

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
INVESTIGATION INTO ELECTRIC VEHICLE
CHARGING SERVICE IN THE STATE.

CASE NO. 20-434-EL-COI

FINDING AND ORDER

Entered in the Journal on July 1, 2020

I. SUMMARY

{¶ 1} The Commission finds that any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, which is providing electric vehicle charging service in this state, is not engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, and, therefore, does not qualify as an “electric light company” or public utility pursuant to R.C. 4905.02 and 4905.03. Consequently, the Commission’s jurisdiction does not extend to an entity’s provision of electric vehicle charging service.

II. PROCEDURAL BACKGROUND

{¶ 2} On February 26, 2020, the Commission initiated an investigation into electric vehicle charging service (EVCS) in the state of Ohio. On the above date, the Commission issued an Entry seeking comments specifically on whether any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, which is providing EVCS in this state, is “engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state.” Interested persons were invited to file comments by March 23, 2020, and reply comments by April 7, 2020.

{¶ 3} On March 19, 2020, the Office of the Ohio Consumers’ Counsel (OCC) filed a motion to intervene pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11. No memoranda contra were filed. The Commission finds OCC’s motion to intervene reasonable and, therefore, grants the motion.

{¶ 4} Pursuant to the February 26, 2020 Entry, written comments were filed on March 20, 2020, by Alliance for Transportation Electrification (Alliance). On March 23, 2020, comments were filed by Industrial Energy Users-Ohio (IEU-Ohio); Interstate Gas Supply, Inc. (IGS); Ohio Power Company (AEP Ohio); Duke Energy Ohio, Inc. (Duke); Buckeye Power, Inc. and Ohio Rural Electric Cooperatives, Inc. (collectively, OREC); Ohio Partners for Affordable Energy (OPAE); OCC; Environmental Law and Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club (collectively, Environmental Advocates); Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy); and ChargePoint, Inc. (ChargePoint). On March 24, 2020, initial comments were filed by Tesla, Inc. (Tesla) and Greenlots. On April 6, 2020, Alliance filed its reply comments. On April 7, 2020, reply comments were by Tesla, Duke, AEP Ohio, Environmental Advocates, IGS, IEU-Ohio, the Ohio Hospital Association (OHA), ChargePoint, OCC, FirstEnergy, and The Dayton Power and Light Company (DP&L). On April 8, 2020, Greenlots filed its reply comments.

III. APPLICABLE LAW

{¶ 5} R.C. 4928.02(A) and (G) provide that it is the policy of this state to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service and to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment. Moreover, as delineated in R.C. 4928.02(J) and (N), it is the policy of this state to provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates while also facilitating the state's effectiveness in the global economy.

{¶ 6} R.C. 4905.02 provides, in relevant part, that "public utility" includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, except an electric light company that operates its utility not for profit and except for a public utility that is owned or operated by any municipal corporation. R.C. 4905.03 defines an "electric light

company” as a person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, “engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state.” Subject to certain exceptions, the above statutes extend the Commission’s jurisdiction to entities qualifying as public utilities and electric light companies.

{¶ 7} The Ohio Supreme Court has held that it is a company’s actual practices, not what the company claims to do or provide, that determine if it is a public utility. *Indus. Gas Co. v. Pub. Util. Com.*, 135 Ohio St. 408, 412, 21 N.E.2d 166 (1939). Further, the resolution of the question of whether an enterprise is operating as a public utility is decided by an examination of the nature of the business in which it is engaged. *Indus. Gas Co. v. Pub. Util. Comm.* at paragraph one of the syllabus. And, although case law provides a list of characteristics common to public utilities, none of these characteristics is controlling and each case must be decided on the facts and circumstances peculiar to it. *Indus. Gas Co. v. Pub. Util. Comm.* at 413. *Montville Bd. of Twp. Trustees v. WDBN, Inc.*, 10 Ohio App.3d 284, 10 OBR 400, 461 N.E.2d 1345 (1983).

{¶ 8} The Commission has historically applied a three-part test to determine if an entity, engaged in the resale of public utility service, is operating as a public utility and falls within the scope of the Commission's exclusive jurisdiction. The three-part test, first adopted by this Commission in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) (*Shroyer*), and affirmed by the Ohio Supreme Court in *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶18, (*Shroyer Test*) is as follows:

- (a) Has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right of way for utility purposes?

