BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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| In the Matter of the Application of Union<br>Electric Company d/b/a Ameren Missouri<br>for Approval Of a Tariff Setting a Rate for<br>Electric Vehicle Charging Stations | )<br>)<br>)<br>) | **File No. ET-2016-0246** |

# REPLY BRIEF OF SIERRA CLUB & NRDC

## I. Introduction

Sierra Club and the Natural Resources Defense Council (NRDC) file this reply brief in support Ameren Missouri's application for approval of a tariff authorizing a pilot program for electric vehicle (EV) charging stations, including, in principle, above-the-line cost recovery, as an important step in expanding the market for EVs, a technology which is in the public interest and will benefit all Ameren customers.

## II. Jurisdiction

### a. The Commission Should Resolve Jurisdiction to Balance the Role for Utility and Non-Utility Providers of EV Charging Services, in Accord with Missouri Law.

To the detriment of utilities and non-utilities alike, the regulatory status of EV charging stations (EVCS) has been in limbo since KCP&L introduced the Clean Charge Network in February 2015.[1] Now is the time to resolve that uncertainty.

Sierra Club and NRDC have explained that Missouri law calls for a simple

[1] *See Supplemental Direct Testimony of Darren R. Ives*, Case No. ER-2014-0270, In the Matter of Kansas City Power & Light Company's Request for Authority to Implement a General Rate Increase for Electric Service (filed February 6, 2015).

jurisdictional test.[2] First, whether the proposed EVCS would be made available for "public use."[3] Second, whether the proposed EVCS are to be owned and operated by an *otherwise-regulated* public utility[4], or, instead, are to be owned and operated by a non-utility third party.

With this test, public-facing EVCS that are owned and operated by already-regulated entities, as with Ameren's EV Pilot, would be regulated as part and parcel with its distribution system; an EVCS owned and operated by a non-utility, by contrast, which is utterly dependent on utility plant, would not be transformed into a utility subject to regulation.

This interpretation tracks the judgment of other utility regulators, whose decisions demonstrate that the legal identity of the owner/operator is paramount in determining jurisdiction. In several states, including New York—where the relevant statutory terms are identical to Missouri's—regulators have held that *non-utility* owners of EVCS are excepted from regulation on the grounds that EVCS do not alone constitute "electric plant," while holding that they do have jurisdiction over EV charging stations where the owner or operator *otherwise falls* within the definition of an electrical corporation.[5]

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[2] *See Sierra Club-NRDC Initial Brief at 3-7.*

[3] *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)).

[4] *See* Mo. Rev. Stat. § 386.250(1) (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…."); Mo. Rev. Stat. § 386.020.1(15) (An "electrical corporation," in turn, includes persons or corporations "owning, operating, controlling, or managing *any* electric plant.").

[5] *See, e.g., Declaratory Ruling on Jurisdiction Over Publicly Available Electric Vehicle Charging Stations* at 4, Case 13-E-0199, In the Matter of Electric Vehicle Policies (filed November 22, 2013), New York Public Service Commission.

This regulatory treatment subjects utility investments to Commission oversight, while also promoting the growth of a competitive, innovative, sustainable market for EV charging services. Other parties to this case claim to support such a vision for the EV market, but none suggest a regulatory scheme that would achieve it. Instead, parties focus myopically on an either/or approach, where *all* EV charging either is or is not a regulated service. These views are not only out of touch, but fail to track Missouri law.[6] They should be rejected.

**b. The Commission Should Heed the Judgment of Other Regulators, But Must Disregard the Misrepresentations Made by Several Parties.**

Several state utility commissions have had occasion to consider the same jurisdictional questions at issue here. In most, the utility laws have been the same or similar to Missouri's, and these cases therefore provide useful guidance to this Commission.[7] New York is one such example.

Because of the identical nature of the relevant statutory terms, several parties referenced a 2013 decision of the New York Public Service Commission in their initial briefs. OPC and ChargePoint are among those parties.[8] Unfortunately, both OPC and ChargePoint seriously misrepresented the decision of the New York Public Service Commission (NY PSC).

On pages 1-3 of its initial brief, OPC quotes the NY PSC decision at length, and at several points purports to recite its holding. The most complete attempt is on page 2,

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[6] *See Sierra Club-NRDC Initial Brief* at 3-4, 7-9.

[7] *See Sierra Club-NRDC Initial Brief* at 5-6.

[8] *OPC Initial Brief* at 1-3; *ChargePoint Initial Brief* at 6-7.

where OPC states "The NYDPS [sic] determined it does not have jurisdiction over charging stations, the owners, or operators of charging stations, or the transaction between such owners of charging stations and members of the public."

