**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Commission’s Investigation into Electric Vehicle Charging Service in this State. | ))) | Case No. 20-434-EL-COI |

**COMMENTS**

**BY**

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Electric vehicle charging—and the electric vehicles that need the charging—can be a good thing for Ohio consumers—and that good thing should be made available to consumers through the competitive market, for lower prices and greater innovation. Indeed, Ohio law requires this approach of reliance on the competitive market for electric vehicle charging services to consumers, with no allowance for utility monopolies to exert market power and to obtain subsidies from their captive consumers. The PUCO came to this very conclusion in its recent PowerForward report, which addressed how electric vehicle charging services should operate in the competitive market to benefit consumers:

Because the location of EV charging infrastructure is generally located on the customer’s side of the meter, the Commission believes that the EV charging stations should operate within the sphere of a competitive marketplace, especially for home and private business charging.[[1]](#footnote-2)

In this new investigation, the PUCO has asked parties to “comment on whether an entity that provides electric vehicle charging service is a public utility subject to the jurisdiction of the Commission.”[[2]](#footnote-3) The Office of the Ohio Consumers’ Counsel (“OCC”) responds to that question with a “no” because electric vehicle charging services should be offered to consumers through the competitive market, as stated above and explained below.

Electric vehicle charging is a service that is provided on the customers’ side of the meter. It occurs in the home, at a place of business, in a parking garage, or in other locations that are not part of the monopoly utility’s grid. It exists in a competitive space, not the utility’s monopoly space.

This pro-markets approach makes the most sense for Ohio public policy and customer protection—and it is the law. Customers will benefit because companies will have an opportunity to innovate and compete.

# I. RECOMMENDATIONS

## A. Entities that provide electric vehicle charging service ultimately benefit customers through competitive markets and are not engaged in a public utility service, because they are not “in the business of supplying electricity for light, heat, or power purposes to consumers” under R.C. 4905.03. The service is to be competitive and not for regulated monopoly utilities to provide.

Under R.C. 4905.04, the PUCO has the “power and jurisdiction to supervise and regulate public utilities.” Under R.C. 4905.02, a “public utility” is any person or entity “defined in section 4905.03 of the Revised Code,” other than non-profit electric light companies, a utility owned and operated exclusively by and for the utility’s customers, or a municipal utility.[[3]](#footnote-4) R.C. 4905.03 defines an “electric light company” as any person or entity “engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state ….”[[4]](#footnote-5)

For the reasons that follow, an entity that provides electric vehicle charging services is not engaged in the business of supplying electricity for light, heat, or power purposes to consumers in Ohio. Thus, it is not a “public utility.” This means that competitors are in and utility monopolies are out for purposes of providing these services to consumers.

### 1. Entities providing electric vehicle charging services are not “in the business of supplying electricity” to consumers and thus are not engaged in public utility service. The service is to be competitive and not for regulated monopoly utilities to provide.

A review of the types of entities providing electric vehicle charging stations in the State of Ohio shows that these entities are not “in the business of supplying electricity” to consumers under R.C. 4905.03. Clean Fuels Ohio[[5]](#footnote-6) tracks electric vehicle charging stations throughout the State of Ohio. As of March 11, 2020, there were 500 level 2 and DC fast charging stations in Ohio.[[6]](#footnote-7) According to this data, more than 60% of these 500 stations are found at the following types of locations: car dealerships and repair shops (82), retail shopping and restaurants (72), hotels (63), college campuses (42), parking garages and lots (32), banks (13), and hospitals (12).[[7]](#footnote-8) Entities like Huntington Bank, AAA, Ohio State University, Whole Foods, Meijer, the Ritz Carlton, the First Unitarian Church of Cleveland, the Columbus Zoo, McDonald’s, Easton Mall, Kroger, and Walmart all have electric vehicle charging stations.[[8]](#footnote-9) But none of these entities is “in the business of supplying electricity” to consumers. To the contrary, they are in the businesses of banking, car service, education, groceries, hotels, religion, animal preservation and education, food service, and retail shopping, among many other things that are decidedly not the business of supplying electricity.[[9]](#footnote-10) The PUCO should not interpret R.C. 4905.03 in a manner that turns these types of entities into utilities—and turns utility monopolies into providers of non-utility competitive services.

### 2. Electric vehicle charging stations are installed on the customer’s side of the meter, so the “consumer” under R.C. 4905.03 is the charging station, not the person using it to charge an electric vehicle.

