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EVgo
FAST CHARGING

TESLA

ChargePoint, Inc. (ChargePoint), Tesla, Inc. (Tesla) and EVgo Services LLC (EVgo) (collectively, the Joint Charging Providers) appreciate the opportunity to respond to the Public Utility Commission of Texas' (Commission) second set of questions in Project No. 49125, *Review of Issues Relating to Electric Vehicles*.

About ChargePoint:

ChargePoint is the leading electric vehicle (EV) charging network in the world, with scalable solutions for every charging need and for all of the places that EV drivers go: home, work, around town, and on the road. ChargePoint's network offers more than 115,000 places to charge, including 3,578 spots in Texas, and those numbers continue to grow. With thousands of customers in several verticals including workplaces, cities, retailers, apartments, hospitals, and fleets, ChargePoint provides an integrated experience enabling consistent performance, efficiency and reliability at every touchpoint whether one is using a mobile app, plugging into a charger, managing the station or analyzing charging data.

About Tesla:

Tesla's mission is to accelerate the world's transition to sustainable energy through the development of all-electric vehicles and clean energy products including solar and battery storage. Tesla's vehicle line-up includes the Model S sedan, Model X crossover vehicle, Model 3 sedan and Model Y crossover vehicle. The vehicles have all-electric range of up to 400 miles, and industry leading performance and safety ratings. In 2019, Tesla delivered over 367,000 vehicles globally. In the coming years, Tesla is also planning to launch the Cybertruck light-duty truck, a Roadster sports car, and a Class 8 Semi truck. Tesla also owns and operates an extensive Supercharger network of direct current fast chargers (DCFC) with over 2,102 stations and more than 18,667 Supercharger connectors deployed globally. Tesla has a significant customer base in Texas and has deployed 416 Superchargers at 46 locations.

About EVgo:

EVgo owns & operates America's largest public EV fast charging network, with more than 800 DCFC locations in 34 states and 66 metro markets nationwide, including 50 locations across Texas with plans for expansion. EVgo has strong roots in Texas, having originally been borne out of NRG in Houston in 2011. The first public fast charging corridor built by EVgo was in Texas, and the vast majority of EVgo's existing Texas infrastructure is located in the Dallas-Fort Worth, Austin, and Houston areas. Currently, more than 115 million Americans live within a 15-minute drive of an EVgo fast charger.

Because they raise interrelated issues, the Joint Charging Providers provide a combined response to Questions 1 and 2, below.

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?**
2. **Is the operation of an electric vehicle charging station a retail sale of electricity?**

A. *EV charging station owners and operators host chargers for a variety of reasons and currently operate throughout Texas.*

EV charging station owners and operators – generally known as "site hosts" – install EV charging stations for a wide variety of reasons. For example, a convenience store may install EV charging stations to enhance its role as a transportation fueling provider. A restaurant may install chargers as a way to attract customers to its core food service business. The owner of a multi-unit dwelling might install charging stations to attract and retain tenants. Local governments install charging stations to meet the needs of their communities and to demonstrate their commitments to sustainability. Other businesses install charging stations as a benefit for their employees or to charge their own fleet vehicles. Some companies offer EV charging as their primary business and compete to attract EV drivers based on convenience and price.[1] Finally, Tesla provides EV charging services solely to support its vehicle sales. Indeed, depending upon the vehicle sale package, Tesla may not charge customers for electricity conveyed in conjunction with the provision of the charging service.[2]

Any person or business should be permitted to own and/or operate electric vehicle (EV) charging stations anywhere in Texas. In fact, non-utility businesses, including the Joint Charging Providers and site host partners and customers, already own and operate EV charging stations in both the competitive and non-competitive areas of Texas. As a matter of policy, the Joint Charging Providers urge the Commission not to disrupt this nascent industry by restricting ownership or operation of EV chargers to specific entities. There are ample mechanisms available to ensure that EV charging station owners and operators operate charging stations safely and that consumers are protected without regulating them as electric utilities or retail electric suppliers, or restricting ownership of stations to these entities.[3]

[1] In the DC fast charging (DCFC) space, for example, the owner-operator of the charging station is often a third-party electric vehicle service provider (EVSP) who develops, finances, owns, operates, and maintains the charging station for a site host. Under this model, the third party EVSP is often the customer of record on the electricity bills.

[2] Tesla provides free Supercharging for some of its legacy Model S and Model X customers.

