

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION OF	)	
DELMARVA POWER & LIGHT COMPANY FOR	)	PSC Docket No. 17-1094
APPROVAL OF A PROGRAM FOR PLUG IN	)	
VEHICLE CHARGING	)	

**SIERRA CLUB RESPONSE TO THE DIVISION OF THE PUBLIC ADVOCATE’S AND
THE PUBLIC SERVICE COMMISSION STAFF’S MOTION TO STAY FURTHER
ACTIVITY ON DELMARVA POWER & LIGHT COMPANY’S APPLICATION FOR
APPROVAL OF A PROGRAM FOR PLUG IN VEHICLE CHARGING UNTIL THE
EARLIER OF JUNE 30, 2019 OR THE DATE THAT A STATUTE DEREGULATING
ELECTRIC CHARGING STATION OPERATORS BECOMES EFFECTIVE**

The Sierra Club respectfully submits the following response in opposition to the Division of the Public Advocate’s and Public Service Commission Staff’s (“Movants”) motion to stay further activity on Delmarva Power & Light Company’s application for approval of a program for plug in vehicle charging until the earlier of June 30, 2019 or the date that a statute deregulating electric charging station operators becomes effective. Movants misapprehend the relationship between recently proposed legislation that would exempt electric vehicle charging service from the definition of “public utility” (SB 188) and the utility offerings proposed in this docket. As the actions by many other states amply illustrate, there is no tension or inconsistency between exempting owners and operators of public charging stations from regulation by the public service commission, and the review and approval of utility programs to deploy electric vehicle (“EV”) charging infrastructure; indeed this has been the norm among states that have considered these two issues. Moreover, even if the potential passage of theoretical future legislation were to have some bearing on this docket, given the timing and vagaries of that legislative process, it would be unreasonable and imprudent to rely on that possibility as the basis for a stay. Because the future passage of SB 188 or a similar bill in the next legislative session is

uncertain and, most importantly, because it would in no way diminish the approvability of Delmarva's proposals in this docket, Movants' motion should be denied.

1. There is a growing recognition around the country that electrification of transportation is critical to achieving state climate goals and that utilities have an important role to play in accelerating that transformation. Outside of Delaware, the Sierra Club is currently engaged in, or has recently engaged in, dockets or work groups in seventeen other jurisdictions addressing the utility's role in facilitating the deployment of EV charging infrastructure,¹ frequently including review of specific proposed utility investments (to be recovered from ratepayers) to accelerate deployment of EV charging infrastructure.
2. In their petition Movants state that "it seems inconsistent with deregulating the provision of electric charging infrastructure to allow Delmarva to recover the cost of investments in such infrastructure and charging equipment"² To the contrary, this is exactly what most states that have considered these issues have done.
3. At least seven states—California, Maryland, Massachusetts, New York, Oregon, Utah, and Washington—have determined, either administratively or legislatively, that owners and operators of public charging stations are not "public utilities" subject to public service commission regulation³ yet have nevertheless approved or are in the process of reviewing utility proposals to deploy electric vehicle charging infrastructure.

¹ California, Florida, Georgia, Illinois, Kentucky, Massachusetts, Michigan, Missouri, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Utah.

² DPA & Staff Mot. at 3.

³ *E.g.*, Cal. Pub. Util. Code § 216(i) ("The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge light duty plug-in electric vehicles does not make the corporation or person a public utility within the meaning of this section solely because of that ownership, control, operation, or management."); Md. Code Pub. Utils. §§ 1-101(j)(3)(iii) (clarifying that the term "electricity supplier" does not include "a person that owns or operates equipment used for charging electric vehicles, including a person that owns or operates: 1. an electric vehicle charging station; 2. electric vehicle supply equipment; or 3. an electric vehicle charging station service company or provider."), 1-101(x)(2)(ii) (clarifying that the term "public service company" does not include "a person that owns or operates equipment used for charging electric vehicles, including a person

