

Electric Vehicle Charging Station Regulation: Why Your Local Electric Vehicle Charging Station Doesn't (and Shouldn't) Look Like Your Local Gas Station

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On April 7, 2016, Tesla announced that it had received more than 325,000 reservations for its new Model 3 electric vehicle (EV) in a [blog post titled "The Week That Electric Vehicles Went Mainstream."](#) Tesla expects to earn more than \$14 billion in sales from the Model 3, which represents its most affordable vehicle to date. The rise of more affordable EV options, along with federal and state incentive programs, have led to a steady increase in the number of EVs in the United States. Despite this continued growth, the number of EV charging stations has remained low across the country, which may be partly attributed to the hazy regulatory environment surrounding EV charging stations.

Most local, state and federal regulations and codes do not specifically address the business of selling electricity to EVs in a clear or consistent way. While regulatory requirements are well-established for owners of privately owned gasoline service stations, those seeking to own or operate a commercial EV charging station often face significant regulatory hurdles or delays. In deciding how EV charging stations will be regulated, states have generally followed one of three approaches: (1) refraining from taking any action and potentially defaulting to regulation by the state's public utility commission; (2) affirmatively deciding that utilities may own and operate EV charging stations; or (3) exempting EV service providers from existing public utility regulations either through legislation or interpretation of statutes and regulations.

States That Have Refrained from Taking Any Action Yet

Electricity is delivered to consumers mainly by investor-owned utilities, municipal utilities and cooperatives (collectively, the utilities).¹ In states that have restructured or partially deregulated, competitive generation suppliers also provide generation service to some consumers; these suppliers are typically licensed by the state or by the public utility commission, and they sell electric power to consumers, which is then physically delivered by the utilities. In states that have not restructured or partially deregulated, sales of electricity by unregulated firms may be unlawful, and such sales may intrude on the exclusive service territories granted to utilities. There are, of course, significant differences in the ways in which states regulate their utilities and other entities that supply electric power to end users² Many states have not yet decided whether to regulate EV charging stations or how best to regulate these stations, and, without regulatory changes, EV service providers may potentially be subject to a form of public utility regulation. Another complicating factor is that, in some states, the existing utilities may have established tariffs that prohibit the resale of electric power delivered over the utilities' distribution systems.

Likewise, in some states, there may be statutes or regulations that limit the ability of utility customers to resell or to mark up the price on electric power delivered by existing utilities.

States that have not yet made a distinction between the sale of electricity to consumers and the provision of electricity through EV charging stations include Arizona, Indiana, New Jersey, North Carolina and Pennsylvania.

In some of these states, like Pennsylvania, the regulation of the sale of electricity at EV charging stations has been developing at the local level, rather than the state level, through zoning codes and other initiatives. For example, the city of Philadelphia has added EV-related provisions to the city's Traffic Code, despite a lack of regulatory change by Pennsylvania itself.³ These provisions grant the Philadelphia Parking Authority the ability to designate EV-reserved on-street parking spaces and describe the necessary procedures for installing curbside EV-charging units.⁴ Multiple Pennsylvania state agencies, such as the Pennsylvania Department of Transportation and the Department of Environmental Protection, have also provided grants and created task forces to encourage the development of EV infrastructure; however, it is unclear when the state will begin the process of deciding how to uniformly regulate EV charging stations, if at all. While the slow development of many states' policies on EV charging stations may hinder the growth of the EV market, it also allows these states to observe the effectiveness of regulations that have already been adopted in other states.

States That Have Decided That Utilities May Own and Operate EV Charging Stations

A handful of states have affirmatively permitted utilities to own and operate EV charging stations. For example, the Public Utility Commission of Oregon decided that “[e]lectric utilities should be allowed to invest in [EV service equipment (EVSE)] and operate EV charging stations as a non-regulated, non-rate based venture.”⁵ The Public Utility Commission of Oregon also observed that it “[did] not find that allowing utilities to potentially participate in the EVSE market will necessarily impede the vibrancy of the whole market.”⁶

Other states have implicitly permitted only utilities to own and operate EV charging stations. For example, section 39.105 of the Texas Public Utility Regulatory Act requires sellers of electricity to demonstrate that they have “the financial and technical resources to provide continuous and reliable service to customers in the area for which the certification is sought.” This high burden has resulted in the exclusion of competitive private entities from owning or operating EV charging stations.⁷ Some companies have partnered with municipally owned electric companies to provide EV charging services as a workaround to the law.⁸ Interestingly, the utilities' domination of the EV charging station market has not appeared to impede electric vehicle ownership in Texas, as the utilities have actively installed charging stations, especially in urban areas.⁹