[3] Both the Department of Agriculture and the Department of Licensing and Registration have traditionally had oversight over commercial transactions with weighing and measuring devices with TDLR recently gaining authority over motor vehicle fuels transaction.

B. *EV charging station owners and operators provide a value-added service distinct from the services provided by Commission-regulated and Commission-supervised entities.*

Allowing any person or business to own and operate EV charging stations is not only a good policy for Texas, it is also consistent with Texas law. EV charging station owners and operators do not meet the statutory definitions of "electric utility," "transmission and distribution utility," or "retail electric provider," nor does an EV driver charging her vehicle at a charging station meet the definition of "retail customer."[4] Because EV charging is not a retail sale of electricity, this conclusion applies for both the competitive electric market and in areas not open to retail competition.

Vertically integrated electric utilities and transmission and distribution utilities distribute electricity (which is supplied by a retail electric provider in competitive areas) to their customers, who then use that electricity to power an incredibly wide variety of devices, including air conditioners, televisions, industrial manufacturing equipment, and smartphones. In the transaction between a utility and its customer, electricity is treated as a commodity that the customer "purchases and ultimately consumes" however they please.[5] As long as a utility customer does not violate the utility's tariff or break any law, there is virtually no limit to what the customer can power with the electricity the utility furnishes.

By contrast, EV charging stations use electricity solely in conjunction with providing an electrical charge to the battery of an EV for purposes of transportation. Unlike a retail customer that can use electricity however they please, an EV driver who purchases charging services from the charging station can only do one thing after making that transaction: drive the EV. The transaction between a charging station and an EV driver in no way resembles the typical transaction between a utility and a customer described above. To put it simply, an EV charging station does not distribute, furnish, or sell electricity. Rather, an EV charging station provides a value-added service – EV battery charging – which is distinct from a retail sale of electricity. An EV charging station owner or operator is therefore neither an electric utility, a transmission and distribution utility, nor a retail electric supplier.

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[4] For convenience, these statutory definitions are as follows:

- Tex. Utilities Code § 31.002(6): "'Electric utility' means a person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state."
- Tex. Utilities Code § 31.002(19): "'Transmission and distribution utility' means a person or river authority that owns or operates for compensation in this state equipment or facilities to transmit or distribute electricity... ."
- Tex. Utilities Code § 31.002(16): "'Retail customer' means the separately metered end-use customer who purchases and ultimately consumes electricity."
- Tex. Utilities Code § 31.002(17): "'Retail electric provider' means a person that sells electric energy to retail customers in this state. A retail electric provider may not own or operate generation assets."

[5] Tex. Utilities Code § 31 002(16).

Many other types of entities also use the commodities provided by public utilities to sell value-added products and services to the public. For example, carwash companies use water to provide car cleaning services to the public. Despite the importance of water to the transaction between a carwash owner and a vehicle owner, the Commission has not (to the Joint Charging Providers' knowledge) found that a carwash is engaged in the "distribution, sale, or provision of potable water to the public"[6] and therefore subject to regulation as a public utility. To take another example involving electricity, a laundromat uses electricity to provide the services of washing and drying clothes to the public. A laundromat could not provide these services without electricity, yet the Commission does not regulate laundromats because they provide value-added services and do not "transmit, distribute, sell, or furnish electricity"[7] or "transmit or distribute electricity."[8] Likewise, the Commission does not require laundromats to register as retail electric providers because they sell clothes washing and drying services, not "electric energy."[9]

Another commonality in the examples above is that each provider of the value-added service is also a retail customer. A carwash must purchase its water from the local water utility, which is regulated by the Commission (assuming it is not a municipal entity). In non-competitive areas, a laundromat must purchase its electricity from its local electric utility, and in competitive areas the laundromat must purchase electricity from a retail electric supplier and pay its local transmission and distribution utility to deliver the electricity to its place of business. Likewise, EV charging station owners and operators are themselves retail customers that purchase electricity from their local electric utility or retail electric provider and pay their local electric utility or their local transmission and distribution utility for the delivery of that electricity. EV charging station owners and operators cannot be both retail customers and utilities, nor can they be both retail customers and retail electric providers.

