

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

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

**RESPONSIVE BRIEF OF THE CITIZENS' UTILITY RATEPAYER BOARD**

COMES NOW, The Citizens' Utility Ratepayer Board (CURB) and respectfully submits its *Responsive Brief* pertaining to Evergy Kansas Metro Inc. and Evergy Kansas Central Inc. (Evergy or “Company”) proposed Clean Charge Network (CCN) electric vehicle (EV) charging station program in Kansas. As set forth below, CURB recommends that the Commission deny approval of Evergy’s request for decisional prudence of its CCN proposal.

**A. Background**

1. On February 24, 2021, Evergy filed its Application for Approval of Transportation Electrification Portfolio<sup>1</sup> (“Portfolio”) before the Kansas Corporation Commission (KCC) requesting approval of the Portfolio which included: rebate programs; rates for charging services, and associated education and program administration budget; the authorization to use a deferral accounting mechanism to track program costs associated with the Portfolio (incentive rebates and other program costs such as customer education and program administration) for recovery of prudently incurred costs in future rate cases through expense amortization over a period of five years; and a request that the Commission find that the limited and targeted CCN expansion plans in the filing are prudent from a decisional perspective.<sup>2</sup> Specifically, Evergy’s proposed portfolio

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<sup>1</sup> Application For Approval of Transportation Electrification Portfolio (February 24, 2021).

<sup>2</sup> Application For Approval of Transportation Electrification Portfolio.

included (1) rebates to incentivize the installation of a 240V outlet at residential locations to encourage the installation of Level 2 (L2) charging in residential homes, (2) rebates to developers to incentivize the installation of a 240V outlet at residential locations to encourage the installation of L2 charging in the construction of new homes, (3) rebates to incent installation of commercial EV charging infrastructure by a third party, (4) rates that encourage off-peak fleet and commercial EV charging, (5) customer education and program administration for the proposed programs and rates and (6) additional charging stations to build on Evergy's CCN.<sup>3</sup>

2. On March 1, 2021, CURB filed its Petition to Intervene and Motion for Protective Order and Discovery Order, explaining Evergy's Portfolio may substantially affect the rates paid, and services received by residential and small commercial ratepayers.<sup>4</sup>

3. On March 9, 2021, the Commission issued its Order Granting CURB's Petition to Intervene.<sup>5</sup>

4. On March 15, 2021, National Resource and Defense Counsel (NRDC) filed its Petition to Intervene.<sup>6</sup>

5. On April 6, 2021, ChargePoint Inc. (ChargePoint) filed its Petition to Intervene.<sup>7</sup>

6. On April 22, 2021, the Commission issued its Orders Granting NDRC and ChargePoint's Petitions to Intervene.<sup>8</sup>

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<sup>3</sup> Direct Testimony of Charles A. Caisley p. 7.

<sup>4</sup> CURB Petition to Intervene and Motion for Protective Order, p. 2 (March 1, 2021).

<sup>5</sup> Order Granting CURB's Petition to Intervene (March 9, 2021).

<sup>6</sup> NRDC Petition to Intervene (March 15, 2021).

<sup>7</sup> ChargePoint Petition to Intervene (April 6, 2021).

<sup>8</sup> Orders Granting NDRC and ChargePoints's Petitions to Intervene (April 22, 2021).

7. On June 8, 2021, American Fuel & Petrochemical Manufacturers (AFPM) filed its Petition to Intervene.<sup>9</sup>

8. On June 29, 2021, the Commission issued its Order Granting AFPM Petition to Intervene.<sup>10</sup>

9. Pursuant to the Presiding Officer Order Granting Joint Motion for Procedural Schedule issued March 31, 2021 (“Procedural Order”), the parties to this proceeding met and engaged in settlement discussions on July 21, 2021.

10. As a result of the settlement discussions, CURB, KCC Staff (“Staff”), Evergy and NDRC reached a Partial Non-Unanimous Settlement Agreement (“Settlement Agreement”) on many of the issues involved in this case, which has been reduced to writing and filed in this docket on July 29, 2021.<sup>11</sup> The Agreement was non-unanimous in that AFPM and ChargePoint were not signatories.

11. On July 30, 2021, CURB, Staff, and Evergy filed Testimony In Support of the Partial Non-Unanimous Settlement Agreement.<sup>12</sup>

12. On July 30, 2021, AFPM filed Testimony in Opposition to the Partial Non-Unanimous Settlement Agreement.<sup>13</sup>

13. The Settlement Agreement resolved many of the issues as proposed by the

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<sup>9</sup> AFPM Petition to Intervene (June 8, 2021).

<sup>10</sup> Order Granting AFPM Petition to Intervene (June 29, 2021).

<sup>11</sup> Motion to Approve Partial Non-Unanimous Settlement Agreement (July 29, 2021).

<sup>12</sup> Testimony in Support of Partial Non-Unanimous Settlement Agreement of Andrea Crane, Justin T. Grady, Darrin R. Ives.

