

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

<b>Commission Jurisdiction Over</b>	)	<b>CASE NO.</b>
<b>Electric Vehicle Charging Stations</b>	)	<b>2018-00372</b>

**SUBMITTAL OF COMMENTS BY THE  
ALLIANCE FOR TRANSPORTATION ELECTRIFICATION**

**INTRODUCTION**

The Alliance for Transportation Electrification (“the Alliance”) appreciates the opportunity to file comments in this proceeding, and to participate in any further proceedings or workshops that the Commission may wish to initiate. The Alliance appreciates the Commission’s decision to take a deliberate and transparent approach to study these complex issues in a general investigation type process.

The Alliance was established in November, 2017 at the time of the NARUC meeting in Baltimore, Maryland, as a non-profit mutual benefit corporation (as a 501.c.6), and is led by utilities, EV infrastructure firms, auto OEMs (original equipment manufacturers), and affiliated trade associations. We started with 20 organizations at the launch just over a year ago, and have grown rapidly to include about 45 members and affiliate organizations.

We advocate primarily before State Commissions and other state agencies, preferably prior to litigation, in which we promote policies that remove barriers to EV adoption and accelerate the deployment of EVSE (electrical vehicle supply equipment) in suitable locations in a state. We encourage a collaborative approach, not litigation at the outset, in addressing these issues at Commissions through processes similar to the approach being followed in Kentucky.

**COMMENTS**

In this current Docket, the Commission is seeking comments on whether or not it is appropriate to exempt EVCS’s (Electric Vehicle Charging Stations) from Commission regulation as an electric utility based on the express language of KRS 278.010(3)(a). The Commission properly points out that to be an electric utility under the Kentucky statute and subject to the Commission’s full jurisdiction;

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.”

The Commission also seeks comment in this Docket as to whether an EVCS, even if it meets the criteria to not be defined as an electric utility, could violate the Electric Territorial Boundary Act. The Alliance has no particular expertise with respect to this statute and will not comment on this aspect of the proceeding here.

Getting to whether or not an EVCS meets the definition of an electric utility, it is clear that the Commission could assert jurisdiction if it so desired, but perhaps could also make the case that because the electric vehicle market is nascent, sales from EVCS’s don’t amount to a general sale or furnishing of electricity to the general public as a dedicated service. In short, we believe the Commission has considerable discretion to strike the appropriate balance here, both for the near term and the longer term development of this emerging market. We believe the important point to be made is that some regulation of EVSC’s, and particularly as they begin to proliferate over the next decade or two is essential both for maintaining the reliability of the distribution grid and the development of a more “integrated energy system” that serves the interests of consumers, utilities, and third party innovators and service providers.

As the Commission points out in an Appendix, numerous states (23 and the District of Columbia) have made determinations to exempt in some way EVSCs from PSC regulation. The subject of this proceeding in Kentucky on threshold jurisdictional and legal issues has been addressed in different ways by many other jurisdictions. However, the Appendix attached to the Commission order (provided by ChargePoint) is misleading and should not be given much deference. In many of these states, the ultimate decisions by either the Legislature or the Commission that are cited are taken out of context, and accordingly, such conclusions should be assessed more carefully (as we attempt to do for certain states in the following)., If the Commission is serious about examining “case studies” or “best practices” from other jurisdictions, a more thorough examination of these proceedings is warranted before drawing conclusions from this Appendix.

#### *Washington State*

The Washington Utilities and Transportation Commission (UTC) (and other Commissions) have attempted to address similar issues for third party providers of net energy metering facilities (Docket UE-112133, July 30, 2014: Interpretive Statement concerning Commission jurisdiction and regulation of third-party owners of net metering facilities). In this Policy Statement, the Commission considered other jurisdictions such as Iowa (and its use of the eight-factor test to determine service dedicated to public use). It concluded that, on balance, the third-party

business model (in this case solar NEM have dedicated their facilities to public use. In its determination, the Commission mentioned the importance of consumer protection issues, and called for a better statutory and regulatory framework for such regulation, perhaps through an MOU between the Attorney General Office and the Commission consumer protection staff. However, the Legislature has failed to act on any of these recommendations.