4. In Massachusetts, after clarifying that EV site hosts are not public utilities,⁴ the Department of Public Utilities (“DPU”) in 2017 approved a \$45 million proposal by distribution utility Eversource to invest in infrastructure and provide rebates to accelerate deployment of EVs in its service territory.⁵ Eversource’s program is designed to facilitate the installation of almost 4,000 public charging ports in multi-unit dwellings, in workplaces, and in other public long-dwell-time locations in Massachusetts by installing and owning the make-ready infrastructure, and in some cases rebating the cost of the chargers as well.⁶ The DPU is also considering a second similar \$24 million proposal from National Grid that would support the deployment of approximately 1,200 public

that owns or operates: 1. an electric vehicle charging station; 2. electric vehicle supply equipment; or 3. an electric vehicle charging station service company or provider.”); Investigation by the Department of Public Utilities upon its own Motion into Electric Vehicles and Electric Vehicle Charging, Mass. Dept. of Pub. Utils. Dkt. No. 13-182, Order No. 13-182-A: Order on Department Jurisdiction over Electric Vehicles, the Role of Distribution Companies in Electric Vehicle Charging and Other Matters (Aug. 4, 2014), at 7 (distinguishing sale of EV charging services from resale of electricity and finding that owners or operators of EV supply equipment (EVSE) are “not selling electricity within the meaning of” its utility regulations); In the Matter of Electric Vehicle Policies, N.Y. Pub. Serv. Comm’n Dkt. No. 13-E-1099, Declaratory Ruling on Jurisdiction over Publicly Available Electric Vehicle Charging Stations (Nov. 14, 2013), at 4 (EV charging stations “do not fall within the definition of ‘electric plant’ because Charging Stations are not used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light heat or power” but rather “are used to provide a service, specifically, charging services.”); Or. Rev. Stat. § 757.005(1)(b)(G) (excluding from definition of “public utility” “[a]ny corporation, company, partnership, individual or association of individuals that furnishes natural gas, electricity, ethanol, methanol, methane, biodiesel or other alternative fuel to any number of customers for use in motor vehicles and does not furnish any utility service described in paragraph (a) of this subsection.”); Utah Code § 54-2-1(8)(c) (“‘Electrical corporation’ does not include an entity that sells electric vehicle battery charging services, unless the entity conducts another activity in the state that subjects the entity to the jurisdiction and regulation of the commission as an electrical corporation.”); Wash. Rev. Code § 80.28.320 (“The commission shall not regulate the rates, services, facilities, and practices of an entity that offers battery charging facilities to the public for hire; if: (1) That entity is not otherwise subject to commission jurisdiction as an electrical company; or (2) that entity is otherwise subject to commission jurisdiction as an electrical company, but its battery charging facilities and services are not subsidized by any regulated service. An electrical company may offer battery charging facilities as a regulated service, subject to commission approval.”).

⁴ See *supra* note 3.

⁵ Petition of NSTAR Electric Company and Western Massachusetts Electric Company, each doing business as Eversource Energy, Pursuant to G.L. c. 164, § 94 and 220 CMR 5.00 et seq., for Approval of General Increases in Base Distribution Rates for Electric Service and a Performance Based Ratemaking Mechanism, Mass. Dept. of Pub. Utils. Dkt. No. 17-05, Order Establishing Eversource’s Revenue Requirement (Nov. 30, 2017), at 471.

⁶ *Id.* at 472-73.