<sup>13</sup> Testimony In Opposition of Partial Non-Unanimous Settlement Agreement of Don Thoren.

Portfolio. These included the Residential Rebate Program for installing 240 volt outlets in a home. The Settlement provides for rebates of \$500 or \$250, depending upon the rate schedule selected by the customer, with higher rebates for customers that select an EV or TOU rate.

14. The Settlement Agreement further authorizes the Company to spend up to \$10 million on the Commercial Rebate Program. \$1.6 million of this amount will be targeted to underserved areas. Depending on the results of the initial program, the Settlement provides for the Commercial Rebate Program budget to be increased to \$15.4 million through an expedited process at the request of Evergy, with the concurrence of KCC Staff and CURB.

15. The parameters that will be considered when evaluating whether to support an increase in the Commercial Rebate Program budget, include a) the number of EVs in each territory and the number of public chargers that are available, b) the number of public charging ports that have become available without the assistance of the rebate program, and c) the extent to which actual experience tracks with the Electric Power Research Institute's ("EPRI") current medium run projections for EVs.

16. The Settlement includes a budget for Customer Education and Program Administration of \$2.3 million. Internal labor costs will not be included in the deferred asset related to Customer Education and Program Administration costs.

17. At CURB's request, the Residential Developer Rebate was rejected as part of the Settlement.

18. The Settlement provides for the approval of the Transit Fleet and Business EV TOU rates as proposed by Evergy.

19. CURB, KCC Staff, AFPM, ChargePoint and Evergy could not reach agreement on the CCN portion of the Portfolio.

20. In its Portfolio, Evergy is requesting a decision from the Commission that it would be prudent for Evergy spend up to \$13.5 million in costs for expanding the CCN as described in its application.<sup>14</sup>

21. Evergy's proposed CCN expansion includes the installation of approximately 102 new EV charging stations in its service territories.<sup>15</sup> Ninety-nine of the new EV charging stations would be within the Kansas Central service area and three within the Kansas Metro service area.<sup>16</sup>

22. Evergy is not seeking a regulatory asset tracking mechanism treatment for the expansion of additional CCN deployments as part of this filing. Evergy intends to request recovery of prudently incurred O&M expenses, as well as rate base treatment of prudently incurred capital spend associated with the CCN deployments, as part of a future general rate case. Evergy acknowledges that its execution of the CCN expansion plans will be subject to review in its next rate case.<sup>17</sup>

## **B. Evidentiary Record**

23. On February 24, 2021, Evergy filed direct testimony of Charles Caisley in support of its Application.<sup>18</sup> In his testimony, Mr. Caisley identified six additional witnesses offering direct

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<sup>14</sup> Transportation Electrification Portfolio p. 32

<sup>15</sup> *Id.*

<sup>16</sup> Transportation Electrification Portfolio p. 32.

<sup>17</sup> Evergy Kansas Metro and Evergy Kansas Central Application for Approval of Transportation Electrification Portfolio p. 4 (February 24, 2021).

<sup>18</sup> Testimony of Charles Caisley February 24, 2021).

testimony through the Portfolio.<sup>19</sup> These witnesses are identified as Kimberly Winslow, Darrin Ives, Edward Hedges, Brad Lutz, Nick Voris and Ambika Coletti.<sup>20</sup> Evergy’s witnesses testified on the numerous requests proposed by Evergy and specific to this brief, the CCN expansion program.<sup>21</sup>

24. On June 25, 2021, CURB filed its Direct Testimony of Andrea Crane.<sup>22</sup> CURB opposes the expansion of Evergy’s CCN.<sup>23</sup> Ms. Crane explained that there is no need or demand for the CCN program.<sup>24</sup> Ms. Crane further explained that the program would result in cross-subsidization of EV owners, including non-Evergy and out-of-state EV owners, by all Evergy Kansas customers.<sup>25</sup> Additionally, she points out that Evergy should not be setting public policy stating: “it is not the role of the utility to promote public policy but rather to carry out the policies that are adopted by the duly-elected representatives of the citizens of each state.”<sup>26</sup> To support this, Ms. Crane recognizes the enactment of Kansas House Bill 2145 (HB 2145), whereby this legislation exempts private or public entities providing EV charging services from being classified as public utilities. This legislation eliminates one possible obstacle to the expansion of EV charging stations by private entities. It also clarifies that the “marketing or sale” of EV charging service is not an activity of jurisdictional public utilities.<sup>27</sup>

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<sup>19</sup> *Id.* p. 6-7.

<sup>20</sup> *Id.* p. 7.

<sup>21</sup> Transportation Electrification Portfolio, p. 32.

<sup>22</sup> Direct Testimony of Andrea Crane (June 25, 2021).

<sup>23</sup> *Id.* p. 6.

<sup>24</sup> *Id.* p. 18.

<sup>25</sup> Testimony of Andrea Crane p. 20.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* p. 21.