Meanwhile, the statute cited in the Appendix (SHB 1571) regarding “battery charging facilities” is wholly irrelevant and outdated in the state of Washington today and should be given no weight. That legislation was prompted by a particular business model of battery swapping advocated by an Israeli company, Better Place, which over-extended itself and went bankrupt in 2013. The more relevant legislation to be considered is ESHB 1853 (RCW 80.28.360) passed by the Legislature and signed by the Governor in June, 2015, which recognized the central role of regulated utilities in building out EVSE, provided an incentive rate of return (which has never been tested), and directed the UTC to develop a Policy Statement to carry out this legislative intent (UE-160799, published in June, 2017). Accordingly, the Alliance believes Kentucky should be careful in assessing this rapidly changing EVSE marketplace today, and try to gather and hear all the evidence in a dispassionate manner and not embrace one particular non-utility business over another.

## Oregon

Similarly, the Oregon statute cited in the Appendix (757.005.1(b)(G) is not especially relevant to the Kentucky proceeding and should not be given much weight. The Oregon Legislature and the Oregon PUC have been quite active in the area of “widespread transportation electrification” as both a policy and regulatory imperative for the past four years. The Legislature passed path-breaking legislation on both renewable energy and transportation electrification (Section 20) in the bill SB 1547 in March, 2016. The important section in the bill on transportation electrification provided, among others, that “widespread transportation electrification requires that electric companies increase access to the use of electricity as a transportation fuel.” Note that the Legislature, as in Washington, provided the primary role in catalyzing the EVSE marketplace to “electric companies”, namely the regulated public service companies. In response, the regulated utilities in Oregon submitted program plans and tariffs provided for a strong utility role (including both make-ready and ownership and operation of the EVSE beyond the meter), which were subsequently approved by the Commission. Non-utility service providers have been able to participate in the development of this expanding market through qualifying as a vendor, as well as full utility ownership and operation. Accordingly, the Alliance believes that the rapidly growing and dynamic EVSE marketplace in states like Oregon have moved beyond a simple distinguishing line between “public utilities”

and “non-utility service providers” – hybrid business models are developing in a dynamic and effective manner.)

### *Alabama*

The Alabama Public Service Commission has recently opined on a similar legal threshold issue, and has concluded that third party charging service providers are not to be considered “public service companies” within that statutory definition (Docket No. 32694, dated June 22, 2018). However, the Commission reiterated that it maintains jurisdiction over existing utilities, such as Alabama Power, that it has authority to petition the Commission “to engage in the ownership, operation, lease, or control of such facilities, and seek to recover the costs of same through the jurisdictional rates that are charged to its customers.” Since Alabama Power has not filed a specific petition or program to develop EVSP’s in Alabama, a more detailed discussion is premature at this time. In its reply comments, Alabama Power stated: “In short, actions by the Company related to EVCS would be subject to the same monitoring and oversight of the Commission and its’ Staff that apply in comparable circumstances today.” Obviously, the devil will be in the details, and since the regulated utility in that state has not filed a specific program or tariff, one cannot make a final determination about how the Alabama Commission will ultimately resolve some of these complex issues.

### *Missouri*

Meanwhile, the Missouri PSC has been active in this area as well (as well as the Kansas Corporation Commission, or KCC), and issued an Order in 2017 dealing with the legal jurisdictional issues, and the definition of “electric plant” in Missouri statute and rules, in response to a filing by KCP&L. Although the Commission concluded that it lacked the authority to approve regulated utility programs and tariffs submitted to it, it considered the lack of legislative deference to the Commission on this issue and, specifically, concluded the definition of “electric plant” in a narrow manner. However, on appeal by KCP&L, the Missouri Court of Appeals, Western District, overturned the Commission’s decision,<sup>1</sup> and concluded that these issues of EV charging infrastructure, and a role for the utility, are clearly within the Commission’s jurisdiction, per statute, and implied that the Commission could advance these issues on policy grounds with the regulated utilities and other stakeholders. Meanwhile, Ameren Missouri had filed an application with the Commission in early 2018 for a modest investment in various charging infrastructure in its service territory. In response, on February 6, 2019, the Commission issued a Final Order (following the Appeals Court decision and remand back to the Commission) that approved a modest level of inter-city corridor charging (about \$4.4 million), and established a working group to develop further ideas and programs among