Level 2 charging ports and 80 direct current (“DC”) fast charging ports in its service territory.⁷

5. Likewise in California, having determined in 2010 that providers of electric vehicle charging services were not public utilities,⁸ the California Public Utilities Commission subsequently approved multiple rounds of charging infrastructure proposals by the state’s three investor owned utilities amounting to approximately \$935 million of recoverable investment in EV charging infrastructure.⁹ The recently approved proposals are wide-ranging and build on smaller-scale utility-sponsored EV programs now underway,¹⁰ with the programs recently approved for Pacific Gas & Electric and Southern California Edison concentrating on charging infrastructure for electric trucks, buses and heavy-duty equipment.¹¹

⁷ Petition of Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid for Pre-Approval of Electric Vehicle Market Development Program, and of Electric Vehicle Program Provision, Mass. Dept. of Pub. Utils. Dkt. No. 17-13, Revised Pre-filed Direct Testimony of Karsten A. Barde and Brian J. Cronin (Feb. 13, 2017), at 30.

⁸ Order Instituting Rulemaking on the Commission’s own motion to consider alternative-fueled vehicle tariffs, infrastructure and policies to support California’s greenhouse gas emissions reduction goals, Cal. Pub. Utils. Comm’n Dkt. No. R.09-08-009, Decision in Phase 1 On Whether a Corporation or Person That Sells Electric Vehicle Charging Services To the Public Is a Public Utility, D.10-07-044 (Aug. 2, 2010), at 40; *see also* codification *supra* note 3.

⁹ *See, e.g.*, Application of Southern California Edison Company (U338E) for Approval of its Charge Ready and Market Education Programs, Cal. Pub. Utils. Comm’n App. No. 14-10-014, Decision 16-01-023 (Jan. 14, 2016) (approving \$22 million pilot by Southern California Edison); I/M/O Application of Pacific Gas and Electric Company for Approval of its Electric Vehicle Infrastructure and Education Program (U39E), Cal. Pub. Utils. Comm’n App. 15-02-009, Decision 16-12-065 (Dec. 15, 2016) (approving \$130 million program by Pacific Gas & Electric); Application of San Diego Gas & Electric Company (U902E) for Approval of its Electric Vehicle-Grid Integration Pilot Program. Cal. Pub. Utils. Comm’n, App. 14-04-014, Decision 16-01-045 (Jan. 28, 2016) (approving \$45 million in EV-related expenditures by San Diego Gas & Electric); Application of San Diego Gas & Electric Company (U902E) for Approval of SB 350 Transportation Electrification Proposals, and Related Matters, Cal. Pub. Utils. Comm’n, Apps. 17-01-020, 17-01-021, 17-01-021, Decision 18-05-040 (June 6, 2018) (approving \$738 million of EV-related proposals by San Diego Gas & Electric, Southern California Edison, and Pacific Gas & Electric).

¹⁰ *See generally* Decision 18-05-040, *supra* note 9.

¹¹ *Id.* at 76-100.

6. Similarly in Oregon, with legislation on the books codifying the exclusion of charging stations from the definition of “public utility,”¹² the Oregon Public Utility Commission recently approved pilots by both Portland General Electric (“PGE”) and PacifiCorp that include EV charging infrastructure components.¹³ PGE’s pilot includes \$2.6 million for the company to install and own up to 24 DC fast chargers.¹⁴ PacifiCorp’s pilot includes up to \$1.85 million for the company to construct and own up to seven charging sites, with each site featuring up to four dual-standard DC fast chargers and at least one Level 2 port.¹⁵
7. Washington and Utah have likewise both codified exemptions from regulation for non-utility EV charging station site hosts¹⁶ yet approved utility proposals to accelerate deployment of EV charging infrastructure. The Washington Utilities and Transportation Commission in 2016 approved a pilot by Avista Utilities to install 265 Level 2 chargers in residential single-family homes, at workplace, fleet, and multi-unit dwelling locations, and at public locations, as well as DC fast chargers at seven locations.¹⁷ The Utah program authorizes PacifiCorp to spend up to \$2 million per year for five years and includes EV charging equipment incentives for non-residential and multi-family Level 2, DC fast chargers, and grant-based custom projects and partnerships.¹⁸

¹² See *supra* note 3.

