

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the Application of Evergy Metro, Inc.,)
Evergy Kansas Central, Inc., and Evergy Kansas) Docket No. 21-EKME-320-TAR
South, Inc. for Approval of Transportation)
Electrification Portfolio.)

**REPLY BRIEF OF
EVERGY METRO, INC., EVERGY KANSAS CENTRAL, INC.,
AND EVERGY KANSAS SOUTH, INC.**

COME NOW Evergy Metro, Inc., Evergy Kansas Central, Inc., and Evergy Kansas South, Inc. (“Evergy”) and hereby submit to the State Corporation Commission of the State of Kansas (“Commission”) this reply brief in accordance with the *Presiding Officer Order Amending Procedural Schedule* issued in this docket on August 25, 2021.

I. INTRODUCTION

1. Evergy filed its *Initial Post-Hearing Brief of Evergy Metro, Inc., Evergy Kansas Central, Inc., and Evergy Kansas South, Inc.* (“Evergy’s Initial Brief”) on October 8, 2021. On October 22, 2021, responsive post-hearing briefs were filed by the Commission Staff (“Staff’s Brief”), the Citizens’ Utility Ratepayer Board (“CURB’s Brief”), ChargePoint, Inc. (“ChargePoint’s Brief”) and American Fuel & Petrochemical Manufacturers¹ (“AFPM’s Brief”). To a large extent, Evergy’s Initial Brief has addressed the arguments set out in the Briefs of the

¹ The AFPM group also includes Kansas Corn Growers Association, Fuel True Independent Energy & Convenience, and Renew Kansas Biofuels Association.

other parties and Evergy will attempt to avoid repetition in this Reply Brief. Not responding specifically to every argument or assertion of the other parties should not be construed as agreement with their position.

2. This Reply Brief is organized so as to respond to each party individually in the following order: Staff, CURB, ChargePoint and AFPM. To the extent a response is applicable to more than one of the parties' arguments, it should be applied to them all even if not repeated in each section.

II. RESPONSE TO STAFF'S BRIEF

3. Staff agrees with Evergy that the Non-Unanimous Partial Settlement Agreement ("S&A" or "Agreement") should not be amended to add the requests made by ChargePoint.² Staff's position is also consistent with Evergy's rejection of AFPM's challenges to the legality of Evergy's Application and this proceeding.³

4. Regarding expansion of the Clean Charge Network ("CCN"), Staff asserts that granting Evergy's request for decisional prudence effectively prevents the Commission from later concluding the cost was imprudently incurred, should Staff find evidence of its imprudence during the audit process in a rate case.⁴ Staff's reason is that the request was too broad and undefined, and the Application lacked a definition of "underserved" as well as any limitations on the expansion.⁵

² Staff's Brief, pp.8-9, ¶¶ 20-22. The additions requested by ChargePoint are addressed by Evergy in its Initial Brief, pp. 30-31, ¶¶ 51-55.

³ Staff's Brief, pp. 9-11, ¶¶23-25.

⁴ Staff's Brief, p. 11, ¶28.

⁵ Staff's Brief, pp. 11-12, ¶28.

5. Staff's concerns are no longer justified in light of the evidence and testimony now in the record. First, the parties have reached a definition of "underserved" in the context of the S&A and that definition can apply equally to the CCN.⁶ Second, Evergy has made every attempt to explain the limitations on its request for a grant of decisional prudence, making clear that disallowances are still permissible if the Commission agrees with a Staff finding of imprudence in how Evergy locates the stations or in their construction.⁷ The investment is further limited by the proposed "cap" of \$13.5 million on the potential spend for the stations, and by Evergy's repeated confirmation that it does not seek to become a player in the charging station marketplace and only plans to build stations as needed to fill gaps in service.⁸

6. Staff proposes certain "guardrails" be put in place if the Commission decides to grant approval of the CCN expansion. This acknowledges that the investment can occur in a way that allows the Commission proper oversight and control.⁹ Staff recognizes stations need to be built in Kansas, and that in some areas of the state the utility may be the entity that needs to build them.¹⁰ Staff prefers a process that allows the utility to step in only when an area meets the agreed-upon definition of "underserved", or when private industry is not interested in meeting an identified need.¹¹

⁶ Grady, Tr. Vol. 2, pp. 116, 117, 119; Caisley, Tr. Vol. 1, p. 116.

