

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

ELECTRONIC INVESTIGATION)	
OF COMMISSION JURISDICTION)	CASE NO. 2018-00372
OVER ELECTRIC VEHICLE)	
CHARGING STATIONS)	

**KENTUCKY ASSOCIATION OF ELECTRIC COOPERATIVES, INC.’s
COMMENTS PURSUANT TO NOVEMBER 29, 2018 ORDER**

Kentucky Association of Electric Cooperatives, Inc. (“Kentucky Electric Cooperatives”), by counsel and pursuant to the Commission’s November 29, 2018 order (“Order”) in the above-captioned matter, respectfully provides the following comments regarding the question of whether the Commission should assert jurisdiction over owners and/or operators of electric vehicle charging stations (“EVCS”).

As the statewide association representing the interests of Kentucky’s electric cooperatives, the Kentucky Electric Cooperatives appreciate the Commission’s attentiveness to the potential issues that could arise with expanding EVCS deployment across the Commonwealth. Moreover, the Kentucky Electric Cooperatives appreciate the Commission’s attentiveness to the territorial concerns implicated by this new technology. The deployment of this technology is clearly growing around the country, and providing regulatory certainty regarding the implicated jurisdictional issues could help encourage efficient infrastructure investment and development, while also underscoring the Commission’s responsibility to help protect the public interests in the orderly development of retail electric service and minimizing disputes between retail electric suppliers. *See generally* KRS 278.016.

In that light, and on the express assumptions that: (1) an EVCS is not capable of generating or producing electricity; and (2) that the sole use of the EVCS is to charge a battery to be used exclusively in an electric vehicle, the Kentucky Electric Cooperatives believe the sole act of owning or operating an EVCS does not meet the definition of “utility” or “retail electric supplier” because the EVCS owner or operator is providing an electric vehicle charging service, not providing electric service.

If, however, an EVCS were to generate or produce its own electricity, or provide a service other than charging a battery that is exclusively used in an electric vehicle, an EVCS owner or operator would likely be a “utility,” and would likely be providing “retail electric service” in violation of the Electric Territorial Boundary Act. Thus, the Kentucky Electric Cooperatives believe the Commission should establish clear guidelines underlying its conclusion(s) in this matter and continue to monitor technological advances in EVCS deployment to ensure that an EVCS owner or operator is not providing electric service to an end-user in violation of the Electric Territorial Boundary Act or any other applicable laws. In other words, while EVCS are not a “utility” or a “retail electric supplier” in their current iteration, technological innovations or changes in EVCS usage could cause EVCS to become subject to the Commission’s jurisdiction.

I. Using Current Technology, an EVCS Owner or Operator is Not an “Electric Utility.”

Based upon the Kentucky Electric Cooperatives’ understanding of the current operation of an EVCS, the Commission may properly determine that an EVCS owner is providing the limited service of charging a battery solely to power an electric vehicle, not generating, producing, transmitting, or distributing electricity.

As the Commission correctly noted in its Order, an EVCS would have to meet three criteria to subject its owner or operator to the Commission’s jurisdiction as a “utility” under KRS 278.010(3)(a).

1. An EVCS must be a “facility used or to be used for or in connection with” the “generation, production, transmission, or distribution of electricity”;
2. An EVCS must be a “facility” that provides electricity “for lights, heat, power, or other uses”; and
3. An EVCS must be a “facility” that provides electricity “to or for the public, for compensation.”¹

While the Kentucky Electric Cooperatives believe an EVCS will be used for “lights, heat, power, or other uses,” and will be offered “to the public, for compensation,” the Kentucky Electric Cooperatives believe an EVCS is – under the carefully circumscribed factual assumptions described herein – properly providing the limited service of charging an electric vehicle battery, and is not generating, producing, transmitting, or distributing electricity. Accordingly, assuming an EVCS is using electricity provided by its territorial utility/retail electric supplier, and assuming the EVCS may only be used to provide the limited service of charging a battery to be exclusively used to power an electric vehicle, the Commission should determine that an owner or operator of such an EVCS is not a “utility,” within the meaning of KRS 278.010(3)(a) and should therefore refrain from exercising jurisdiction over an entity solely because it operates or owns an EVCS.

1. Publicly-Available EVCS Charging a Fee Are Providing Services “To the Public, For Compensation” for “Power, or Other Uses.”