- (b) Is the utility service available to the general public rather than just to tenants?
- (c) Is the provision of utility service ancillary to the landlord's primary business?

{¶ 9} The Commission initially applied the *Shroyer* Test to waterworks companies, but it can be applied to the provision of any public utility service. *In re Inscho v. Shroyer's Mobile Homes*, Opinion and Order (Feb. 27, 1992); *In re Pledger*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004); *Pledger v. Pub. Util. Comm.* at ¶18; *In re Brooks*, Case No. 94-1987-EL-ATA, Opinion and Order (May 8, 1996); *In re FirstEnergy*, Case No. 99-1212-EL-ETP, et al., Entry (Nov. 21, 2000); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶10, 18. Additionally, failure of any one of the three prongs may be sufficient to demonstrate that an entity is unlawfully operating as a public utility. *In re the Comm.'s Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI (*Submetering Case*), Finding and Order (Dec. 7, 2016) at ¶20.

IV. DISCUSSION

A. Summary of Comments

{¶ 10} Commenters acknowledge and agree that under Commission precedent, determining whether an entity is a public utility requires a review of the unique facts and circumstances of each matter (IGS Comments at 5; Duke Comments at 5). No commenters argue that EVCS operators are providing light or heat to consumers, and thus the bulk of the comments addressing the definition of an electric light company focus on the phrase “power purposes” under R.C. 4905.03(C), which states that an entity is an electric light company if it is “engaged in the business of supplying electricity for...power purposes.” OPAE, OCC, IGS, IEU-Ohio, ChargePoint, Environmental Advocates, Tesla, and Greenlots all unequivocally agree that, when applying the facts of EVCS to the plain language of R.C. 4905.03, EVCS operators clearly do not fit within the definition of an electric light company and thus should not be considered public utilities (OPAE Comments at 2; OCC Comments

at 3; IGS Comments at 6; IEU-Ohio Comments at 1-2; ChargePoint Comments at 3; Environmental Advocates Comments at 2-3; Tesla Comments at 2-3; Greenlots Comments at 3).

{¶ 11} In ChargePoint’s analysis, EVCS operators are not supplying electricity for power purposes but are instead offering the “distinct and specific service” of recharging EV batteries (ChargePoint Comments at 3; ChargePoint Reply at 1-3). While acknowledging that “power purposes” is not defined in R.C. 4905.03, OPAE argues that the plain meaning of the phrase indicates that the power must be supplied for more generalized purposes. EVCS operators, however, are allowing consumers access to electricity that can only be used to charge a car battery. In OPAE’s assessment, this is not supplying electricity for “power purposes” as contemplated in the statute. (OPAE Comments at 2-3.) Tesla echoes these sentiments, pointing out that EVCS operators provide a “limited electric service” that only enables electric transportation and does not provide electricity that can be used to power other devices (Tesla Comments at 5). IEU-Ohio, OCC, IGS, Environmental Advocates, and Greenlots provide similar analyses in applying R.C. 4905.03, generally agreeing that EVCS operators are offering a distinct service and are not reselling electricity (IEU-Ohio Comments at 1-2; OCC Comments at 2-4; IGS Comments at 6-7; Environmental Advocates Comments at 2-3; Greenlots Comments at 3; IGS Reply at 2-3).

{¶ 12} As further support that they are not public utilities, many commenters also argue that EVCS operators are themselves the consumers referenced in R.C. 4905.03. OCC argues strongly in its comments that most EVCS occurs on the customer’s side of the meter – typically in a home, parking garage, or other business – and that the entity providing EVCS is itself already a customer purchasing electricity from a jurisdictional utility. In OCC’s opinion, the EVCS owner/operator is the consumer referenced in R.C. 4905.03 and, therefore, is not itself supplying electricity to a consumer. (OCC Comments at 4-6.) The Environmental Advocates provide a similar argument in their comments, adding that many EVCS stations are in private complexes and residences where charging is often provided without a fee. (Environmental Advocates Comments at 4.) Tesla’s comments align with

those of OCC and the Environmental Advocates, as Tesla agrees that charging sites are typically located “behind” utility meters where an EVCS operator is purchasing electricity from a regulated utility (Tesla Comments at 5-6). In reply comments, AEP Ohio takes issue with these generalizations, arguing that while most EVCS sit behind the meter, not all of it currently does, and the still-developing EVCS market could result in charging services moving in front of the meter in the future (AEP Ohio Reply at 1).

