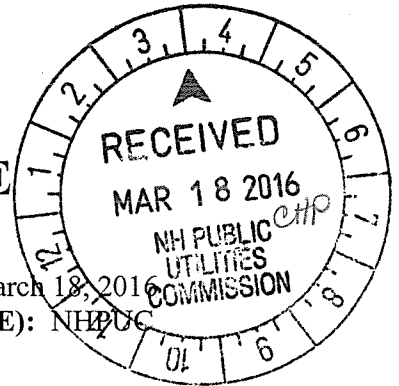


STATE OF NEW HAMPSHIRE

Intra-Department Communication



DATE: March 18, 2016

AT (OFFICE): NHPUC

FROM: Thomas C. Frantz, Director, Electric Division
 Amanda Noonan, Director, Consumer Services and External Affairs
 Karen P. Cramton, Director, Sustainable Energy Division
 David K. Wiesner, Esq., Staff Attorney

SUBJECT: IR 15-510, Investigation into Resale of Electricity by
 Electric Vehicle Charging Stations

TO: Commissioners
 Debra A. Howland, Executive Director

Pursuant to the Order of Notice issued in this docket on December 18, 2015, Commission Staff was directed to investigate legal and regulatory issues regarding the resale of electricity by electric vehicle charging (EVC) stations and file a report of its conclusions and recommendations with the Commission no later than February 26, 2016. This deadline was later extended until March 18, 2016.

Staff has completed its investigation of legal, regulatory, and policy issues implicated by the development of commercial EVC stations in New Hampshire, including review and research of the matters addressed in the legal memoranda and comments submitted in January 2016 by the three electric distribution utilities, ChargePoint, Inc., and Acadia Center and Conservation Law Foundation.

This report summarizes the results of Staff's review and investigation. Based on this investigation, Staff recommends that the Commission not continue the temporary suspension of the tariff amendment filed by Liberty Utilities (Granite State Electric) Corp., d/b/a Liberty Utilities (Liberty), in Docket DE 15-489, which amendment would expressly permit the resale of electricity for EVC stations.

Policy Implications

Electric vehicles (EV) and EVC stations are a growing presence in New Hampshire and in New England, and their use is supported by both State and regional initiatives. These initiatives include the following:

- 2009 NH Climate Action Plan
- New England Governors/Eastern Canadian Premiers
 - 2001 Climate Action Plan
 - 2013 Transportation Air Quality Action Plan
 - 2015 Climate Resolution 39-1

2015 Under 2 MOU Climate Agreement
2016 Governors' Accord for a New Energy Future

In connection with signing the Under 2 MOU Climate Agreement last October, Governor Hassan issued a press release which included the following statement (emphasis added):

In addition to the emissions reduction goals, the Under 2 MOU calls for parties to aim to increase energy efficiency and develop renewable energy; *to coordinate on transportation issues and the development of electric vehicle infrastructure*; to collaborate on climate change adaptation and resilience efforts; and to coordinate in the areas of scientific assessments, communication and public participation.

In New Hampshire there currently are 58 EVC stations, with 112 separate charging outlets, not including any stations which are exclusively private.¹ These public EVC stations generally use Electric Vehicle Supply Equipment (EVSE) of one or both of two separate types:

- "Level 2" means a 208-240 volt AC EVSE using an SAE J1772 connector. EV owners also can install a Level 2 charger at home to reduce charging time.
- "Level 3" or "DC Fast Charger" means a direct current (DC) vehicle charger with high voltage (up to 480 volts) and amperage output using SAE DC Combo or CHAdeMO standard connector. Not all EVs are equipped to use this type of charger, which requires commercial installation.²

The Department of Environmental Services (DES), utilizing U.S. Department of Energy State Energy Program grant funds administered by the Office of Energy and Planning, currently is offering grants to qualifying EVC infrastructure projects in New Hampshire. The DES grant solicitation places a high priority on the extension of an "electric charging corridor" through New Hampshire via installation of DC Fast Charging stations along the I-89 and I-93 corridors, and also on Level 2 EVSE installation along major transportation corridors and at tourist destinations. DES also may consider using grant funds to support New Hampshire's business community by funding "workplace charging" projects, through the installation of EVSE at business locations to charge business-owned and employee-owned EVs.

