

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Union Electric)
Company d/b/a Ameren Missouri for Approval)
Of a Tariff Setting a Rate for Electric Vehicle)
Charging Stations)

Case No. ET-2016-0246
Tariff No. YE-2017-0052

STAFF RESPONSE TO ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Response* to the Commission's *Order* of October 18, 2016, states as follows:

On October 7, 2016, Ameren Missouri filed a revised tariff for a pilot program to whereby the Company would install and operate electric vehicle ("EV") charging stations at locations within its service territory. On October 13, 2016, the Office of the Public Counsel ("OPC") and Consumers Council of Missouri ("CCM") filed motions to reject the tariff, asserting that the Commission lacks jurisdiction to approve the proposed tariff because the proposed activity is not a public utility service. OPC also asserted that the tariff ought not to be approved because (1) the charging stations will serve the general public rather than Ameren Missouri's ratepayers; (2) the 99.96% of Ameren Missouri's ratepayers who do not operate electric vehicles would be required to subsidize the very few that do; (3) and because EV charging is a competitive service, not a regulated utility service.

On October 18, the Commission directed that Staff shall respond to the jurisdictional arguments of OPC and CCM, and also to these questions:

(A) What is the statutory authority under which the Commission may approve the tariff filed by Ameren Missouri in this case?

(B) Are there any factual questions that must be addressed in determining the Commission's jurisdiction over electric vehicle charging stations?

(C) Is a certificate of convenience and necessity required for Ameren Missouri to build, install, and operate the electric vehicle charging stations?

Jurisdiction:

Staff suggests that the Commission certainly has jurisdiction over Ameren Missouri's proposed activity of installing EFV charging stations for the use of the general public in charging electric vehicles.

As has been explained by OPC, the Commission is a creature of statute and its jurisdiction in any situation must be found by reference to the plain language of the Missouri statutes.¹ Statutory language applicable to EV charging stations is not hard to discover. Section 386.250, RSMo,² provides:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter (1) To the manufacture, sale or distribution of . . . electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to . . . electric plants, and to persons or corporations owning, leasing, operating or controlling the same[.]

The statute confers jurisdiction over two activities: first, the activity of manufacturing, selling or distributing electricity for light, heat or power; second, the activity of owning or operating "electric plants." What is an "electric plant"? Section 386.020(14) defines "electric plant" as "all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to

¹ *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979).

² All statutory references are to the Revised Statutes of Missouri (RSMo.), as currently amended.

facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power[.]”

EV charging stations are devices used to convey electricity into electric vehicles. Electric vehicles, like all automobiles, convey passengers and property from place to place over the public roads and highways and are equipped with lights and heating systems. The electricity delivered into electric vehicles by EV charging stations are necessarily used for light, heat and power. It follows, therefore, that EV charging stations fall within the definition of “electric plant” and that the activities of owning and operating them and using them to charge electric vehicles fall squarely within the ambit of the statute. Section 386.020(15) in turn, defines every entity “owning, operating, controlling or managing any electric plant” to be an “electrical corporation.” Section 386.020(43) defines every electrical corporation as a public utility “subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter[.]” Consequently, the operation of an EV charging station is generally subject to the regulation of the Commission.

There are undoubtedly fact patterns where an EV charging station would not be subject to the Commission’s jurisdiction, just as there are circumstances in which the operation of electric plant and the distribution and sale of electricity are not within the Commission’s jurisdiction.³ The use of an EV charging station by its owner to charge her own vehicle, for example, would not make her a public utility, just as her use of a

³ *Danciger, supra*. By statute, the Commission does not regulate municipal power plants or rural electric cooperatives.

wall socket to power an electric lamp does not make her a public utility. The courts have cautioned that whether or not a given actor is a public utility depends upon what it actually does.⁴

Section 386.020(15) contains certain exceptions and the courts have also glossed this statutory definition. Railroads that generate power for railroad purposes or for the use of their tenants are not electrical corporations. Any entity that generates and distributes electricity on private property for railroad purposes or for its own use or for the use of its tenants is not an electrical corporation. However, both of these exemptions may be lost if the electricity is sold to others.⁵ The Missouri Supreme Court has held that, in addition to using electric plant to produce electricity for light, heat and power, an entity must hold itself out as serving the general public before it becomes a public utility.⁶

Staff has elsewhere expressed the view that EV charging stations should be treated in a manner similar to pay telephones.⁷ Telephone companies that operated pay telephones within their certificated service areas did not need any additional certification to do so; the telephones were treated as utility plant and the Commission regulated the rates. Third-party operators had to obtain a certificate for each pay

⁴ *State ex rel. and to the use of Cirese v. Public Service Comm'n of Missouri*, 178 S.W.2d 788, 790 (Mo. App., W.D. 1944).

⁵ § 386.020(15). While the statute is clear that “sale to others” extinguishes the exemption, the *Danciger* case conditions the loss of the exemption on the nature of the relationship of the buyer and seller. By “others,” presumably the statute means buyers that are not tenants.

⁶ *Danciger*, *supra*.

⁷ *In the Matter of a Working Case Regarding Electric Vehicle Charging Facilities*, Case No. EW-2016-0123 (*Corrected Staff Report*, filed Aug. 9, 2016) p. 12.

telephone that they operated. At one time, there were many hundreds of active pay telephone certificates.

Turning to the arguments made by OPC and CCM, Staff notes that sophistry cannot defeat the unmistakable intention of the General Assembly. Calling the electricity delivered into an electric vehicle “transportation fuel” is a distinction without a difference. As demonstrated above, electric vehicles use electricity for light, heat and power and the activity of charging them necessarily falls within the Commission’s jurisdiction.

OPC and CCM also raise policy arguments against the proposed tariff. They complain that the EV charging stations proposed by Ameren Missouri will serve the general public rather than its captive ratepayers. Service to the general public is, of course, the essential hallmark of a public utility.⁸ That is no reason to reject the tariffs. They complain that few of Ameren Missouri’s customers will use the EV charging stations; the same was true when electric lights were first introduced. That is also no reason to reject the tariffs. Finally, they complain that EV charging is a competitive service. Maybe one day, it will be.

The most powerful policy argument raised by OPC and CCM is that the ratepayers will be required to subsidize part of the cost of the program in its initial years of operation. Staff opposed to this model, which is why Staff recommended all revenues, expenses and investments associated with Ameren Missouri’s program be recorded “below-the-line” in order to hold ratepayers harmless. Staff also recommended Ameren Missouri be required to gather data and report annually to the

⁸ *Danciger, supra.*

Commission and interested stakeholders on the impact of electric vehicle charging stations on grid reliability, recognizing the public policy that supports electric vehicles generally.

Responses to Specific Commission Questions:

The Commission's *Order* required Staff and Ameren Missouri to respond to certain specific questions.

(A) What is the statutory authority under which the Commission may approve the tariff filed by Ameren Missouri in this case?

Section 393.140(11) provides:

[The Commission shall] (11) Have power to require every ... electrical corporation ... to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such ... electrical corporation ...; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a ... electrical corporation ... in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of

every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

The Commission's rules governing the tariffs of electrical corporations are found at 4 CSR 240-3.145, *Filing Requirements for Electric Utility Rate Schedules*.

(B) Are there any factual questions that must be addressed in determining the Commission's jurisdiction over electric vehicle charging stations?

By analogy to pay telephones, the relevant facts pertaining to each proposed EV charging station must be established at the outset in order to determine whether it will be subject to Commission regulation or not. Who will own and operate it? Who may use it to charge a vehicle? Who will pay for the power thus consumed? As Staff explained in its *Report* mentioned above:⁹

- An entity that uses an EV charging station to sell electricity to anyone that wants it is thereby an electrical corporation and a public utility. This is true even if the activity is viewed as the sale of a service rather than the sale of electricity.
- An entity that uses an EV charging station to charge its own vehicles and those of its tenants and contractees is not an electrical corporation and a public utility. Thus, a homeowner that uses his or her residential current to charge his or her own vehicles and those of friends and family is not an electrical corporation and a public utility. Under *Danciger*, this is true even if the homeowner charges for the service/electricity.
- An existing electrical corporation and a public utility that uses an EV charging station to charge vehicles is generally engaged in the utility business and the EV charging station is therefore part of plant in service and a component of rate base. However, other fact patterns can be imagined, with different legal outcomes. How the utility is compensated for that service, and by whom, is a rate case issue for the Commission to determine.

⁹ *Corrected Staff Report*, *op. cit.*, p. 12.

To assist in this process, the Commission should develop and promulgate an appropriate rule, but not reject the Ameren Missouri tariff in the meantime.

(C) Is a certificate of convenience and necessity required for Ameren Missouri to build, install, and operate the electric vehicle charging stations?

A certificate of convenience and necessity (“CCN”) is the fundamental grant of authority that permits a person, corporation or other entity to engage in the business of providing regulated utility services.¹⁰ A CCN also authorizes the construction of utility plant.¹¹ The applicant must already have any necessary local franchises¹² and, in the case of a corporation, a corporate charter permitting operation as a utility.¹³ The Commission’s rules detail the supporting documentation that must accompany applications for CCNs.¹⁴

Section 393.170 provides:

1. No ... electrical corporation ... shall begin construction of a ... electric plant ... without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

¹⁰ Section 393.170, 1 and 2. Technically, “a CCN does not confer any new powers on a public utility; it simply permits the utility ‘to exercise the rights and privileges presumably already conferred upon it by state charter and municipal consent.’” *State ex inf. Shartel v. Missouri Utilities Co.*, 331 Mo. 394, ___, 53 S.W.2d 394, 399 (1932).

¹¹ Section 393.170.1.

¹² The franchise typically authorizes the utility to use the public rights of way for its pipes or wires.

¹³ Section 393.170.2.

¹⁴ See Rule 4 CSR 240-3.105.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

There are two varieties of CCN: an *area certificate*, which authorizes the provision of utility services within a certain defined territory, generally on a monopoly basis, and a *line certificate* or *plant certificate*,¹⁵ which authorizes the construction of a utility plant at a particular location or the construction and operation of a transmission line or pipeline along a prescribed route:

Certificate 'authority' is of two kinds and emanates from two classified sources. Sub-section 1 requires 'authority' to construct an electric plant. Sub-section 2 requires 'authority' for an established company to serve a territory by means of an existing plant.¹⁶

An area certificate includes authority to construct transmission and distribution lines within the service territory as necessary,¹⁷ but "[u]tilities must, nonetheless, obtain line certificates to extend transmission lines beyond their certificated areas."¹⁸

An EV charging station, while "electric plant" within the intendments of § 386.020(14), is a species of distribution plant because its function is to enable the retail end user to access the electricity for its intended purpose. Therefore,

¹⁵ ***State ex rel. Cass County v. P.S.C.***, 259 S.W.3d 544, 549 (Mo. App., W.D., 2008): "Permission to build transmission lines or production facilities is generally granted in the form of a 'line certificate.'"

¹⁶ ***State ex rel. Harline v. P.S.C.***, 343 S.W.2d 177, 185 (Mo. App. 1960).

¹⁷ ***StopAquila.Org v. Aquila, Inc.***, 180 S.W.3d 24, 36 (Mo. App., W.D. 2005): "***Harline*** appropriately ruled that transmission line extensions do not need additional authorization from the Commission, because such authority already comes within the franchise granted by a county, and territorial authority is based on the franchise."

¹⁸ ***Cass County***, *supra*, 259 S.W.3d at 549 n. 6.

Ameren Missouri does not require a CCN to install and operate EV charging stations within its certificated service area; however, it does require CCNs to install and operate EV charging stations outside its certificated service area.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will approve Ameren Missouri's revised proposed tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served electronically, or hand-delivered, or via First Class United States Mail, postage prepaid, on all parties of record herein on this 19th day of October, 2016.

/s/ Kevin A. Thompson