

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) **File No. ET-2016-0246**
Approval Of a Tariff Setting a Rate for) Tariff No. YE-2017-0030
Electric Vehicle Charging Stations)

**SIERRA CLUB & NATURAL RESOURCES DEFENSE COUNCIL
RESPONSE TO ORDER DIRECTING FILING**

Come now Sierra Club and Natural Resources Defense Council and for their *Response* to the Commission’s *Order* of October 18, 2016, respectfully state as follows:

On August 15, 2016 Ameren Missouri filed its Application for Approval of a Tariff Authorizing a Pilot Program for Electric Vehicle Charging Stations.¹ If approved, the proposed tariff would authorize the company to install and operate electric vehicle (“EV”) charging stations at up to six sites within the Company’s service territory, with five of the sites located along Interstate 70.² On October 7, 2016, pursuant to Commission order, Ameren filed a revised version of its proposed tariff.

On October 13, 2016, two months after the initiation of this case, the Office of Public Counsel (“OPC”) moved to reject the proposed tariff, asserting lack of Commission jurisdiction and raising several policy objections. As set forth more fully below, the jurisdictional argument raised by OPC is inconsistent with a plain reading of Missouri law, and its policy objections are logically unsound and raise issues outside the

¹ *Application for Approval of Tariff Authorizing a Pilot Program for Electric Vehicle Charging Stations*, File No. ET-2016-0246 (filed August 15, 2016). The application is supported by the direct testimony of Mark Nealon.

² *Id.* at Exhibit 3, page 1.

scope of this case. Because OPC's arguments are unconvincing, Sierra Club and NRDC respectfully request that the Commission deny this motion.

Commission Jurisdiction

OPC argues that "the Commission lacks jurisdiction to approve the proposed tariff because the company's proposal to install and to operate EV charging stations is not a public utility service."³ In support, OPC contends that EV charging stations are not "electric plant," and concludes, therefore, that the proposed pilot program falls outside the scope of the Commission's jurisdiction.⁴ This argument is based on an extraordinarily narrow view of the Commission's jurisdiction, and should be rejected as inconsistent with a plain reading of Missouri law.

Under Missouri law, the Commission's jurisdiction extends 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."⁵ Under the same section, jurisdiction is also extended "to all public utility corporations...."⁶ A "public utility" is defined to include "every ... electrical corporation."⁷ An "electrical

³ *OPC Motion to Reject Proposed Tariff* at 1, File No. ET-2016-0246 (filed October 13, 2016).

⁴ *Id.* at 2.

⁵ Mo. Rev. Stat. 386.250 at §1. ("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 gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same....").

⁶ *Id.* at §5 ("To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined").

⁷ Mo. Rev. Stat. 386.020.1(43) ("Public utility" includes every pipeline corporation, gas corporation,

corporation,” in turn, includes persons or corporations “owning, operating, controlling, or managing *any* electric plant.”⁸ In addition, although a “public use” requirement is not expressly stated in the definitions above, the Missouri Supreme Court long ago found that “it is apparent that the words ‘for public use’ are to be understood and to be read therein.”⁹ In short, “facilities must be devoted to a public use before they are subject to public regulation.”¹⁰ This view remains the law in Missouri today.¹¹

Accordingly, in determining its jurisdiction in the instant matter, the Commission’s inquiry should consider two questions: first, whether the proposed EV charging stations would be made available for “public use”; and second, whether the owners and operators of the proposed EV charging stations are “public utilities” under Missouri law. As to both questions, Sierra Club and NRDC submit that the answer must clearly be “yes.” On the first question, Ameren has expressly stated that “[e]ach of the proposed charging sites, or ‘charging islands’ would be available for use by the general

electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter.”).

⁸ *Id.* at subsection 15 (emphasis added) (“‘Electrical corporation’ includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others.”).

⁹ *State ex rel. M.O. Danciger & Co. v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36, 38 (1918) (citing *ICE CO State v. Spokane & I. E. R. Co.*, 89 Wash. 599, 154 P. 1110 (1916)).

¹⁰ *See, e.g., Hurricane Deck Holding Co. v. Public Service Commission of State*, 289 S.W.3d 260, 264 (Mo. Ct. App. 2009) (citing *State ex rel. M.O. Danciger & Co. v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36, 38 (1918)).

¹¹ *See, e.g., id.*

public to charge electric vehicles.”¹² It is plain, therefore, that the stations will be available for public use.

