BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of	)	
Union Electric Company d/b/a	)	Case No. ET-2021-0082
Ameren Missouri for Approval of	)	Tracking No. YE-2021-0081
Its Surge Protection Program.	)	

UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI'S REPLY BRIEF

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and for its Reply Brief, states as follows:

INTRODUCTION

For the most part, the opposing briefs present little that was not already addressed to some extent in the Company's Initial Brief. It is the Company's position that regulated public utilities should be allowed to offer their customers service choices they do not have today provided in connection with the provision of electric service, and to do so under the Commission's supervision and control. It is further the Company's position that such services can and in some cases should be priced based in a manner that gives consideration to the value of the service – here derived in large part from relevant experience of tens of thousands of other utility customers participating in similar programs – and that any resultant margins above program costs can and should be used to offset the revenue requirement used to set rates for all customers, which will promote more affordable electric service for all. If a customer does not want the service, the customer need not participate. The Company recommends that the Commission allow it to provide that convenient choice to its customers by approving the proposed surge protection program.

The Commission Staff (especially) and the Office of the Public Counsel ("OPC") raise a myriad of arguments, insisting that electric utilities under the Commission's jurisdiction stick strictly to traditional, basic delivery of electricity to the meter. The program opponents express

some fears about the possibility that the program economics turn out to be unfavorable, but they do not seriously challenge the overwhelming likelihood that participants and non-participants alike will benefit from the program's existence, nor do they challenge the fact that there will likely be – as there is at other utilities with similar programs – a group of customers who will value the choice and convenience the proposed program will provide. Program opponents have also come up with some legal concerns about the proposed program, but those claims are demonstrably flawed as they variously ignore (or attempt to re-write) the statutory language upon which they are based, ignore basic principles governing the Commission's ongoing authority, are at odds with the Commission's decisions in other analogous circumstances, and find no support in the case law underlying the Commission's authority.

REPLY TO STAFF'S SPECIFIC CONTENTIONS

The Company will address Staff's contentions in the order presented in Staff's Initial Brief.

A. Lawfulness Generally (Reply to Staff's Initial Brief Section I).

The first approximately six pages of Staff's Initial Brief include Staff's viewpoint regarding the lawfulness of the program, albeit much of Staff's discussion largely consists of nothing more than general criticisms of the proposed program without any clear connection to any question of law. Regardless, the Company thoroughly addressed the legal issues raised about the program at pages 10-13 of the Company's Initial Brief and will not repeat that discussion here.

However, certain points made by Staff in this section of Staff's Initial Brief warrant a brief reply.

- Page 2: Staff misstates the record (apparently desiring to raise some still unexplained legal "flaw" in the program) when it claims that the "program is primarily grounded in a manufacturer's warranty." The surge protection devices rarely fail (just 5 out of 10,000 times)

– so warranty coverage is similarly rarely going to be triggered;[1] the primary benefit of the program is the fact that the surge protection device is highly effective in preventing damage in the first place, giving participating customers peace of mind that they deem worth the cost, or else they would not have voluntarily chosen to participate.[2]

- Page 2 (Continued): The fact that Ameren Missouri complies with the Commission's regulation that requires it to provide standard voltages and within reason maintain service at those voltages has nothing to do with whether the surge protection devices are "electric plant" or whether the Commission is entitled to approve and oversee the proposed program. The Company is glad that Staff (and OPC) apparently agree that it has a well-operated system, but it does not follow that the surge protection program at issue in this case will not benefit participants and non-participants alike.

- Pages 2-3: Staff's claim that the Company has failed to "clarify that the warranty for the program covers only motor driven household equipment" is false.[3] The tariff provides, explicitly, that it covers only "standard residential equipment," and the tariff defines "standard residential equipment" as "motor driven household equipment ...."[4] There is nothing to "clarify."_The program benefits were not, and are not, premised on reducing damage claim expenses from surges that might have otherwise caused damage and that then might have led to a claim against the Company. The program benefits are choice, convenience, and value for those who believe $9.95 per month is worth the additional protection and peace of mind having a surge protection device installed at their home brings them, together with the conservatively