25. On June 25, 2021, Staff filed its direct testimony of three witnesses: Justin Grady, Leo Haynos and Dr. Robert Glass.<sup>28</sup> Mr. Grady's testimony discussed the CCN and he opposed its expansion for several reasons.<sup>29</sup> Mr. Grady explained that Staff does not recommend the Commission approve the "decisional prudence" aspect of Evergy's request to expand the CCN, stating, "Staff has serious procedural concerns about this request as it attempts to shortcut and circumvent the typical after-the-fact prudence review that occurs when a utility seeks to recover its investments from ratepayers during a ratemaking proceeding."<sup>30</sup> Similar to Ms. Crane, Mr. Grady indicated Staff has policy concerns with the proposed expansion in that the recent enactment of HB 2145 exempts private or public entities providing EV charging services from being classified as public utilities. Mr. Grady also highlighted widely reported announcements that major automakers (both foreign and domestic) are investing billions of dollars in new EV's and batteries, have created an environment where "competing technologies and business models have emerged to fuel this rapidly developing market, all vying for the privilege to provide EV charging services and infrastructure."<sup>31</sup> Mr. Grady summarizes with the statement, "This rapid and yet still uncertain growth profile of EV's and the emergence of several EV charging competitors, each with their own competing technology, causes Staff great concern with the expansion of the CCN at this time, before a need has actually been demonstrated, and before the burgeoning competitive market has had an opportunity to meet the need as it arises, is not prudent."<sup>32</sup>

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<sup>28</sup> Direct Testimony of Justin T. Grady, Leo Haynos, Dr. Robert Glass (June 25, 2021).

<sup>29</sup> Direct Testimony of Justin T. Grady p. 5.

<sup>30</sup> *Id.* p. 3.

<sup>31</sup> Testimony of Justin T. Grady p. 4-5.

<sup>32</sup> *Id.*

26. On June 25, 2021, AFPM filed the Direct Testimony of Don Thoren.<sup>33</sup> AFPM is opposed to Evergy's Application because it will: 1) unlawfully expand the monopoly franchise for Evergy's electric utility services to extend beyond a customer's meter; and 2) imprudently and unnecessarily increase costs to AFPM members, as well their customers, Kansas taxpayers, Evergy ratepayers, and other persons who may be adversely impacted.<sup>34</sup>

27. On June 25, 2021, ChargePoint filed the Direct Testimony of Justin D. Wilson.<sup>35</sup> The purpose of ChargePoint's testimony was to explain ChargePoint's position on Evergy's proposed Portfolio. ChargePoint largely supported Evergy's proposals, but recommended several changes to the rebate programs and the proposed CCN expansion that it stated would ensure the programs are effective, encourage participation, and support the competitive market.<sup>36</sup>

28. On July 2, 2021, CURB filed the Cross-Answering Testimony of Andrea Crane.<sup>37</sup> In her testimony, Ms. Crane reiterated that she agreed with Staff's conclusion that the KCC should not authorize expansion of the CCN at this time. However, she notes that Staff largely ignored the prior KCC proceeding, Docket No. 16-KCPE-160-MIS ("16-160 Docket"), wherein the CCN program was fully vetted and, ultimately, rejected by the KCC. While understanding that a prior KCC decision does not permanently preclude all future commissions from reaching a different outcome, there is nothing in this case to support a finding that is different from the KCC's findings in the 16-160 Docket.<sup>38</sup>

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<sup>33</sup> Direct Testimony of Don Thoren (June 25, 2021).

<sup>34</sup> Direct Testimony of Don Thoren p. 6.

<sup>35</sup> Direct Testimony of Justin D. Wilson (June 25, 2021).

<sup>36</sup> *Id.* p. 3-4.

<sup>37</sup> Cross-Answering testimony of Andrea Crane (July 2, 2021).

<sup>38</sup> Cross-Answering Testimony of Andrea Crane p. 5.



29. On July 16, 2021, Evergy filed Rebuttal testimony of Darrin Ives and Charles A. Caisley, Kimberly Winslow, Nick Voris, Brad Lutz and Ambika Coletti.<sup>39</sup> In its rebuttal testimony, Evergy argued that transportation electrification is inevitable,<sup>40</sup> that there is a demand for EV charging stations,<sup>41</sup> and the CCN expansion program will benefit all customers.<sup>42</sup>

30. On July 29, 2021, CURB, KCC Staff and Evergy filed a Partial Non-Unanimous Settlement Agreement with the Commission.<sup>43</sup>

31. On September 20–21, 2021, the Commission held an evidentiary hearing on this matter. At the hearing, a total of twelve witnesses testified on behalf of CURB, Staff, Evergy, AFPM and ChargePoint.

32. On October 8, 2021, Evergy filed its Post-Hearing Brief with the Commission.<sup>44</sup>

### **III. Arguments and Authorities**

33. CURB will not address in detail each of Evergy's comments made in the Post-Hearing Brief of Evergy. As stated earlier in this brief, CURB recommends that the Commission deny Evergy's request to expand its CCN program. More specifically, CURB recommends that the Commission reject Evergy's request for an order determining that Evergy's CCN program is decisionally prudent because; 1) Evergy has not demonstrated a need or demand for the expansion of its CCN, 2) Evergy's proposal will result in cross-subsidization of EV owners by

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<sup>39</sup> Rebuttal Testimony of Darrin Ives; Charles A. Caisley, Kimberly Winslow, Nick Voris, Brad Lutz, Ambika Coletti. (July 16, 2021).