¹³ In the Matter of Portland General Electric Company, Application for Transportation Electrification Programs, Ore. Pub. Util. Comm’n UM 1811, Order 18-054 (Feb. 16, 2018); In the Matter of PacifiCorp, dba Pacific Power, Application for Transportation Electrification Programs, Ore. Pub. Util. Comm’n UM 1810, Order 18-075 (Feb. 27, 2018).

¹⁴ Order 18-054, *supra* note 13, at 4-5.

¹⁵ Order 18-075, *supra* note 13, at 3.

¹⁶ See *supra* note 3.

¹⁷ Wash. Utils. & Transp. Comm’n v. Avista Corp., Wash. Utils. & Transp. Comm’n Dkt. UE-160082, Order 01: Order Allowing Tariff Revisions to Become Effective Subject to Conditions (Apr. 28, 2016), at 1-2.

¹⁸ I/M/O Application of Rocky Mountain Power to Implement Programs Authorized by the Sustainable Transportation and Energy Plan Act, Pub. Serv. Comm’n of Utah Dkt. No. 16-035-36, Phase Three Report and Order (June 28, 2017), at 3-4.

8. Maryland has exempted EV charging station site hosts from the definition of “electricity supplier” and “public service company”¹⁹ but is nevertheless evaluating \$104 million in proposals from four of its distribution utilities including rebates or other incentives for installation of approximately 18,000 “smart” Level 2 chargers for residential customers, rebates or other incentives for installation of approximately 3,000 smart Level 2 and DC fast chargers in non-residential (multi-unit dwellings, workplaces, fleets) or public settings, and utility ownership of more than 1,000 Level 2 and DC fast charging stations in non-residential or public settings.²⁰
9. The New York Public Service Commission, having previously concluded that EV charging stations were not subject to Commission regulation, earlier this spring opened a docket to consider, among other things, potential utility roles in supporting EV supply equipment and potential utility roles in supporting EV charging services,²¹ and recently held a technical conference for parties to consider what role utilities should play in deploying charging infrastructure and implementing other incentives and initiatives to support the electrification of the transportation sector.²²
10. Beyond these individual state actions, it is worth noting that the Northeast Corridor Steering Committee (“Steering Committee”), which is composed of representatives from twelve states (including Delaware) and the District of Columbia, and facilitated by Northeast States for Coordinated Air Use Management (“NESCAUM”), has also dismissed the purported tension identified by Movants. The Steering Committee recently

¹⁹ See *supra* note 3.

²⁰ In the Matter of the Petition of the Electric Vehicle Work Group for Implementation of a Statewide Electric Vehicle Portfolio, Md. Pub. Serv. Comm’n Case No. 9478, Petition for Implementation of a Statewide Electric Vehicle Portfolio (filed Jan. 19, 2018).

²¹ Proceeding on Motion of the Commission Regarding Electric Vehicle Supply Equipment and Infrastructure, N.Y. Pub. Serv. Comm’n Case No. 18-E-0138, Order Instituting Proceeding (April 19, 2018), at 4.

²² *Id.* at 4-5.

released a Northeast Corridor Regional Strategy for Electric Vehicle Charging Infrastructure: 2018 – 2021²³ that simultaneously recommends exempting electric vehicle supply equipment providers from regulation by public service companies²⁴ and also a robust role for utilities in accelerating deployment of EV charging stations including owning or defraying the cost of EV supply equipment at multi-unit dwellings, rebates and incentives for Level 2 home charging, make-ready infrastructure for DC fast chargers along travel corridors, and educating their customers about EV charging and incentives.²⁵

11. As all of the above examples illustrate, there is plainly no tension or inconsistency between exempting EV charging stations from regulation as public utilities and entertaining and approving cost recovery for utility investments to accelerate deployment of EV charging infrastructure. Nor have Movants identified any actual tension or inconsistency. Precisely because exemption from regulation as public utilities and cost recovery for public utility investments in EV charging infrastructure can and do co-exist, there is no need to wait to see if some as-yet introduced exemption legislation gets passed in Delaware before considering Delmarva’s proposal in this docket. As such, Movants’ request for a stay should be denied.
12. Moreover, even if Movants were able to identify a legitimate inconsistency between the programs proposed by Delmarva in this docket and the implications of SB 188, Movants’ stay motion should still be denied. The prospective passage of future legislation, the

²³ NESCAUM, Northeast Corridor Regional Strategy for Electric Vehicle Charging Infrastructure: 2018-2021 (May 16, 2018), available at www.nescaum.org/documents/northeast-regional-charging-strategy-2018.pdf.

