



Control Number: 49125



Item Number: 55

Addendum StartPage: 0



PROJECT NO. 49125

**REVIEW OF ISSUES RELATED TO
ELECTRIC VEHICLES**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

**VISTRA’S RESPONSES TO THE COMMISSION’S SECOND REQUEST FOR
COMMENTS**

Vistra Corp. (Vistra) submits the following comments in response to the request approved for publication by the Public Utility Commission of Texas (Commission) at its July 31, 2020 open meeting¹ and published in the *Texas Register* on August 14, 2020.²

I. INTRODUCTION

Vistra appreciates the opportunity to respond to the Commission’s request for comments from stakeholders regarding the integration of electric vehicles (EVs) into the existing electricity policy framework in Texas. Vistra supports the adoption and deployment of EVs not only in Texas but across the nation. Vistra is also an enthusiastic supporter of the Texas competitive electricity market and believes that incorporating EVs into Texas’ existing market policies presents unique policy challenges as well as opportunities to demonstrate the resiliency and flexibility of the Texas competitive market.

One barrier to consumer adoption of EVs identified long ago is range anxiety, the concern that infrastructure is not widely available to support rapid recharging of the vehicle’s batteries to enable the vehicle’s occupants to reach their destination. Accordingly, a thriving and competitive consumer ecosystem for publicly-accessible commercial EV charging stations (EVCSs) is the best way to overcome this barrier – as well as position that niche service to grow with and respond to consumer preferences with innovative technologies, business models, and value propositions.

Vistra believes that, particularly at this nascent stage of development in the commercial EVCS industry, it is important to do so while both respecting the competitive, non-monopoly nature of the service and recognizing the distinctions between commercial EVCS and “traditional” energy services and to the greatest extent possible allow the market for EVCS to continue evolving

¹ Public Notice of Request for Comments (Jul 24, 2020)
² 45 Tex. Reg. 5691-5692 (Aug. 14, 2020).

competitively without imposing restrictive regulatory standards or burdens (particularly those that originated in the context of a different service). Commercial EVCS is an activity that is likely to occur primarily at existing commercial retail customer sites, behind that customer's meter/point of delivery. In the abstract, this behind-the-meter charging service is a value-added service similar to the provision of gasoline or compressed air at a gas station, or cell phone charging services at an airport. On the other hand, commercial EVCS clearly involves the consumption of (and arguably sale of) electric energy made possible by a compensated exchange between two unrelated persons – and this appropriately triggers many policy considerations under the Public Utility Regulatory Act (PURA).³ Most importantly, it is abundantly clear that EVCS service is not a natural monopoly, and as such the role of regulated utilities should be limited to the building and operating the supporting infrastructure on the utility's side of the meter necessary to integrate EVCS loads into the grid – just as they do with any other load. Vistra believes this is the correct policy regardless of the underlying electric market structure and is an imperative in the ERCOT competitive market.

In approving these questions for publication, Commissioner discussion indicated that EV charging may be a topic of interest to the Texas Legislature. In that context, Vistra suggests that the most straightforward approach to integrating EVCS into the existing policy framework would be for the Legislature to consider a targeted and limited exception or alternative definition for commercial EVCS in PURA.⁴ However, in the absence of such statutory clarification, Vistra believes that the Commission can – and recommends that the Commission should – take an approach to EVCS that endeavors to (1) allow the market for EVCS to grow freely and competitively by making reasonable exceptions and accommodations to account for the nature of EVCS service; and (2) ensure that other existing market structures and policies are preserved to the greatest extent possible.

Vistra is also participating in comments submitted by the REP Coalition that share those same objectives and offers these comments as a supplement for the Commission's consideration. These comments focus primarily upon the question regarding whether EV charging is a retail sale of electricity. Vistra agrees that a retail sale of electricity is inherent to the operation of an EVCS – but where that retail sale occurs (i.e., whether the sale is to the EVCS provider or the end use

³ Public Utility Regulatory Act, Tex Util. Code Ann. §§ 11.001-66.016 (PURA).

⁴ *e.g.*, certain exceptions that exist for master-metered or sub-metered retail electric service to apartments, condominiums, mobile homes, and RV parks.

customer) is a more nuanced question on which Vistra anticipates the Commission will hear fair arguments from numerous parties. Vistra hopes to provide helpful information regarding both possible answers to the question, as well as potential paths to help integrate EVs into existing policy frameworks that best preserve the competitive nature of EVCS while minimizing barriers to its flourishing.