<sup>40</sup> Rebuttal Testimony of Kimberly Winslow p. 3-6.

<sup>41</sup> Rebuttal Testimony of Charles A. Caisley p. 10.

<sup>42</sup> Rebuttal Testimony of Nick Voris p. 3-7.

<sup>43</sup> Partial Non-Unanimous Settlement Agreement (July 29, 2021).

<sup>44</sup> Evergy's Post-Hearing Brief (October 8, 2021).

all of Evergy's Kansas customers, 3) Evergy should not be determining public policy in an area that has been and rightfully left up to duly-elected representatives of the state.

34. The Company indicates that the tidal wave is coming and now is the time to either surf it or drown in it. CURB does not disagree that a tidal wave of EVs is coming. However, there is a basic disagreement about the fundamental role that each participant should play in managing that tidal wave, or more correctly, in adapting to new technology. Adapting to new technology is nothing new. It has been happening for centuries. And it involves a delicate balance between consumers, the private sector, and governmental agencies. While EVs may be an important public policy issue, ratepayers should not be provider of last resort for investments that competitive public entities or governments fail to fund.

35. The Commission should be especially careful about the use of customer funds. Evergy seems to suggest that the cost to ratepayers is so small, that the KCC should somehow obviate its responsibility to ensure that ratepayer funds are used appropriately. But whether it is \$1.00 or \$100 million, the Commission has the responsibility to ensure that funds recovered from captive utility ratepayers are used for the purposes intended, for the provision of utility service.

**A. Evergy has not demonstrated that there is a need or demand for its CCN program and, as a result, expansion of the CCN infrastructure at the expense of ratepayers does not establish just and reasonable rates that are reasonably necessary to maintain reasonably sufficient and efficient service as required by K.S.A. 66-101b.**

36. In Kansas, every electric public utility is required “to furnish reasonably efficient and sufficient service and facilities” in its service territory as set forth in K.S.A. 66-101b.<sup>45</sup> The Commission’s analysis on K.S.A. 66-101b regarding the provision of sufficient and efficient

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<sup>45</sup> K.S.A. 66-101b.

service is still applicable in this docket. In furnishing “reasonably efficient and sufficient service,” the Commission has the power to require an electric public utility to establish “just and reasonable” rates. Furthermore, the Commission has the power to require all electric public utilities “to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such electric public utilities.”<sup>47</sup> The United States Supreme Court has stated that “the fixing of ‘just and reasonable’ rates involves a balancing of the investor and the consumer interests.”<sup>46</sup>

38. In order for an electric public utility to include property into rate base, the property must be “used and required to be used.”<sup>47</sup> More specifically, the Kansas Court of Appeals has stated that, “capital costs for new plants, generators, or other facilities are allowed into rates only when they become ‘used and required to be used’ in services to the ratepayers.”<sup>48</sup> If the Commission determines that a utility invests in unnecessary infrastructure or infrastructure that is far in excess of current needs, then that infrastructure is not “used and required to be used” and the Commission must exclude those costs from rate base.<sup>49</sup>

39. While Evergy is not asking for the costs of the CCN expansion to be placed in rate base in this proceeding, it “will request recovery of prudently incurred O&M expenses as well as rate base treatment of prudently incurred capital spend associated with the CCN deployments as part of a future general rate case consistent with other capital investments made by the

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<sup>46</sup> *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

<sup>47</sup> K.S.A. 66-128(a).

<sup>48</sup> *Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 36 Kan. App. 2d 83, 97, 138 P.3d 338, 350 (2006).

<sup>49</sup> K.S.A. 66-128; *See Kansas Gas & Elec. Co. v. State Corp. Comm'n*, 218 Kan. 670, 674, 544 P.2d 1396, 1400 (1976).

Company.”<sup>50</sup> Evergy intends on expanding its CCN program by installing and operating 102 additional EV charging stations in its service territory.<sup>51</sup>

40. Evergy states transportation electrification, “is inevitable, it is the future, and it provides both challenges and opportunities in terms of grid management.”<sup>52</sup> In its arguments and testimony, Evergy asserts that there is currently a need or demand for its expansion of its CCN program; however, the evidence does not support that the level of investment proposed by Evergy is required to provide efficient and sufficient service to Kansans

41. EV adoption is low in Evergy’s Kansas service territories. As of September 2020, there were only 3,030 EVs in Kansas Metro out of an estimated total of 623,656 light-duty vehicles, which constitutes less than ½ of 1 percent of the total market.<sup>53</sup> In Kansas Central, there were 1,997 EV’s in September 2020, out of a total 1,216,223 light-duty vehicles, which is less than 2/10<sup>th</sup> of 1 percent of the total market.<sup>54</sup>

42. While evidence indicates the hint of growth in these numbers, the degree and trend of EV penetration in Kansas does not warrant significant investment by a regulated utility in this evolving market at this time. This was confirmed by the testimony of Charles Caisley during the Evidentiary Hearing:

Q. Okay. Evergy acknowledges there currently is low EV penetration in Kansas, though, right? You said in your testimony that the impact of TE proliferation, quote, can be mitigated by a proactive approach before there is

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<sup>50</sup> Evergy Kansas Metro and Evergy Kansas Central Application for Approval of Transportation Electrification Portfolio p. 4.