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<sup>1</sup> *In re Kansas City Power & Light v. Missouri Pub. Serv. Comm’n*, WD80911 (Mo. Ct. App. Aug. 7, 2018).

stakeholders for EVSE development (ET-2018-0132, February 6, 2019: “In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for approval of efficient electrification program).

*Iowa*

The Iowa Utilities Board (IUB) issued the most recent Order dealing with the subject of this Docket on February 6, 2019. First the Board asserted that it had jurisdiction to make the determination as to regulation of EVSCs contrary to comments filed by the Office of Consumer Advocate. In making this Determination, the Board pointed to the wide-variety of EVCS business models that are possible and suggested a one-size fits all, bright-line determination is not desirable. The Board also pointed to Iowa Supreme Court decisions (both *SZ Enterprises in July, 2014*, and the *Northern Natural Gas v. IUB case in September, 1968*)<sup>2</sup> in which the Court disavowed a bright line rule in favor of an eight-factor test that considers eight specific factors that are assessed in determining what may constitute services dedicated to general public use. Several State Commissions, including Arizona, Colorado, Washington, and others, have referred to this specific test in determining jurisdictional issues.

In the end, the IUB concluded in its proposed rule that “electric energy sold for the purpose of electric vehicle charging at a commercial or public electric vehicle charging station constitutes neither the furnishing of electricity to the public nor the resale of electric service. If the electricity used for electric vehicle charging is obtained from a rate-regulated public utility, the terms and conditions of the service to the electric vehicle charging station shall be governed by and subject to the utility’s filed tariff...”

While this is not the whole of the Iowa Board’s Proposed Rule, what they have proposed in essence is that while they won’t regulate the price for selling charging services, they will regulate the rates, terms and conditions of the electricity provided to EVCS’s by rate-regulated utilities providing cost-based services.

There is a reason that this seemingly subtle distinction is critical. EVSC’s, and particularly those using DC fast charging can create tremendous loads on the distribution grid. The providing utility must know, often in real time, what loads charging vehicles are placing on the system. Advance planning and operational coordination between the utility and the EVCS is vital to ensuring grid safety and reliability. There may often be site-specific challenges which the utility

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<sup>2</sup>SZ Enterprises LLC v. Office of Consumer Advocate, Environmental Law & Policy Center, Iowa Environmental Council, Iowa Solar/Small Wind Energy Trade Association, Iowa Renewable Energy Association, Solar Energy Industries Association (SEIA), and Vote Solar Initiative, Intervenor-Appellees. (Supreme Court of Iowa, No. 13-0642. Decided: July 11, 2014) and Iowa State Commerce Com’n v. Northern Natural Gas Co., 161N.W.2d 111, Iowa 1968. (Decision No. 52959, Supreme Court of Iowa, dated September 5, 1968)

must incorporate into its transmission and distribution planning. The Iowa Board's proposed rule explicitly requires a tariff between the utility and EVSC to address these, among other issues.

In conclusion, while the Alliance generally agrees that heavy-handed regulation of EVCS's is not as a general matter required, we also do not believe a bright line test exempting EVCS's fully from utility regulation is appropriate either. At a minimum, the Iowa approach of ensuring that EVSCs adhere to terms of a Commission-approved tariff is essential. In particular, we believe the Factor Number 8 in the eight-part test should be carefully evaluated, namely: "actual or potential competition with other corporations whose business is clothed with the public interest."<sup>3</sup> The Commission should exercise its discretion to fully consider such criteria. And the Commission should not foreclose future regulatory needs when EVCS's are providing a major proportion of the Commonwealth's transportation energy and may need a different approach than today.