As the example of Texas demonstrates, allowing utilities to own and operate EV charging stations provides both advantages and disadvantages. On one hand, the utilities are familiar with the local electrical grid and have the expertise and engineering background to operate charging stations safely and in a way that does not damage existing power lines or facilities. Potentially, the knowledge held by utilities may allow them to operate more efficient and, therefore, cheaper EV charging stations.¹⁰ On the other hand, allowing the utilities or utility affiliates to own and operate EV charging stations may lead to a lack of retail competition in these states, which could negatively impact EV consumers in the long run.¹¹ However, this potential negative impact may be mitigated by the fact that, unlike homeowners, apartment dwellers or business owners, vehicle owners are not completely captive to a local utility; they often have the ability to travel outside the service territory of their local utility. Vehicle

owners also have the ability to choose a gasoline-powered vehicle or a vehicle that runs fully or partly on electric power. Consequently, vehicle owners may not need the full array of regulatory protections that normally exists vis-à-vis investor-owned utilities.

States That Have Exempted EV Service Providers from Existing Public Utility Regulations

The recent trend has been for states and state regulatory agencies to affirmatively exempt EV service providers from public utility regulation. California is perhaps the most well-known example of a state that has exempted EV service providers from the statutes governing public utilities. In 2010, the California Public Utility Commission decided that charging station owners should not be considered “electric corporations or public utilities” pursuant to California’s Public Utility Code. Eventually, the California legislature passed an amendment excluding EV charging stations from the “public utility” definition.

Similarly, New York’s Public Commission (the Commission) recently exempted EV charging station service providers from public utility regulation by finding that it did not have jurisdiction over EV charging stations. In 2013, the Commission decided that EV charging stations do not fall under New York’s Public Service Law (NY PSL) because charging stations only provide a service. Under the NY PSL, the Commission has jurisdiction over “the manufacture, conveying, transportation, sale or distribution of . . . electricity for light, heat or power, to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same.”¹² The Commission explained that, in order to determine whether its jurisdiction extended to the owners and operators of charging stations, it had to determine whether an EV charging station is considered an “electric plant.”¹³ The Commission concluded that a charging station is not an 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, these stations simply provide a service.¹⁴ The Commission further explained that “[w]hile the customer is using electricity, this is incidental to the transaction.”¹⁵

Approximately 15 other states, including Colorado, Florida, Illinois, Maryland, Massachusetts, Virginia and Washington, have followed an approach similar to California or New York and have exempted EV charging stations or their owners and operators from regulations applicable to public utilities.

Regulations Similar to Those Governing the Sale of Motor Fuel Should Not Be Applied in the EV Charging Station Context

When states exempt EV charging stations from the statutes or regulations governing the retail sale of electricity, the question arises as to which regulatory agencies, if any, will then be responsible for regulating the EV charging stations and what types of laws, if any, should govern the sale of electricity at EV charging stations. For many years, states have enacted numerous laws to protect gasoline service station dealers and consumers from predatory and deceptive practices relating to the sale of motor fuel at the wholesale and retail levels of the market. These laws govern the method of sale of motor fuel and range from below-cost sales statutes to labeling and price-posting requirements to weights-and-measures regulations. However, in stark contrast to the highly developed regulatory environment that currently exists for retail sales of motor fuel, very few states have taken meaningful steps to regulate the sale of electricity at EV charging stations.¹⁶

In our view, states should resist imposing regulations similar to those that exist for motor fuel to the sale of

electricity at EV charging stations for three principal reasons. First, many of the regulations governing the sale of motor fuel are archaic and unnecessary in the electricity context. Motor fuel sales regulations were largely enacted years ago to protect consumers and retail dealers from the perceived dangers of oligarchy market power held by a handful of integrated oil companies. As described above, that situation simply does not exist today in the retail electricity marketplace.

Second, the market for the retail sale of electricity at EV charging stations has not developed enough yet to justify the kinds of consumer- and dealer-friendly regulations that exist for motor fuel sales. In some areas of the country, the retail market does not even exist. There is no indication that consumers need special protection from unscrupulous sellers of electricity to justify regulations requiring, for example, that retail prices be prominently displayed on the EV charging station premises or that prices should not be changed more than once in a 24-hour period to prevent price gouging.

Third, many of the regulations governing the sale of motor fuel are inapplicable to EV charging stations because the EV charging station sales model has developed so differently from conventional motor fuel sales. Many employers provide EV charging to employees for free; some parking garages also provide this service free of charge. Further, where states have exempted EV charging stations from existing public utility regulations, EV infrastructure companies, such as ChargePoint and [NRG's EVgo](#), allow consumers to sign up and pre-pay for monthly plans and locate charging stations online. Thus, state laws requiring gas stations to accurately display their motor fuel prices may not be practical or even necessary in the EV charging station realm.

The owners of EV charging stations likely will — and should — be subject to the rules on marketing and advertising that apply to most retail businesses. State and federal regulatory authorities can — and should — challenge any deceptive practices under existing consumer protection statutes and regulations. However, in our view, regulations specific to sales of electricity at EV charging stations should not be imposed in the absence of evidence that free market forces and existing laws are not protecting competition or consumers.