<sup>51</sup> Transportation Electrification Portfolio p. 32.

<sup>52</sup> Rebuttal Testimony of Charles A. Caisley p. 7.

<sup>53</sup> Crane Direct, p. 30-31.

<sup>54</sup> *Id.*

significant penetration of EVs in Kansas, end quote. Doesn't that acknowledgement by Evergy penetration level was low at this time?

A. Absolutely, the penetration level was low at this time.<sup>55</sup>

43. Evergy argues that there is a need for the expansion of the CCN program to support the growth of EV's in Kansas. However, the degree to which this expansion translates into increased EV proliferation is debatable. As Ms. Crane points out:

“Evergy suggests on in its Portfolio that its current CCN program has been responsible for the significant growth of EVs in Kansas Metro relative to Kansas Central. However, while it is true that EV adoption has been more rapid in Kansas Metro than in Kansas Central, both areas have seen significant growth. Evergy reports growth of 1300% from 2014 to 2019 in Kansas Metro and of 400% in Kansas Central. Therefore, while Kansas Metro's growth was 3.25 times that of Kansas Central, Kansas Metro has over 30 times as many charging stations. Therefore, while Kansas Metro's growth was 3.25 times that of Kansas Central, Kansas Metro has over 30 times as many charging stations. If EV charging stations were directly responsible for the growth in EV adoption, one would expect even more disparate growth rates between the two service areas.”<sup>56</sup>

44. Ms. Crane further notes, “In addition, growth of EVs in the Kansas Metro and Missouri service territories from 2017-2019 accelerated even though the number of CCN charging stations did not change significantly, suggesting that it was not necessarily the addition of more charging stations that propelled such growth.”<sup>57</sup> She continues, “Nor does the evidence suggest that limitations in the number of charging stations is stifling expansion of EVs in Kansas.”<sup>58</sup>

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<sup>55</sup> Cross-Examination of Charles A. Caisley. Transcript p. 47, lines 8-17.

<sup>56</sup> Direct Testimony of Andrea Crane p. 29.

<sup>57</sup> *Id* p. 29-30.

<sup>58</sup> *Id*.

45. Evidence does not suggest the lack of charging stations is hindering adoption of EV's in Kansas. Nor, does evidence suggest that additional expansion of the number of charging stations will increase the number of EV's in Kansas. Expansion of the CCN fails to take into account other external factors beyond charging station availability that impact a customer's decision on buying an EV, such as price comparisons to combustion-engine vehicles.

46. Further, as demonstrated by the evidence and consistent with the Commission's ruling in the 16-160 Docket, Evergy's proposed CCN expansion is unnecessary due to the fact that it is not necessary to provide "reasonably efficient and sufficient service", and is not "used and required to be used" under K.S.A. 66-128.<sup>59</sup> Rushing forward to make substantial capital expenditures with an expectation that ratepayers will be saddled with costs without sufficient and realistic chances of providing advertised benefits is not a prudent course of action. Thus, CURB recommends that the Commission deny Evergy's request for CCN expansion and jurisdictional prudence for the above-mentioned reasons.

**B. Expansion of Evergy's CCN would result in cross-subsidization leading to rates that are "unreasonably discriminatory" and "unduly preferential."**

48. CURB has concerns that Evergy's proposed expansion of its CCN program will result in cross-subsidization by non-EV owning customers of Evergy to support infrastructure that will benefit only EV drivers, regardless of that driver's status as an Evergy Customer. These EV drivers may not even be Kansas customers, but may well include EV drivers from other states.<sup>60</sup>

49. Under K.S.A. 66-101b, "every unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge, or exaction is prohibited and is unlawful

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<sup>59</sup> *Id.* p. 15.