[1] Ex. 3 (Schneider Direct), p. 3, ll. 16-18.
[2] Ex. 4, p. 3, ll. 15-17; Tr. p. 108, ll. 3-17. Staff also wrongly claims, at pages 3-4 of Staff's Initial Brief, that the "purported draw" for the program is the warranty. The warranty is a benefit, but it is secondary to the high level of protection the device provides.
[3] Staff's Initial Brief, p. 3
[4] Program Tariff, Sheet No. 166.

estimated net benefits for *all* customers of approximately $47 million to offset revenue requirement over twenty years.[5]

- Page 4: Staff's claim that "Ameren Missouri does not explain why it would not offer this program . . . [if it were not regulated]" ignores the record.[6] Company witness Tom Byrne addressed these reasons expressly at page 9 of his surrebuttal testimony, and did so again during the evidentiary hearing:[7] first, Ameren Missouri is strictly a regulated service provider offering regulated service: that is all it does and that's all it intends to do; and second, offering the program on an unregulated basis defeats the entire purpose of creating incremental revenues from optional service offerings that will lower rates for all customers.
- Pages 4-5: Staff continues its hyper-focus on the manufacturer warranty, claiming (without support in the record) that "customer confusion is inevitable" and implies that the Company will leave customers who believe they have a warranty claim to fend for themselves as if the Company did not exist. To the contrary, customers can call the Company's dedicated toll-free line for all aspects of the program, including if they have a warranty claim.[8] The Company will help the customer with the customer's warranty claim.[9] And of course customers should be able to (and can as a matter of law) bring a complaint against the Company if some aspect of its operation of the proposed program violates its tariff, or a statute, rule, order, or decision of the Commission.

[5] Ex. 6, p. 14, l. 13 to p. 15, l. 11 (Updating the net benefits modeled in the expected case for the Company's direct case filing to account for property taxes and the impact of plant-in-service accounting ($600,000 and $300,000, respectively), and resulting in revised net benefits of $47.4 million.
[6] Staff's Initial Brief, p. 4.
[7] Ex. 1 (Byrne Surrebuttal) p. 9, ll. 8-21;Tr. p. 70, ll. 2-21.
[8] Tariff Sheet No. 166.1, 166.3.
[9] Tr. p. 67, l. 17-18;

- Pages 5-6: The Company agrees with Staff's statement that the Company did not provide examples of regulated surge protection programs. Unlike those other (successful) unregulated programs, Ameren Missouri's program offering is designed to benefit all of the Company's customers. That Ameren Missouri proposes to do something different than others – and not keep the financial benefits of the program for itself – is not a program shortcoming. Rather, Ameren Missouri's purposeful decision to return those benefits to all customers to promote more affordable electric rates should be viewed as a positive; as a key reason to approve the program as proposed.
- Pages 6-7: Citing the testimony of its economist, Ms. Lange, Staff boldly (and incorrectly) persists in claiming that the program would "purport to deprive future Commissions of the opportunity to review the reasonableness of Ameren Missouri's rates and terms." The Company's proposal does not – nor can it – do any such thing. Paradoxically, the Staff follows its citation to Ms. Lange's flawed claim with a citation to authority that it claims confirms what the Company has already told the Commission: The Commission does and will have ongoing supervision over the program, its tariff, and rates charged for it. Staff counsel conceded the point at hearing.[10]

B. Program Approval Regardless of Issues of Lawfulness (Reply to Staff's Initial Brief Section II).

The theme of this section of Staff's Initial Brief completely misses the point of the program offering, which is to provide customers with a service that requires them to do one thing and one thing alone: pick up the phone or click their mouse, if they so choose, and contact the Company to sign up for additional surge protection for all the electric devices connected to the electric system in their home. Ameren Missouri has researched the device; it is undisputed that it is highly

[10] Tr. p. 56, ll. 17-22.

effective; it is undisputed that it will be sourced from the leading manufacturer of such devices;[11] and it is undisputed that customers will not have to locate and hire a qualified electrician and let that electrician into their home to install a device and be responsible for repair or replacement if the device fails.[12]

Despite these undisputed facts of record, Staff's Initial Brief attempts to make it appear that customers can get the same thing by just running down the street to Home Depot, etc. Staff claims that "there are alternative surge protection devices available, similar to those included in the proposed Ameren Missouri surge protection program," citing Staff witness Coffer's testimony.[13] Staff goes on to claim that these alternatives "would provide a similar level of protection against the type of surges identified by Ameren Missouri," this time citing pre-filed testimony of Ms. Ferguson and Ms. Lange. Staff's statements in its Initial Brief[14] are unsupported by the record in this case.