Utility initiatives also exist to support the development and operation of EVSE infrastructure in New Hampshire and other New England states, as noted by Public Service Company of New Hampshire, d/b/a Eversource Energy (Eversource).³

It is in this context of governmental and utility support for EVSE development that Liberty filed its proposed tariff amendment, stating it is "looking to enhance the opportunities for [EVC] in its electric territory" by working with "the EVC industry to make electric vehicle charging stations

¹ *An Overview of Electric Vehicle Initiatives in New Hampshire for the Energy Efficiency and Sustainable Energy Board*, N.H. Department of Environmental Services, February 19, 2016, at 13.

² *EV Chargers*, N.H. Department of Environmental Services, <http://des.nh.gov/organization/divisions/air/drive-electric/chargers.htm> (last visited March 18, 2016).

³ Initial Legal Memorandum filed by Eversource on January 22, 2016, at 2 (Eversource Memorandum).

more economic for customers who utilize such facilities.”⁴ According to Liberty, its tariff amendment would allow businesses desiring to offer electric vehicle charging to their customers “to do so and charge by any method they determine appropriate, including charging on a per kilowatt-hour basis.”⁵ Liberty stated that 18 states have adopted, through regulatory changes or legislation, exceptions for the resale of electricity for EVC stations, including both Maine and Massachusetts.⁶

Staff concurs with the view that greater clarity regarding the legal and regulatory status of EVC station operators would advance important economic development and public policy goals through the development of EVSE infrastructure in the State.

Legal and Regulatory Issues

As noted in the Order of Notice initiating this investigation, the potential resale of electricity by EVC station operators raises issues related to the legal and regulatory status of these operators as public utilities under RSA 362:2 or as competitive electric power suppliers (CEPS) under RSA 374-F:2 and 7 and N.H. Code Admin. Rules Chapter Puc 2000. EVC station operation also may implicate issues regarding the design and implementation of rates charged to and potentially by EVC stations, the Commission’s jurisdiction over such rates and terms of service, and whether changes to electric distribution utility tariffs are warranted as a result of these considerations.

None of the parties and stakeholders that filed legal memoranda or comments in this docket maintained there was any legal requirement or policy basis for the Commission to regulate EVC station operators or the services they provide to their customers, under either the public utility statutes or the CEPS regulations. This position was supported by all three of the electric distribution utilities, by ChargePoint, Inc., an EVC network operator, and by environmental advocates Acadia Center and Conservation Law Foundation.

According to ChargePoint, 15 states have passed statutes explicitly exempting non-utility EVC services from regulation under public utility or competitive supplier laws in order to remove regulatory uncertainty about the jurisdictional status of EVC services and to foster the development of competitive market providers.⁷ Other states have determined by regulatory commission decision that the services provided by EVC station operators do not fall within the applicable public utility or competitive supply statutes. These states include New York and Massachusetts.

In 2013, the New York Public Service Commission (NYPSC) held that EVC stations are not utility plant, and charging services are not subject to its jurisdiction, by distinguishing between the nature of the sale of electricity and charging services:

⁴ Technical Statement of Heather M. Tebbetts filed on November 20, 2015 in Docket DE 15-489.

⁵ *Id.*

⁶ *Id.*

⁷ Comments of ChargePoint, Inc. filed on January 22, 2016, at 3-4 (ChargePoint Comments).

Charging Stations do not fall within the definition of “electric plant” because Charging Stations are not used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light heat or power. Instead, and as urged by several commenters, Charging Stations are used to provide a service, specifically, charging services. This service requires the use of specialized equipment and allows the customer to do only one thing, charge [an EV’s] battery. The primary purpose of the transaction between Charging Station owners/operators and members of the public is the purchase of this service and the use of this specialized equipment. While the customer is using electricity, this is incidental to the transaction.⁸

The NYPSC further found that “the method of calculating the transaction fee, specifically the use of a per kWh price, will not confer jurisdiction where none otherwise exists.”⁹ The relevant public utility law in New York is similar in scope and effect to the RSA 362:2 definition of “public utility.”