The question of whether an EVCS owner or operator is a “utility” should ultimately turn on the Commission’s determination of whether an EVCS owner or operator is “generating, producing, transmitting, or distributing electricity” because the remaining elements of the

¹ Order, at 2.

definition of “utility” are met. Indeed, a publicly available EVCS² that offers services for a fee or other form of compensation is very clearly providing services “to the public, for compensation” for “power or other uses” under prior Commission orders.

“The Commission considers the public to be one or more end-users.”³ Thus, an owner or operator of a publicly available EVCS is offering its services to the public. Similarly, if an EVCS owner or operator is charging any fee or requiring any other form of compensation for its services, the services are being provided “for compensation.” The Commission has previously determined that, “[r]egardless of the name used to describe the fee, if it is a charge or other compensation” the services are being provided “for compensation.”⁴ Therefore, an owner or operator of a publicly available EVCS is providing its services “to the public, for compensation.” Finally, an EVCS owner or operator is providing services to be used for “lights, heat, power, or other uses.” In fact, the sole purpose of an EVCS is to provide the limited service of powering an electric vehicle.

Accordingly, the question of whether an EVCS owner or operator is a “utility” subject to the Commission’s jurisdiction should turn on whether an EVCS owner or operator is “generating, producing, transmitting, or distributing electricity,” because the owner or operator of a publicly available EVCS is very clearly offering services to be used for “power, or other uses” “to the public, for compensation.”

² The Kentucky Electric Cooperatives comments do not address an EVCS used in a private residence solely for the resident’s private use, which the Kentucky Electric Cooperatives concede would not involve providing services “to the public, for compensation.”

³ *In the Matter of: An Investigation of Natural Gas Retail Competition Programs*, 2010 Ky. PUC LEXIS 448, at *34 (Ky. PSC Apr. 19, 2010) (emphasis added); see also *In the Matter of: Petition of Ky. Pioneer Energy, LLC for Declaratory Order*, 2000 Ky. PUC LEXIS 1350, at *2-3 (Ky. PSC July 13, 2000) (quoting 64 Am. Jur. 2d Public Utilities § 1) (“[T]he principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities.”).

⁴ *In the Matter of: ICH Corporation a/k/a Glenwood Hall Resort and Country Club a/k/a Perry Park Resort and Par-Tee, LLC d/b/a Perry Park Resort Alleged Violation of KRS 278.020(4) and (5), KRS 278.160, and Commission Regulations 807 KAR 5:011, Section 2, and 807 KAR 5:011, Section 11*, 2000 Ky. PUC LEXIS 1188, at *8 (Ky. PSC July 11, 2000).

2. Current EVCS Provide the Limited Service of Charging an Electric Car Battery; They Do Not Currently Generate, Produce, Transmit, or Distribute Electricity.

The Kentucky Electric Cooperatives believe that the current technology available for an EVCS does not allow an EVCS to generate or distribute electricity.⁵ Rather, an EVCS is comprised only of specialized equipment that allows electric vehicles to charge the batteries that power the electric vehicle. To allow an electric vehicle owner to charge their electric vehicle, an EVCS uses the electricity supplied to it by an existing electric utility⁶ – electricity that may only be used to charge an electric vehicle battery. Based on this understanding, the Kentucky Electric Cooperatives believe the Commission may properly determine that an EVCS simply provides the unique and limited service of providing an electric vehicle owner the opportunity to receive the service of charging an electric vehicle battery. That electricity is not supplied by the EVCS owner or operator; it is supplied from the existing electric grid. Consequently, the EVCS owner or operator does not “generate, produce, or transmit” electricity.

Furthermore, under the current technological capabilities of an EVCS, the “distribution” of electricity to an EVCS ends at the electric meter of the EVCS owner or operator’s territorial electric utility/exclusive retail electric supplier. The equipment attached to the EVCS is a specialized charging adapter that can only be used to charge an electric vehicle. Consequently, an EVCS is not currently capable of “distributing” electricity that can be used for multiple purposes by an end user. Indeed, as was determined by the Massachusetts Department of Public Facilities,

⁵ It is not clear whether an EVCS is properly characterized as a “facility,” because that definition is somewhat circular to the question of whether the EVCS owner or operator is a “utility.” See KRS 278.010(11) (“Facility” includes all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility.”). Regardless, if there is no generation, production, transmission, or distribution of electricity, the owner or operator would not be a “utility” under KRS 278.010(3)(a).