While Ms. Coffer provided some very general information on "surge protection devices available on the market," she did not testify that such devices "provide a similar level of protection." To the contrary, Ms. Coffer simply said these available-on-the-market devices "provide *different* levels of protection," without explaining what that means and certainly without claiming a customer can go to Home Depot and grab a device that will work 9,995 out of 10,000 times.[15] Staff's Initial Brief does not even cite to Ms. Coffer's testimony for the key proposition Staff claims to exist now, but instead cites to the testimony of Ms. Ferguson and Ms. Lange, yet neither of them addressed the level of protection other devices provide, or don't provide, at all.

[11] Tr. p. 76, ll. 10-11.
[12] Ex. 4 (Schneider Surrebuttal), p. 7, l. 18 to p. 8, l. 2.
[13] Page 7.
[14] Pages 7-8
[15] Ex. 7 (Coffer Rebuttal) pp. 5-6.

Ms. Ferguson (obviously relying on Ms. Coffer) stated that there are "competitive alternatives", and Ms. Lange explicitly pointed to Ms. Coffer's testimony and attempted to paraphrase Ms. Coffer's statements about devices available on the market.

Staff also ignores or at best selectively points to the actual record on this issue. Staff claims the Company does not dispute that there are other options available and criticizes Mr. Byrne who Staff claims was only able to say that the Company's offering is "different."[16] Notwithstanding Staff's cherry-picking of a few out-of-context words from the hearing transcript, what the record proves is: (a) the device to be used for the program is from the leading device manufacturer;[17] (b) the devices at issue in this case are not available to the public – they come from a different market;[18] (c) installation of the proposed device cannot be done by a participant since it is installed in the meter box on the Company's meter;[19] (d) installation by a customer of at least certain of these other devices Staff focuses on would require locating, hiring, providing access for, and paying an electrician, and (e) the responsibility for any needed repair or replacement of a customer-owned device would lie with the customer.[20]

C. Program Design Considerations (Reply to Staff's Initial Brief Section III.A).

This section of Staff's Initial Brief contains several disparate points about program "design." As it considers these points of contention, the Company asks that the Commission be mindful of the fact that the Staff simply opposes the program based upon what is clearly a philosophical view that unless the service is literally needed to keep the lights on, a utility should not provide it as a regulated service irrespective of whether its customers want it, and irrespective

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[16] Page 8.
[17] Tr. p. 76, ll. 10-11
[18] Tr. p. 76, ll. 19-21.
[19] Tr. p. 90, ll. 20-24.
[20] Tr. p. 68, ll. 1-25.

of whether the Commission judges – based upon the evidence of record – that it is likely to provide benefits to all customers over time. There is nothing wrong the Ameren Missouri's proposed program "design," that is, if the goal is to meet customer desires and yes, make a profit for all customers' benefit.

As Company witness Steve Wills explained in his direct testimony, the proposed program is designed differently than Staff may be used to because it is a voluntary service that provides customer value above and beyond the services reflected in base rates for basic service.[21] The Company readily agrees that customers would be harmed by charging them for a captive service they must take in order to power their homes at a price in excess of the costs of providing the service. No such proposal has been made in this case. Mr. Wills summed up this debate about "design" well when he rebutted Ms. Lange's 19 charts and graphs and her alternative, cost-based program design with the following straightforward points:[22]

- The program is a logical extension of the Company's electric service as clearly the surge protection devices are provided in connection with that service, just as the statutory definition of "electric plant" contemplates;
- It would not be just and reasonable for the Commission to approve the program *if* it was designed in a manner that it was likely to require subsidies. There is not a shred of evidence in this record indicating the subsidies are likely and overwhelmingly, the record indicates that indeed subsidies are not likely but rather, all customers are very likely to benefit;
- There is of course *some* uncertainty about the ultimate level of participation, but the Company has priced the program at a level that makes it *highly unlikely* there will be a subsidy; and

[21] Ex. 6 (Wills Corrected Surrebuttal) p. 27, ll. 18-22.
[22] Id., p. 28, l. 10 to p. 29, l. 17.

- Programs that by design pose the risk of a subsidy, like energy efficiency programs, have regularly been approved by the Commission because the Commission had a reasonable basis to conclude that those subsidies will not exist (and for its own reasons, favored the programs).

