BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Robert "Bob" Burns, Chairman
Boyd Dunn
Sandra D. Kennedy
Justin Olson
Lea Marquez-Peterson

IN THE MATTER OF: Docket RU-00000A-18-0284

Re: Comments on the ACC Staff Draft Implementation Plan for Electric Vehicles, Electric Vehicle Infrastructure, and the Electrification of the Transportation Sector in Arizona Policy Statement Arizona Corporation Commission

July 7, 2019

Docket Control
Arizona Corporation Commission (ACC)
1200 West Washington Street
Phoenix, AZ 85007

The Alliance wishes to file these comments in this ongoing policy docket relating to electrical vehicle (EV) infrastructure in the state of Arizona in response to several legal briefs filed in late May, specifically by Tesla and ChargePoint which attempt to address the legal and policy issues around the classification of a "public service corporation (PSC)" and non-utility providers of EV charging services. In its' Brief, Tesla argues that the Commission should exempt non-utility charging service providers from all regulation, including light regulation that was suggested as an option in earlier comments filed by the Arizona Residential Utility Consumer Office (RUCO).[1] The Alliance believes that both the legal and policy issues concerning regulation by state PSC's of EV charging are complex and need to be considered in a separate Docket or rulemaking where the issues can be aired and analyzed with substantial input. The grid is rapidly becoming more complex with more options for customers and is moving away from the traditional radial model of large central station plants. As the grid evolves in complexity and accommodates two-way flows of power, the Commission may wish to preserve its discretion and

[1] RUCO's Legal Brief In the Matter of Possible Modifications to the Arizona Corporation Commission's Energy Rules. Filed April 5, 2019, Docket No. RU-00000A-18-0284.

authority to oversee this evolution, both for EV infrastructure providers as well as other forms of distributed energy resources and services.

The Alliance for Transportation Electrification (ATE) is a national business nonprofit organization (organized under IRS rules 501.c.6) that advocates for accelerated EV infrastructure deployment, a strong and robust utility role, and for open standards and interoperability for consumers. We are active in many State Commission dockets in each region of the country (currently, about 20 proceedings or rate cases), and we believe strongly in a collaborative approach in the EV ecosystem to achieve these goals. We currently have about 45 members, including utilities, EV infrastructure firms, auto and bus original equipment manufacturers (OEM's), and affiliated trade organizations and NGO's.

We have participated in most of the workshops leading to the policy guidance statement adopted last December, and now with the development of the draft implementation plan whose major purpose is to offer a "roadmap" to the filings of regulated utilities in Arizona. We offered written comments in this Docket on April 7, 2019. At that time, we did not address the legal issues in the Arizona Constitution, court precedents, and important decisions in other jurisdictions regarding the legal classification of a PSC and the Commission's regulatory authority over EV charging stations. We believe that this Docket is not the proper forum to address and attempt to resolve those issues; as stated earlier, the main purpose of this proceeding is to provide specific guidance to the PSCs on filings for EV infrastructure. While we do not believe that heavy-handed regulation is necessary either, there are multiple situations in which the Commission should have the ability to step in and protect consumer interests. Such opportunities would be lost if Tesla's position of no regulation ever were to be adopted. In the comments below, we suggest why caution by the Commission is needed.

Comments

It is not clear to us that as a legal matter, EV charging stations do not meet the definition of a Public Service Company under the Arizona Constitution and relevant court precedents. We believe RUCO in its comments on the matter[2] provides a good explanation of why charging stations likely fall within the statutory definition. But RUCO also states that there is insufficient information in this Docket on the various business models that might be adopted and the specifics of a non-utility service provider (such as Tesla and ChargePoint, as well as others) offering electrical service to make any informed determination.