#### OTHER ISSUES

While not directly at issue in the current Docket, we take this opportunity to just mention some other issues that the Commission should address in future proceedings or perhaps through stakeholder workshops. As in many other states such as Michigan, Minnesota, Ohio, Washington, and Oregon, the Alliance realizes the "fine line" that the Commission has to walk between what the Legislature may wish to do in the EV and EVSE area, compared to what the Commission may wish to pursue, upon the request of regulated utilities. Again, this is not unique to Kentucky, and Commissions have to grapple with this interaction in the EVSE area and other emerging technologies including distributed energy resources (DER's). While the desire for clear and concise Legislative action is admirable, but it is often not achievable for a variety of reasons we will not discuss here.

As we argue below, we believe the imperative to action on EVSE deployments today is urgent given the large number of EVs – including light duty and medium and heavy-duty vehicles – coming in to the fleets in the next several years. The Commission itself acknowledges that Kentucky is behind neighboring states in constructing EV infrastructure. But the opening of this Docket provides an opportunity to begin to address the myriad of issues that EV market penetration over the next decade will raise. We would recommend that the Commission initiate a state-wide study and series of stakeholder workshops to begin the process of identifying and then addressing EV issues. Such a process might be done in coordination with other state agencies that will affect the ability of Kentucky to adopt to electric and autonomous vehicles in the future. It is not too early to start preparations for what many believe will be the next

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<sup>3</sup> *Ibid.*

revolution in transportation and mobility. Agencies that could be included in such stakeholder workshops, facilitated by the Commission, may include the Energy and Environment Cabinet, the Kentucky Transportation Cabinet, Kentucky DEP, and others.

*Time Is of the Essence*

First, the Alliance believes that the “infrastructure gap” is large and growing, in not just Kentucky but throughout the country. If one examines the various projections for EVs based on public announcements from auto OEMs and others, as well as examining the declining costs of batteries and other components of electric drive transportation, there is little question that the industry is preparing for “hockey-stick” type growth in the 2018 to mid-2020s period.

One of the major constraints to this growth, however, is inadequate infrastructure. This includes the infrastructure being deployed by non-utility third parties, as well as regulated utilities across the country. By all accounts and forecasts, it is simply inadequate, and if not resolved quickly through regulatory and policy actions, will impose a major barrier on such growth in EVs and innovation generally.

We therefore encourage Kentucky to conduct a specific state-level study, either through a state agency, a non-governmental organization, or other entity, to more granularly study the distribution grid, including at the city and county levels, to see where the EV infrastructure could be sited. We also encourage the utilities to engage in specific, distribution-level studies in their service territories to assess similar issues, and perform what other utilities have done around the country. One example of such a study was conducted by Southern California Edison, in what is referred to as “Pathway to 2030.”

*Utility Involvement is Important*

Second, we believe that a robust utility role in planning and building out EVSCs is vital for a number of reasons. The Alliance fundamentally believes that the utility has an important role to play in market transformation of EV infrastructure, especially at this nascent stage (although we are quickly moving from early adopter to early majority, in our view) of market development. There are several key market failures or gaps in today’s marketplace dominated by non-utility third parties (such as low-income and disadvantaged communities, rural communities, multi-unit dwellings and more densely populated urban areas, to cite a few). Only a strong utility role – with ratepayer funding that is deemed to be just and reasonable (J&R) and approved by the Commission – can resolve these gaps on a sustainable basis. Moreover, since the utilities are heavily regulated by the Board, they have the “obligation to serve” and indeed have the responsibility given to the Board by the Legislature to ensure “universal service” (or as close an approximation as possible) for all types of electric service, including EV infrastructure services. Finally, the issue of scale is very important in today’s market development given the projected rapid growth in the marketplace mentioned above and agreed upon by most analysts. The

utilities have large balance sheets, and deep access to capital markets, and have traditionally had a core competency in building out infrastructure in the distribution grid. Accordingly, we believe that the Board should allow, and in fact encourage, a strong utility role in this phase of market development, while ensuring appropriate protections for electric ratepayers (including non-participants) as well as recognizing a robust role for non-utility service providers either offering services on a stand-alone basis or on a turnkey basis with utilities.