Next, the statutes referenced above confer the Commission’s jurisdiction broadly, and contemplate multiple bases for it. One hook—relied on by OPC to the exclusion of others—is the operation of electric plant. Staff, in addressing jurisdiction in response to OPC’s motion, also focus narrowly on the nature of the proposed EV charging stations, arguing that because they fall within the definition of “electric plant,” the operators of such stations are “electrical corporations,” and therefore the proposed tariff is subject to Commission jurisdiction.¹³ Sierra Club and NRDC strongly agree with Staff’s conclusion, but submit that the Commission’s jurisdiction is clear in this case regardless of whether EV charging stations constitute “electric plant.” This is because the Commission’s jurisdiction extends broadly to entities engaged in the manufacture, sale or distribution of electricity, and to those entities with direct control over “*any* electric plant.”¹⁴ Ameren doubtlessly meets this definition; therefore, even if EV charging stations were found not to constitute “electric plant,” a position Sierra Club has taken elsewhere and maintains in the instant proceeding¹⁵, the ownership and operation of public EV charging stations will be carried out by an otherwise-regulated public utility. The provision of EV charging services should not affect Ameren’s status as a public

¹² *Application* at 3.

¹³ Staff Response to Order Directing Filing at 3, File No. ET-2016-0246 (filed August 19, 2016).

¹⁴ Mo. Rev. Statute 386.20.

¹⁵ *Comments of Sierra Club on Electric Vehicle Charging Facilities*, File No. EW-2016-0123 (filed March 7, 2016).

utility, and the Commission should exercise its traditional scope of jurisdiction over the provision of electricity as between public utilities and end-users.

This interpretation not only reflects a plain reading of Missouri law, but also is consistent with the conclusions reached by other utility regulators in other states evaluating similar utility laws. Of the several utility commissions that have considered and found that *non-utility* owners and operators of EV charging stations are not “public utilities” subject to regulatory oversight, Sierra Club & NRDC are not aware of any jurisdiction in which the ownership and operation of EV charging stations by otherwise-regulated public utilities was exempted from regulation. Below, we summarize the reasoning and conclusions of utility commissions in two states with comparable statutory language—California and New York.

In California, the Public Utility Commission (“PUC”) first considered whether EV charging stations and their operators constitute “public utilities” in a January 2010 Scoping Memo, in which the assigned Commissioner offered the following preliminary interpretation as a basis for parties’ briefs:

Facilities that are solely used to provide electricity as a transportation fuel do not constitute “electric plant” pursuant to Pub. Util. Code § 218.¹⁶ Thus, an entity owning, controlling, operating, or managing electric vehicle charging facilities is not an “electric corporation”¹⁷ pursuant to Pub. Util. Code § 218

¹⁶ Ca. Pub. Util. Code Section 217 defines “electric plant” to include “all real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all 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.”

¹⁷ Ca. Pub. Util. Code Section 218 defines an “Electrical corporation” to include “every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others.”

and not a “public utility” pursuant to Pub. Util. Code § 216, unless an entity falls under § 216 and § 218 for other reasons.¹⁸

As a result, Commissioner Michael Peevey reasoned that “the Commission would not have regulatory authority regarding the price” or other aspects of operation of a charging facility by a non-utility operator, “unless the charging facility operator is a public utility by reason of its operations other than providing electric charging.”¹⁹

After stakeholder input, the PUC reached the following Conclusion of Law:

It is reasonable to conclude, consistent with the underlying rationale of the Public Utilities Code and Sections 740.2 and 740.3, that the legislature did not intend that this Commission regulate providers of electric vehicle charging services as public utilities pursuant to §§ 216 and 218.”²⁰

In addressing several parties’ arguments that EV service providers should qualify as “public utilities” and must be regulated to ensure that vehicle charging occurs in a manner that maintains a safe and reliable grid—concerns shared by the Sierra Club and NRDC here—the PUC was careful to articulate its other remaining sources of regulatory authority over EV charging. Those sources included its ability to set the conditions of utility service, including rates, for operators of EV charging stations, and its jurisdiction over the provision of EV charging services by an IOU, given that “the provision of such

¹⁸ *Assigned Commissioner’s Scoping Memo* at 4-5, Rulemaking 09-08-009, Order Instituting Rulemaking on the Commission’s own motion to consider alternative-fueled vehicle tariffs, infrastructure and policies to support California’s greenhouse gas emissions reduction goals (filed August 20, 2009), California Public Utilities Commission.