The Commission similarly not only has a reasonable basis – but a very strong basis – to believe subsidies will not exist from the Company's proposed program, as outlined in detail at pages 7-8 of the Company's Initial Brief. Regardless, the Company addresses a few of Staff's specific points in this section of Staff's Initial Brief, below:

- Page 10: Staff complains that the program is not cost-based. As noted, by design the program charge, which is similar to that charged by other similar programs, will likely exceed program costs by somewhere between approximately $2.75 per participant per month (worst case) to approximately $7 per participant per month (best case).[23]
- Page 10 (continued): The termination fee issue Staff raises is a red herring. Participants are not paying for a device; they won't own it, they won't be responsible for it; they won't have to maintain or replace it. Instead, customers will be paying for an ongoing service and the ongoing protection the device the Company has installed provides them, plus the limited manufacturer's warranty. In any event, termination fees play a very small role in the program: in the expected case, termination fees are expected to comprise a mere 1.1 percent of the total program revenues, or $726,000 out of $66 million.[24]
- Pages 10-11: Staff claims that Ameren Missouri did not provide information regarding how other programs progressed over time. To the contrary, Mr. Schneider testified about the establishment of Ameren Missouri's estimated participation rates based on the peer programs

[23] Company's Initial Brief, pp. 7-8.
[24] Tr. p. 125, l. 9-25 ($726,000/0.011 = $66 million).

studied (2%/5%/8% after five years, in the worst/expected/best-case scenarios)[25] and about the fact that some of the peer programs have operated for 20-30 years.[26] The logical conclusion to draw from this evidence is that these kinds of programs have participation levels that sustain them economically over time.

- Pages 11-12: Staff claims the program creates responsibility for non-participants to "indemnify" shareholders and poses a "double-recovery" problem. Neither claim is true. As explained in the Company's Initial Brief (pages 16-17), it is highly likely that the Company will experience regulatory lag (bear program losses, if any) between program start-up and when rates reflecting any program costs (and revenues) would be reset. And if the program is not successful, the Company itself (and the Commission if the Company for some reason didn't voluntarily do so) would end the program after only three years of operation when the Company comes back to the Commission with a financial analysis of the program's results, which might or might not mean non-participant rates are, for some time, higher than they otherwise would have been (by at most 3 cents per month[27]) had the program not operated. There is also no "double-recovery," whatever Staff means by the phrase (which Staff completely fails to explain).[28] Customers pay for service, not for the property used to render it. *See, e.g., State ex rel. Empire Dist. Elect. Co v. Pub. Serv. Comm'n*, 100 S.W.2d 509, 511-512 (Mo. 1936) (The Court making clear that in addition to the, just-stated principle the law is that by "paying bills for service . . . [customers] do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company." (internal citations

[25] Company's Initial Brief, p. 8, including the Table and footnote 5; Tr. p. 131, l. 18 to p. 132, l. 4.
[26] Tr. p. 98, ll. 5-9.
[27] See Company's Initial Brief, pp. 16-17.
[28] Staff points to page 10 of Ms. Lange's rebuttal testimony, which makes no mention of "double-recovery" and which is demonstrably flawed, as explained by Mr. Wills at page 12 of his surrebuttal testimony.

omitted). The Commission will set just and reasonable rates in each rate case, based on a revenue requirement that included surge protection program costs and revenues (assuming program approval) along with all the Company's other costs and revenues. If the actual cost of service goes down after those rates are set, the Company will experience regulatory lag but will not "double-recover" any cost, just as it will not "under-recover" a cost if the revenue requirement goes up after rates are set. To the contrary, its costs are what they are. As is always true, rates may or may not, at any given point in time, precisely match the cost of service.