Despite this, some states have appeared to contemplate the imposition of regulations governing the sale of motor fuel in the EV charging station context. For example, in 2012, Florida passed a statute stating, “[t]he provision of electric vehicle charging to the public by a nonutility is not the retail sale of electricity for the purposes of this chapter. The rates, terms, and conditions of electric vehicle charging services by a nonutility are not subject to regulation under this chapter.”¹⁷ The statute also provided that “[t]he Department of Agriculture and Consumer Services shall adopt rules to provide definitions, methods of sale, labeling requirements, and price-posting requirements for electric vehicle charging stations to allow for consistency for consumers and the industry.”¹⁸ Although the Florida Department of Agriculture and Consumer Services held an open workshop in 2013 to solicit public comments on the definitions, methods of sale, labeling requirements and price-posting requirements for electric vehicle charging stations, no rule has been adopted yet.

Other states have appeared to contemplate the protection of consumers in the EV charging station context without directly applying regulations governing the sale of motor fuel to the retail electricity industry. Connecticut, for example, has sought to protect consumer access to EV charging stations by recently proposing a bill that includes requirements for public access to EV charging stations.¹⁹ Under the bill, EV charging station owners and operators that charge a fee cannot condition the use of the station on subscription fees or membership in any organization.²⁰ Instead, owners and operators that charge a fee can utilize different price schedules based on a subscription or

membership.²¹

Over time, states could explore whether additional light-handed regulation of EV stations is necessary. If necessary, the owners and operators of EV stations could be subjected to licensing and bonding requirements that are similar to requirements imposed on competitive power suppliers. Again, however, careful study should be undertaken before imposing regulation on this new sector.

Conclusion

For EVs to become a successful alternative to gasoline-powered vehicles, EV charging infrastructure must become more widespread. This will require more states to eliminate unnecessary rules and remnants of public utility regulation, while adopting licensing and financial responsibility requirements where appropriate. Because local, state and federal regulations and codes are changing every day, EV charging station owners and operators and potential owners and operators should stay well informed. Additionally, in the long run, EV suppliers and consumers would benefit from a higher level of regulatory certainty. Regulatory uncertainty will only serve to impair the development of this nascent industry.

Endnotes

1 Regulatory Assistance Project, Electricity Regulation in the US: A Guide at 9 (Mar. 2011) , *available at* https://www.raonline.org/docs/RAP_Lazar_ElectricityRegulationInTheUS_Guide_2011_03.pdf.

2 *Id.*

3 The Philadelphia Code, Title 12, Traffic Code, § 12-1131, Electric Vehicle Parking. EV owners can also apply to the Philadelphia Parking Authority for a permit that allows them to install a curbside charger in front of their residences.

4 *Id.*

5 In re Public Utility Commission of Oregon, Order No. 12-013 (Public Util. Comm'n of Or. Jan. 19, 2012), *available at* <https://apps.puc.state.or.us/orders/2012ords/12-013.pdf>.

6 *Id.*

7 See Capitol Research, State Utilities Law and Electric Vehicle Charging Stations, at 2 (Oct. 2013), *available at* https://knowledgecenter.csg.org/kc/sites/default/files/Electric%20Vehicle%20Charging%20Stations_0.pdf.

8 *Id.*

9 Stephen Edelstein, Why Oil State Texas Turns Out To Be Friendly To Electric Cars, [ved-href="https://www.greencarreports.com/news/1091145_why-oil-state-texas-turns-out-to-be-friendly-to-electric-cars">https://www.greencarreports.com/news/1091145_why-oil-state-texas-turns-out-to-be-friendly-to-electric-cars](https://www.greencarreports.com/news/1091145_why-oil-state-texas-turns-out-to-be-friendly-to-electric-cars).

10 New York State Energy Research & Dev. Auth., Compilation of Utility Commission Initiatives Related to Plug-in Electric Vehicles and Electric Vehicle Supply Equipment (Apr. 2013), *available* at <https://www.nyserda.ny.gov/-/media/Files/Publications/Research/Transportation/Compilation-Utility-Commission-Initiatives-Plug-acc.pdf>.

11 *Id.*

12 New York Public Service Law § 5.

13 *In re Electric Vehicle Policies*, 13-E-0199, at 3 (State of N.Y. Public Serv. Comm'n Nov. 22, 2013).

14 *Id.* at 4.

15 *Id.*

16 For example, New York, like most states, regulates devices “for the purpose of dispensing and measuring petroleum has not imposed any other regulations addressing the method of sale, labeling or price-posting for electricity for EV charging stations.”

17 Fla. Stat. 366.94(1).

18 Fla. Stat. 366.94(2).

19 See House Bill No. 5510, *available* at https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB05510&which_year=2016.

20 *Id.*

21 *Id.*

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