Beyond these examples, in the case of electric vehicles, the EV driver is not using physical power sold to them as an end use customer when they drive the EV – the power used to operate the vehicle comes from the battery in their EV. Inside the EV, chemical energy stored in the battery is converted to electrical energy and that electrical energy powers the vehicle. Charging the battery is a necessary predicate, but the EV charging station is "the separately metered end-use customer who purchases and ultimately consumes electricity,"[10] not the EV driver. The charging station is the retail customer because it consumes all of the electricity that is metered at its site to charge batteries. The EV itself does not consume that energy – the EV consumes energy is produced by its internal battery system. The EV charging station cannot be both a metered retail customer and a retail electric provider, and it very clearly meets the strict definition of retail customer in PURA.

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[6] Tex Water Code § 13 002(23).
[7] Tex. Utilities Code § 31.002(6).
[8] Tex. Utilities Code § 31.002(19).
[9] Tex. Utilities Code § 31.002(17).
[10] Tex. Utilities Code § 31.002(16)

It is worth noting that the pricing scheme adopted by a service provider should not determine whether a service provider is transformed into a regulated utility or retail electric supplier. Most carwashes charge flat fees or by the minute, but there is no reason they could not charge by the gallon for water that a customer uses. The fact that water utilities charge their customers by the gallon should not prohibit carwashes from doing so. A per-gallon pricing scheme at a carwash would also not create a need for Commission regulation where such a need did not exist before. Similarly, many EV charging station owners price their service on a per-session or per-minute basis, but they should not be prohibited from using a per-kilowatt-hour (per-kWh) pricing scheme or become subject to regulation for doing so.

The Commission "exercises the jurisdiction and powers conferred by" the Public Utility Regulatory Act,[11] which includes regulatory and supervisory authority over electric utilities, transmission and distribution utilities, and retail electric providers as those terms are defined in the Act (and as quoted above).[12] While broad, the Commission's authority is not unfettered.[13] As discussed, EV charging stations provide a specific, unregulated service: charging EV batteries. Because it is a value-added service, EV charging is distinct from the transmission and distribution of electricity provided by transmission and distribution utilities in competitive areas and by vertically integrated electric utilities in non-competitive areas. There is therefore no reason to restrict ownership or operation of EV charging stations to either transmission and distribution utilities or vertically integrated electric utilities. There is also no reason and no legal justification to regulate EV charging station owners and operators as utilities.

Further, because EV charging stations must themselves purchase electricity from a retail electric provider and because EV charging is a value-added service, EV charging is also distinct from the retail sale of electricity. Accordingly, there is no need nor legal justification for requiring EV charging station owners to register as retail electric providers.

Consistent with these conclusions, the Joint Charging Providers believe that both utilities and non-utilities should be permitted to own and operate EV charging stations in Texas. Retail electric providers should also be permitted to own EV charging stations, but EV charging station owners and operators that are not engaged in sales of electric energy to retail customers should not be required to register as retail electric providers. The Joint Charging Providers note, however, that issues can arise when transmission and distribution utilities and vertically integrated utilities in non-competitive areas with captive ratepayers use ratepayer funds to compete with private companies by operating chargers. Investing utility shareholder dollars may be more appropriate than using captive ratepayer dollars to invest in chargers, which can create distortions in the competitive market for EV charging services. However, this issue is likely outside the scope of this

[11] Tex. Utilities Code § 12.001.
[12] Tex. Utilities Code § 31.002(6), (19), and (17), respectively.
[13] *See Brazos Elec. Power Coop. v. Public*, 101 S.W. 3d 499 (Ct. of App. of Tx., 3rd Dist 2002) (prohibiting the Commission from enlarging its powers beyond those delegated to it in the Public Utility Regulatory Act)

investigation and better addressed in rate cases or in proceedings to address any utility proposals to invest in charging stations.

C. *Every jurisdiction that has examined this issue has decided not to regulate EV charging station owners and operators.*

At present, 35 states, the District of Columbia, and Austin Energy have concluded that EV charging is not a public utility function.[14] This list includes states with regulated and deregulated electricity markets. States with retail choice have likewise concluded that EV charging station owners and operators do not qualify as competitive retail suppliers.[15] The Joint Charging Providers are not aware of any state that has decided to regulate EV charging stations as public utilities after examining this issue.[16]

Further, several jurisdictions have recently found that EV charging station owner/operators are not retail electricity suppliers. Recently the Ohio Public Service Commission ruled expressly to this effect in determining that EV charging station owners and operators are not retail electric suppliers.[17] Specifically, it held:

> As multiple commenters point out, EVCS [EV charging station] 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 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 [Electric Distribution Companies], 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 operator's measured electricity consumption. These "behind-the-meter" services operate within the sphere of a

[14] See Attachment A for a complete list.