- Page 12: While only Commissioner Rupp can provide irrefutable confirmation about whether he was expressing "concern" about the rate impact of the program i.e., whether he had real "concern" the program would create subsidies for non-participants as Staff implies, a fair reading of the entire exchange between the undersigned counsel for the Company and Commissioner Rupp suggests otherwise, Staff's suggestion to the contrary notwithstanding. Instead, placed in context Commissioner Rupp's question appears to seek confirmation that if the program were approved with the three-year condition recommended by the Company, the risk would, from a rate perspective, *not* be much if any of a concern at all. That this was the point Commissioner Rupp was driving at with his question appears to be confirmed by the rate impact – again in this three-year no one signs up case -- estimate given to him by Mr. Wills later in the hearing in reply to Commissioner Rupp's question – when Mr. Wills confirmed that even if the Company bore none of the costs (unlikely due to regulatory lag) the exposure of customers would only be about 3 cents per month.[29]

[29] See footnote 27, *supra.*

- Page 12 (continued): Staff attempts to build on its (likely mistaken) characterization of Commissioner Rupp's "concern" by pointing to various "scenarios" based on Ms. Lange's concoction of a program that bears no resemblance to the one proposed by the Company (cited by Staff in footnote 68). These scenarios are the ones that Ms. Lange herself prefaced with "**[i]f** all assumptions used to set the rate in my example are correct and **[if]** the levelized revenue requirement is used….", then here is the resulting math.[30] But Ms. Lange's scenarios are nothing more than examples which are not in any way based upon the proposed program, but instead are based on her own made-up "simplified example."[31] As Mr. Wills explains in detail, when using the *actual* program design, it is highly likely that the program will make money (i.e., lower rates) for all customers.[32] Following discussion of these irrelevant "simplified example" scenarios, Staff then then characterizes Ameren Missouri's program modeling as being based on "unrealistic" assumptions, but the only material assumption Ms. Lange claimed actually resulted in what she characterized as an "unreasonable" (not unrealistic) projection was the Company's simplifying assumption for purposes of its analysis that it would gain no new customers after year 5.[33] The Company agrees: it is unrealistic to assume that the Company will gain not a single new participant after year five, but it is unrealistic in a way that makes it even *less likely there will be a subsidy* because use of a more realistic assumption (customers keep signing up, either additive to existing ones or replacements) indeed is more realistic and would provide even more revenues in excess of program costs.[34]

[30] Ex. 13 (Lange Rebuttal), p. 9, ll. 8-9.
[31] Id., p. 5, l. 4.
[32] Ex. 6, pp. 5-11.
[33] Ex. 13, p. 21, ll. 7-8.
[34] For a more detailed discussion of why this is true, see pages 6-7 of the Company's Initial Brief.

- Page 13: Despite having had several weeks to provide its initial Recommendation and an additional nearly three months to file rebuttal testimony, to this day Staff has not made any material effort to actually explain any specific criticisms of the proposed program tariff (or to offer any specific or really even any general improvements that it believes should be made). The Company has committed to making sure its customers are fully educated on the program if it is approved and has offered to seek Staff and OPC input in that regard. With respect to the two items mentioned in the Staff's Initial Brief, as Staff well knows Ameren Missouri's tariffs provide for standard voltage that would be provided to program participants (residential customers) of 120/240 volts.[35] If the Commission believes a specific reference or further delineation should be included in the program tariff to draw a clearer line between these well-understood service levels and the program, the Company of course is willing to make whatever clarification the Commission deems necessary. With respect to Staff's criticism about whether the tariff contains sufficient information about claims under the manufacturer warranty, similarly the Company is more than willing to address any specific concern the Commission may have as part of filing compliance tariffs following approval of the program.
- Pages 13-14: With respect to Staff's continued fixation on the relatively minor amount of termination fees expected as the program operates, it makes no sense to operate a program whereby all revenues are by design used to offset the revenue requirement and lower rates for all customers while treating the fees (or the investment in the devices) as contributions in aid of construction ("CIAC"). As Mr. Wills explains, while CIAC treatment makes sense when a utility must expend funds that the resulting revenues from the utility service are *not* expected

[35] Mo.P.S.C. Schedule No. 6, 1st Revised Sheet No. 107.

to cover the expenditure, it makes no sense at all to do so when the revenues – as here – *are* expected to cover the Company's expenditures, and more.[36]

D. Remaining Staff Contentions.

The Company already addressed Staff's proposed conditions discussed in Section III.B. of Staff's Initial Brief (see pages 17-18 of the Company's Initial Brief) and will not repeat the discussion here.

With respect to customer education addressed in Section IV of Staff's Initial Brief, the Company has unequivocally indicated that it will make sure to educate and inform customers to the best of its ability, including by soliciting and receiving Staff and OPC input on how to best do just that.[37] The Company has no objection to ensuring that the educational/marketing materials include each of the first five bulleted items listed on page 17 of Staff's Initial Brief, but does question providing descriptions of complaint processes that are unaffected by the existence of the program.