In 2014, the Massachusetts Department of Public Utilities (MDPU) followed a similar rationale and reached the same conclusion that EVC equipment does not constitute a distribution facility, because the “equipment component of EVSE used to supply the electricity is in the nature of a connector or cord, not a line,” and “ownership or operation of EVSE does not transform an entity that otherwise is not a distribution company into a distribution company.”¹⁰ The MDPU also found that an EVSE owner or operator is not “selling electricity” within the meaning of the Massachusetts public utility statute, because

the EVSE owner or operator is selling EV charging services, *i.e.*, the use of specialized equipment - EVSE - for the purpose of charging an EV battery. EVSE allows the customer do to only one thing, charge an EV battery. This result is true regardless of the business model the EVSE owner/operator uses to charge customers for charging services, even if the charge is by a per-kilowatt hour basis or other volumetric energy basis.¹¹

The MDPU also found that EVSE owners and operators are not competitive suppliers of electricity under state laws and regulations.¹²

ChargePoint further maintained that an EVC station operator is not a load-serving entity and does not arrange for the supply of electricity to meet retail customer demand; instead, the EVC station operator’s “energy requirement is itself the retail customer demand

⁸ *In the Matter of Electric Vehicle Policies*, Declaratory Ruling on Jurisdiction over Publicly Available Electric Vehicle Charging Stations, at 4 (NYPSC Case No. 13-E-0199, issued November 22, 2013).

⁹ *Id.*

¹⁰ *Investigation by the Department of Public Utilities upon Its Own Motion into Electric Vehicles and Electric Vehicle Charging*, Order on Department Jurisdiction over Electric Vehicles, the Role of Distribution Companies in Electric Vehicle Charging and Other Matters, at 6 (MDPU 13-182-A, issued August 4, 2014).

¹¹ *Id.* at 7 (internal footnote omitted).

¹² *Id.* at 8-9.

whose supply requirements must be met by a CEPS or through the host utility's default energy service."¹³ According to ChargePoint, the EVC station operator does not make electricity sales to utility customer classes, nor would the provision of services result in a change of a distribution utility customer's default service or CEPS.¹⁴ ChargePoint therefore asserted that an EVC station operator "cannot be considered to be a CEPS."¹⁵

Eversource expressed the opinion that the sale of electricity through EVC stations does not make the owners of such facilities public utilities or CEPS; rather, "from a distribution system perspective, EVC stations are end-use devices and those who install them are utility customers subject to Commission-approved tariffs and policies."¹⁶

In support of its legal position, Eversource cited *Appeal of Zimmerman*, 141 N.H. 605, 609 (1997) (provider not furnishing its services to an undifferentiated public is not subject to regulation by the Commission); and *Appeal of Omni Communications, Inc.*, 122 N.H. 860, 863 (1982) (intent of legislature's public utility definition is not to place all companies and businesses somehow related to power under the Commission's regulatory power); accord *Appeal of Atlantic Connections, Ltd.*, 135 N.H. 510, 514 (1992) (RSA 362:2 public utility definition does not apply to industries that the legislature did not intend to be regulated).¹⁷ Eversource likewise concluded that EVC station operators are not subject to Commission regulation as CEPS.¹⁸ Liberty and Unifil Energy Systems, Inc. (UES) adopted similar positions regarding the legal and regulatory status of EVC station operators in their filed memoranda.

Staff believes that the Commission might apply a similar analysis to that adopted by the NYPSC and the MDPU to find that EVC station operators do not re-sell electricity, but instead provide a charging service that does not fall within the scope of RSA 362:2, RSA 374-F:2 and 7, or the Puc 2000 rules. Such a conclusion would clarify that EVC station operators will not be regulated by the Commission either as public utilities or as CEPS, nor will their services be regulated by the Commission as to rates, prices, terms, or conditions.