⁷ Caisley, Tr. Vol. 1, pp. 60, 127.

⁸ Ives, Tr. Vol. 1, pp. 279-280.

⁹ Staff's Brief, pp. 13-15, ¶¶31-34.

¹⁰ Grady, Tr. Vol 2, pp. 119-120.

¹¹ Grady, Tr. Vol. 2, pp. 120-121. Staff also discussed a budget cap, which Evergy believes was included in its Application. (See Evergy's Initial Brief, p. 26, ¶45.)

7. Evergy testified that it does not object to Staff’s approach as long as the guardrails imposed are reasonable, clear and do not undermine the goals of the program.¹² For investment in underserved areas, the standard is clear since the parties have agreed to an objective method of identifying those areas. As for areas not falling within the underserved definition where a need for a station has been identified, Staff wants Evergy to attempt to get private entities to build before Evergy builds. This guardrail needs further detail, as discussed in Evergy’s Initial Brief.¹³

8. Finally, Staff raises the argument again that the enactment of HB 2145 during the 2021 legislative session expresses the intent of Kansas lawmakers that charging stations should only be built by private industry.¹⁴ Other parties make this argument as well.¹⁵ Evergy was very involved in the passage of that legislation, as was ChargePoint, and both have explained that the intent was to remove regulatory obstacles to private station ownership; it was not to exclude utility companies from participating when it is in the public interest for them to do so.¹⁶ HB 2145 should not be interpreted in a way that hinders access to charging stations in Kansas, especially since that would be the *opposite* of the overarching purpose of the legislation.

III. RESPONSE TO CURB’S BRIEF

9. CURB maintains its initial position that the CCN expansion should be rejected outright.¹⁷ CURB’s arguments have been addressed comprehensively in Evergy’s Initial Brief.

¹² Evergy Initial Brief, pp. 26-27, ¶¶44-47.

¹³ Evergy’s Initial Brief, p. 26-27, ¶ 45.

¹⁴ Staff’s Brief, p.12, ¶30.

¹⁵ CURB’s Brief, pp. 19-20, ¶60; AFPM’s Brief, p. 21.

¹⁶ Caisley, Tr. Vol. 1, pp. 37, 122-123.

¹⁷ CURB’s Brief, p. 21, ¶63 – “CURB does not believe that Evergy should be allowed to proceed with its proposed CCN investment at this time, even with the guardrails discussed by the Commission.”

CURB continues to promote the Commission’s findings in the 16-160 Docket that Evergy has explained are not consistent with the additional information and data available today and are no longer serving the best interests of Kansas. Evergy implores the Commission to take this new and better information and look to the future, not to the past as CURB has done.

10. CURB also argues that the S&A submitted to the Commission in this docket results in a robust program for transportation electrification (“TE”) so expansion of the CCN should at least be delayed until the S&A has time to work.¹⁸ But the Commercial Charger Rebate (“CCR”) program in the S&A is not a replacement for the CCN expansion plan. The goal of the CCN expansion is to make public charging available in areas of Kansas where it is needed but will likely not occur without utility involvement. In contrast, the CCR program is designed to generate non-utility charging stations that contain “grid friendly” characteristics the utility can leverage in the future to manage the impacts of TE. Specifically, the CCR program requires participants to (1) install networked chargers capable of demand response, and (2) provide Evergy with access to charger-level usage data. The CCR program enables Evergy to influence the rollout of charging infrastructure in ways that will benefit future grid management, which is solely Evergy’s responsibility. While Evergy believes the CCR will be attractive to third-party developers in Evergy territory, the primary purpose is to incent third-party station development to be more “grid friendly” and to give Evergy greater visibility to valuable data.

11. CURB argues that the Kansas Supreme Court’s decision in *KG&E*¹⁹ requires the charging stations to be “used and required to be used” if the investment is to be placed into rates; a regulatory concept with which Evergy does not disagree. However, a utility must plan its

¹⁸ CURB Brief, p. 21, ¶¶64, 65.

