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

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| In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Approval of Efficient Electrification Program. | ) ) ) | File No. ET-2018-0132 |

**AMEREN MISSOURI'S RESPONSE TO OPC'S MOTION TO DISMISS**

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and for its response to *The Office of the Public Counsel's Motion to Dismiss Union Electric Company's d/b/a Ameren Missouri's Application,* states as follows:

## I. Introduction

1. The Office of the Public Counsel ("OPC") seeks complete dismissal of the Company's application (and the related tariff filings) seeking approval of two new programs: the Charge Ahead – Electric Vehicles program and the Charge Ahead – Business Solutions program.[1] Both programs are designed to create incentives for customers to use more efficient electric equipment, which in turn will make more efficient use of the Company's infrastructure and lead to lower overall rates than would exist without the programs.

2. Under the Charge Ahead – Electric Vehicles Program, the Company would offer incentives to developers to install, own, and operate electric vehicle charging stations in the Company's service territory, including along highway corridors across the state. Under the Charge Ahead – Business Solutions Program, the Company would offer rebates to customers who buy more efficient electric equipment (e.g., an electric forklift) for use in the customers' businesses instead of utilizing equipment powered by propane, gasoline, or diesel.

[1] OPC's Motion to Dismiss refers to "three sets of tariff sheets" but appears to only seek dismissal relating to the tariff sheets filed for the two Charge Ahead programs referenced above. The third set of tariff sheets seek to implement changes to the Company's existing line extension policies, which are not a part of the Charge Ahead programs.

3. What is the basis for OPC's claimed lack of jurisdiction? OPC claims that the programs' "go beyond the purpose for which the Legislature established the Commission." OPC Motion, ¶ 2.[2] OPC attempts to support its claim by reference to the Commission's refusal to include costs related to Kansas City Power & Light Company's ("KCP&L") Clean Charge Network in the revenue requirement used to set KCP&L's rates in File No. ER-2016-0285. The Commission's refusal to include those costs was based on a rationale like that relied upon by the Commission when it denied approval of Ameren Missouri's proposal in File No. ET-2016-0246. That is, in both File No. ET-2016-0246 and File No. ER-2016-0285, the Commission held that utility-owned electric vehicle charging equipment does not constitute "electric plant" and, therefore, concluded that it lacked jurisdiction to approve a program where the utility owned the equipment.

4. The holdings of those two decisions have nothing to do with the two programs at issue here. Ameren Missouri will neither own electric vehicle charging equipment nor own the electric equipment (e.g., a forklift) that its customers may purchase for use in their businesses.[3]

## II. The Commission has jurisdiction to approve tariffs providing for incentives to encourage private development of electric vehicle charging stations and to encourage the use of efficient electric equipment.

5. OPC's basic argument is that because no statute expressly states that the Commission can approve a program involving incentives and rebates *of these specific types,* the Commission is therefore totally lacking in the ability to approve these programs. Under OPC's narrow view of the Commission's authority, the Commission would be totally unable to approve

[2] OPC also seeks dismissal based on OPC's allegation that the Company's request for a variance of the Commission's promotional practices rule is defective. That claim will be addressed separately, below.

[3] As further addressed below, OPC ignores the holdings of those decisions and cherry picks certain passages from the KCP&L decision expressing policy rationales also discussed by the Commission in those decisions. OPC neglects to mention that the Commission made clear that any policy bases for its prior decisions would have to be evaluated on a case-by-case basis.

such programs even if the Commission determined that doing so would be beneficial to customers overall, or is otherwise in the public interest. It is clear this is OPC's main point since OPC points to the existence of the Missouri Renewable Energy Standard ("RES") (Sections 393.1025, .1030) and the Missouri Energy Efficiency Investment Act ("MEEIA") (Section 393.1075), the implication being that since those statutes involve the payment of incentives or rebates, no other incentives or rebates can be approved, absent similar express statutory authority.

6. OPC's views are inconsistent with well-settled law. Indeed, longstanding case law confirms that the Commission is vested with certain positive (i.e., expressly stated) powers (the RES, MEEIA would be two examples), but it is equally settled that the Commission is also vested 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 [Public Service Commission Law]" (emphasis added). *State ex rel. Pitcairn v. Pub. Serv. Comm'n*, 111 S.W.2d 982, 986 (Mo. App. K.C. 1937), quoting *Public Service Commission v. St. Louis–San Francisco Railway Co.*, 256 S.W. 226, 228 (Mo. *banc* 1923). Consequently, the premise that there must be a statute that authorizes "express subsidies" (incentives/rebates in this context) is simply wrong as a matter of law.

7. The Commission has well understood this for decades. Although prior to MEEIA there was no express statutory authority for utilities to run energy efficiency programs (and to pay incentives for efficient measures), the Commission had authority to approve, and did approve, such programs and the incentive payments. See, e.g., File No. ET-2009-0404 (where the Commission approved a pre-MEEIA energy efficiency program for Ameren Missouri; see also the discussion of Ameren Missouri's pre-MEEIA energy efficiency program offerings in the Commission's Report and Order in File No. ER-2011-0028). And although the RES did not

exist until 2008, the Commission had authority to approve, and did approve, utility programs where the utility paid rebates (incentives) to customers to use equipment that ran on the fuel sold by the utility; e.g., for electric heat pumps, water heaters, etc. See, e.g., File No. GE-2006-0156 (incentives for gas water heaters approved). There was no "express statutory authority" for such rebates, but that did not mean the Commission lacked the power to approve them.