{¶ 13} Alliance is not as certain of the majority’s analysis under R.C. 4905.03. Alliance states in its initial comments that it is “not clear” whether EVCS operators fall under the statutory definition of a public utility. Ultimately, Alliance concludes that a non-utility EVCS operator “likely serves a ‘power purpose to consumers’ under the [s]tatute,” although it does not cite specifically how it reaches this conclusion. (Alliance Comments at 1-2.) Alliance, however, acknowledges that it has no objection to EVCS operators being exempted from traditional public utility regulation (Alliance Comments at 2). Likewise, while OREC generally agrees that EVCS operators do not meet the definition of an electric light company and concurs that EVCS operators provide a distinct charging service, it states that this conclusion is subject to caveats, such as an EVCS operator receiving its electric supply exclusively from the appropriate jurisdictional utility and only using the electricity for battery charging. If such caveats are not met, OREC argues that EVCS operators are functioning as public utilities. (OREC Comments at 3-4.) While Greenlots agrees with the majority’s analysis, it also states that if an entity that is already regulated as a public utility is providing EVCS, then those activities would be subject to Commission jurisdiction (Greenlots Comments at 5). FirstEnergy agrees with Greenlots’ position for public utilities that supply EVCS directly from their distribution systems (FirstEnergy Comments at 2).

{¶ 14} Duke’s initial comments argue that the answer to the Commission inquiry depends on the location of the EVCS equipment in relation to the utility meter (Duke Comments at 8). Duke expounds upon the OREC caveats and acknowledges that so long as an EVCS operator is connected to the jurisdictional utility’s electric distribution system, the EV equipment is behind the utility’s meter, and the operator is being supplied with

electricity by a regulated utility pursuant to a relevant tariff, then such an operator is merely providing a charging service and does not meet the definition of an electric light company under R.C. 4905.03 (Duke Comments at 5-8). FirstEnergy, in its comments, reaches a similar conclusion (FirstEnergy Comments at 1). However, Duke contends that if an EVCS operator is not connected to a regulated utility's electric distribution system, the result changes. Duke argues that if an operator is being supplied in front of the meter, via its own power source, that an EVCS operator would be supplying electricity to consumers and not simply providing a charging service. If a fee is charged for that EVCS, Duke contends the operator would be an electric light company. (Duke Comments at 7-8.) Duke then goes into a lengthy discussion of the Certified Territories Act (CTA), under R.C. 4933.81 through R.C. 4933.89. Duke stresses that under the CTA, only the jurisdictional electric light company can provide retail electric service within its certified territory. In its final summation, Duke states that for a non-regulated utility to provide EVCS, it must either be behind the meter of the appropriate jurisdictional utility or itself be a utility customer providing a "non-regulated charging service." Otherwise, Duke contends, such third-party EVCS operators would be in violation of the CTA. (Duke Comments at 9-11.) Other commenters also reference the CTA in their analysis of the inquiry, cautioning against EVCS operators infringing upon each electric utility's exclusive right to furnish electric service within its certified territory (FirstEnergy Comments at 1-2; OREC Comments at 4; Alliance Comments at 2; Alliance Reply at 1-2). AEP Ohio states that the "generation, transmission, and distribution of electricity" to EVCS operators must remain solely the right of the appropriate jurisdictional utility in whose certified territory an EVCS station is located (AEP Ohio Comments at 5).

{¶ 15} Multiple commenters attack arguments that invoke the CTA. IGS, in its reply comments, points out that the CTA is only implicated if EVCS operators are deemed to be public utilities. R.C. 4933.81(A) defines an electric supplier as an electric light company under R.C. 4905.03; therefore, IGS argues, since EVCS providers are not electric light companies under R.C. 4905.03 and not electric suppliers for the purposes of R.C. 4933.81, such providers' sale of electricity is not subject to the CTA. IGS also notes that R.C.

4933.81(F), in part, states that “‘electric service’ also excludes a competitive retail electric service.” IGS argues that AEP Ohio overstated the scope of the CTA when it included electricity generation, in addition to transmission and distribution, as the function of the electric supplier in whose territory a EVCS station is located. IGS states that, under R.C. 4928.03 and when complying with other applicable laws, EVCS stations are free to self-supply or purchase power from a competitive retail electric supplier. (IGS Reply at 11-12.) Tesla, in its reply comments, argues that the purpose of the CTA is to protect public utilities from the development of redundant infrastructure to provide a full array of retail electric services but that such a concern is unfounded with EVCS operators since the charging equipment cannot be used for any other electrical purposes (Tesla Reply at 5-6). The Environmental Advocates also disagree with the application of the CTA and argue that the source of the electricity used by EVCS stations is irrelevant (Environmental Advocates Reply at 2-3).