¹⁹ *Kansas Gas & Electric Co. v. State Corp. Comm’n*, 218 Kan. 670 (1976).

facilities in advance, anticipating future needs and employing projections and forecasting. In *KG&E*, the court rejected the Commission’s decision to exclude from rate base a portion of *KG&E*’s La Cygne plant even though it was not being fully used at the time, explaining,

Accordingly, items of property not used or reasonably necessary to the furnishing of the product or service should not be included in the rate base; ... On the other hand, property or equipment provided **or acquired in anticipation of reasonable future need** should be allowed as part of the rate base even though wholly or partially unused at the time to which the inquiry relates.²⁰

The decision explains that property not used to its full capacity can still qualify as being “used and useful”. Evergy believes *KG&E* actually supports Commission approval of the CCN proposal.

12. CURB’s reliance on *Jones*²¹ is not correct either.²² *Jones* expresses the general regulatory concept that rate design should attempt to assign cost recovery to the class of customers who cause a cost to be incurred. But other factors besides economic efficiency and subsidy free allocation influence rate design, as explained by Staff witness, Mr. Robert Glass, in a previous rate case docket:

Because there is no mechanical method universally accepted to generate rates and because **many other factors besides economic efficiency and subsidy free allocation influence rate design**, rate design by its very nature is a subjective balancing of many different and changing objectives. Within this balancing act, rate design practitioners generally agree that CCOS [Class Cost of Service] is just a starting point and a guide, not the means to a mechanical rate design.

The CCOS study, because it reflects cost causation, provides a starting point for rate design but is not the only objective of rate design. Staff, like Lutz in his testimony, takes several different objectives into account when creating a rate design. These objectives include gradualism to minimize rate shock, revenue stability for the company, **economic development, and energy efficiency**.²³

²⁰ *KG&E* at 676 (emphasis added).

²¹ *Jones v. Kansas Gas & Elec. Co.*, 222 Kan. 390 (1977).

²² CURB’s Brief, p. 15, ¶¶49 - 51.

²³ Direct Testimony of Robert Glass in Docket No. 12-KCPE-764-RTS, filed August 22, 2012, pp. 4, 10, (emphasis added).

13. *Jones* involved late payment fees for customers who had failed to pay their bill timely which required the utility to incur additional, distinct collection costs. The utility's late payment fee didn't distinguish between customers who were only a few days late (and didn't cause any real additional costs) and those who were severely delinquent (causing substantial additional costs). *Jones* did not involve complicated rate design questions or policy, infrastructure build-out, or grid management efforts that benefit all customers, as does the CCN program. Furthermore, CURB ignores the Commission's finding in Docket No. 04-GIMX-531-GIV where the legality of low-income discount rates were considered in light of *Jones* and other related caselaw.²⁴ The Commission found that "some programs benefiting low-income ratepayers might have **system-wide advantages** such that, under certain circumstances, there might be sufficient justification. Weatherization programs benefiting low-income ratepayers might achieve such system-wide advantages through conservation and efficiency achievements." It is Kansas law and policy that discounted rates and other forms of cross-subsidies within the rate structure do not violate *Jones* when they provide benefits to all customers. The CCN provides benefits to all customers.²⁵ *Jones* does not prohibit Commission approval of the CCN expansion.

14. The *Midwest Gas Users Ass'n*²⁶ and *Hope*²⁷ cases cited by CURB also do not support denial of the CCN expansion. Both cases make clear that the Commission is to use its judgment and discretion to evaluate the evidence presented and issue an order that properly

²⁴ "In the Matter of the Generic Investigation to Consider a General Commission Policy with Regard to a Low Income Assistance Tariff by Utilities Providing Electric and Natural Gas Service in Kansas", Order issued August 31, 2005.

²⁵ Evergy's Initial Brief, pp. 15-16, ¶28.

²⁶ *Midwest Gas Users Association v. State Corporation Commission*, 3 Kan. App.2d, 376 (1979). CURB's Brief, pp. 15-16.

²⁷ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). CURB's Brief, p. 11, ¶37.

balances the interests of all parties.²⁸ The evidence in the present docket showing the CCN expansion is in the interests of all customers is substantial; certainly, it is sufficient to support an order approving the proposal.