¹⁹ *Id.*

²⁰ *Decision in Phase 1 On Whether a Corporation or Person That Sells Electric Vehicle Charging Services To the Public Is a Public Utility* at 40, D.10-07-044, Order Instituting Rulemaking on the Commission’s own motion to consider alternative-fueled vehicle tariffs, infrastructure and policies to support California’s greenhouse gas emissions reduction goals (filed July 29, 2010), California Public Utilities Commission ((Public Utilities Code Sections 740.2 and 740.3 direct the Commission to focus on the potential impacts of vehicle charging on electrical infrastructure and grid operations, and to promote policies to facilitate the use of electric power to fuel low emission vehicles, respectively.).

services will not affect the utility's status as a public utility.”²¹

In 2013, the New York Public Service Commission (“PSC”) also considered the nature of EV charging stations and their owners and operators as against the State’s Public Service Law definitions for “electric plant”²² and “electric corporation,”²³ which, similar to Missouri, define the New York PSC’s jurisdiction.²⁴ In its November 2013 Order, the PSC held that EV charging stations are not “electric plant” because “[c]harging 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.”²⁵ The PSC focused on the “primary purpose” of the transaction between operators of EV charging stations and members of the public, which it described as the use of specialized equipment; the use of electricity “is incidental to the transaction.”²⁶ As with the California PUC, the New York PSC limited its denial of jurisdiction to owners and operators of EV charging stations “which do not otherwise fall within the Public Service Law’s definition of ‘electric corporation,’” and maintained its “continuing jurisdiction over the transactions between electric distribution companies and the owners and

²¹ *Id.* at 23-29.

²² NY PSL §2(12) (“Electric plant” means “all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light heat or power.”).

²³ NY PSL §2(13) (“Electric corporation” means an entity “owning, operating or managing any electric plant...”).

²⁴ *See* NY PSL §5(1)(b) (Extending NY PSC jurisdiction to the manufacture, conveying, transportation, sale or distribution of electricity for light, heat or power, to electric plant and to entities owning, leasing or operating electric plant).

²⁵ *See supra* note 16 at 4.

²⁶ *Id.* at 4.

operators of Charging Stations.”²⁷

In sum, Sierra Club and NRDC urge the Commission to reject the arguments of OPC as unduly narrow and inconsistent with the Commission’s grant of jurisdiction under Missouri law, and to act to approve the company’s proposed tariff.

Policy Objections

OPC raises several policy objections. First, OPC suggests that the audience of the pilot project is *too broad*, because the charging stations will be available for use by the general public and not limited to Ameren’s ratepayers. This objection ignores the essential role of public utilities and their services: service to the public and devotion to public use.²⁸ That the stations will be broadly available is no reason to reject the tariffs, and in fact should provide added assurance that the stations will be used and useful.

OPC next argues that the beneficiaries of the proposed pilot program are *too few*, because adoption of electric vehicles is low among Ameren ratepayers and therefore “essentially none of Ameren’s customers are even *able* to use” the stations.²⁹ This objection does not survive close scrutiny. First, it assumes that limitations exist where they do not. Access to, or ownership of, an electric vehicle is not limited to any one group of Ameren’s ratepayers. Second, this argument assumes that the vehicle preferences of Ameren ratepayers will remain unchanged throughout time, and does so in spite of the

²⁷ *Id.* at 5.

²⁸ *State ex rel. M.O. Danciger & Co. v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36, 38 (1918) (citing *ICE CO State v. Spokane & I. E. R. Co.*, 89 Wash. 599, 154 P. 1110 (1916)).

²⁹ OPC at 3 (emphasis in original).

central policy aim of Ameren’s proposed pilot program: to enable greater adoption of electric vehicles. Third, the objection overlooks the fact that electrification of Missouri’s vehicle fleet can deliver public health, economic and electricity system benefits to all ratepayers, regardless of whether they own an electric vehicle. Sierra Club and NRDC have offered detailed background on these benefits in this and other proceedings before the Commission.

Finally, OPC complains that the tariff will result in “subsidization of a tiny subset of customers by all Ameren customers.”³⁰ Sierra Club and NRDC submit that the matter of cost recovery for the EV charging stations is not at issue in the instant case. Moreover, the Commission has already spoken to the issue in rejecting the motion of OPC and others to consolidate the instant case with Ameren’s general rate-case.

WHEREFORE, Sierra Club and NRDC respectfully request that the Commission deny OPC’s motion to reject the proposed tariff.

Respectfully submitted,

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³⁰ OPC at 3.

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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 21th day of October, 2016, to all counsel of record.

/s/ Henry B. Robertson
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