[15] Many states have resolved the issue through statutory changes. For example, an Illinois statute exempts EV charging station owners/operators from both the definition of "public utility" and "alternative retail electric supplier " (220 ILCS 5/3-105(c) and 220 ILCS 5/16-102.)

[16] D.C. Code § 34-214 explicitly exempts EV charging stations from the definition of "public utility." In 2019, the District of Columbia Public Service Commission (D.C. PSC) found that EV charging stations technically meet the definition of "electricity supplier" but, in recognition of the D.C. Council's intent not to regulate EV charging stations, waived licensing and bonding requirements (the only requirements that apply to electricity suppliers) for EV charging station owners and operators until it issued a rulemaking determining what, if any, requirements would apply. Order No. 19898 at P 19, D.C. PSC Formal Case No. 1130 (April 12, 2019), see also Order No. 19983 at P 19-20, D C. PSC Formal Case No. 1130 (August 2, 2019) (reaffirming and clarifying decision in Order No. 19898).

[17] Ohio Public Utilities Commission, Case No. 30-434-EL-COI, Finding and Order, July 1, 2020 ("PUCO Order").

> 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.[18]

Similarly, in Delaware:

> The [Delaware Public Service] Commission determine[d] that Electric Vehicle Charging Station Owners and Operators are not an "electric supplier" pursuant to the Electric Restructuring Act by adopting the following language: "The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles does not make the entity corporation, or person an 'electric supplier' . . . solely because of that ownership, control, operation or management."[19]

The Delaware Public Service Commission adopted the findings and recommendations of the Hearing Examiner, who had concluded that in restructuring the sales of electricity within the state of Delaware, it was never the intent of that state's legislature to capture electric vehicle charging station site owners and operators "in its sweep."[20]

For the same reasons, it would be hard to imagine that the Texas legislature intended to treat EV charging station owners and operators as retail electric providers or as electric utilities. The purpose of restructuring in Texas was to undo the "monopoly" held by utilities on the production and sale of electricity, and thereby allow for "the establishment of a fully competitive power industry."[21] Electric vehicle charging station owners and operators do not compete in the power industry with retail electric suppliers, any more than laundromats compete with retail electric suppliers or car washes compete with water utilities.

Finally, it is worth noting that the City of Austin has clarified that EV charging is not a public utility function or a prohibited resale of electricity within the service territory of Austin Energy. Specifically, Austin City Code § 15-9-121(E) states: "Subsections (B) and (C) [prohibiting remetering and reselling electricity] do not apply to the remetering or resale of electric service for the sole purpose of providing retail electric-vehicle charging service at the point of remetering or resale." The Austin City Council adopted this clarification based on Austin Energy's conclusion that "[the] model for third-party EV infrastructure investment minimizes costs and risks to Austin Energy while still providing the utility the opportunity to sell the energy at established rates."[22]

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[18] *Id.*, ¶ 27.
[19] Delaware Public Service Commission, Docket No 19-0377, Order No. 9516 (December 12, 2019) ("Delaware Order"), ¶ 13.
[20] *Id.*, Exhibit 1, ¶ 139.
[21] Tex Utilities Code § 39.001(a).
[22] Austin Monitor, "AE seeks code change to support fast car charging," October 18, 2018 (available at: https://www.austinmonitor.com/stories/2018/10/ae-seeks-code-change-to-support-fast-car-charging/)

*D. The Commission has sufficient authority to clarify this issue in this proceeding.*

For the reasons discussed, the Joint Charging Providers respectfully recommend that the Commission make explicit findings that owners and operators of EV charging stations do not meet the statutory definitions of "electric utility," "transmission and distribution utility," or "retail electric supplier" and that EV charging does not involve a retail sale of electricity. Consistent with such findings, the Commission should clarify that it does not regulate EV charging. The Commission has sufficient authority to make this jurisdictional determination in this proceeding.[23]

The Joint Charging Providers further recommend that the Commission clarify that EV charging station owners may price their services in the manner of their choosing, including on a per-kWh basis. Providing EV charging station owners with both regulatory certainty and pricing flexibility will encourage the continued development of the competitive market for EV charging services. Protecting competition in this industry will encourage additional investments in the Texas EV charging market and ensure that EV charging services are accessible and affordable for all Texans.