<sup>60</sup> Direct Testimony of Andrea Crane p. 20.

and void.” It is from this statutory language that the rule against cross-subsidization emerged. In *Jones v. Kansas Gas & Elec. Co.*, the Kansas Supreme Court heard an appeal in which the Appellant contested a late payment charge imposed by the Kansas Gas and Electric Company.<sup>61</sup> The Appellant, among other things, alleged that late charge payments were unreasonable “because it does not assess collection costs against those who create such costs.”<sup>62</sup> The Court held that it was unfair to charge a uniform penalty for all customers who are overdue in paying their bills.<sup>63</sup>

50. More importantly, the Kansas Supreme Court in its holding defined the standard for the rule against cross-subsidization. The Court in *Jones* held, “the touchstone of public utility law is the rule that one class of consumers shall not be burdened with costs created by another class.”<sup>64</sup> Moreover, the Court held that, “the charge which is levied... must be reasonably related to the purpose to be achieved; and if the purpose is to recover collection costs the utility company must collect from the class of consumers creating the costs.”<sup>65</sup>

51. In *Midwest Gas Users Ass’n v. State Corp. Comm’n*, the Kansas Court of Appeals upheld a District Court and Commission decision on a rate schedule relating to the retail sale of natural gas.<sup>66</sup> The Court in *Midwest* expounded on the general rule in *Jones*, holding:

“...the weight to be given the resulting data when offered is peculiarly within the domain of the KCC. If the KCC is convinced or the evidence indisputably demonstrates that a rate structure in fact imposes on one class costs created by another, the rate structure cannot withstand the test

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<sup>61</sup> *Jones v. Kansas Gas & Elec. Co.*, 222 Kan, 390, 319 (1977).

<sup>62</sup> *Id.* p. 400.

<sup>63</sup> *Id.* p. 401-02.

<sup>64</sup> *Id.* at 401.

<sup>65</sup> *Id.* at 402.

<sup>66</sup> *Midwest Gas Users Ass'n v. State Corp. Comm'n*, 3 Kan. App. 2d 376, 377 (1979).

of Jones. We do not, however, read Jones as requiring a cost of service analysis in every rate design case. A rate design fair on its face, with substantial evidence to support it, may be approved without a cost of service study absent a convincing showing of a Jones violation....”<sup>67</sup>

In *Jones*, the court dealt with two commodities, credit and collection expense, which were quite distinct from the utilities' basic service, which was the sale of electricity. As to those collateral commodities costs were readily available from the companies' books, and were relatively easy to allocate to the classes of customers who created them. That is quite a different situation from attempts to allocate system-wide costs of operating an entire utility.<sup>68</sup>

52. The holding in *Midwest* indicates that the Commission may approve rates that seemingly differentiate as long as those differences are reasonable.<sup>69</sup> Put another way, the Commission may approve rates that seemingly differentiate if those rates are not “unreasonably discriminatory or unduly preferential.”<sup>70</sup>

53. Here, Evergy’s request for approval from the Commission to require Non-EV drivers to help pay for the costs associated with its expansion of the number of charging stations in its CCN is an unreasonable cross-subsidization. It is unreasonable to require ratepayers to subsidize a small number of EV drivers who are the only group of customers deriving the benefit of charging at those stations. In the instance of highway corridors, out-of-state travelers who are likely to use the chargers will only have brief and limited contact with Evergy’s system. The pricing for electricity sold at these stations are not subject to Commission review, per HB 2145.

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<sup>67</sup> *Id.* at 391.

<sup>68</sup> *Id.* at 390.

<sup>69</sup> *Midwest Gas Users Ass'n v. State Corp. Comm'n*, 3 Kan. App. 2d at 388.

<sup>70</sup> K.S.A. 66-101b.



Therefore, these out-of-state customers are not likely to be paying a fair and reasonable share of the costs required to maintain and use these charging stations, resulting in little, if any, benefits to Kansas ratepayers. Any tangential perks to increased travel and tourism are limited and should be best left to local communities and state governments to facilitate, not a regulated utility.

54. The issue of cross-subsidization is much more extensive than simply from non-EV drivers who are customers of Evergy to other Evergy customers. Evergy will be unable to ensure that customers of its CCN will not be ratepayers from another utility in Kansas, and further, there could be instances where customers using the CCN may be residents of other states just passing through Kansas. As mentioned above, this would result in Evergy's ratepayers subsidizing EV drivers who are not ratepayers within Evergy's service territory. CURB believes this type of subsidy is clearly unreasonable.

55. Evergy does not argue that there will not be any cross-subsidization, however, they do argue that the "benefits" derived from its CCN outweigh the detriments of the cross-subsidization. Evergy claims the CCN will provide beneficial electrification, environmental benefits, and economic benefits,<sup>71</sup> but the record does not contain sufficient information to support that the claimed benefits will offset the cross-subsidization created by Evergy's CCN expansion that justifies a finding of "decisional prudence." Other factors, such as decreased tax revenue from gasoline sales and emerging technologies, affect the cost/benefit ratio associated with Evergy's request. Therefore, CURB believes the Commission should follow its prior decision from the 16-160 Docket wherein the Commission holds that the benefits for non-EV customers do not

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<sup>71</sup> Evergy Transportation Electrification Portfolio.

outweighed the cross-subsidization concerns and find that the CCN resulted in unjustified cross-subsidization.<sup>72</sup>

**C. A regulated utility should not be a public policy maker, especially in a competitive market.**

56. CURB does not believe that Evergy, as a regulated utility, should be attempting to set public policy in an area where both the private sector and government are working to establish nationwide standards. As Ms. Crane states “While there may be societal benefits associated with expansion of the electric vehicles market, such as environmental and economic benefits, the question is whether it is the role of the local electric utility to be making these determinations, or whether such decisions are better left to government agencies and the private sector”<sup>73</sup> However, Evergy, in implementing its CCN program and installing its own stations, is, essentially, attempting to become a public policy maker.