⁶ Alabama Public Service Commission, *Generic Proceeding to Determine the Commission’s Jurisdiction Over Electric Vehicle Charging Stations*, Docket No. 32694, Comments of Chargepoint, Inc., at 3, available at <http://www.psc.state.al.us/ChargePoint%20Comments%20-%20AL%20PSC%20EV%20Charging%20Jurisdiction%20Comments%20Final.pdf> (“[C]harging activities take place after the retail sale of electricity by a utility.”).

an EVCS does not distribute electricity because the specialized equipment on an EVCS is a “connector or cord,” which is not in the same vein as a distribution line, and which is used only to “provide electricity to an EV in the charging function.”⁷

Accordingly, the Kentucky Electric Cooperatives believe the Commission may properly determine that an EVCS is not a “utility” because an EVCS owner or operator does not generate, produce, transmit, or distribute electricity; it only provides electric vehicle charging services.

a. Utilities Commissions Across the Country Agree that EVCS Are Providing a Limited Charging Service, Not Electric Service.

A Commission finding that an owner or operator of an EVCS is not a “utility” solely by owning or operating an EVCS would be consistent with the decisions reached by other utilities commissions around the country. Indeed, other jurisdictions faced with the exact question posed in the Commission’s Order have determined that EVCS do not generate, transmit or distribute electricity. Rather, they use electricity from existing utilities to provide electric vehicle battery charging services.

For example, the Alabama Public Service Commission noted: “The EVCS allows for electric current (which the EVCS did not generate, transmit or distribute) to pass through the charging cable to the vehicle. . . . [T]hird-party owners and operators use electricity to provide electricity to EV charging services to their customers.”⁸ Similarly, the New York State Public Service Commission stated:

Charging stations do not fall within the definition of ‘electric plant’ because Charging Stations are not used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light heat and power. Instead, and as urged by several commenters, Charging Stations

⁷ Massachusetts Department of Public Utilities, D.P.U. Case No. 13-182-A, August 4, 2014 Order on Department Jurisdiction Over Electric Vehicles, the Role of Distribution Companies in Electric Vehicle Charging and Other Matters, at 6, *available at* <https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9233599>.

⁸ Alabama Public Service Commission, *Generic Proceeding to Determine the Commission’s Jurisdiction Over Electric Vehicle Charging Stations*, Docket No. 32694, June 22, 2018 Order, at 3 (emphasis added).

are used to provide a service, specifically, charging services. This service requires the use of specialized equipment and allows the customer to do only one thing, charge [an electric vehicle's] battery.⁹

Like New York, the Massachusetts Department of Public Utilities recognized that an EVCS currently “allows the customer [to do] only one thing, charge an EV battery.”¹⁰ Finally, some states that have legislatively exempted an EVCS owner or operator from the definition of “utility” have specifically provided that the exemption only exists in the limited circumstance where (1) the EVCS purchases electricity from an existing utility, and (2) the EVCS is only capable of providing a service that allows for the charging of an electric vehicle battery.¹¹

Accordingly, based on the current technological capabilities of EVCS and on the express assumption that the EVCS owner or operator is receiving its electricity from its territorial electric utility/retail electric supplier, the Commission should find that an EVCS owner or operator is not a “utility” within the meaning of KRS 278.010(3)(a) because it is not “generating, producing, transmitting, or distributing” electricity.

b. A Finding that an EVCS Owner or Operator is Not a “Utility” Solely by Owning or Operating an EVCS is Consistent with Prior Commission Orders.

A Commission determination that an EVCS owner or operator is not a “utility” would also be consistent with the Commission’s approval of the LG&E/KU EVCS-related tariffs. In those tariffs, a site host is allowed to “recover the charging station installation cost, the monthly

⁹ New York Public Service Commission, *Declaratory Ruling on Jurisdiction Over Publicly Available Electric Vehicle Charging Stations*, Case 13-E-0199, Nov. 22, 2013 Order, at 4, available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B0A1AB82A-ABD4-43FA-B3E6-A4C54EC02220%7D>.

¹⁰ Massachusetts Department of Public Utilities, D.P.U. Case No. 13-182-A, August 4, 2014 Order on Department Jurisdiction Over Electric Vehicles, the Role of Distribution Companies in Electric Vehicle Charging and Other Matters, at 7.