II. COMMENTS

Question 1: As a matter of policy, which entity or entities should be permitted to own or operate an electric vehicle charging station in the Texas competitive electric market? Is a different ownership structure appropriate for service areas not open to retail competition?

Vistra agrees with the response of the REP Coalition that the answer to Question 2 below is potentially dispositive of this question. That is, if the Commission were to determine that operation of an EVCS is a retail sale of electricity, then PURA is clear that only certain entities would be permitted to own or operate an EVCS for compensation: retail electric providers (REPs), municipally-owned utilities, electric co-operatives, and electric utilities in areas not open to retail customer choice.⁵ Note that the limited, specified exceptions in PURA for self-use and incidence of tenancy or employment that would still apply (i.e., ownership or operation of EVCS by other entities in those limited capacities would not be prohibited so long as they stayed within the bounds of the excepted activity).⁶ Vistra agrees with the REP Coalition's response elaborating on this contingency and will not repeat those arguments here.

If, however, the Commission were to determine that operation of an EVCS is not a retail sale of electricity, then Vistra would suggest that the Commission specify that it is a competitive energy service as defined in 16 Tex. Admin. Code § 25.341(3) (TAC). This would be a natural fit under such a threshold determination, as that term is defined liberally and expansively as "customer energy services business activities that are capable of being provided on a competitive basis in the retail market." It would also allow for more consistent implementation across the various utility service territories by avoiding the need to adapt the multiple sets of rules that govern retail electric service across the state. Importantly, such an approach should not risk upending the

⁵ PURA §§ 17.002(5)-(6), 31.002(6), and 39.105.

⁶ PURA § 31.002(6)(J)(i)-(iii).

existing competitive market structure because PURA ⁷ and Commission rules are both unambiguous that electric utilities in competitive areas (i.e., transmission & distribution utilities, or TDUs) should not provide competitive energy services.⁸ Nonetheless, to avoid any potential future confusion, if the Commission decides that operation of commercial EVCS is not a retail sale of electricity and is instead a competitive energy service then Vistra recommends that the Commission reiterate that it is a service that TDUs are not permitted to engage in.

Question 2: Is the operation of an electric vehicle charging station a retail sale of electricity?

PURA does not define “retail sale” directly, but it is commonly accepted to mean furnishing electricity to an end-use consumer for compensation. As noted above, in Texas there are a limited number of entities that are permitted to engage in the retail sale of electricity, as well as a few scenarios that are specifically exempted from being deemed a retail sale of electricity (but all those exceptions are specifically granted in PURA).

Vistra agrees with the analysis put forth by the REP Coalition that one viable and reasonable approach under PURA today would be to define commercial EVCS as a retail sale of electricity and require EVCS owners/operators to register as a REP (preferably under a new “Option 4” REP designation, so long as the Commission is able under PURA to craft rules that appropriately reflect the unique nature of EVCS services). However, Vistra is concerned that potential incompatibilities between provisions in PURA that apply to REPs, and that were written contemplating only traditional electric service to stationary customers, could create unnecessary regulatory barriers to EV adoption if operation of EVCS is deemed to be a retail sale of electricity.

For example, PURA requires the Commission to require the use of uniform terminology in the discussion of rates, terms, services, customer rights, etc., and further requires that “bills” conform to certain standards, including the use of the universally-applicable terms.⁹ However, paper bills that incorporate all of the typical customer disclosures are unlikely to be produced in a typical EV charging transaction. PURA also prohibits refusal of service based on siting in an economically-distressed geographic location¹⁰ and prohibits “unreasonable discrimination” on the

⁷ PURA § 39.051(a).

⁸ 16 TAC § 25.343(c), (f), and (g). The Commission rules provide limited and specific exceptions for statutory energy efficiency programs, emergency situations, necessity for support of the operation of the TDU’s delivery facilities, and certain arrangements that preceded the transition to competition

⁹ PURA §§ 17.003(c) & 17.004(a)(8).