{¶ 16} IEU-Ohio contends that without clear statutory authority to regulate EVCS, the Commission uses the *Shroyer* Test to determine on a case-by-case basis whether an entity is behaving like a public utility (IEU-Ohio Reply at 6). As described more particularly in paragraphs 8-9, *Shroyer* established a three-part test to determine if an entity is operating as a public utility and falls within the scope of the Commission's exclusive jurisdiction. Many commenters agree that *Shroyer* is applicable to EVCS and of those that applied the *Shroyer* Test to EVCS operators – OPAE, IGS, IEU-Ohio, ChargePoint, Environmental Advocates, and OHA – all reached the conclusion that each factor of the *Shroyer* Test demonstrates that EVCS operators are not public utilities (OPAE Comments at 4-6; IGS Comments at 1; IEU-Ohio Comments at 4-5; ChargePoint Comments at 5-7; Environmental Advocates Comments at 5-6; OHA Reply at 2-3).

{¶ 17} Under the first *Shroyer* Test factor, commenters point out that EVCS operators neither hold themselves out as public utilities nor receive any of the special privileges granted to utilities, such as eminent domain or exclusive franchise territories (IEU-Ohio Comments at 5; OPAE Comments at 5; IGS Comments at 6-7; Environmental

Advocates Comments at 5). As ChargePoint concisely states, EVCS operators “do not have the ability, far less the ‘intent,’” to utilize any of the benefits of public utilities. (ChargePoint Comments at 6). OHA, which represents 236 hospitals and 14 health care systems, many of which provide EVCS on their premises, confirms that its members do not exercise the privileges reserved for public utilities nor do they hold themselves out as having the ability to do so (OHA Reply at 3).

{¶ 18} Addressing the second *Shroyer* Test factor, commenters agree that EVCS is not offered indiscriminately to the general public, but instead is limited to a defined customer base (ChargePoint Comments at 6; IGS Comments at 7). Whereas electric utilities operate distribution systems to bring electric service to all customers within a defined service area, EVCS is available only to electric vehicle owners that voluntarily utilize a chosen station’s service. Only electric vehicle owners with the charging ports required by a particular EVCS station are able to utilize the services. (Environmental Advocates Comments at 5-6, IGS Comments at 7.) IEU-Ohio points out that the availability is often limited even further than the vehicle compatibility issues – in many instances, EVCS is limited to the patrons of a particular business establishment, such as guests at a hotel or customers of a particular retail location (IEU-Ohio Comments at 5). OPAE contends that this limited availability of service is analogous to *Shroyer* and the landlord providing electric service only to tenants (OPAE Comments at 5).

{¶ 19} Finally, in addressing the third factor of the *Shroyer* Test, commenters stress that most EVCS owners do not provide the service as a primary business but rather do so as an ancillary activity (IGS Comments at 7; ChargePoint Comments at 7; OPAE Comments at 6; OHA Reply at 2-3). According to ChargePoint and OHA, many businesses offer EVCS as an amenity to attract new customers or to provide an additional benefit to employees (ChargePoint Comments at 7; OHA Reply at 3). IEU-Ohio states that not only is EVCS typically not the primary business of an owner, but many EVCS stations do not charge a fee for the service (IEU-Ohio Comments at 5). Environmental Advocates argues that the goal of most EVCS is not to make money but to encourage drivers to visit a particular location,

such as a retail establishment (Environmental Advocates Comments at 6). Even entities that did not directly tie their comments to the *Shroyer* Test provide much evidence of the varied ownership of EVCS stations. OCC cites data indicating that more than 60 percent of 500 level 2 and DC fast charging stations in Ohio are found at locations such as car dealerships and repair shops, retail shopping/restaurants, hotels, college campuses, parking lots, banks, and hospitals. According to OCC, the primary business of these entities is car services, education, food service, and various other fields that is not electric battery charging. (OCC Comments at 3-4.) Tesla, in providing an overview of its extensive involvement and investment in EVCS and the EV market, highlights that it typically does not own the underlying property where its charging equipment is located but instead partners with businesses ranging from convenience stores to shopping centers to host the charging stations (Tesla Comments at 3-4).

