

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) **File No. ET-2018-0132**
for Approval of Efficient Electrification Program.)

**SIERRA CLUB AND NRDC’S RESPONSE
TO THE OFFICE OF THE PUBLIC COUNSEL’S MOTION TO DISMISS**

Come now Sierra Club and NRDC and in response to the *The Office of the Public Counsel’s Motion to Dismiss Union Electric Company’s d/b/a Ameren Missouri’s Application*, respectfully state as follows:

I. Introduction

On February 22, 2018, Ameren Missouri filed an application for the approval of two new programs, collectively referred to as the “Charge Ahead” program.¹ If approved, Charge Ahead would create incentives for third parties to deploy electric vehicle charging stations for passenger cars and offer rebates to support customer purchase of cleaner, more efficient electric vehicles for goods movement and materials handling.² Charge Ahead is designed to improve electricity system efficiency to the benefit of all Ameren customers³, and would support much-needed air quality improvement in the company’s service territory.

On April 5, 2018, The Office of the Public Counsel (“OPC”) moved to dismiss

¹ Application, Request for Variance, and Request for Accounting Authority at 1, File No. ET-2018-0132 (filed February 22, 2018) [hereinafter: “Application”]. The company’s application is supported by the direct testimony of Steven M. Wills, Patrick Justis, Michael Harding, and David Pickles.

² Application at 3-4.

³ See Testimony of Steven Wills at 33-34, 37.

this case in its entirety, asserting lack of Commission jurisdiction. OPC suggests that issue-specific statutory authorization is required for the Commission to review certain matters, such as Ameren's application, even when those matters are squarely within its general jurisdiction and basic authority. To rationalize its position, OPC selectively quotes from two recent decisions of this Commission.⁴ Those decisions, while related to electric vehicles, are not applicable to the facts of this case. Because OPC's narrow view of the Commission's jurisdiction is inconsistent with well-settled Missouri law and this Commission's decisions, Sierra Club and NRDC respectfully request that the Commission deny this motion.

II. Argument

a. The Commission is clearly authorized to review Ameren's application under its enabling statutes and well-settled Missouri law.

OPC's basic contention is that, absent express statutory authority for electric vehicle-related incentives, the Commission may not review Ameren's application. OPC cites no direct authority for this proposition; instead, OPC suggests that the State's energy efficiency and renewable energy statutes, which, among other things, allow for incentives, generate a negative implication that forecloses Commission review of incentives of any other kind.⁵ The strength of such a "negative implication," if any, depends on its context.⁶ Here, OPC's narrow view of the Commission's authority is at

⁴ See Report and Order, Case No. ER-2016-0285; Report and Order, Case No. ET-2016-0246.

⁵ See OPC Motion at 2.

⁶ See *Sullivan v. Hudson*, 490 U.S. 877, 891-92 (1989) (refusing to read an express provision in the Equal Access to Justice Act, which allows for the recovery of fee awards in adversarial administrative proceedings, to generate a "negative implication" that the court lacks power to award such fees in a non-

odds with the Commission’s enabling statute and well-settled law defining its powers, and would frustrate its ability to meet its core obligations in a changing energy landscape. Given that context, OPC’s argument should be rejected.

Under Missouri law, the Commission must ensure that its regulated utilities provide electric service that is “safe and adequate and in all respects just and reasonable.”⁷ To meet that obligation, the Commission is vested not only with certain express powers but also “all others necessary or proper to carry out fully and effectually all the purposes of [the Commission].”⁸ The courts have affirmed the breadth of this authority time and again⁹, finding it “referable to the police power of the state.”¹⁰ Moreover, the Commission’s powers are flexible “to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.”¹¹

The Commission has long exercised its authority accordingly in order “to meet changing conditions,” including review and approval of efficiency and renewable programs, including incentives, that pre-dated the current MEEIA and RES statutes. *See*,

adversarial proceeding).