8. The Commission's enabling statutes do enumerate certain specific items (including general jurisdiction over public utilities like Ameren Missouri), but those statutes also state that the Commission's jurisdiction extends 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." Section 396.250(7).

9. The rationale for both Charge Ahead programs at issue in this case is that they will result in a more efficient use of the Company's system, and ultimately lower long-run revenue requirements (and thus rates), for all customers. Whether that rationale is justified is a question of fact for the Commission to determine. Regardless, consideration of a program involving the use of electricity that will impact revenue requirement and rates is, at a bare minimum, within the Commission's implied powers to regulate public utilities, and also within its express power to ensure that the utility's charges are just and reasonable.

## III. OPC's selective quotes from the KCP&L Clean Charge Network decision fail to support OPC's motion.

10. As alluded to earlier, as support for its motion OPC cited passages from the Commission's order denying inclusion in rates for KCP&L's Clean Charge Network. OPC claims that the cited passages establish a lack of jurisdiction on the Commission's part in the present case. Motion, ¶ 3. OPC's selective quotations were characterized by OPC as reflecting a Commission "concern" about regulated entity involvement in "competitive markets." *Id.* But

OPC chose to omit most of the Commission's discussion of what were simply policy reasons the Commission discussed in connection with its legal determination that utility-owned electric vehicle charging equipment is not "electric plant."

11. After discussing one of the Commission's functions – preventing unnecessary duplication of service by preventing destructive competition – the Commission went on in the same paragraph of the KCP&L order to observe that "[the laws governing the Commission are] designed as a practical system to promote the public good, and the *facts of each case must be considered in applying . . . [those laws]"* (emphasis added). *Report and Order*, File No. ER-2016-0286, p. 46. The facts of this case have not yet been determined by the Commission. Ameren Missouri is entitled to its "day in court."

12. OPC's selective quotation ignores other key aspects of the KCP&L decision and key differences between the programs proposed in this docket and the utility-owned electric vehicle charging stations at issue in the KCP&L case. First, the programs proposed in this docket would not "effectively create . . . a regulatory barrier" for new entries into the electric vehicle charging or forklift, airport ground equipment, etc., markets. The "regulatory barrier" with which the Commission was concerned in the KCP&L case was allowing a *regulated public utility through a regulated service offering* to compete with private electric vehicle charging equipment manufacturers in the charging equipment market.

13. The proposed Charge Ahead – Electric Vehicles program involves no such competition. Instead, it would simply provide incentives to the businesses that already compete with one another in the charging station market.

14. The Charge Ahead-Business Solutions program also would involve no competition by Ameren Missouri. Instead, the Company's customers would receive assistance in

purchasing more efficient electric equipment from manufacturers or dealers who will be competing among themselves, but not against Ameren Missouri.

## IV. OPC's hyper-technical reading of the Commission's general rule regarding variance requests does not justify complete dismissal of the Company's application.

15. The Charge Ahead programs proposed in this docket are promotional practices under the definition of that phrase in 4 CSR 240-14.010(6)(L). Under the "promotional practices rule," (Chapter 14 is entitled "Utility Promotional Practices"), these programs could not be offered without obtaining a variance from the application of that rule, i.e., from Chapter 14. Chapter 14 itself contains a specific variance provision, 4 CSR 240-14.010(2).

16. The Company's application in this case requested a variance "from Chapter 14 of the Commission's rules (i.e., the Promotional Practices rule) for good cause shown." Application, ¶8. The gravamen of the variance request was that the prohibitions in Chapter 14 not be applied to the programs. The Company believes the Commission understands the request and that the Company's request complies with not only 4 CSR 240-14.010(2), but also 4 CSR 240-2.060(4)(A).

17. In the interest, however, of providing even more clarity and considering OPC's questions regarding 4 CSR 240-14.020 and 14.030, the Company states that the principal prohibitions that necessitate the variance request are found in 4 CSR 240-14.020(1)(B) and perhaps (1)(D). It is possible other provisions of Chapter 14 could also require a variance, depending on arguments a creative practitioner might choose to make. For that reason, the Company simply requested a variance from Chapter 14 in its entirety, but if the Commission believes additional clarity is needed and that it can approve the programs by granting only a

variance of 4 CSR 240-14.020(1)(B) and (D), then a variance of those two provisions alone will suffice.

18. Regardless, dismissal of the application would be a drastic and unwarranted remedy for what, at most, would be a highly technical violation of the specificity requirement of 4 CSR 240-2.060(4)(A). Please also note that if the Commission believes further clarity is required, the Company will promptly provide it.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing response was served on counsel for all parties of record in this docket via e-mail on the 20th day of April, 2018.

*/s/ James B. Lowery*
James B. Lowery