Under Arizona law, to determine whether third party charging constitutes service by a "public service company" subject to regulation, the Commission will have to apply a two-part test: first, to determine what constitutes a PSC in terms of the "furnishing of electricity" with rates, charges, and terms, and secondly, to interpret what it means to be "clothed in the public interest" by applying eight factors enumerated by the Arizona Supreme Court in the Serv-Yu case. For example, most (but not all) charging stations do hold themselves out for public use. But more importantly, the business models of charging station providers are likely to evolve over time so that they are doing more than just charging individual vehicles.

[2] *Ibid.*

While RUCO just lists the eight factors to be considered, both Tesla and ChargePoint assess each of the eight factors in the Serv-Yu case, and offer arguments and conclusions as to why a non-utility service provider does not meet the criteria listed in those factors. We believe that this analysis is perfunctory and lacks adequate evidence on specific use cases and actual evidence, both currently and based on possible technology and business model changes in the future. These eight factors are not meant to be determinative in any case; instead, they are meant to be guidelines for analysis by the Commission and any judicial body on review. As RUCO states well, there must be considerably more evidence on the specifics of a case, and "the discussion to this point has not contemplated a specific entity that has been identified for consideration in the docket. It would be difficult, if not impossible to do a legal analysis using the Serv-Yu factors since many are entity specific."[3] The Alliance agrees, and therefore thinks it is sensible to refer these issues to a separate future docket.

Several examples of technologies and business models for third party charging companies should be tested under the "Serv-Yu" case criteria, including the possibility of a charging station making sales-for-resale. Non-utility charging companies could attempt to resell power that they buy from the utility either at wholesale back to the grid (e.g., in a vehicle to grid arrangement, or V2G) or at retail to customers for uses other than charging vehicles. For example, a vehicle charging station at a host site could, by simply placing a meter behind it, make retail sales to the host site. In states such as Arizona that have not allowed retail choice, such sales would otherwise be illegal, but it is possible that exempting third party chargers from state regulation would enable such sales.

The situation becomes more complex if the charging station has on-site batteries associated with it. The charging station could purchase power during off peak periods to charge the batteries and attempt to resell that power in peak periods back to the grid or again to retail customers. While such transactions can be efficient, they should be regulated by the state because the charging station is holding itself as serving the public in such circumstances. The batteries can also be used of course to provide vehicle to grid and ancillary services to the grid, which may in fact be FERC regulated under recent FERC decisions but may impact state-jurisdictional retail customers. By exempting these stations from state regulation, the Commission will be giving all jurisdiction to FERC. Another example relevant to Arizona is the California ISO (CAISO), and the nascent but evolving attempts by third parties within CAISO to aggregate ancillary services from energy storage, and perhaps other DERs (distributed energy resources) which could also include vehicle batteries or non-utility charging providers bundling those services. Arizona is enjoying significant benefits from the Energy Imbalance Market (EIM), which is FERC regulated, today and such markets may expand in the future. Again, the Commissions should carefully examine its options if it is to carry out a legal classification of EV charging providers.

There are other possible business models or arrangements that may require special consideration by this Commission. For example, the third-party charging station might generate its' own power for the purpose of powering its' stations. If the charging station is unregulated would the associated generation also be unregulated, and can that generator than make retail or wholesale sales? And the third-party charging station would not necessarily have to own the generation. It could have a non-utility leasing

[3] *Ibid.*, p. 4.

agreement or a non-utility PPA with an outside seller. In any of these cases an exemption from regulation of the charging company or station could lead to perverse results, with many parties using this loophole to get around restrictions on resale or retail sales in Arizona. But it is pretty clear that if the third-party charging company is buying or generating power, it is likely than holding itself out as a public service company.

The commission should also be concerned about potential reliability impacts of charging stations. Traditional oversight of the PSCs by the Commission involves the regular reporting on reliability metrics, such as SAIDI and SAIFI, and how the regulated utility resolves problems or challenges on certain feeders or distribution circuits. Normally, the charging station would have to enter into an interconnection agreement with the local utility, the provisions of which would protect the system. But an unregulated charging station may not be required to operate in a manner that preserves reliability. Even if the Commission ultimately decides not to heavily regulate charging stations, it should at a minimum require interconnection agreements that protect reliability of the system.