⁷ *See* Mo. Rev. Stat. 393.130; 394.130; *see also* *State ex rel. Union Elec. Co. v. Pub. Serv. Comm’n of State of Mo.*, 765 S.W.2d 618, 625 (Mo. Ct. App. 1988).

⁸ Mo. Rev. Stat. 386.040. Similarly, the Commission’s jurisdiction extends not only “to all public utility corporations,” including Ameren, but also to “such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.” *See* Mo. Rev. Stat. 396.250(7).

⁹ *See, e.g., State ex rel. Pitcairn v. Pub. Serv. Comm’n*, 111 S.W.2d 982, 986 (Mo. App. 1937) (“[The legislature] thereby vested the commission with certain positive powers, *expressly* conferred, and also vested it with all others necessary and proper to carry out fully and effectually all such powers so delegated, and necessary to give full effect to the act.”).

¹⁰ *State ex rel. Chicago, R. I. & P. R. Co. v. Pub. Serv. Comm’n*, 312 S.W.2d 791, 796 (Mo. 1958).

¹¹ *Id.*

e.g., Case No. ER-2004-0570 (approving incentives for energy efficiency audits and a wind energy assessment for Empire); Case No. EO-2005-0263 (approving energy efficiency and demand customer program process for Empire); Case No. EO-2005-0329 (approving requirement to build 100MW of wind energy and establishing demand response, efficiency and affordability programs for Kansas City Power & Light); File No. ET-2009-0404 (approving tariffs to implement energy efficiency program for Ameren, pursuant to Commission decision in ER-2007-0002); *see also* File No. GE-2006-0156 (approving incentives for gas water heaters).

Just as express statutory authority was not required for Commission review of these matters, it is not required in the instant case. OPC's contention to the contrary is wrong as a matter of law. Consistent with its historical practice, the Commission should exercise its well-settled authority to determine whether Ameren's proposal is in the public interest.

b. OPC's reliance on this Commission's decision in ER-2016-0285 is misplaced.

OPC argues that “[b]oth of Ameren Missouri’s programs go beyond the purpose for which the Legislature established the Commission.”¹² In support of that view, OPC cites to this Commission’s decision in ER-2016-0285, which denied cost recovery for Kansas City Power and Light’s (KCP&L) investment in electric vehicle charging stations. OPC claims that its cited passages, which concern the potential competitive impacts from utility ownership of charging stations, support a general lack of jurisdiction

¹² OPC Motion at 1.

that is applicable in the instant case. That argument fails for at least two reasons.

First, the core of the Commission’s decision in ER-2016-0285 is the legal determination that electric vehicle charging stations are not “electric plant,” and therefore cannot be treated or regulated as utility assets. Whatever its merits, that legal conclusion and its supporting analysis would be misapplied in this case. Ameren does not propose to own or operate charging stations pursuant to the Charge Ahead program. The program would support, not supplant, the competitive market. OPC’s cherry-picked references to “punish[ing] existing competition,” therefore, concern facts that are not alleged, much less established, in the instant case. Indeed, at this early stage, it appears that the proposed program is consistent with ER-2016-0285’s directive that “[a utility] may include in rate base any equipment, such as distribution lines, transformers, and meters, necessary to provide electric service to an owner of an EV charging station....”¹³

Second, the Report and Order in ER-2016-0285 was clear that “the facts of each case must be considered in applying” its enabling laws.¹⁴ While the Commission found in ER-2016-0285 that KCP&L had not met its burden to justify recovery for its modest investment in electric vehicle charging, the Commission did not discourage subsequent applications for investment, particularly those proposing new program models. In short, it would be premature for the Commission to dismiss the instant case, where the facts have not yet been determined and all parties—including the Commission—would stand to benefit from a full and fair hearing of Ameren’s application.

¹³ Report and Order at 46, Case No. ER-2016-0285 (filed May 3, 2017).

¹⁴ *Id.*

III. Conclusion

WHEREFORE, Sierra Club and NRDC respectfully request that the Commission deny OPC's motion to dismiss Ameren's application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 20th day of April, 2018, to all counsel of record.

/s/ Henry B. Robertson
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