This language tracks the format of the NY PSC holding, but *omits* its critical conditional language, resulting in a material misrepresentation. The NY PSC did not deny jurisdiction for *all* EV charging, as OPC would have readers believe; instead, the NY PSC denied jurisdiction to "owners or operators of charging stations, so long as the owners or operators do not otherwise fall within the Public Service Law's definition of electrical corporation."[9] This conditional language appears no fewer than five times in the six-page order. OPC does not reference it once.

ChargePoint also offers a deceptive presentation, quoting two full paragraphs of the NY PSC order on pages 6-7 of its initial brief, but *omitting* a key footnote reference from the first sentence in the second paragraph, which contains the critical conditional language. The complete line, with footnote intact, reads as follows:

> Since a charging station is not electric plant, the owners and operators of Charging Stations do not fall within the definition of electric corporation.7
>
> 7. We do have jurisdiction over the owner or operator of a Charging Station, where that owner or operator otherwise falls within the PSL section 2 definition of "electric corporation."[10]

ChargePoint also supplies a list of states where EV charging has been exempted

[9] *Declaratory Ruling on Jurisdiction Over Publicly Available Electric Vehicle Charging Stations* at 5, Case 13-E-0199, In the Matter of Electric Vehicle Policies (filed November 22, 2013), New York Public Service Commission.

[10] *Id.* at 4.

from regulation under utility laws[12], arguing that the list supports its view that EV charging should not be viewed a publicly utility service under any circumstances. What ChargePoint fails to mention is that, in nearly every instance, the legislative or regulatory exemptions are focused on non-utility owners and operators of EVCS.[13] That is, the decisions simply clarify that non-utility owners and operators do not transform into public utilities solely by virtue of the operation of an EVCS. This necessarily assumes that operation of EVCS by otherwise regulated utilities would otherwise be subject to regulation, a fact which most of ChargePoint's referenced commission orders state explicitly. (New York is one such example).

Only Staff offers a relatively complete representation of the NY PSC decision, quoting part of the introduction on page 11, but they too omit relevant text.[14] For the sake of completeness, the full finding and declaration of the NY PSC is reproduced below:

> The Public Service Law does not provide the Commission with jurisdiction over (1) publicly available electric vehicle charging stations; (2) the owners or operators of such charging stations, so long as the owners or operators do not otherwise fall within the Public Service Law's (PSL) definition of "electric corporation;" or, (3) the transactions

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[12] *Id.* at Appendix A.

[13] *Id.* (See, for example: Connecticut, HB 5510, "an owner of an electric vehicle charging station…shall not be deemed a 'utility', 'public utility,' or 'public service company' **solely by virtue** of the fact that such owner is an owner of an electric vehicle charging station;" Florida, Fl. Rev. Stat. §27-366.94, "…provision of electric vehicle charging to the public **by a nonutility** is not considered a retail sale of electricity;" Oregon, Or. Stats. §757.005(1)(b)(G), "The statutory definition of 'public utility' does not include any corporation, company, partnership, individual or association of individuals that furnishes electricity for use in motor veihcles as long as the entity **is not otherwise a public utility;"** West Virginia, W. Va. Code §24-2D-3, "PSC has no jurisdiction over ultimate sale by **non-utilities** of alternate fuel used for motor vehicles."

[14] *Staff Initial Brief* at 11 (The quoted text omits footnote 2 of the NY PSC decision, which states: "We retain jurisdiction over the services provided by electric distribution utilities to the owners or operators of Charging Stations.").

> between the owners or operators of publicly available electric vehicle charging stations, which do not otherwise fall within the PSL's definition of "electric corporation," and members of the public.[15]

Despite a fair reading, Staff dismisses the NY PSC decision as "interesting, but not determinative," and argues that "this Commission must apply Missouri law to the facts of the record and can only conclude that the activity proposed by Ameren Missouri is a regulated activity."[16] In doing so, Staff does not identify any meaningful difference in text or legal gloss between the public utility laws of the two states.

Staff's position that *all* EV charging is a regulated service—which is rooted in a sweeping read of the term "electric plant" and fails to account for the legal identity of the owner/operator—is not only an outlier position among other regulators that have seriously considered this issue, but it ignores the fact that, "in determining whether a corporation is or is not a public utility, the important thing…is what it actually does."[17] The operator of a charging station is not a public utility simply because her equipment conducts electricity, and a public utility is no less one because it adds a charging station onto its system.