{¶ 20} FirstEnergy acknowledges that while EVCS is “somewhat analogous” to the submetering scenario dealt with in *Shroyer*, it argues that EVCS is different because it is not provided to a lessee or tenant and also includes an additional hardware component not present in *Shroyer* (FirstEnergy Comments at 2). AEP Ohio does not analyze EVCS operators under the *Shroyer* Test but advocates the Commission opening a rulemaking docket to potentially modify the test (AEP Ohio Comments at 5). In reply comments, IEU-Ohio again asserts that the *Shroyer* Test is applicable to EVCS providers and states its belief that FirstEnergy and AEP Ohio provide no analysis under *Shroyer* but simply presume that the test should be modified or disregarded (IEU-Ohio Reply at 7).

{¶ 21} Some commenters mention a modification to the *Shroyer* Test used by the Commission in the *Submetering Case* called the Relative Price Test. *Submetering Case*, Finding and Order (Dec. 7, 2016). Essentially, the test asks whether a reseller of utility service sells that service to a submetered residential customer and charges an amount that is greater than what the submetered customer would have been charged through the local public utility’s default service tariffs (referred to as the “reasonable threshold percentage,” which the Commission set to zero). If the answer to this question is “yes,” then there is a rebuttable

presumption, under the third prong of the *Shroyer* Test, that provision of utility service is not ancillary to the reseller's primary business. *Submetering Case*, Finding and Order (Dec. 7, 2016), at ¶16, Second Entry on Rehearing (June 21, 2017), at ¶1. In its initial comments, OREC suggests that while it generally agrees that EVCS operators should not be treated as public utilities, the Commission might still wish to maintain some jurisdiction over the operators similar to how it has handled submetering (OREC Comments at 4-5). IEU-Ohio addresses this contention in both its initial and reply comments, stating that the service provided by EVCS operators is entirely different from that offered by submetering companies. Additionally, IEU-Ohio says that it is not clear whether the Relative Price Test is intended to apply to entities other than submetering companies. With an EVCS station, vehicle owners come and go, using the energy only as needed and not always being charged for the service. Based on the above, IEU-Ohio contends that the Relative Price Test could not even be properly applied to EVCS, as no reasonable threshold percentage could be set, and thus the original *Shroyer* Test remains the proper standard. (IEU-Ohio Comments at 5-7; IEU-Ohio Reply at 8-9.) In its reply comments, OHA voices support for IEU-Ohio's comments on the test to be applied and adds that EV charging is not a "human need" purpose in the public utility context; therefore, there is no need to apply the Relative Price Test to EVCS. (OHA Reply at 3-4.)

{¶ 22} Many commenters also believe that objectives outlined throughout the Ohio Revised Code support EVCS being offered by non-utilities. Pursuant to R.C. 4928.02, it is the policy of the state of Ohio to ensure the availability of adequate and reliable electric service and to recognize the emergence of competitive electricity markets. IEU-Ohio contends that EVCS is a competitive service, similar to smart thermostats and other behind the meter products and services that are offered by a number of different companies and provide options to consumers (IEU-Ohio Comments at 8). Likewise, OCC contends that deeming EVCS operators to be public utilities would destroy what in its estimation is already a competitive market (OCC Comments at 11). Tesla also points out that EVCS operators are already engaged in a "competitive landscape" that provides customers with a

variety of options for EVCS and supports the policy of R.C. 4928.02. Tesla contends that the competitive market is in the public interest because it allows for continued business and technical innovation, as well as a safe and affordable customer experience. (Tesla Comments at 7-8; ChargePoint at 14). Alliance disagrees with the broad generalization of the EVCS market as being fully competitive and argues that utility involvement would be beneficial in stabilizing and continuing to grow what is still a nascent industry (Alliance Reply at 2). Similarly, Greenlots argues that public utility involvement, and the investment that would be made in EVCS by public utilities, could actually increase EV demand and spur greater competition (Greenlots Reply at 2-3).