With respect to the introductory comments in Section V of Staff's Initial Brief, see pages 18 to 19 of the Company's Initial Brief. As addressed there, no additional accounting requirements should be imposed on program approval. Such requirements are impractical and completely unnecessary. As Mr. Lansford explains in his surrebuttal testimony,[38] the exercise of adding general ledger codes or subaccounts cannot (nor should it) be done for this above-the-line program any more than it is done for the many costs and revenues associated with all other aspects of the Company's business.[39] The Company will specifically account for discrete, incremental program costs – the investment in the devices, depreciation on those devices,

[36] Ex. 6, p. 25.
[37] See the Company's Initial Brief, pp. 9-10.
[38] Ex. 2. (Lansford Surrebuttal)
[39] Id., pp. 9-10.

payments to the administrator hired to run the program, and all participant revenues.[40] But other revenue requirement items are by their nature not directly traceable to any given aspect of the Company's operations.[41] If despite Commission approval of the program, Staff decides in a later rate proceeding that some allocation of such other items ought to be made to the program (again, an inappropriate exercise if indeed the costs *and revenues* are to be passed on to customers) it is free to come up with whatever allocation method it desires to argue for. But it would be inappropriate (and in fact not possible) to in effect pre-judge the issue by somehow pre-coding the Company's ledger with a view of what those allocations should be that Staff has not expressed in any way in the record of this case, and with which the Company disagrees. The Company has committed to providing a financial analysis of the program in each rate proceeding using reasonable allocation methods to identify amounts in the revenue requirement that are directly related to the program.[42] The Staff can take issue with some aspect of the analysis, as they can with any issue in a rate proceeding.

Finally, Staff raises a more specific issue in Section V.A of its Initial Brief, that is, it discusses plant-in-service-accounting ("PISA")[43] and makes a vague but flawed claim of some kind of "double-recovery". However, the claim is based on a flawed and false premise, that is, that customers are somehow "paying for" specific assets and costs today when they pay their electric bill for the electric *service* they received. As earlier noted, customers do not pay for costs or assets used to provide service but rather, they pay for service. *Empire*, *supra.* There simply is no "double-recovery" because there was no "recovery" of any specific cost or investment in the first place.

[40] Id., pp. 4-5.
[41] Id., p. 3, ll. 18-20.
[42] Id. p. 5.
[43] Section 393.1400, RSMo, (Cum. Supp. 2020).

Moreover, as Staff concedes (assuming the devices are "electric plant"), the investment in the surge protection devices is "qualifying electric plant" that the applicable statute (Section 393.1400.2) requires be included in the PISA regulatory asset. That same statute dictates the accounting and ratemaking treatment of the deferred sums, including that all plant-related accumulated depreciation and accumulated deferred income taxes be taken into account in determining the return portion of the regulatory asset.[44] And the statute expressly prohibits offsetting, reducing, or adjusting the regulatory asset balance.[45] Staff is proposing this requested accounting so that it can "propose an adjustment to remove depreciation and return from the PISA deferral."[46] Such removal would clearly reduce the regulatory asset balance and, consequently, would be unlawful.

II. <u>REPLY TO OPC'S INITIAL BRIEF</u>

In the end, there is little daylight between the Staff's and OPC's ultimate positions in this case. Both parties do not believe the program should be offered as a regulated program, and both would apparently rather the Company not offer customers the choice to subscribe to this service, or have the opportunity garner significant revenues in excess of the program's costs for the benefit of all customers. OPC does agree that the surge protection devices are "electric plant" but suggests that if the Commission approves the program all benefits the program is expected to provide to nonparticipants should be given only to participants through isolation of all costs and revenues into a single surge protection program participant rate class for ratemaking purposes. Regardless, adoption of these positions will kill the program because it

[44] Section 393.1400.3(2).
[45] Section 393.1400.2(1).
[46] Ferguson p. 15.

will defeat one of its primary purposes, that is, to contribute to more affordable electric service for all customers.

OPC really only makes one substantive point not made by the Staff and attempts to amplify one other point about the efficacy of the service the Company proposes to provide. We will first briefly address OPC's second point.