For an electric vehicle charging station to be considered a utility, it must be “engaged in the business of supplying electricity … to consumers.”[[10]](#footnote-11) The question, then, is who is considered the “consumer” under this statute: the individual charging the electric vehicle, or the charging station? The PUCO should rule that the charging station is the consumer when an individual charges an electric vehicle. Thus, the charging station cannot be deemed to be supplying electricity to the consumer under R.C. 4905.03.

Ohio Revised Code chapter 4905 does not define “consumer” for purposes of R.C. 4905.03. Thus, we must look elsewhere to determine who the consumer is.

The PUCO and Ohio Supreme Court have, at times, addressed the question of who is a “consumer” under R.C. 4905.03, though not in the context of electric vehicle charging. In *Pledger v. PUCO*, for example, the Supreme Court found that a landlord was the “consumer” of utility service (water, in that case), even though the landlord resold that service to its tenants.[[11]](#footnote-12) On that basis, the Court ruled that the landlord was not a public utility under R.C. 4905.03. In an earlier case, *Shopping Centers Association v. PUCO*, the Court similarly ruled that office buildings, apartment buildings, and shopping centers can be considered “consumers” for purposes of R.C. 4905.03, even if they resell electricity to others.[[12]](#footnote-13)

Similar logic applies here. When an entity installs an electric vehicle charging station on its property—typically a retail shopping center, car dealer, hotel, college campus, or parking garage, as explained above—that entity remains the “consumer.” The EV charging station is on the customer side of the meters, and the entity offers EV charging as a service to EV owners and pays for that electricity as a cost of doing their primary business.

Other states have grappled with this same issue. For example, the Kentucky Public Service Commission recently held a proceeding to consider the issue of whether electric vehicle charging stations are electric utilities.[[13]](#footnote-14) The Kentucky Commission found that the charging station “is an end user or electric-consuming facility, and is not a distribution facility.”[[14]](#footnote-15) Thus, the Kentucky Commission ruled that electric vehicle charging stations are not public utilities and are therefore not subject to regulation under Kentucky law.[[15]](#footnote-16)

The PUCO should find that the provider of electric vehicle charging services is the “consumer” for purposes of R.C. 4905.03. On that basis, such a provider is not a “public utility” under Ohio law but is a competitor that is not subject to PUCO regulation.

### 3. When defining “public utility” for purposes of R.C. 4905.02 and in enacting regulations under R.C. Chapter 49, the General Assembly could not have envisioned the regulation of all entities that operate electric vehicle charging stations. The service is to be competitive and not for regulated monopoly utilities to provide.

In interpreting the definition of “public utility” under R.C. 4905.02 and 4905.03, the Supreme Court of Ohio has ruled that the statutory definition is “not self-applying” and that “more than the words of the statute is needed.”[[16]](#footnote-17) In other words, the Court found that the plain language of the statute is ambiguous, and the Court (and PUCO) must look elsewhere for guidance.

In considering various possible interpretations of a statute, the PUCO cannot read the statute in isolation. Instead, it must attempt to determine legislative intent by reading the words and phrases of the statute in context.[[17]](#footnote-18) It is not appropriate to read a single phrase without considering the context in which that phrase was included in the statute.[[18]](#footnote-19)

When read in the context of R.C. Title 49, there is no way that the Ohio General Assembly intended R.C. 4905.02 and 4905.03 to mean that the PUCO would regulate entities that operate an electric vehicle charging station. For example, R.C. 4905.26 allows any person to file a complaint with the PUCO regarding any “rate, charge, toll, rental, schedule, classification, or service” proposed by a public utility. The PUCO is then required to hold a hearing “if it appears that reasonable grounds are stated” for the complaint.[[19]](#footnote-20) If an electric vehicle charging station owner—say, Walmart—were deemed to be a utility, then the PUCO would potentially be required to hear all manner of complaints against Walmart, whether they are related to electric vehicle charging or not. This is an unreasonable interpretation of the law—one which compels the conclusion that Walmart is not a public utility just because it installs an electric vehicle charging station at one of its stores.

R.C. 4905.30 requires a public utility to “file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it.” This would lead to absurd results. For example, if Kroger installed an EV charging station and thus became a “public utility,” it might then be required to provide the PUCO with schedules showing the price for each of the many thousands of different food items it sells. This cannot be what the General Assembly envisioned when defining “public utility” in R.C. 4905.02 and 4905.03.