Rates and Charges Subject to Commission Jurisdiction

Eversource maintained that rates charged to EVC stations should be consistent with existing tariffed rates for electric delivery service. According to Eversource, the Commission will continue to have the same oversight and approval authority over the rates, terms and conditions, and customer service requirements of public utilities and CEPS as it presently does, regardless of the fact that the service is being provided to an EVC station rather than to some other customer.¹⁹ UES similarly asserted that the question whether any changes should be made to utility tariffs related to the provision of

¹³ ChargePoint Comments at 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Eversource Memorandum at 3-4.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.* at 7.

¹⁹ *Id.*

electric service to EVC station operators would be best “decided on a case-by-case or utility-by-utility basis depending upon the particular circumstances demonstrated.”²⁰

Eversource asserted that the Commission has “little or no authority” to regulate the rates charged by EVC station operators to their customers, given that these operators are not public utilities or CEPS; under the present state of the law, it appears that the Commission would not have the requisite authority to require certain pricing structures, quality standards, or customer service obligations be met by EVC stations. According to Eversource, the Commission retains its authority up to the point of delivery by the utility, after which point “the Commission’s authority [is] limited to issues such as, for example, determining whether a particular pricing structure could render an [EVC] station owner a public utility.”²¹

Staff agrees with the electric distribution utilities that, assuming that EVC station operators will not be regulated by the Commission as public utilities or CEPS, there is no current need to address modifications to utility rates, charges, rate design, or terms and conditions of service. Staff’s position is based on its understanding of current industry conditions and may be revisited if such conditions change in any material respects.

ChargePoint’s Policy Proposals

ChargePoint proposed that the Commission continue its investigation further by advancing a policy that will promote adoption of EVSE by enabling utilities to make infrastructure investments, including make-ready infrastructure expenditures, that are necessary to enable private investment in EVSE facilities in New Hampshire, with the costs of these investments and expenditures potentially recovered from utility ratepayers.²²

ChargePoint further recommended that the Commission open a proceeding to explore electric utility roles, with the goal of developing a record regarding the current status of EVSE infrastructure in New Hampshire, where EVSE infrastructure is needed in order to meet the needs of EV drivers, how investment can be leveraged along with private investment to “meet identified needs without wasting ratepayer money, without harming competitive markets for EV charging equipment and services, and without taking away customer choice in equipment and services, which is the factor that ultimately drives innovation and healthy competition.”²³

The electric utilities did not recommend that any such further actions or proceedings be undertaken by the Commission at this time. Eversource maintained that the Commission “should be cautious about requiring specific courses of action, and should remain open to following and understanding future market developments to appreciate how they may

²⁰ Memorandum filed by UES on January 22, 2016, at 6.

²¹ Eversource Memorandum at 8.

²² ChargePoint Comments at 13-16.

²³ *Id.* at 16.

benefit from new or different Commission oversight.”²⁴ In particular, Eversource suggested that changes in the Commission’s processes, or in utility tariffs and methods, may be warranted to address future potential distribution system impacts resulting from EVC load growth.²⁵

Staff agrees with the electric utilities that there is no current need to address either the infrastructure development policy issues raised by ChargePoint or the potential system impacts identified by Eversource. Staff’s position is based on its understanding of current industry conditions and may be revisited if such conditions change in any material respects.

Staff Recommendation

The memoranda and comments filed by the parties and interested stakeholders in this docket, in conjunction with Staff’s independent investigation and research into relevant matters, has served to inform Staff’s understanding and analysis of the legal and regulatory status of EVC station operators and related policy implications.

Based on its review and investigation, Staff recommends that the Commission not continue the temporary suspension of Liberty’s tariff amendment filed in Docket DE 15-489, which amendment would expressly permit the resale of electricity for EVC stations in Liberty’s service territory.

Staff otherwise does not see a need to continue this investigation at this time. Staff will continue to monitor developments related to EVs, EVC stations, and utility distribution systems, and Staff may recommend further investigation or action by the Commission at some future time if and when warranted by changed circumstances.

²⁴ Eversource Memorandum at 3.

²⁵ *Id.* at 8-9.