

<http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=13-E-0199>) (Declaratory Ruling)

In May 22, 2013, the NYDPS opened a new proceeding (Case 13-E-0199 *In the Matter of Electric Vehicles Policies*). The purpose of the notice was to ensure the NYDPS's "regulations and policies promote the continuing evolution of the market for [plug-in electric vehicles] PEVs and for supporting services, while maintaining the safety and reliability of New York's electric grid." (NYDPS Declaratory Ruling, p. 1) The NYDPS asked for comments on its jurisdiction and the potential of the NYDPS decision.

The NYDPS determined it does not have jurisdiction over charging stations, the owners, or operators of charging stations, or the transaction between such owners of charging stations and members of the public. In making its decision, the NYDPS noted comments that "Charging Stations are not a natural monopoly," and that the NYDPS should "take care to maintain its ability to respond to a market that is likely to evolve in ways that cannot be anticipated." (*Id.* p. 1). The NYDPS considered it important to maintain its ability to respond to the market for charging stations as it evolves.

Analyzing the New York Public Service Law the NYDPS found EVCS are not electric plant:

Charging Stations do not fall within the definition of "electric plant" because Charging Stations are not used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light heat or power. Instead, and as urged by several commenters, Charging Stations are used to provide a service,

specifically, charging services. This service requires the use of specialized equipment and allows the customer to do only one thing, charge a PEV's battery. The primary purpose of the transaction between Charging Station owners/operators and members of the public is the purchase of this service and the use of this specialized equipment. While the customer is using electricity, this is incidental to the transaction.

The Missouri Public Service Commission Law's definition of "electric plant" is identical to that of New York. The evidence in this case shows that approval of this pilot project would be an obstacle to ChargePoint's investment in charging stations. (Tr. p. 335:1-13) There is no evidence in this case that Ameren's installation of two charging stations in the St. Louis area, three EVCS on I-70 and one in Jefferson City will promote EV purchases.

By taking jurisdiction, the PSC would impose additional administrative burdens on charging station owners/operators, which may deter marketplace participation. (Exh. 200, Marke Reb. 7:6-8). The inherent competition in the market eliminates the need for Commission regulation of the prices and terms of the charging service provided by EVCS. *Id.* at 11-16. As explained further below, any exercise of jurisdiction by the Commission has significant potential to stifle the marketplace for this emerging technology. Approval of this tariff boxes Ameren customers into paying for technology that is just emerging, creating the likelihood of stranded assets. (Exh. 200, Marke Reb. 9: 3-22). NYDPS's decision avoids this significant drawback.

ISSUE 1. Does the Commission have jurisdiction to regulate utility-owned and operated electric vehicle charging stations operated in a utility's service territory?

“The PSC is an administrative agency with limited jurisdiction and the lawfulness of its actions depends directly on whether it has the statutory power and authority to act.” *State ex rel. Gulf Transp. Co. v. Pub. Serv. Com. 'n*, 658 S.W.2d 448, 452 (Mo. Ct. App. 1983). Since it is purely a creature of statute, the PSC's powers are limited to those conferred in statute, “either expressly, or by clear implication as necessary for the Commission to carry out the powers specifically granted to it.” *State ex rel. City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc 1958).

Different statutes grant the Commission different powers and responsibilities. The *Gulf Transport* case explains the PSC's roles in regulating competition as opposed to regulating state-sanctioned monopolies:

[T]he statutory law regarding the motor carrier industry establishes a scheme of regulated competition and not officially sanctioned monopoly. When the entire statutory framework creating and authorizing the P.S.C. is examined, it becomes apparent there exists a fundamental difference between the economic structure of the motor carrier industry and that of traditional public utilities such as electrical power, communications, water, and natural gas. The industries in this latter group have generally been classified as theoretical "natural monopolies". Unlike these so-called "natural monopolies", the motor carrier industry is characterized by

comparatively low fixed cost and capital investment requirements which serve as high entry barriers to new competition in natural monopoly industries. The absence of these barriers to entry in the motor carrier industry reduces significantly the possibility of monopoly pricing because attempts to engage in such pricing attract new competition.

Competition benefits the . . . public, because it forces prices closer to cost, and creates incentives to provide the service desired by consumers.

Gulf Transport at 456 (internal citations omitted).

Under § 386.250 (1) the Public Service Commission Law sets out the jurisdiction of the public service commission when it is regulating natural monopolies,. As described in *Gulf Transport* Ameren is a “natural monopoly” and this is a different statutory scheme than the legislature adopted for regulated competition. *Gulf Transport* at 454. Electric corporations have high fixed cost and significant capital investment costs which create barriers to entry. The availability of EVCS demonstrates the lack of barriers to entry to providing EV battery charging services. With this application, as a natural monopoly, Ameren proposes to enter an existing competitive market for EVCS. The PSC regulates Ameren as a natural monopoly and, as such Ameren’s entry into this competitive field inhibits other market entrants. *Gulf Transport* at 454.