More generally, virtually the entirety of R.C. Chapter 4909—pertaining to regulated utility rates—could not reasonably be applied to entities that operate EV charging stations ancillary to their primary business. The General Assembly could not have envisioned the PUCO valuing the used and useful property (R.C. 4909.04) of large companies that own a handful of EV charging stations but otherwise sell non-utility goods and services, evaluating their management policies (R.C. 4928.154), or subjecting them to rate of return regulation (R.C. 4909.15 and 4909.18).

As explained above, R.C. 4905.02 and 4905.03, by their own terms, should not be read to mean that any entity operating an EV charging station is a public utility (and not read to mean that a monopoly utility can be operating an EV charging station). The statutory context of that definition—aimed at regulating monopoly utility rates—only confirms that the General Assembly did not intend for all manner of businesses to be swallowed into the definition of “public utility” when they offer electric vehicle charging as a service to their customers and patrons.

## B. Other states have consistently found that providers of electric vehicle charging services are not engaged in public utility service.

Ohio is not the first state to consider whether the provider of electric vehicle charging services is a public utility. Thus, Ohio can benefit from the guidance that other states have provided on this issue.

In a recent report by the National Association of Regulatory Utility Commissioners (NARUC), NARUC found that “[a]t least 24 states (plus DC) have ruled on the issue, with all deciding that charging stations should not be regulated in the same manner as a utility.”[[20]](#footnote-21) These include Midwest states like Illinois (a restructured state), Michigan, Minnesota, and Missouri.[[21]](#footnote-22)

As discussed above, one of the most recent states to address the issue is Kentucky. In the Kentucky proceeding, most of the parties agreed that providers of EV charging stations are not utilities. For instance, Duke Energy Kentucky (a Duke Energy Ohio affiliate) agreed that an electric vehicle charging station is not a utility if installed on the customer side of the meter.[[22]](#footnote-23) Two other investor-owned utilities, Kentucky Utilities Company and Louisville Gas and Electric Company, similarly concluded that EV charging stations are not public utilities.[[23]](#footnote-24) Other non-utility parties came to the same conclusion.[[24]](#footnote-25) Kentucky Power (an AEP Ohio affiliate), on the other hand, argued that only jurisdictional utilities (like Kentucky Power) should be allowed to own EV charging stations.[[25]](#footnote-26) The Kentucky Commission rejected Kentucky Power’s argument and ruled that electric vehicle charging stations are not public utilities. The Kentucky Commission reasoned that (i) the electric vehicle charging station is the consumer, (ii) electric vehicle charging stations are not utilities because they do not generate, transmit, or distribute electricity, (iii) electric vehicle charging stations do not have a duty to serve the public at large, and (iv) electric vehicle charging stations cannot serve all electric vehicle owners because there are different charging ports depending on the type of electric vehicle.[[26]](#footnote-27)

Of course, the fact that other states have found that electric charging stations are not utilities is not binding in Ohio. But as the Kentucky Commission recognized, “the characteristics that define a public utility tend to be consistent” from state to state.[[27]](#footnote-28) Thus, the reasoning and conclusions reached by other states support the PUCO interpreting Ohio’s statute in a way that does not turn operators of electric vehicle charging stations into regulated utilities (and does not turn utilities into a monopoly operation of electric vehicle charging stations).

## C. It would be bad public policy for consumers and the competitors that serve consumers if electric vehicle charging services were determined to be a public utility service. The service should be competitive and not for regulated monopoly utilities to provide.

### 1. Electric vehicle charging stations are not a natural monopoly, so it would be bad public policy to include them as a regulated utility service and it would be harmful to consumers who could be used by monopoly utilities to subsidize anticompetitive utility electric vehicle initiatives.

Distribution utilities are regulated because they are natural monopolies. It would be impossible and unnecessarily duplicative for businesses to compete with each other to provide distribution utility service because of the infrastructure necessary to deliver things like electricity, natural gas, and water to homes.[[28]](#footnote-29) The PUCO, therefore, exists to regulate natural monopolies and “protect against the ill effects of monopolies, including price gouging.”[[29]](#footnote-30) The same concern does not exist for electric vehicle charging stations.