57. Evergy asserts in its Portfolio that Residential customers are interested in lower transportation and energy costs, incentives, and the environmental and health benefits of reduced vehicle noise and emission. Commercial customers are interested in lower vehicle total cost of ownership, reduced noise and pollution, and support to meet their own sustainability and decarbonization goals. Municipalities are interested in TE for greater economic development and workforce opportunities, environmental and health benefits of reduced vehicle noise and pollution, support of access to technology and energy services for underserved communities, and achievement of community sustainability and decarbonization goals. Regional organizations are interested in TE to help achieve the regions’ clean energy and environmental goals, availability of

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<sup>72</sup> Order Denying Application, 16-160 Docketp.15.

<sup>73</sup> Direct Testimony of Andrea Crane p. 20.

funding to invest in EV adoption, opportunities to develop partnerships with new companies and organizations in a position to bring EV-related jobs to the area. For Evergy, TE is an opportunity to engage more proactively and expansively with its customers to offer additional energy services, growth of flexible and beneficial load to support grid management activities, greater capacity utilization, and the achievement of environmental and clean energy goals.<sup>74</sup>

58. While many of these goals may be laudable, they should be left up to the elected officials of this state and not Evergy as stated earlier, CURB believes it is not the responsibility of the utility to set this policy because of the potential of the utility's captive customer base being burdened by unreasonable costs without commensurate benefits.

59. CURB recognizes that Kansas policy makers have recently taken steps to clarify who may be involved in the selling of electricity through charging stations. Kansas recently enacted HB 2145, which determined:

[T]he term "public utility" shall not include any activity of an otherwise jurisdictional corporation, company, individual, association of persons, their trustees, lessees or receivers as to the marketing or sale of:

(1) Compressed natural gas for the end use as motor vehicles fuel; or

(2) electricity that is purchased through a retail electric supplier in the certified territory of such retail electric supplier, as such terms are defined in K.S.A. 66-1.170, and amendments thereto, for the sole purpose of the provision of electric vehicle charging service to end users.<sup>75</sup>

60. This legislation exempts private and public entities providing EV charging services from being classified as public utilities, and thus, subject to KCC regulation and rules.

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<sup>74</sup> Transportation Electrification Portfolio.

<sup>75</sup> Kansas House Bill 2145.

Furthermore, the legislation eliminates one possible obstacle to the expansion of EV charging stations by private entities.<sup>76</sup> This is evidence of the Legislature’s desire to give the private sector the latitude necessary to establish a robust network of EV service stations, akin to present-day gas stations. Allowing a public utility like Evergy to compete with the private sector in EV charging only highlights the financial disparities between a regulated monopoly and private business. The advantages in having a large captive market base along with direct access to influencing regulatory oversight and policy via the KCC should not be ignored. If the market will support an increase in EV charging stations, then the Commission should let the private sector do so. If Evergy feels that they should become involved by expanding their CCN, then as ordered by the Commission in the 16-160 docket, let the shareholders of the utility bear that risk and not all of Evergy’s ratepayers.

61. CURB would further point out that the Federal Infrastructure Bill, presently pending before Congress, includes billions of dollars for the building of charging stations across this country. While the future and execution of this investment is still in development, there exists the potential that Evergy and the federal and state governments become competitors on where stations can be placed, lest we risk an oversaturation of unused charging stations.

62. CURB appreciates that the Commission asked for comments from the parties surrounding some guardrails should it approve some version of the expanded CCN requested by Evergy. Potential guardrails could include (1) a requirement that Evergy’s CCN investment to go only in areas that meet the definition of “underserved” that was agreed to by the parties in the S&A; (2) a requirement that Evergy attempt to get private entities to build the stations prior to Evergy doing the construction; or (3) a budget cap on the CCN investment.

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<sup>76</sup> Direct Testimony of Andrea Crane 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. In short, 1) the parties have already agreed to a robust program, a portion of which is targeted to underserved areas, 2) CURB believes that the S&A should be given a chance to work, and 3) there is a lot of other activity going on in both the private and public sectors that needs to play out. These points will be discussed below.

64. The settlement agreement already provides extensive support for EVs in consideration of the present state of the industry and will establish a firm foundation to support the advancement of EV charging stations in Kansas by the competitive market. It provides for new rate structures, \$2.3 million in customer education funding, residential rebates for charging equipment, and it provides for extensive commercial rebates. The Parties, including Staff and CURB, have already agreed to a broad program. Moreover, certain elements of that program are tied to underserved areas, which appears to be a particular concern of Evergy.