In terms of the Commission’s jurisdiction over Ameren, there is no question the PSC has jurisdiction over Ameren as an “electric corporation.” § 386.010(15) RSMo. In this case, the PSC’s jurisdiction is limited by the statutory definition of “electric plant.” §386.010 (14) RSMo. The issue is whether this particular equipment – EVCS – falls

within the definition of “electric plant.” *Id.* EVCS is not “electric plant” under the statutory definition. The use of specialized equipment to charge vehicle batteries for transportation purposes is not provision of electricity for light, heat, and power.

Company’s witness Mark Nealon regularly referred to EVCS as a means to fuel electric vehicles . (Exh. 001, Nealon Dir. 3:22-23). Ameren proposes ‘the electric fueling charges’ be based on plug time. (*Id.* at 5:22). “In addition to the physical means by which EVs are fueled . . .” (*Id.* 9:20). Customers use EVCS “to fuel their vehicles. . .” (*Id.* at 10:11).

Not only should the Commission deny Ameren’s tariff proposal based on statute, and Missouri law interpreting the statute, which alone is sufficient, there are also important public policy reasons for denial.

2. **Public Policy**

2. A. Are there public benefits realized if the Commission approves Ameren Missouri’s proposal to install six electric vehicle charging stations in Ameren’s service territory?

A utility’s infrastructure investment must be devoted to what is necessary to provide safe and adequate service at just and reasonable rates. Sections 393.130; 393.170.3 RSMo. This offering is not necessary for Ameren to provide adequate service to ratepayers. “[R]egulatory treatment of a nonessential, competitive service raises policy concerns. The concern with any utility treating these types of assets “above the line” as opposed to “below the line” is that the shift in risk from shareholder to ratepayer is not

warranted and comes at the expense of market efficiencies.” (Exh. 200, Marke Reb. 7:20-24).

The vast majority of Ameren’s customers do not own EVs. Only a tiny percentage of one percent (.14 %) of Ameren’s customers actually own EV. In fact, the number of EVs operated state-wide is under 3,000. Records from the Department of Revenue show the number of EV passenger vehicles registered in each county with a “Grand Total” of 1,577. (Exh. 203). Moreover, EV drivers usually charge at home. (Tr. 201:8-10). When they charge away from home, customer have choices including a diverse set of Charge Point customers offering free or low-cost charging in the St. Louis area. (Exh. 302)

2. B. Is Ameren acting as a regulated utility in offering this service?

Ameren is seeking to engage in a competitive business to provide a service that is not necessary for it to provide safe and adequate service to its customers (§393.140).

Ameren can only speculate whether there is, or will ever be, a public demand for these EVCS. Ameren is seeking tariff approval because it seeks buy-in by stakeholders. (Tr. at 40:21 - 41:25). As a regulated utility, Ameren intends to place these charging stations into rate base in its next rate case. (Tr.) By placing EVCS into rate base, “utilities receive a guaranteed rate of return on an investment.” (Exh. 200, Marke Reb. 7:11-12).

When the service is non-essential and when “a competitive market already exists, a utility’s ability to get a return of and on investment that “effectively creates a regulatory barrier for new entries, unfairly punishes existing competition, and shifts risk from utility shareholders to ratepayers. Instead of promoting growth, an insulated regulated

monopoly can undermine competition which may reduce [market] efficiency.” (*Id.* at 7:12-16).

2. C. Does the pilot design proposed by Ameren, impact competition with third parties for charging station sites in its service territory?

The evidence is overwhelmingly that there is already a competitive EVCS industry. (*see example* Exh. 302). “Both ratepayers and drivers are best served by a competitive market” for EV charging. (Marke Reb. 5:2-3). A wide variety of businesses offer EV charging to customers, among them are electric vehicle dealerships, apartment complexes, hotels, businesses and parking garages. (Exh. 302)

If Ameren’s theory is correct, that “serious penetration of EVs is just around the horizon as range anxiety is eased by longer battery life and reduced automobile costs, then demand should increase and the market will respond accordingly with both EV cars and EV charging stations as appropriate. Under this favorable scenario, the risks of stranded assets are eliminated and consumers, Ameren Missouri, and the economy as a whole benefit from fair, efficient competition.” (Exh. 200, Marke Reb. 5:16-23)

Ameren already has competition for installation of DC fast charge EVCS along the I-70 corridor. Charge Point’s witness Anne Smart testified Charge point it has plans to deploy EVCS along the I-70 fast charge corridor. (Tr. Vol. 2, 334:7-12) Those plans may be abandoned if the Commission approves Ameren’s proposal. (Tr. Vol. 2, 332:3-5). This evidence clearly demonstrates Commission regulation of EVCS creates an anti-competitive environment, undermining the development of a viable market for EV charging services (Tr. Vol. 2, 335:5-14)

As OPC has stated, both Ameren and the free market for EVCS “*can and should* provide a symbiotic force for ratepayers and consumers alike.” (*Id.*) This approach will benefit both ratepayers and shareholders and will only happen if the PSC encourages competition for installation of EVCS and requires Ameren to educate its customers on the cost to charge an EV, adopt a well-designed, adequately publicized TOU rate to off- peak battery charging. In terms of educating customers Dr, Marke testified:

It is in the public interest for Ameren to support rather than hinder competition. To do that, Ameren should focus on educating its customers.