¹⁰ PURA § 39.101(c).

basis of location in any geographic location¹¹ – both of which reflect an appropriate policy for retail electric service that is supported by a distribution network, but could raise questions about the ability to follow market signals for EVCS siting decisions. PURA also prohibits disconnection of service to residential customers during extreme weather emergencies and requires REPs to work with customers to establish a pay schedule for deferred bills (i.e., deferred payment plans),¹² which raises interesting questions about how the EV operator utilizing EVCS would be defined (i.e., if an individual would they continue to be deemed a “residential” retail customer, or would some other, potentially new, definition need to be established?)¹³ as well as the appropriateness of certain credit extension policies (such as deferred payment plans or deposit waivers) to EVCS service. This is by no means an exhaustive list. While the Commission may be able to waive requirements that would otherwise apply to the retail electricity sale context but yield an absurd result in the EVCS context (similar to how it allows certain non-residential customers to waive the majority of the aforementioned requirements today¹⁴ and allows for different certification options for REPs serving particular types of customers¹⁵) Vistra believes that it is important to recognize and consider such incongruities and complexities up front.

In the alternative, Vistra also believes there is a reasonable argument that EVCS does exhibit distinguishing characteristics from a traditional retail sale of electricity. As stated above, there is undoubtedly a retail sale of electricity inherent to the operation of an EVCS – but where that retail sale occurs (i.e., whether the sale is to the EVCS operator or the end use customer) is less obvious. A potentially key distinguishing factor between EVCS and “retail sale of electricity” under PURA is the context of the transaction. A “retail sale” or sale of electricity “at retail” in PURA descends conceptually from the definition of “retail electric utility,” which is in turn rooted in the provision of separately metered service to a generally stationary end-use customer at a defined premise within a certificated territory. In contrast, commercial EVCS does and will necessarily involve the provision of a value-added “refueling” service to an itinerant and ever-changing set of customers. To the extent that commercial EVCS has a natural value proposition

¹¹ PURA § 17.004(a)(4).

¹² PURA §§ 39.101(a)(1) & (h).

¹³ Vistra agrees with the assertion in the REP Coalition comments that the EVCS user is distinct conceptually from a “residential customer” or “small commercial customer” as those terms apply in PURA and the Commission’s rules.

¹⁴ 16 TAC § 25.471(a)(3)

¹⁵ Vistra also agrees with the assertion in the REP Coalition comments that the Commission has the authority to do so and precedent to draw upon, including the establishment of Option 3 REP certification standards as well as separate customer protection rules for prepaid retail electric service

for individuals traveling by EV, these customers utilizing commercial EVCS would in large part likely be traversing multiple service territories in a single day. This is a novel scenario that was not explicitly considered in PURA's construction.

Additionally, the nature of EVCS begs the question of where the electricity is ultimately consumed – e.g., by the EVCS at the time of charging, or by the EV while in operation (or both)? This is potentially significant, since the determination of where the consumption occurs may also be partially dispositive of the Commission's question.¹⁶ While electric energy does undoubtedly flow from the EVCS into an EV's battery, Vistra believes it is clear and should be recognized that the electric energy is actually consumed in the charging process, where it is converted to chemical potential energy. The discharge of energy from a battery is in fact a re-generation of electricity by converting that stored chemical potential energy into real power. The Commission could, therefore, conclude that the end-use consumption of electricity occurs at the EVCS itself. If the Commission determines that the use of an EVCS is not a retail sale of electricity, Vistra believes it is reasonable to consider it a competitive energy service, as outlined above.

In summary, there are fair arguments that commercial EVCS operation is a retail sale of electricity under current law and there are fair arguments that it is not. In the absence of clarity, Vistra recommends that the Commission consider seeking guidance from the Texas Legislature in its upcoming legislative session. In the absence of legislative guidance, however, Vistra would recommend that the Commission either: (1) determine that it is a retail sale and establish appropriately separate REP certification requirements with appropriate exceptions and accommodations to the customer protection requirements in Subchapter R of the Commission's substantive rules; or (2) determine that it is a competitive energy service, and specifically reiterate that it is an activity that TDUs are not permitted to engage in.

Question 3: As a matter of policy, how should the cost of the distribution system infrastructure associated with an electric vehicle charging station be recovered in the Texas competitive electric market?

Vistra agrees with the REP Coalition response to this question.

¹⁶ If the electricity is deemed consumed only by the EVCS when charging, then the owner or operator of the EVCS is necessarily the "end-use customer" and implies that EVCS operation is *not* a retail sale of electricity.

Question 4: Is the answer to Question 3 different for an electric vehicle charging station located in a remote area, primarily for use by long-distance rather than local motorists?

Vistra agrees with the REP Coalition response to this question.

III. CONCLUSION

Vistra thanks to the Commission for the opportunity to file these Comments and looks forward to working with the Commission and other stakeholders toward appropriate policies to accommodate the deployment of EVs across Texas.

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Respectfully submitted,

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Ned Bonskowski (with permission)

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