65. CURB believes that at this nascent point in time of EV industry development, the terms of the Settlement Agreement create an opportunity to observe the impacts of utility-based efforts to promote EV adoption through financial incentives. In these regards, it is important to note that HB 2145 was just enacted in 2021. Prior to that time, any entity installing a CCN charging station for profit ran the risk of being classified as a public utility, and subject to the ratemaking process. It is no surprise that there was little, if any, growth in private charging stations in Kansas while this risk existed. Kansas needs time to determine where, if anywhere, the private industry will place CCN stations after HB 2145's enactment. Simply because an area is currently underserved does not mean that it will remain so for the next five years.

66. There is very little time between this docket and the filing of Evergy's next rate case in 2023, in which Evergy intends to ask for recovery of costs for the CCN expansion. CURB believes it is best to use the time between this docket and the rate case filing to determine how things are progressing under the terms of the settlement while the private market continues to develop. Afterwards, all parties and the Commission will have a much clearer idea of the need, if any, for an expanded CCN by Evergy.

67. Given the extensive programs that the Parties have agreed to in the settlement agreement, there is no need at this time to overturn the prior Commission ruling regarding the CCN. CURB urges the Commission to implement the numerous provisions of the Settlement Agreement, which address various aspects of EV promotion in Kansas. The Commission should instead monitor the programs agreed to in the settlement, along with the other factors (both private and governmental) that will impact EV adoption over the next few years. To reiterate, nothing prevents the Commission from authorizing a CCN program in the future if additional data and studies show that the measures taken through the settlement agreement are not adequate or that EV adoption in Kansas has a more tangible link to the presence of charging stations. CURB believes terms of the Settlement are sufficient at this point and there is no current need to approve an expanded CCN, even with the guardrails discussed by the Commission.

68. Moreover, the guardrails do not abate the concerns that Ms. Crane expressed in her testimony on behalf of CURB. The guardrails discussed by the Commission will not resolve cross-subsidies in favor of wealthy EV owners by low-income ratepayers. It is undeniable that some of Evergy's ratepayers are heavily energy burdened. In some cases, ratepayers have to choose between food or medicine or paying their utility bills. These ratepayers are not inclined to spend

their income on an EV in order to take advantage of new charging station rebates and locations. Yet, Evergy's CCN proposal will still result in those ratepayers paying more on their utility bills while receiving none of the benefits. The fact that the CCN is built in an "underserved" area does not add any benefit to those low-income consumers without an EV. Interestingly, Andrea Crane points out in her testimony that, if this is such an important policy issue, Evergy's shareholders should share in the investment costs. Yet, Evergy protests Ms. Crane's suggestion, all the while suggesting that it is appropriate for low-income ratepayers to bear that investment expense. While there may be a time in the future when utility CCN investments broadly benefit all ratepayers, it does not exist presently. CURB hopes that the Commission sees the inequity of forcing low-income ratepayers to subsidize wealthier ratepayers.

#### **IV. Conclusion**

68. As set forth above, the need of EV charging stations is not so dire as to require Kansas ratepayers to begin paying from them en masse. Evergy's proposal would result in inappropriate cross-subsidization of EV operators by Non-EV-owning ratepayers. Moreover, Evergy should not be setting the policy of the state of Kansas and this task should be left to its duly-elected representatives. CURB believes that the Settlement filed in this docket provided sufficient support for EV's in the state of Kansas and requests the Commission approve the Settlement, but not the expansion of the CCN program.

69. CURB further requests that the Commission approve the terms of the Non-Uniform Settlement Agreement as filed by the signatory parties. CURB believes that the terms of this agreement are fair and reasonable and the product of thorough negotiations among the parties. CURB is supportive of efforts to bolster the growing EV market in Kansas and believes

that the use of alternative rate schedules and rebate programs strike an appropriate balance in a regulated utility's role in this particular competitive market. The programs agreed to by the parties will provide a valuable opportunity to observe and record data associated with the financial incentives tied to EV ownership and electricity usage. CURB predicts that significant investment and action will occur within the next few years by the private market and state and federal governments towards the goal of increased EV adoption. Utilizing the Settlement Agreement's provisions during this period allows for meaningful participation without overcrowding the free market's involvement.

WHEREFORE CURB, submits this *Responsive Brief* and requests the Commission deny Evergy's requests for a finding of decisional prudence for any expansion of its CCN program.



Respectfully submitted,



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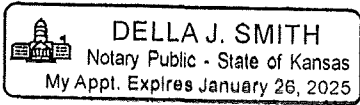
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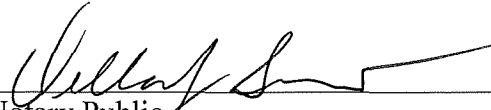
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COUNTY OF SHAWNEE	)	

I, Todd E. Love, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.

  
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Todd E. Love

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of October, 2021.



  
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Notary Public

My Commission expires: 01-26-2025.

**CERTIFICATE OF SERVICE**

21-EKME-320-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 22<sup>nd</sup> day of October, 2021, to the following:

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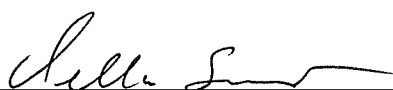
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