*Infrastructure Must Possess Open Standards and be Interoperable*

The Alliance believes strongly in building out an EV infrastructure that is interoperable and subject to open standards. Today, that is not the case. The Alliance is concerned that, without sufficient attention devoted to this by this Commission and other state decision-makers, the EV ecosystem will develop on both the front end (consumer facing), and the back end (network management system to charging stations) in a manner that is detrimental to EV owners, utilities, and the general public interest.

*i. Network to Charger Communications; Hardware Portability*

The Alliance believes that the Open Charge Point Protocol (OCPP), which is not connected with any individual charging network, is the most appropriate protocol for the network to charger communications. As evidence of OCPP's importance, all members of the Alliance have committed to using this protocol while it advances through the process for "official" designation.

We believe the industry is generally coming around to this standard, although more slowly than we would like, and that the Board does have the authority to condition the use of ratepayer funding for EVSE to be used by the regulated utility, in an RFP or tendering process, to be compliant with OCPP, and that such EVSE be "portable," or contractually permitted to be moved between networks without onerous fees. The utility must ensure, through due diligence and self-certification procedures, that all of the vendors are, in fact, complying with this in practice. Moreover, since all EVSE providers have demand response capabilities, the Alliance believes that adherence to the Open ADR standards is equally important; most vendors have accepted this as a widely accepted standard.

*ii. Network to Network Communications; Customer Roaming*

Customer roaming between networks is another topic worthy of discussion. While plug shapes have not yet coalesced to a single format for DC fast charging, charger manufacturers are addressing this by equipping units with multiple plugs, *i.e.*, CHAdeMO and CCS. (Tesla remains an independent network, though Teslas are capable of using CHAdeMO chargers with an adapter and Teslas can use the J-1772 Level 2 industry standard plug, also with an adapter.)



A more significant issue we've observed is that many customers prefer to use a single card to access each of the various charging networks. This is what we mean by "roaming" or network to network communications. Currently, each network generally operates independently and requires a dedicated account. As with network to charger communications, so too is the industry gradually moving toward a means for customers to use the card for one network on another network's chargers. One of the protocols for customer roaming between networks is called Open Charge Point Interface (OCPI).

## CONCLUSION

In summary, the Alliance commends the Commission for opening this rulemaking proceeding to gather information on EV charging infrastructure, and we look forward to participating in the months and years ahead. We believe that the Commission should keep this proceeding open for the foreseeable future since it is vital to develop a robust and transparent stakeholder process among not just the utilities, consumers, EVSCs, and other traditional intervenors before the Board, but a larger and more diverse group. Also, since technology is evolving rapidly in EV infrastructure and as more functionalities may be added such as demand response (DR) and distributed storage, we believe that it is prudent for the Commission and its staff to stay abreast of these issues.

There are many other issues which we do not address in these comments, such as the quickly evolving role for medium and heavy duty EVs (such as transit, school buses, and commercial delivery fleets), DC fast charging issues both in cities and inter-city corridors, demand charges and other rate design issues, and vehicle to grid (VGI) integration issues as mobile batteries become larger and more capable of interfacing with the distribution grid. But we reserve the right to comment on these issues once the Commission has resolved the jurisdictional issues, and is prepared to move to the next phase of this Docket, if appropriate. We believe that this is a unique and valuable opportunity for both the Commission and Kentucky as a whole to address this epochal transformation of the electric power and transportation markets. The Commission can set forth a regulatory framework in which both economic innovation and consumer interests are protected as this transformation occurs over the next decade or two.

Respectfully submitted,

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