the option to choose an alternative fuel source in their homes.

WHEREFORE, Summit respectfully submits this Legal Memorandum in supplement to its Opposition to MPGA's Motion for Summary Determination.

Respectfully submitted,

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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 13th day of June, 2016.

/s/ Lewis Mills

Lewis Mills