{¶ 23} While the Commission is not obligated to reach conclusions that align with other states, many commenters felt it beneficial to highlight what other states concluded when evaluating whether EVCS operators are public utilities. According to the commenters, other states have almost universally determined that EVCS operators are not public utilities. (IEU-Ohio Comments at 3; Greenlots Comments at 3-5; OREC Comments at 3.) OCC cites a report by the National Association of Regulatory Utility Commissioners (NARUC) that says that 24 states and the District of Columbia have ruled on this issue, “with all deciding that charging stations should not be regulated in the same manner as a utility” (OCC Comments at 8-9). OCC then highlights the deciding order from Kentucky, in which the Kentucky Public Service Commission ruled that EVCS operators are not public utilities for the reasons outlined in the majority’s arguments – the EVCS operator itself is a consumer, the operators are not generating or distributing electricity, and the operators do not, and have no duty to, indiscriminately serve the public. (OCC Comments at 8-10). Tesla offers even more expansive numbers, stating in its comments that 35 states and the District of Columbia have determined that EVCS operators are not public utilities (Tesla Comments at 6). ChargePoint and Environmental Advocates both provide in-depth surveys of other states, highlighting similar decisions and reasoning from states as geographically and politically diverse as California, New York, Massachusetts, Pennsylvania, Missouri, Iowa, Alabama, and Kentucky, among others (ChargePoint Comments at 8-11; Environmental

Advocates Comments at 10). Environmental Advocates concedes that while Ohio law is not identical to the other states, the language and intent is similar, and that the principals traditionally used by the Commission to determine utility status aligns with that used in Kentucky, Michigan, and other states (Environmental Advocates Comments at 10).

{¶ 24} While beyond the current scope of this inquiry, the Commission acknowledges that large sections of comments center on the extent of the role that public utilities should be permitted in the EVCS market. In both initial and reply comments, Duke, FirstEnergy, AEP Ohio, Greenlots, Environmental Advocates, and DP&L all argue that electric distribution utilities (EDUs) are integral to the development of the EVCS market and should be actively involved at all stages. These entities stress that public utilities have the resources and expertise necessary to ensure the sustainable expansion of EVCS. (Duke Comments at 2-3; FirstEnergy Comments at 2-3; AEP Ohio Comments at 2-4; Greenlots at 5-8; Environmental Advocates at 13; DP&L Reply at 1-2.) Duke, FirstEnergy, Greenlots, and DP&L also argue that regulated public utilities should be permitted to directly own and operate EVCS stations (Duke Comments at 2; FirstEnergy Comments at 2; DP&L Reply at 2; Duke Reply at 2-3; First Energy Reply at 2-3; Greenlots Reply at 4). Tesla offers a slight rebuttal to these positions by arguing that public utilities are not the only entities that have the resources and expertise to build the EVCS infrastructure, citing its own nationwide efforts in the EV market. Tesla acknowledges, however, that public utilities can still play an important role in the market, including EVCS station ownership and operation. (Tesla Reply at 2.) Conversely, OCC maintains that EDUs should be barred from ownership and operation of EVCS stations, citing concerns about unfair advantages that jurisdictional utilities would enjoy over third-party operators (OCC Comments at 12; OCC Reply at 2-4). IEU-Ohio and IGS also contend that public utility ownership or operation would potentially run afoul of R.C. 4928.17 concerning corporate separation by utilities (IGS Comments at 1; IGS Reply at 8-9; IEU-Ohio Reply at 3).

{¶ 25} The Commission received other comments that are also ancillary to the question posed in our February 26, 2020 Entry. For instance, multiple commenters advocate

for EVCS operators to be able to charge customers on a kilowatt-hour basis, arguing that it would lead to more efficient and cost-effective charging services (Environmental Advocates Comments at 11-13; ChargePoint Comments at 13; Tesla Reply at 7; Greenlots Reply at 5-6). Additionally, some commenters suggest that the Commission initiate a more extensive rulemaking docket to clarify the parameters of EVCS participation by utilities and non-utilities or to state that the Commission maintain some type of “light touch” regulatory authority over EVCS operators (AEP Ohio Comments at 5; Alliance Comments at 2-3; AEP Ohio Reply at 2; Alliance Reply at 1). Particular commenters also raise a concern that consumers will not be adequately protected if the Commission does not maintain some jurisdiction over EVCS operators (AEP Ohio Comments at 1-3; OREC Comments at 5-6; Alliance Comments at 3; Greenlots Comments at 3). In response to the consumer protection concern, others contend that general consumer protection laws will apply to non-utility EVCS services and will adequately safeguard EVCS customers (ChargePoint Reply at 3-4; Tesla Reply at 4-5; IEU-Ohio Reply at 10-11). While beyond the current scope of this inquiry, the Commission acknowledges that such comments have been taken under advisement and may be utilized in future proceedings, if necessary.