An electric vehicle charging station can be placed virtually anywhere: at a parking garage, shopping mall, park, hospital, gas station, car dealership, office building, library, and so on. Businesses that make electric vehicle charging stations can and do compete in the market for such stations. Businesses hoping to install a station can choose from a variety of vendors and decide what price to pay for the station. Likewise, electric vehicle charging stations can and do compete for customers. A customer can choose whether to charge his or her vehicle at one station or another based on the station’s location, price, and availability of the correct type of charging port (*e.g.*, Tesla vs. others). There is no danger of price gouging because a customer can simply choose a different charging station. Indeed, price gouging seems to be the least of anyone’s worries when it comes to electric vehicle charging: more than 60% of electric vehicle charging stations in Ohio currently offer the service for free.[[30]](#footnote-31)

In short, there is simply no reason for electric vehicle charging stations to be a monopoly utility service because the forces of economic competition allow for a market-based approach to electric vehicle charging. If utilities are allowed to own electric vehicle charging stations, customers could be forced to subsidize the utilities’ anti-competitive electric vehicle charging initiatives. Distribution utilities are regulated because the market does not provide consumer protection. With electric vehicle charging, there is a choice. And the market-based choice is preferable for consumer protection.[[31]](#footnote-32)

Thus, not only should businesses who own charging stations not be deemed utilities, but regulated monopoly utilities should be prohibited from owning charging stations. Allowing regulated monopolies to own and charge their captive customers for charging stations would harm the market by giving the monopoly an unfair competitive advantage. Other businesses wanting to offer electric vehicle charging service might not be able to offer those services if they have to compete with monopolies who are guaranteed a return on their investments. Electric vehicle charging and monopoly utility service don’t mix. The market is the preferred approach for electric vehicle charging. If a utility wants to compete for service in the electric vehicle charging marketplace, then it should do so through a separate, shareholder-funded company that would purchase electric service from the same distribution utility tariff as its competitors. This would help to establish a level, competitive playing field for the provision of these services, which should be the PUCO’s objective.

### 2. Treating electric vehicle charging stations as a utility service would lead to unintended and unfair consequences for other businesses that offer similar services and would harm consumers.

That treating electric vehicle charging services as a utility is a mistaken notion can be seen by considering the extension of its illogic. For example, some businesses allow customers to charge their smart phones while shopping, dining, and drinking. If charging a car battery makes you a utility, then so too would charging a phone battery. Stores that sell batteries might also become utilities. For example, if Best Buy sells anything with a battery and charges the battery before selling to a customer (to ensure that the customer is satisfied and able to use the product immediately), Best Buy might then become a utility because it technically sold that customer the electrons being stored in the battery. Bottled water companies that purify utility-sourced water and sell that water to consumers might also become utilities by the same logic. Restaurants using utility-sourced water in their cooking might become utilities because some of that water is served to customers when they purchase a meal. Golf courses might be utilities if they charge customers to use electric-powered golf carts.

Regulation should generally be limited to those businesses that cannot operate effectively in a competitive market and those where the competitive market does not adequately protect consumers. Electric vehicle charging is not such a business. Good public policy demands that the competitive market, not monopoly electric utilities, be allowed to dictate and deliver the future of electric vehicle charging in Ohio.

# II. CONCLUSION

The PUCO asked parties to comment on “whether an entity that provides electric vehicle charging service is a public utility subject to the jurisdiction of the Commission.” The answer is a resounding “no.” Electric vehicle charging can and should be developed through competitive markets, not utility monopolies, so that customers can benefit from lower prices and greater innovation. To protect consumers through market competition, regulated monopoly utilities have no business owning and billing their captive customers for electric vehicle charging stations.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of these Comments was served on the persons stated below via electronic transmission, this 23rd day of March 2020.