If the goal is just to promote EV adoption, you know, our position had been that probably the best way to do that is just through education, that right now if I drive -- I know just conceptually gas costs about \$2 a gallon. I don't know exactly what a kilowatt hour would cost me, and I would venture to say that most Ameren Missouri customers don't know.

If I'm a prospective EV -- if I'm looking to purchase a car, I would want to know what the cost of that fuel would be over, say, a given year. Being able to educate car dealers, being able to get that message across I think would be infinitely more cost effective than [installation] of four charging stations west of Wentzville.

Tr. 559:12- 560: 2)

Instead of educating its customers, in its opening statement Ameren stressed what it hopes to learn and whether, if Ameren builds EVCS, “they will come.” (Tr. 46:21-24.) Instead of Ameren’s hope EV buyers will come, it is in the public interest for Ameren to

do what it already knows as a regulate utility, and let Charge Point and other EVCS experts deploy charging stations.

By its own testimony Ameren is not an expert in EVCS deployment. It is proposing to build this pilot project to learn what Charge Point already knows. [Ameren] want[s] to gather data. We want to figure out what would be the best way to deploy a lot of these situations going forward . . . We're going to gather good long-term information so we can figure out how to continue to deploy it. We want a little bit more information before we build it and hope they will come.” (Tr. 42:3-21)(emphasis added).

C. Does the pilot design proposed by Ameren, impact competition with third parties for charging station sites in its service territory?

Yes. The Commission’s approval of the pilot project would stifle competition when a competitor is poised to install DC fast chargers along the I-70 corridor. ChargePoint witness Anne Smart (“Smart”), testified that while Ameren’s proposal appears to fill a hole [in EVCS availability it also creates a hole because [ChargePoint] can’t compete. ChargePoint currently has plans to install DC fast charging stations along the I-70 corridor as part of its nationwide plans. (Tr. 331:7-334:12)

At hearing in response to Ameren’s question “Have you made any detailed actual plans [about the Missouri corridor]? Smart replied, “We have plans to expand along the fast act designated corridors, including the I-70 corridor.” In response to Ameren’s question, Staff asked if ChargePoint would “feel itself locked out of that corridor” if the Commission approved Ameren’s pilot program but” allowed pricing to be competitive or set by the market.” Tr. 335:1-13. Smart responded saying: “So our ability to sell at full

cost a charging station to a site host or to develop a site if they are to receive something for free of charge from Ameren where Ameren has used the rate base in order to pay for the cost.” *Id*

Based on ChargePoint’s testimony, there is no question competition for installation of EVCS already exists in the same area Ameren is proposing to install EVCS. Based on Ms Smart’s testimony referenced above there is no question Ameren’s proposal will interfere with the plans of that competitor. Public Counsel explained the concern with thwarting competition: “EVs and the current and future state of the transportation market is one shrouded in uncertainty with outstanding questions leading to a greater level of investment risk.” (Exh. 200, Marke Reb. 9:1-12).

Regulated utilities are less nimble and are likely slower to respond efficiently, increasing the risk ratepayers will bear the financial burden of stranded assets with minimal emissions reductions. ((Exh. 200, Marke Reb. 7:9-24).

3. Should the cost of installing the electric vehicle charging stations be booked below the line or above the line and recovered from ratepayers?

As explained above, the Commission should decline jurisdiction. If Ameren decides to proceed with deployment of EVCS, it would mean the costs and revenues would be booked below the line.

4. Does Ameren Missouri’s proposed tariff represent the proper rate design for its EV charging station pilot project?

Public Counsel maintains the PSC should reject the tariff. There is no proper rate design for a non-essential service. The charging station service Ameren proposes is not a

utility service. The Commission is not authorized to approve tariffs when the service is not for light, heat, or power. The Commission should not approve the proposed EV pilot program EV charging station tariff because the provision of this service is not a regulated activity. The market should set the appropriate price without government intervention.

The proposed rates for the electric vehicle charging service will not cover the cost of the pilot project. (Tr. Vol. 4 507:3-9) The Company intends to include the cost of these projects in its rate base and paid for by all ratepayers. In effect, ratepayers will be subsidizing the cost of the Company's experimental project that will benefit the small group of people who have chosen to purchase electric vehicles. (Exh. 200, Marke Reb. 3:11-14) No one, including the Company, disagrees there is a subsidy from customers who will never use this service. (Exh. 001, Nealon Dir. 7:6-13.) Staff objects to the subsidy, recommending that if the Commission approves this project, in future rate cases the Company would absorb any shortfall. Staff further testified the size of the subsidy is not what matters, it is the "concept." Staff recommends the costs be booked "above the line but that there would be an imputation to protect ratepayers. (Tr. Vol. 4, 380:7-8)

Approval of this tariff is not in the public interest, is anti-competitive and will likely impede rather than promote EV adoption.

WHEREFORE, the Office of Public Counsel respectfully recommends the Commission decline jurisdiction over regulation of charging stations, deny Ameren's request to approve its tariff and grant such other relief as the Commission deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 18th day of January, 2017.

/s/ Lera L. Shemwell