¹¹ Ark. Code Ann. § 23-1-101 (“The term “public utility”, as to any public utility defined in subdivision (9)(A)(i) of this section, does not include a person or corporation that: (i) Purchases electricity from an electric public utility or a municipal electric utility; (ii) Furnishes electricity exclusively to charge battery electric vehicles and plug-in hybrid electric vehicles to or for the public for compensation; and (iii) Is not otherwise a public utility.” (emphasis added)); Idaho § 61-119(2) (providing an exemption from the definition of “electrical corporation” where electricity is “purchased from a public utility . . . to charge the batteries of an electric motor vehicle” (emphasis added)).

fee, and any other costs related to hosting the charging stations” from the end user.¹² Thus, under the tariffs, a site host is allowed to offer services “to the public, for compensation” that is used for “power, or other uses.”

Accordingly, by allowing a site host of an EVCS to be compensated for providing EVCS services to the public without regulation by the Commission as a “utility,” the Commission has already implicitly recognized that the current technological capabilities of an EVCS do not allow an EVCS to generate, produce, transmit, or distribute electricity.

II. An Entity Is Not a “Retail Electric Supplier” Solely Because it Owns or Operates an EVCS.

Intertwined with the Commission’s determination of whether an EVCS owner or operator is a “utility,” is the determination of whether an EVCS owner or operator qualifies as a “retail electric supplier” under the Electric Territorial Boundary Act. Indeed, if an EVCS is determined to be capable of generating, producing, transmitting, or distributing electricity – either in this proceeding or at a later date – the Commission will be required to assert jurisdiction over the EVCS owner or operator as a “utility” and prevent the EVCS owner or operator from operating as a “retail electric supplier” in the exclusive jurisdiction of the existing retail electric supplier.

In 1972, the Kentucky legislature passed the Electric Territorial Boundary Act, which provides that “no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.”¹³ The Electric Territorial Boundary Act created exclusive territory for retail electric suppliers

¹² *In the Matter of: Application of Louisville Gas & Electric Company and Kentucky Utilities Company to Install and Operate Electric Charging Stations in Their Certified Territories, for Approval of an Electric Vehicle Supply Equipment Rider, An Electric Vehicle Supply Equipment Rate, an Electric Vehicle Charging Rate, Depreciation Rate, and for a Deviation from the Requirements of Certain Commission Regulations*, Case No. 2015-00355, 2016 Ky. PUC LEXIS 398, at *4-5 (Ky. PSC April 11, 2016).

¹³ KRS 278.016.

to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer. . . .¹⁴

A “retail electric supplier” is “any person, firm, corporation, association, or cooperative corporation, excluding municipal corporations, engaged in the furnishing of retail electric service.”¹⁵ In turn, “retail electric service” is defined as “electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy¹⁶ furnished by an electric supplier to another electric supplier for resale.”¹⁷

As is explained above, EVCS are not currently capable of “generating, producing, transmitting, or distributing electricity.” Instead – through the use of electricity already distributed through the existing electric grid – they provide the limited service of charging a battery that may only be utilized to power an electric vehicle. Because the EVCS is not involved in the generation, production, transmission, or distribution of electricity for the reasons stated above, the Kentucky Electric Cooperatives believe the Commission may properly determine that an EVCS owner or operator is not providing “retail electric service” to an end user; it is providing a charging service for use exclusively with electric vehicle batteries.

Nevertheless, the Kentucky Electric Cooperatives encourage the Commission to continue its proactive stewardship over the jurisdictional considerations that could arise in this context and continue to monitor this subject-matter to ensure that EVCS owners or operator are solely

¹⁴ KRS 278.016 (emphasis added); *see also Grayson Rural Elec. Corp. v. City of Vanceburg*, 4 S.W.3d 526, 528 (Ky. 1999) (“The Territorial Law was enacted to protect each KPSC-regulated utility in its certified territory against invasion or competition by another KPSC-regulated utility.”).

¹⁵ KRS 278.010(4).

¹⁶ Even if the owner or operator of an EVCS qualifies as a qualifying facility under PURPA, the energy must be purchased by the existing electric utility, not sold to the end user. *See* 18 C.F.R. § 292.303 (“Each electric utility shall purchase . . . any energy and capacity when it is made available from a qualifying facility. . .”).