An additional factor for the Commission to consider in such a legal classification for third party providers is who and which state agency will be responsible for consumer protection for EV charging services. Tesla has been successful in building out a nation-wide systems of charging stations, under a proprietary system that is not interoperable with other systems and offers its charging stations only to Tesla vehicle owners. By most accounts, the Tesla owners appear to be satisfied with its system, but it is important to stress that unique nature of its system and also that Tesla owners may use other publicly accessible charging stations with a plug adaptor it provides. But most charging station providers offer more "open systems" (at least with a more universal plug, such as an SAE J-1772, a CCS, or a ChaDeMo plugs) at multiple locations and host sites. Thus, in most cases, charging providers will hold themselves out to serve the general EV owning public.

Accordingly, this begs the question: who is responsible for resolving any consumer complaints about terms and conditions of services, and under what legal authority should this reside? While Tesla and ChargePoint and others commenting in this docket point to substantial competition among charging stations as the primary means of consumer protection, we are not so sure at this time. Market power may exist for certain service providers, and with the lack of true interoperability in the system (both the back-end of the network management system, and the lack of convenient e-roaming on the front end), it may be difficult for consumers to easily move among service providers. Particularly in these early years of market development, competition may or may not be sufficient. And by the Commission taking a position of wait and see, it is following a prudent course of action that gives it the ability to introduce regulation if it becomes necessary. On the other hand, if the Commission exempts third party charging from regulation without adequate examination in this docket, it will be difficult to reverse that decision later on.

Tesla and ChargePoint point to other states that have exempted third party charging stations from regulation. It is true that there are numerous states (23 and the District of Columbia) that have made determinations to exempt in some way third party EV charging stations from PSC regulation. However, the reality is that many of these decisions are quite nuanced and not as clear cut as Tesla and others suggest. In an Appendix to these comments we discuss the recent decision in Iowa on this topic as an

example of the nuances that need to be considered. Accordingly, we urge the Arizona Commission to proceed cautiously.

Conclusion

As the RUCO legal brief points out, there is no simple answer to the legal question as to whether charging stations fall within or outside of the definition of a Public Service Company that would be subject to Commission regulation under the Arizona Constitution and relevant court cases. We do not attempt here to add to that debate or take a position now. However, we do believe that this Docket was established for reasons other than addressing this question. The purpose of the current Docket is to set the terms and conditions under which utilities would propose EV programs. The complex issues surrounding regulation of third party EV charging companies need to be fully considered in a different proceeding both now and for the future. The legal analysis submitted by certain parties in this docket has been perfunctory and superficial and lacks case-specific evidence. Thus, we conclude that the Commission should defer a decision, either to take up the issue in a separate Docket or rulemaking, or even on a case by case basis upon filings for exemption by EVSCs.

Respectfully submitted this 8th day of July, 2019

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Appendix to Comments by the Alliance for Transportation Electrification

Iowa PSC Order Commencing Rulemaking on Regulation of EVCSs (Issued April 19, 2019)

Iowa

The Iowa Utilities Board (IUB) issued a recent proposed Rulemaking 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 two Iowa Supreme Court decisions (both *SZ Enterprises in July, 2014, and the Northern Natural Gas v. IUB case, September, 1968)*) 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 have, 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. But even here, many of the utilities have raised concerns that the proposed rule will lead to disputes because it does not explicitly deal with the kinds of business models and arrangements discussed in these comments.

There is a reason that this seemingly subtle distinction is critical. EVSCs, 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 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 public interest." The Commission should exercise its discretion fully to consider such criteria. And the Commission should not foreclose future needs when EVCS's are providing a major proportion of the State's transportation energy and may need a different approach than today.