IV. RESPONSE TO CHARGEPOINT'S BRIEF

15. ChargePoint supports Evergy's Application and agrees that Evergy's proposed programs, including the CCN, can enhance competition in the charging market.²⁹ This is important to point out because all of the parties objecting to the CCN expansion cite their concern over its impact on competition. However, ChargePoint is the only actual competitor in the charging station marketplace who chose to become involved in this case and ChargePoint supports the CCN expansion.

16. ChargePoint also explains the additions to the S&A it is requesting, which Evergy addressed in its Initial Brief. There are two assertions in ChargePoint's Brief to which Evergy will provide an expanded reply.

17. The first concerns ChargePoint's request that the Commission modify the S&A to allow customers to install a NEMA outlet or hardwire their charger under the Residential Rebate program. This would remove the "de facto" 50 amp limitation on the charging rate imposed by the S&A and ChargePoint argues that Evergy has not explained why it is necessary or desirable to impose a limitation.³⁰ Evergy has, in fact, addressed this issue, explaining that it does not want to incentivize installations larger than 50 amp due to the increased potential for local distribution

²⁸ *Midwest Gas Users Ass'n* also made the point that the mere indicia or potential for subsidization would not rise to the level of undue discrimination. (*Midwest Gas Users Ass'n* at 391.)

²⁹ ChargePoint's Brief, pp. 1-2, 10. ChargePoint proposes additional recommendations it believes will ensure competition is promoted under the programs.

³⁰ ChargePoint's Brief, p. 5.

impacts.³¹ A single family home has an electrical service between 100 amps and 200 amps. The 50 amp limitation effective under the terms of the S&A is important for managing the impact on the distribution system and related costs.

18. The second issue that Evergy wants to respond to concerns ChargePoint's request that the S&A be modified to include a requirement that the customer be rebated for the installation of a smart charger and not just for installation of a 240V outlet.³² ChargePoint asserts that disaggregation algorithms are unproven, and if Evergy is unable to meet its data gathering goals via disaggregation, then customers will have to purchase a smart charger in the future.³³ Evergy disagrees, as utilities are currently pursuing a variety of approaches to managing the impact of residential charging.³⁴

V. RESPONSE TO AFPM'S BRIEF

19. AFPM insists that the Commission evaluate the emerging TE economy and Evergy's role in it through the lens of today's existing circumstances and not with a view to the future. AFPM ignores the reality that Evergy is responsible for grid management and has a legal obligation to provide electric services to all of its customers, including its mobile customers. Evergy's Initial Brief addresses these short comings in AFPM's arguments and those comments will not be repeated in this Reply Brief.

20. However, Evergy must respond to AFPM's claims that (1) Evergy's programs result in unjust and unreasonably discriminatory rates to competitors in the EV charging space and

³¹ Voris, Tr. Vol. 1, pp. 214-215.

³² ChargePoint's Brief, pp. 2, 5

³³ ChargePoint's Brief, p. 6.

³⁴ Voris, Tr. Vol. 1, p. 181.

fuels market³⁵, (2) its assertion that ICF's cost effectiveness modeling showing net benefits to all Evergy's customers from the growth in EVs is flawed because it was not tailored to be Kansas-specific³⁶, and its legal argument that the adoption of K.S.A. 66-1239 prohibits the Commission from approving other forms of predetermination.

21. First, as Evergy points out above in ¶ 15 and in its Initial Brief, approving Evergy's involvement in the TE marketplace as contemplated in its Application is not unjust or unfair to private charging station providers; it supports their efforts. This is evidenced by the fact that the only charging station market participant who chose to be involved in this docket – ChargePoint - supports Evergy's Application. Furthermore, AFPM fails to acknowledge that utilities are not on the same playing field as private entities who operate in the free market because Evergy is the only company who bears the responsibility of managing grid impacts associated with TE. Evergy may have an existing customer base that some competitors do not possess, but Evergy is also the only entity with a legal obligation to provide electric services throughout its territory, including the lower population and lower income areas that will likely be overlooked by the private sector during the earlier stages of the TE build out. Evergy's situation is much different than that of private providers in the free market.

22. Second, AFPM is wrong in its assertion that ICF's cost effectiveness modeling does not reflect Kansas-specific data and inputs. ICF used EPRI's projections which were specifically developed for Evergy's service territory. At hearing, AFPM asked Evergy witness, Ms. Winslow, questions about the data used in the modeling and Ms. Winslow deferred those questions to another Evergy witness, Ms. Colletti.³⁷ Ms. Colletti is the company's expert on the details of the modeling.