²⁴ Northeast Corridor Regional Strategy at 4 (recommending that “State legislators or PUCs, as appropriate, should unambiguously exempt EVSE providers from regulation as public service companies to eliminate regulatory uncertainty, remove regulatory barriers to the expansion of the EVSE sector, and facilitate accelerated deployment of charging stations)

²⁵ Northeast Corridor Regional Strategy at 12, 18.

existence and content of which are presently unknown, is simply too slender a reed on which to hang the lengthy proposed stay request.

WHEREFORE, Sierra Club respectfully requests that the Commission deny Movant's requested stay.

Respectfully submitted,

/s/ Kenneth T. Kristl
Kenneth T. Kristl, Esq. (DE Bar # 5200)
Environmental & Natural Resources Law Clinic
Widener University Delaware Law School
4601 Concord Pike
Wilmington, DE 19803
Tel: (302) 477-2053
Email: ktkristl@widener.edu

Joshua Berman (*pro hac vice*)
Senior Attorney
Sierra Club
50 F St. NW, 8th Floor
Washington, DC 20001
Tel: (202) 650-6062
Email: Josh.Berman@sierraclub.org

Counsel for the Sierra Club

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing SIERRA CLUB RESPONSE TO THE PUBLIC ADVOCATE’S AND THE PUBLIC SERVICE COMMISSION STAFF’S MOTION TO STAY FURTHER ACTIVITY ON DELMARVA POWER & LIGHT COMPANY’S APPLICATION FOR APPROVAL OF A PROGRAM FOR PLUG IN VEHICLE CHARGING UNTIL THE EARLIER OF JUNE 30, 2019 OR THE DATE THAT A STATUTE DEREGULATING ELECTRIC CHARGING STATION OPERATORS BECOMES EFFECTIVE to be served upon the following persons:

Mark Lawrence	mark.lawrence@state.de.us
Thomas McGonigle, Esq.	thomas.mcgonigle@dbr.com
Clark Stalker, Esq.	clark.stalker@exeloncorp.com
Lindsay B. Orr, Esq.	lindsay.orr@exeloncorp.com
Todd L. Goodman, Esq.	todd.goodman@pepcoholdings.com
Heather Hall	heather.hall@pepcoholdings.com
Josh Berman	josh.berman@sierraclub.org
Robert Willard, Esq.	Robert.willard@state.de.us
Regina A. Iorii, Esq.	regina.iorii@state.de.us
Connie McDowell	connie.mcdowell@state.de.us
Amy Porter	amy.woodward@state.de.us
Eric Mease	eric.mease@state.de.us
Kathleen Harris	kathleen.harris@state.de.us
Ralph K. Durstein, III, Esq.	ralph.durstein@state.de.us
David Stevenson	davidstevenson@caesarrodney.org
Andrea Maucher	andrea.maucher@state.de.us
Ruth Ann Price	ruth.price@state.de.us
Drew Slater	andrew.slater@state.de.us
Glenn Watkins	watkinsg@tai-econ.com

via electronic mail this 31st day of July, 2018.

/s/ Kenneth T. Kristl
Kenneth T. Kristl, Esq. (DE Bar # 5200)
Environmental & Natural Resources Law Clinic
Widener University Delaware Law School
4601 Concord Pike
Wilmington, DE 19803
Tel: (302) 477-2053
Email: ktkristl@widener.edu

Counsel for the Sierra Club