## III. Public Policy

### a. Utility Investment Will Advance the Market for EVs and Non-Utility EV Service Providers.

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[15] *Declaratory Ruling on Jurisdiction Over Publicly Available Electric Vehicle Charging Stations* at 5, Case 13-E-0199, In the Matter of Electric Vehicle Policies (filed November 22, 2013), New York Public Service Commission.

[16] *Staff Initial Brief* at 11.

[17] *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)).

As explained in our initial brief[18], and discussed at length in the testimony of Sierra Club witness Jester[19] and NRDC witness Garcia[20], utility investments in EV charging infrastructure can overcome the market coordination problem (more colloquially a chicken-or-the-egg problem) and otherwise advance the market for EVs and non-utility providers of EV charging services.

ChargePoint's brief, which is rife with contradictions, only bolsters this view. Their argument that EV charging is not a regulated service because it "did not originate with electrical corporations"[23] is not to be taken seriously. A utility did not invent the light bulb, but Mr. Edison's creation was the foundation of the utility industry. ChargePoint argues that EVCS is not electric plant and therefore cannot be a public utility service,[24] but it "still supports public utility investments in EV charging infrastructure."[25] Indeed, ChargePoint would be nowhere without utility support, as its status as the sole provider of equipment and services to KCP&L's Clean Charge Network attests. ChargePoint acknowledges the grid benefits of EVs,[26] which is really an argument that charging is a public benefit to ratepayers and thus a public utility service. Chargepoint even argues in favor of above-the-line treatment (if it is done on their

[18] *Sierra Club-NRDC Initial Brief* at 1-2.

[19] Exh 500, Jester rebuttal, p. 5-7.

[20] Exh. 550, Garcia surrebuttal, p. 8-12.

[23] ChargePoint brief, p. 5.

[24] *Id.* at 6–7.

[25] *Id.* at 7.

[26] *Id.* at 7.

terms),[27] in which case it *must* be a public utility service.

OPC compares EV charging to the motor carrier industry as "characterized by comparatively low fixed costs and capital investment requirements."[31] On the contrary, the evidence shows that EVCS has comparatively *high* capital costs relative to the present size of the market, to the extent that it is difficult or impossible for third-party providers to recover those costs at a reasonable price to drivers.[32] Ameren's pilot should help alleviate that barrier to entry.

### b. Arguments that Ameren's EV Pilot Will Not Result in Public Benefits are Circular and Contradicted by the Record.

Staff and OPC essentially argue that there is no need or public benefit that would justify EVCS as a utility service. Their arguments are based, somewhat contradictorily, on the absence of demand and, in OPC's case, the insistence that there is "overwhelming" evidence of competition.[33]

Staff has shifted its ground from denying that the project is a utility service to denying there is any benefit to justify cost recovery.[36] They insist, without evidence, that "the same number of EVs will be on the road as there are presently," and "there is no guarantee…that these proposed benefits will be realized."[37] This is a self-fulfilling

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[27] *Id.* at 13.

[31] *Id.* at 4–5, quoting *State ex rel. Gulf Transport Co. v. PSC,* 658 S.W.2d 448, 456 (Mo.App. W.D. 1983).

[32] Exh. 500, Jester rebuttal, p. 30, lines 1–9.

[33] OPC brief at 8.

[36] Staff brief pp. 12, 18.

[37] *Id.* at 13.

prophecy: Don't build it and they won't come. A pilot project is by nature experimental. The aim of this project is to increase the number of EVs on the road by making long-distance travel possible. This is a reasonable expectation that justifies a small investment. By Staff's logic, no pilot could ever be in the public interest. The existence of benefits in the future is necessarily a matter of probabilities in the present, which favor increased EV adoption. As the *Gulf Transport* case cited by OPC says, "the future must be considered in determining whether the public convenience and necessity would be served by a new entry."[38]

OPC likewise asserts, "[t]here is no evidence in this case that Ameren's installation … will promote EV purchases."[39] OPC also argues that "Ameren is seeking to engage in a competitive business" but "can only speculate whether there is, or ever will be, a public demand."[40] A competitive market without demand is a rare thing. Sierra Club and NRDC have already refuted the existence of such a market.[41] OPC now seems prepared to concede that ChargePoint customers offer charging *"in the St. Louis area"* only.[42]

OPC offers the testimony of ChargePoint witness Anne Smart as proof of a competitive market,[43] but her testimony is vague and just as much in the future as anyone

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[38] *State ex rel. Gulf Transport Co. v. PSC,* 658 S.W.2d 448, 457 (Mo.App. W.D. 1983).

[39] OPC initial brief, p. 3.