After spending many minutes trying to get the only engineer involved in this case with actual experience with surge protection devices to concede his point (Staff witness Bax), OPC's counsel finally posed a hypothetical question to Company witness Schneider where he posited a case where the device the Company plans to install is somehow placed on the customer's electrical system (described by OPC's counsel as on the "customer's side of the meter" – wherever exactly that would be). And Mr. Schneider did say that in such a hypothetical scenario such a device would "likely" provide the same protection.[47] But the record reflects that the device simply cannot be installed in the way OPC hypothetically posits, as clearly demonstrated by the nearly four pages of hearing transcript consumed by a line of questioning where Mr. Bax refused to agree with OPC's counsel that the device at issue (or one of its type) would ever be installed in such a manner.[48]

But all of this is largely beside the point, for the reasons addressed earlier in connection with Staff's somewhat similar claim that it is the specific device that the participating customer is paying for in the proposed program. It is not, for the reasons given earlier.

OPC's other point – not joined by the Staff in Staff's Initial Brief – is that the program as proposed is "discriminatory."[49] Under Missouri law, distinctions between the service provided

[47] Tr. p. 91, l. 16 to p. 92, l. 6.
[48] Tr. pp. 155 to 159.
[49] OPC Initial Brief, p. 6.

and the charges for that service are allowed so long as they are not *unduly* discriminatory. What is *undue* discrimination? "[A] difference in charge which is not based upon difference of service . . . [or] when based upon difference of service [the difference] must have some reasonable relation to the amount of the difference, and cannot be so great as to produce an unjust discrimination." *State ex. Rel. The Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 44-45 (Mo. 1931) *citing Civic League of St. Louis et al v. City of St. Louis,* 4 Mo. P.S.C. 412.1. *See also Western Union Telegraph Co. v. Call Pub. Co.,* 181 U.S. 92, 100 (1901), *quoted with approval* by our Supreme Court in *The Laundry, Inc.* at 34 S.W.2d at 45 (The principle of equality that calls for all to have equal service and charges does not forbid different charges for different service, but it "does forbid any difference in charge which is not based upon difference of service.").

Here, the difference in charge (participants pay $9.95 per month, non-participants do not pay) is clearly based upon a difference in service (participants receive surge protection service). The focus of the prohibition on *undue* discrimination is on the customer who is getting something another customer is not getting and *not* paying for it or *not paying enough* for it. No such situation presents itself here. Not only is OPC's argument not supported by what the law has long understood undue discrimination to mean, but OPC cites no authority to support some different meaning, such as that advanced by OPC here.

Utilities have for years offered programs, the costs and revenues of which are reflected in the rates of all customers, where only a subset of the customers are participants in the programs. The classic examples are energy efficiency programs (including pre-MEEIA and MEEIA), but there are others, including the Company's electric vehicle corridor charging program. Those programs are not unduly discriminatory, and neither is the proposed surge protection program.

III. CONCLUSION

The Company's perspective is that it is time for the provision of electric service to advance in ways that provide customers more choices, greater convenience, and additional value, with those advantages accruing to the benefit of program participants and the benefit of more affordable rates enabled by program revenues in excess of program costs accruing to all customers. This evolution has started – energy efficiency, electric vehicle corridor charging, community solar, and other similar programs. The Commission of course must judge for itself whether the utility has made a reasonable case that the likelihood is that all customers will benefit over time from the program. And to be clear: this is the Commission's choice to make, notwithstanding Staff's tortured and obviously flawed claim that the Commission's hands are tied from a legal perspective simply because the lights will stay on without the proposed program.

The Company respectfully submits that it has made a sufficient showing that all customers are highly likely to benefit, and that it has put its money where its mouth is, so-to-speak, since due to regulatory lag it will likely bear early losses due to start-up costs, and has affirmatively urged the Commission to condition program approval on the Company coming back after three years of program operation, as outlined in more detail in the Company's Initial Brief.

The Commission should approve the proposed program, with the tariff clarification outlined in Mr. Schneider's surrebuttal, with other desired tariff changes to clarify the two issues noted in Staff's Initial Brief, if the Commission believes that to be necessary, and with the just discussed condition requiring the filing of an analysis and creation of a docket to review the program after it operates for three years.

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Respectfully submitted,

/s/ James B. Lowery________

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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First-Class United States Postal Mail, postage prepaid, on this 25th day of May 2021, to all counsel of record.

/s/ *James B. Lowery*