B. Commission Decision

{¶ 26} Based upon the review of all comments and its own independent review of the applicable law, the Commission finds that any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is not engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state when providing EVCS and, therefore, does not qualify as a public utility or “electric light company” pursuant to R.C. 4905.02 and 4905.03. Consequently, the Commission’s jurisdiction does not extend to an entity’s provision of EVCS.

{¶ 27} At the outset, the Commission acknowledges that the market for EVCS is in its nascency and new developments may arise that require us to further consider how those developments shape or change the Commission’s conclusions regarding its jurisdictional

authority over EVCS. Nevertheless, EVCS operators do not qualify as public utilities and electric light companies under the plain language of R.C. 4905.02 and R.C. 4905.03(C). As demonstrated above, nearly all commenters reached this same conclusion. EVCS operators offer a type of service that is fundamentally different than the services offered by regulated utilities. As multiple commenters point out, EVCS operators are not in the business of supplying electricity for light, heat, or power purposes, but, instead, are providing a battery charging service that uses electricity not generated, transmitted, or distributed by that operator. The EVCS equipment is designed for the singular purpose of EV battery charging and not for use on other devices or for other purposes. More specifically, EVCS operators are not providing a retail electric service, as defined in R.C. 4928.01(A)(27), since, unlike EDUs, these operators are not providing a service component involved in supplying or arranging for the supply of electricity to ultimate consumers in the state, from the point of generation to the point of consumption. In fact, EVCS operators are the ultimate consumer of the EDU's electricity distribution. Typically, EV charging stations are located behind a local utility's meter, and operators are charged by the local utility for the operators' measured electricity consumption. These "behind-the-meter" services operate within the sphere of a competitive marketplace and are analogous to a cellphone battery charging port at an airport that requires compensation for service. R.C. 4905.03 does not contemplate these types of services as ones that supply light, heat, or power to consumers in this state.

{¶ 28} Moreover, the Commission finds that, to the extent that EVCS operators are engaged in the resale of public utility service, EVCS operators are not subject to the Commission's jurisdiction. The Ohio Supreme Court has stated that the determination of whether a particular entity is a public utility is a mixed question of fact and law. *Indus. Gas Co. v. Pub. Util. Comm.* at 413. The Commission uses the *Shroyer* Test to determine if an entity, engaged in the resale of public utility service, is operating as a public utility and falls within the scope of the Commission's exclusive jurisdiction. Typically, this test is employed on a case-by-case basis. *Submetering Case*, Finding and Order (Dec. 7, 2016) at ¶17. As previously outlined above, the Commission must examine the following three factors to

determine whether an entity is operating as a public utility: (1) does the EVCS operator avail itself of special benefits available to public utilities; (2) is the utility service available to the general public rather than just to tenants; and (3) is the provision of utility service ancillary to the landlord's primary business? *In re Inscho v. Shroyer's Mobile Homes*, Opinion and Order (Feb. 27, 1992).

{¶ 29} The Commission finds that EVCS operators are not public utilities under the *Shroyer* Test. With respect to the first factor of the test, the comments filed in this case do not claim that any EVCS operator has been granted franchised territory, given eminent domain authority, or given access to existing public utility rights-of-way. Many EVCS operators are private companies that contract with parties to site their charging stations and include a vast array of entities, such as grocery stores, hospitals, and other various businesses, all of which do not possess such broad authority. In regard to the second factor, EVCS is not provided to the public on a general and indiscriminate basis because it is offered to only a specific subset of the general public. As the Environmental Advocates point out, a consumer of EVCS must own an EV, travel to a charging station, and have the correct charging ports to receive electricity from that station (Environmental Advocates Comments at 5-6). Moreover, the site host has discretion over the level of access permitted to the public for that specific charging location, level of access often being determined through the contract between the EV charging station supplier and the site host. Regarding the third factor, EVCS operators often provide EVCS with the goal of encouraging the EV driver to visit and potentially patronize a particular location, such as the grocery store by which the EVCS charging station is located, or as a convenience, such as for visitors at a hospital or for employees at a business. In situations where EVCS operators offer free charging services, the third factor is not violated. However, even if an EVCS operator were providing EVCS for a fee and EVCS was the primary purpose of the facility, we find that that this would not outweigh the first and second factors in the *Shroyer* Test as it relates to EVCS.