[40] *Id.* at 7.

[41] *Sierra Club-NRDC Initial Brief* at 1–2.

[42] OPC brief at 7, emphasis added.

[43] *Id.* at 8.

else's projections: "we've investment strategies in place to create a national network;"[44] "We have concrete plans to create a national network of fast chargers along the fast act designated corridors, including the one listed here, yes;"[45] "we would be expanding on the relationships and partnerships like we have done in 2016."[46] Confidential business information may be an excuse for not going into whatever specifics may exist in ChargePoint's plans,[47] but it is not evidence of a market.

## IV. Cost Recovery

### a. Staff's "Revenue Imputation" Treatment Should Be Rejected.

Staff's position has "evolved" from denying that EV charging is a utility service[48] at all to insisting that it is *only* a utility service. Taking back with one hand what they give with the other, they concede that the investment should be treated above the line, but with a "revenue imputation … for any *costs* exceeding the amount of revenues."[49] This is not a revenue imputation but a cost disallowance. More than that, it is a predetermination that a capital expenditure is imprudent. Staff's reply brief even says as much:

> 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.[50]

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[44] Tr. Vol. II, p. 331, lines 14–5.

[45] *Id.* p. 332, lines 9–12.

[46] *Id.*, p. 333, lines 21–3.

[47] *Id.* p. 332, line 13–p. 333, line 2,

[48] *See Staff's Initial Brief* at 117-124, Case No. ER-2014-0370, In the Matter of Kansas City Power & Light Company's Request for Authority to Implement a General Rate Increase for Electric Service (filed July 22, 2015).

[49] Staff's initial Brief, p. 16, emphasis added.

[50] Staff's reply brief at 5.

Staff's example of a "revenue imputation" comes from a non-unanimous stipulation approved by the Commission in Empire District's rate case ER-2004-0570. In that stipulation, filed on February 22, 2005, the parties agreed that Empire would permanently recover $103 million in fuel and purchased power costs. The balance of variable fuel and purchased power costs would be collected through an interim energy charge subject to true-up and refund to customers of any amount over $10 million.

Another term for revenue imputation is "revenue imputation adjustment."[51] It is a mechanism to prevent overearning, part of the Commission's authority "to disallow costs (or impute revenue)…in a future proceeding."[52] Staff's proposal is a disallowance of costs except to the extent they are covered by EV charging revenue. In essence, Staff has predetermined the imprudence of a rate-base capital expenditure that Staff agrees is for a regulated public utility purpose.

Ameren seeks no recovery in its current rate case. The Commission should simply wait until the next rate case to decide the issue of prudence. Staff can there make its argument that Ameren's EV pilot is "outrageous" speculation.[53] What is truly "outrageous" speculation is Staff's negative speculation that the EV market will fizzle—or that "Global warming may be shown to be a hoax,"[54] even as the evidence mounts day by day that it is a reality.

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[51] *See, e.g., Matter of Liberty Utilities*, GR-2014-0152, Report and Order, p. 20;

[52] *Matter of Tariff Filing of Laclede Gas*, GT-2003-0032, Order Regarding Tariffs, Aug. 14, 2003.

[53] Staff reply brief at 4.

[54] Staff reply brief 5.

## V. Rate Design

### a. The Rate Design for the EV Pilot is Just and Reasonable.

Staff worry that customers will be "confused as to why they are paying differently at the two types of stations," and argue that "Ameren Missouri's EV charging stations should be charged either by the dollar or kWh, but not both."[55] This argument fails to appreciate the difference between the Level 2 and Level 3 charging services that Ameren plans to offer, and the policy aims in charging by the minute versus the kWh.

As explained in our initial brief, in the Level 2 context, the rate of charge is determined by the capacity of the on-board charger in the vehicle, which varies by model. A time-based charge risks significant disadvantage to drivers with lower capacity on-board chargers,[56] which may result in a scenario where one driver pays twice as much as another for the same amount of energy consumed. A kWh charge is therefore fairer to all.

In the Level 3, or Direct Current Fast Charge, context, the per-minute charge discourages those drivers from staying past the time it takes to recharge, after which the island should be open to the next customer.

## VI. Conclusion

WHEREFORE, Sierra Club and NRDC respectfully request that the Public Service Commission exercise jurisdiction over Ameren's proposed EV Pilot and approve the tariff as amended.

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[55] *Staff Initial Brief* at 19.

[56] Exh. 500, Jester rebuttal, p. 6, line 9-18.

**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 28th day of February, 2017, to all counsel of record.

*/s/ Joseph Halso*
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