³⁵ AFPM's Brief, p. 2.

³⁶ AFPM's Brief, p. 24.

³⁷ Winslow, Tr. Vol. 1, pp. 137-138.

However, AFPM did not direct any questions to Ms. Colletti. The Evergy Transportation Electrification Portfolio Filing Report (“Report”) filed with Evergy’s Application, Section 2.2, makes clear that EPRI’s modeling is reflective of Evergy’s territory.³⁸

23. Third, AFPM is legally incorrect in its argument that the adoption of K.S.A. 66-1239 should be interpreted as precluding the Commission’s power to approve other forms of predetermination. Essentially, AFPM is making an argument under the doctrine of *expressio unius est exclusio alterius*, i.e., the inclusion of one thing implies the exclusion of another. But the doctrine of *expressio unius* does not apply here because of the broad generic powers the legislature has granted the Commission.

The *expressio unius* doctrine may be applied to assist in determining actual legislative intent which is not otherwise manifest, although the doctrine should not be employed to override or defeat a clearly contrary legislative intention. ... The extent to which the doctrine should be applied depends in any event on how clearly the drafter's intent is otherwise expressed.³⁹

As the Commission notes, the Kansas Supreme Court has held K.S.A. 66-101 and K.S.A. 66-101g are a constitutional delegation of legislative authority. ... Based on the broad statutory authority granted to the Commission, the *expressio unius* doctrine does not appear applicable with respect to determining legislative intent.⁴⁰

24. There is no statement of this type of legislative intent in K.S.A. 66-1239. The Commission has always had the ability to grant predetermination on a discretionary basis, and the

³⁸ The Evergy Report explicitly states that EPRI’s model is “calibrated to county level registration data”, and it references an EPRI report that explains EPRI’s methodology. This EPRI report includes an explanation of how states with EV sales mandates are treated differently than states that do not have these mandates, which is the focal point of AFPM’s questioning.

³⁹ *Kan. Indus. Consumers Group, Inc. v. State Corp. Comm’n*, 36 Kan.App.2d 83, 96 (2006) – “Likewise, federal courts are especially reluctant to apply the doctrine when defining the authority of a regulatory agency. [cite omitted]. (“[T]he combination of the FCC’s ‘necessary and proper’ authority under 47 U.S.C. §154(i) and the limited usefulness of the *expressio unius* doctrine in the administrative context permit the FCC to expand the reach of universal support to non-telecommunications carriers.”)

⁴⁰ *Kan. Indus. Consumers Group*, at 97.

adoption of the statute is designed to grant utilities the right to obtain predetermination from the Commission on transmission and distribution investments. K.S.A. 66-1239 did not limit the Commission's pre-existing discretion; it granted a specific right to utility companies. K.S.A. 66-1239 is not an exclusive means for obtaining predetermination from the Commission as argued by AFPM.

VI. CLOSING

25. Ultimately, Evergy expects the private market will ultimately meet the needs of EV owners in Kansas, but the compelling question at this point is not “if it will occur”, but “when will it occur” and “how will it occur”. Evergy’s proposal begins to address these questions in a manner that benefits all its Kansas customers. Evergy will start meeting customers’ needs on a more equitable basis *now*; Evergy will begin working in its role to manage TE growth so that it occurs in a grid friendly manner.

26. Supporting and managing the growth of electric vehicles and the new TE economy is not a one-factor equation. A number of actions, programs and policies will need to be adopted and modified to capture the many benefits this revolution offers to Kansas and the nation. And Evergy’s TE portfolio proposed in this docket is not the last step in the process – it is only the next step. Evergy requests the Commission approve this next step and allow Evergy to move forward in this very limited way to embrace the TE future and manage its impact on the grid in Evergy’s Kansas territory. The law, public policy and the evidence presented in this docket support approval.

Respectfully submitted,

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VERIFICATION

I, Glenda Cafer, verify under penalty of perjury that I have caused the foregoing pleading to be prepared; that I have read and reviewed the same; and that the contents thereof are true and correct to the best of my information, knowledge, and belief.

Glenda Cafer

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing pleading was electronically served this 5th day of November, 2021 to:

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