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1. *PowerForward: A Roadmap to Ohio’s Electricity Future* at 20, *available at* <https://www.puco.ohio.gov/industry-information/industry-topics/powerforward/powerforward-a-roadmap-to-ohios-electricity-future/> (Aug. 29, 2018). [↑](#footnote-ref-2)
2. Entry ¶ 1 (Feb. 26, 2020). [↑](#footnote-ref-3)
3. *See* R.C. 4905.02(A) (providing exceptions to the definition of “public utility”). Because this case focuses on electric vehicle charging stations, references in the relevant statutes to natural gas, telecom, water, transportation, and railroad companies are disregarded. [↑](#footnote-ref-4)
4. An electric light company is also a company “supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.” This definition of electric light company does not apply to electric vehicle charging stations. [↑](#footnote-ref-5)
5. According to its website, Clean Fuels Ohio “is a non-profit organization that is dedicated to making Ohio a cleaner, healthier and more prosperous state” and is “helping to build a statewide fueling and charging infrastructure that supports these efforts.” *See* [www.cleanfuelsohio.org](http://www.cleanfuelsohio.org/). [↑](#footnote-ref-6)
6. *See* <https://www.cleanfuelsohio.org/ev-charging-station-locator> (click on “Advanced Filters” and filter by state and fuel type). [↑](#footnote-ref-7)
7. *Id.* The Clean Fuels Ohio locator allows you to download the data in an excel spreadsheet. It organizes stations by “Facility Type.” Some stations were not identified in the “Facility Type” column but the type could be easily identified by the “Station Name.” [↑](#footnote-ref-8)
8. *Id.* [↑](#footnote-ref-9)
9. *See Pledger v. PUC*, 109 Ohio St.3d 463, 467 (2005) (an entity is not a utility if supplying a utility-like service is only ancillary to the entity’s primary business). [↑](#footnote-ref-10)
10. R.C. 4905.03(C). [↑](#footnote-ref-11)
11. 109 Ohio St. 3d 463, 468-69 (2005). [↑](#footnote-ref-12)
12. 3 Ohio St. 2d 1, 4 (1965). Such entities are not *always* the consumer, however. For example, submetering companies can be deemed to be utilities under the PUCO’s modified *Shroyer* test. *See In re Commission’s Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Finding & Order (Dec. 7, 2016). [↑](#footnote-ref-13)
13. Case No. 2018-00372 (Ky. Pub. Serv. Comm.). [↑](#footnote-ref-14)
14. Case No. 2018-00372, Order at 19 (June 14, 2019) (the “Kentucky Order”). [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. *Pledger*, 109 Ohio St. 3d at 465. [↑](#footnote-ref-17)
17. *State v. Blackwell*, 111 Ohio St. 3d 236, 248-49 (2006). [↑](#footnote-ref-18)
18. *Industrial Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St. 3d 509, 516 (2014) (rejecting party’s attempt to interpret a statute without proper context because “[c]ontext matters”). [↑](#footnote-ref-19)
19. R.C. 4905.26. [↑](#footnote-ref-20)
20. NARUC, Electric Vehicles: Key Trends, Issues, and Considerations for State Regulators at 12 (Oct. 2019), *available at* <https://pubs.naruc.org/pub/32857459-0005-B8C5-95C6-1920829CABFE>. *See also* Case No. 2018-00372, Order at 17 (June 14, 2019) (finding that “almost 50 percent of states have concluded that [electric vehicle charging stations] are not utilities”). In some of these jurisdictions, however, this was accomplished through new legislation as opposed to interpreting existing statutes. [↑](#footnote-ref-21)
21. *See* Case No. 2018-00372 (Ky. Pub. Serv. Comm.), Order (Nov. 11, 2019) (identifying states). [↑](#footnote-ref-22)
22. Kentucky Order at 9. [↑](#footnote-ref-23)
23. *Id.* at 5. [↑](#footnote-ref-24)
24. *Id.* at 7-14 (electric cooperatives and EV charging companies arguing that EV charging is not a utility service). [↑](#footnote-ref-25)
25. *Id.* at 11-12. [↑](#footnote-ref-26)
26. *Id.* at 19. [↑](#footnote-ref-27)
27. *Id.* at 17. [↑](#footnote-ref-28)
28. In economics terms, the barriers to entry are so great that once a single seller enters the market in a particular location, no other firm would be able to enter that same market. [↑](#footnote-ref-29)
29. *AT&T Communications v. PUCO*, 88 Ohio St. 3d 549, 555-56 (2000) (Pfeifer, J., dissenting). [↑](#footnote-ref-30)
30. *See* <https://www.cleanfuelsohio.org/ev-charging-station-locator>. [↑](#footnote-ref-31)
31. *PowerForward: A Roadmap to Ohio’s Electricity Future* at 20 (“the Commission believes that the EV charging stations should operate within the sphere of a competitive marketplace, especially for home and private business charging”), *available at* <https://www.puco.ohio.gov/industry-information/industry-topics/powerforward/powerforward-a-roadmap-to-ohios-electricity-future/> [↑](#footnote-ref-32)