{¶ 30} The Commission finds that the modifications to the *Shroyer* Test established in the *Submetering Case* should not apply to EVCS operators because the modified *Shroyer*

Test was only established for the protection of residential customers. There is no evidence in the comments that EV owners are captured customers or are bound to a particular EVCS operator through a lease or other arrangement.

{¶ 31} The Commission's conclusion regarding its jurisdictional authority over EVCS operators aligns with the state of Ohio's policy, articulated in R.C. 4928.02, to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service and to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment. R.C. 4928.02. Further, this decision helps provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates while also facilitating the state's effectiveness in the global economy. R.C. 4928.02. The Commission believes that this decision continues to help foster the emergence of a competitive EVCS market. As competition increases in this sector, similar to the competitive retail electric service market, we expect the array of consumer choices to expand as entities compete for a share of the EVCS market. Competition may manifest in competitive pricing, promotional offers, value-added services complimentary to the charging service, and other benefits yet to emerge. And, we note, as examined further below, this decision does not sacrifice consumer protections.

{¶ 32} Several parties suggest that the Commission retain some level of jurisdiction over EVCS and their operators, especially for the purpose of consumer protection. The Commission's determination regarding EVCS operators, however, functions to limit the oversight we can provide. The Commission is, after all, a creature of statute whose jurisdiction is limited to that conferred to it by the General Assembly. *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993). Furthermore, as multiple commenters assert, a robust consumer protection framework already exists to protect consumers from unfair, deceptive, or unconscionable sales practices. As IGS and Tesla point out, since these EVCS sales are not subject to the exclusive jurisdiction of the Commission,

EVCS would be subject to Federal consumer protection laws and the Ohio Consumer Sales Practices Act (CSPA) under R.C. Chapter 1345 (IGS Comments at 8; Tesla Reply at 4-5). Under R.C. 1345.01(A), a consumer transaction excludes a person determined to be a public utility under R.C. 4903.05, leaving EVCS transactions subject to public and private actions initiated under the CSPA. Certain statutory authority may be invoked that triggers Commission jurisdiction, such as an investigation conducted pursuant to R.C. 4905.26, or, as described earlier, in circumstances where a complaint is filed against an entity due to the complainant's belief the entity is unlawfully operating as a public utility. *See Submetering Case*, Second Entry on Rehearing (June 21, 2017) at ¶14. The Commission will continue to monitor the development of the EVCS market and take further action to encourage and help spur its growth when deemed appropriate by itself or the General Assembly.

{¶ 33} Multiple commenters requested that the Commission provide guidance or a decision on ancillary issues outside of the narrow scope of the question posed thus far in this docket. For example, commenters request that the Commission clarify that EVCS operators may charge for EVCS on a per kWh basis. However, as the Commission noted above, the Commission will not address these issues at this time.

{¶ 34} Finally, the comments also consisted of vigorous debate among the parties concerning the appropriate level of EDU involvement in the development of the EVCS market and EV infrastructure. The Commission recognizes that issues surrounding EVCS, including ensuring a sustained development of the EV market through the electrification of travel corridors, mindful investments in distribution infrastructure, and protection against potential market deficiencies, may necessitate involvement by EDUs; however, the Commission will not address EDU involvement arguments in this order.

V. ORDER

{¶ 35} It is, therefore,

{¶ 36} ORDERED, That OCC's motion to intervene be granted. It is, further,

{¶ 37} ORDERED, That entities providing EVCS in this state do not qualify as public utilities or electric light companies pursuant to R.C. 4905.02 and R.C. 4905.03(C) and, therefore, are not subject to the Commission's jurisdiction. It is, further,

{¶ 38} ORDERED, That a copy of this Finding and Order be served upon each party of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

MJS/mef

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Case No(s). 20-0434-EL-COI

Summary: Finding & Order finding that any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, which is providing electric vehicle charging service in this state, is not engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, and, therefore, does not qualify as an "electric light company" or public utility pursuant to R.C. 4905.02 and 4905.03. Consequently, the Commission's jurisdiction does not extend to an entity's provision of electric vehicle charging service electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio