

**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’S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Reply Brief*, states as follows:

ARGUMENT:

1. Commission Jurisdiction:

Does the Commission have jurisdiction to regulate utility-owned and operated electric vehicle charging stations operated in a utility’s service area?

Of the ten parties in this case, only four deny Commission jurisdiction on the basis of their contention that electric vehicle charging (“EV Charging”) is not a regulated public utility service. ChargePoint likens EV Charging to charging a smart phone or other personal electronic device.

Let’s think about that. You plug a charger into your smart phone and then plug the charger into a standard wall socket. That wall socket is electric plant in the eyes of the law¹ and is part of the distribution system of whatever entity is providing the power, be it a regulated public utility, a rural electric cooperative, or a municipal power station. The owner of the wall socket is paying for the power consumed, and if the power

¹ In the same way that an EV Charging Station is electric plant in the eyes of the law. If I exact a price from someone to access my wall socket, am I thereby a public utility? The answer is “no” if the access is pursuant to a real estate lease agreement, for example, but that’s because § 386.020 specifically exempts sales of power to tenants. In most other cases, the answer is “yes.” The answer is certainly “yes” if it’s an EV Charging Station rather than a wall socket.

provider is a regulated electric utility, the owner is paying a tariffed rate, set by this Commission. Are you paying the owner of the wall socket to access it? If you are, then the wall socket owner is violating the prohibition on resale contained in the utility's tariff and has transformed itself into a public utility.

The Commission could call EV Charging an unregulated service, just as the New York Commission evidently has, but that legerdemain will not change the law. The Commission cannot bind the appellate courts, as it learned in the case of Aquila's unauthorized generation plant near Peculiar, Missouri.

Aquila, now KCP&L Greater Missouri Operations Company and familiarly known as "GMO," decided in 2004 to construct a small generating facility in Cass County, Missouri, near the town of Peculiar.² The construction site was within its service territory.³ It did not seek a Certificate of Convenience and Necessity ("CCN") to authorize the construction but proceeded without one under a 25-year old Commission decision that authorized utilities to build whatever they wanted within their authorized service territories.⁴ Neither did Aquila seek approval from the Cass County zoning authority.⁵ When the plant construction was challenged by a local activist group called "StopAquila.org," the court concluded that Aquila's position, and the 25-year old Commission decision it was based on, were contrary to the plain language of § 393.170.1, RSMo.⁶ The Commission then attempted to save the plant by belatedly

² **StopAquila.Org v. Aquila, Inc.**, 180 S.W.3d 24, 28 (Mo. App., W.D. 2005).

³ *Id.*

⁴ *Id.* at 36, and see **In the Matter of Union Electric Company**, 24 Mo.P.S.C. (N.S.) 72, 77 (1980).

⁵ *Id.*, at 28.

⁶ 180 S.W.3d at 36.

granting the CCN that Aquila had failed to obtain before constructing the plant.⁷ The Court of Appeals held that the Commission was without authority to approve the construction of a plant once it was constructed, and ultimately, Aquila was ordered to dismantle the plant and legislative action was required to save it.⁸

This Peculiar case is a cautionary tale that should serve to discourage overly-innovative legal interpretations by an administrative agency that does not have the final word. Investors deserve a settled and stable legal environment; since the Commission cannot bind the appellate courts by its determination that EV Charging is not a regulated utility service, it should not go down that road.

Let's review the law. Whether or not the business in question is a public utility depends upon what they actually do.⁹ What the operators of EV Charging Stations actually do is offer to sell electricity to any EV-driving member of the general public that wants it. That is the very definition of a service subject to regulation under the Missouri Public Service Commission Law¹⁰ and no amount of dodging and weaving and sophistry and special pleading makes it anything else.¹¹ That's why the Commission should not leave this landmine for investors by pretending that it can make it a non-regulated service by a touch of its magic wand. Remember Peculiar!

⁷ ***State ex rel. Cass County, Missouri, v. Public Service Commission***, 259 S.W.3d 544, 546 (Mo. App., W.D. 2008).

⁸ *Id.*, at 551-552.

⁹ ***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), *citing* ***Terminal Taxicab Company v. Kutz***, 241 U.S. 252, 254, 36 S.Ct. 583, ___, 60 L.Ed. 984, ___ (1916); ***State ex rel. Lohman & Farmers Mutual Telephone Company v. Brown et al.***, 328 Mo. 818, 821, 19 S.W.2d 1048, 1049 (1929); ***State ex rel. M. O. Danciger & Company v. Public Service Commission***, 275 Mo. 483, 205 S.W. 36, 39 (1918).

¹⁰ Chapters 386 and 393, RSMo.

¹¹ See ***Staff's Initial Brief***, pp. 7-11, for a detailed legal analysis.

It may be that the best public policy answer to this question is that EV Charging should not be a regulated utility service. Fine; in that case, the law must be changed. That's not something this Commission can do by itself.

2. Public Policy:

A. Are there public benefits realized from the installation of electric vehicle charging stations, specifically if the Commission were to approve Ameren Missouri's proposed pilot project?

Staff has nothing further to say on this issue.

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

Yes; in fact, anyone offering this service for compensation is thereby offering a regulated utility service.¹²

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

Staff has nothing further to say on this issue.

3. Costs:

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

Above the line, with imputed revenues to hold the ratepayers harmless.

It is frankly outrageous that Ameren would expect the captive ratepayers to underwrite its speculative investment in developing a new market for its product. None of the benefits that a robust EV Charging Station market will possibly deliver will be realized for quite some time; but Ameren wants the ratepayers' money NOW! In any

¹² Unless they are a rural electric cooperative or a municipal utility.

other line of business, it is the shareholders or proprietors who underwrite attempts to expand into new markets, not the customers.

The utilities argue that full rate recovery of Ameren's costs must be permitted unless the Commission determines that these expenditures and investment are imprudent. Because they are speculative, they are certainly imprudent. Ameren in the east, like KCPL and GMO in the west, are trying to prime the pump with EV Charging Stations. If the venture pays off, it could pay off handsomely – but success is not guaranteed. With the change in administrations and in popular sentiment, the public may lose interest in EVs. The federal government may stop pushing them. Global warming may be shown to be a hoax. The investment in EV Charging Stations may well be lost. So, yes, the venture is certainly risky and imprudent. Captive ratepayers should not be willy-nilly forced into this speculation.

4. Rates:

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

Since EV Charging is certainly a regulated service offering, the PSC must set the rate. Staff suggests that its recommended rate is the best alternative because it is the least confusing alternative.

CONCLUSION:

Staff recognizes that the only real issue to be decided is whether the Commission has jurisdiction to regulate EV Charging Stations owned by a regulated public utility. Staff's answer to that question is a clear "yes" based on its analysis of the facts, the applicable statutes and the case law. Staff urges the Commission to resist the

temptation to declare that EV Charging is not a regulated utility service because the Commission has no authority to make any such declaration.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will determine each issue in accordance with Staff's position and 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 28th day of February, 2017.

/s/ Kevin A. Thompson