¹⁷ KRS 278.010(7) (emphasis added).

providing the limited service of charging an electric vehicle battery by utilizing electricity from the existing electric grid, and that they are not undertaking activities that could result in a violation of the Electric Territorial Boundary Act.¹⁸

III. The Commission Should Carefully Limit its Order to the Current Technological Capabilities of an EVCS and Continue to Monitor EVCS Deployment to Ensure EVCS Owners and Operators Do Not Provide Unregulated Utility Service or Retail Electric Service in the Future.

As EVCS deployment involves new and evolving technologies, the Kentucky Electric Cooperatives believe the Commission should take a cautious approach to its findings, and issue an order that is carefully circumscribed in its determinations so that the Commission may continue to monitor and clarify its jurisdiction over EVCS, if any, as technology evolves. This will allow the Commission to support the growth of new energy technologies, while simultaneously continuing to protect the citizens of Kentucky by helping to ensure that Kentuckians are afforded access to the safe and reliable provision of electric service at fair, just, and reasonable rates.

Even so, while the growth of new energy technologies and the fostering of an environment that promotes private investment in new energy technologies are vital to the continued success of the Commonwealth, the growth of this new technology may ultimately raise novel cost of service and rate design questions given the unique load characteristics that could result from the expanded deployment of EVCS. And though the Kentucky Electric Cooperatives recognize that any rate-related questions are outside the limited scope of this proceeding, it bears noting that the Commission should continue its diligence in recognizing the potential flow-

¹⁸ *In the Matter of: Petition of Ky. Pioneer Energy, LLC for Declaratory Order*, 2000 Ky. PUC LEXIS 1350, at *2-3 (Ky. PSC July 13, 2000) (“Pioneer Energy will not qualify as a retail electric supplier. . . . It does not possess a certified territory as established by the Territorial Boundary Act, and it will not be furnishing electric service to any consumer for ultimate consumption. Consequently, Pioneer Energy will have no legal right to provide retail electric service directly to any consumer for ultimate consumption.” (emphasis added)).

through consequences that expanded EVCS implementation could ultimately create for upstream utilities.

Therefore, the Kentucky Electric Cooperatives urge the Commission: (i) to reserve the discretion to revisit these issues in the future should evolving technology or other circumstances so warrant; and (ii) to carefully circumscribe its decision and find the following, which is consistent with the decisions reached by other state utilities commissions that have considered this issue.

- An owner or operator of a publicly available EVCS is providing its services “to the public” because the services will be provided to one or more end users;
- An owner or operator of a publicly available EVCS receiving any fee or other form of consideration for its services, is providing services “for compensation”;
- An owner or operator of an EVCS is providing services for “power or other uses” because the sole use of the EVCS is to power the battery in an electric vehicle;
- An EVCS owner or operator is not a “utility” or “retail electric supplier,” provided that: (1) the EVCS owner or operator does not generate or produce electricity for the EVCS; (2) the EVCS owner or operator receives its electricity for the EVCS from its territorial utility/retail electric supplier; and (3) the EVCS may be used solely for the limited service of charging a battery to be exclusively used to power an electric vehicle;
 - An EVCS owner or operator satisfying all of these conditions is providing an electric vehicle charging service, not electric service;
 - An EVCS owner or operator failing to satisfy all of these conditions is a “utility” subject to Commission jurisdiction, and a “retail electric supplier” supplying electric service to an end-user; and
- The Commission will continue to monitor EVCS deployment and reserves the right to revisit this jurisdictional question as technological advances or other circumstances warrant.

The Kentucky Electric Cooperatives believe such a decision will allow the Commission to recognize the importance of furthering this new technology, while still being sufficiently limited to afford the Commission flexibility to address evolving issues created by new

technologies or other circumstances, all in the service of ensuring the safe and reliable provision of electric service at fair, just, and reasonable rates.

This the 1st day of March, 2019.

Respectfully submitted,

/s/ Edward T. Depp

Edward T. Depp

R. Brooks Herrick

DINSMORE & SHOHL LLP

101 S. Fifth St., Suite 2500

Louisville, KY 40202

(502) 540-2300

(502) 585-2207 (fax)

tip.depp@dinsmore.com

brooks.herrick@dinsmore.com

*Counsel to Kentucky Association of
Electric Cooperatives, Inc.*