However, in the event the Commission recommends statutory changes to clarify this issue, the Joint Charging Providers recommend the following modifications to Tex. Utilities Code § 31.002:

> (6) "Electric utility" means a person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state. The term includes a lessee, trustee, or receiver of an electric utility and a recreational vehicle park owner who does not comply with Subchapter C, Chapter 184, with regard to the metered sale of electricity at the recreational vehicle park. The term does not include: ...
> *K) the owner or operator of equipment used solely to charge the batteries of electric vehicles.*
>
> (17) "Retail electric provider" means a person that sells electric energy to retail customers in this state. A retail electric provider may not own or operate generation assets. *The owner or operator of equipment used solely to charge the batteries of electric vehicles shall not, by virtue of such ownership or operation, be deemed to sell electric energy to retail customers in this state.*

[23] Tex. Utilities Code § 12.001.

**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?**

The Joint Charging Providers assume that the term "distribution system infrastructure" in this question refers to infrastructure on the utility-side of the customer's meter.

Transmission and distribution utilities can and should recover the cost of infrastructure serving EV charging stations in the same manner as they recover the cost of distribution system infrastructure that serves any other customer load. There is nothing unique about an EV charging station that would prevent transmission and distribution utilities from recovering the cost of providing distribution services from the site host that owns and operates the charger and that is also the utility's customer of record.

Level 2 (L2) EV charging stations are often installed behind a customer's existing meter and simply add to the customer's total electricity consumption. In such cases, the site host continues to pay transmission and distribution utility charges on its bill. Because EV charging stations consume electricity, a site host will generally pay more in transmission and distribution utility charges after installing EV charging stations. In the event a site host needs its EV charging stations to be separately metered, the site host may need to pay the cost of the additional meter under the terms of the transmission and distribution utility's tariff.

DC fast chargers (DCFCs) can require upgrades to the distribution system infrastructure serving a site host's property to accommodate DCFCs' higher power needs. Utilities regularly construct such upgrades for other reasons, such as for a new customer or when an existing commercial customer expands its operations and increases its power demands. The customer pays the cost of such upgrades pursuant to the transmission and distribution utility's line extension policy, which appears in the utility's tariff. The upfront cost paid by the customer is typically offset by a construction allowance that accounts for the increased revenue the utility will experience as a result of the new customer or expanded service. Utilities can recover the cost of any upgrades or new service lines needed to serve DCFCs through their existing Commission-approved line extension policies.

Installing EV charging stations can also require upgrades on the customer-side of the meter. Such upgrades typically include additional wiring, conduit, trenching, and panels needed to provide electric service to the parking spots on a site host's property where the chargers will be located. Currently customers are responsible for the costs of such behind-the-meter infrastructure, generally referred to as "make-ready infrastructure." Depending on various factors include site design, the cost of make-ready infrastructure is typically the largest capital expenditure on the customer's property of installing EV charging stations.[24] For that reason, many states that seek

[24] Chris Nelder and Emily Rogers, Reducing EV Charging Infrastructure Costs, Rocky Mountain Institute, 2019, https://rmi.org/ev-charging-costs.

to encourage the deployment of EV charging stations have implemented policies that allow utilities to invest in make-ready infrastructure, either directly or through their existing line extension policies.[25] The Joint Charging Providers encourage the Commission to consider implementing such a policy in the future to encourage greater deployment of EV charging stations in Texas.

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?**

The Joint Charging Providers' response to Question 3 would not be different for EV charging stations located in remote areas. Because either the EV charging station site host or the EVSP is the retail customer of record, the site host or EVSP pays the electric bill and decides how much to charge motorists for charging their EVs.

The cost of distribution system infrastructure extensions or upgrades needed to serve DCFCs is often more expensive in remote areas. However, there is no reason that the utility's line extension policy would not apply to any extensions or upgrades needed in remote areas. In the Joint Charging Providers' experiences, it is generally possible to site highway DCFCs in sufficient proximity to existing distribution system infrastructure such as at restaurants or gas stations that the cost of system upgrades is not prohibitive.

The Joint Charging Providers thank the Commission for the opportunity to provide these comments and look forward to continued engagement in this project.

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[25] For example, Southern California Edison's Charge Ready pilot program provided make-ready infrastructure to support approximately 1,300 charger ports. (*See* California Public Utilities Commission Docket No. A.14-10-014.) Eversource in Massachusetts received authorization to invest $45 million in make-ready infrastructure to support nearly 4,000 level 2 (L2) charging stations and 72 DCFC stations. (*See* Massachusetts Department of Public Utilities, Proceeding 17-05.)