



October 15, 2018

Mrs. Judith Whitney, Clerk
Vermont Public Utility Commission
112 State Street
Montpelier, VT 05602

Filed electronically on e-PUC

Re: Case No. 18-2660-INV Investigation into promoting the ownership and use of electric vehicles in the State of Vermont

Dear Mrs. Whitney,

Thank you for the opportunity to participate in the October 1, 2018 workshop addressing electric vehicle (“EV”) policies in Vermont. Please accept the following comments on behalf of the Sierra Club in response to the Commission’s invitation for post-workshop recommendations. In its Post Workshop Memorandum dated October 4, 2018, the Commission specifically asked for comments on the following topics:

(1) how to proceed with this investigation given what was learned at the October 1 workshop; (2) specific next steps for this investigation, including proposals for future workshops; and (3) the appropriate scope of jurisdiction, if any, over EV charging stations and whether legislative changes are necessary to effectuate participants’ recommendations.

Sierra Club is the nation’s oldest and largest grassroots environmental organization, with more than 3.5 million members and supporters nationwide and over 14,000 members and supporters in Vermont. Sierra Club is dedicated to the protection of public health and the environment, and has long been a leading voice for clean vehicles. Locally, the Vermont Chapter of the Sierra Club works to develop and promote climate solutions applicable to Vermont, collaborating with numerous stakeholders to ensure strategic and effective engagement on environmental and social justice issues. Sierra Club has significant experience with issues at the intersection of EVs and utility regulation, and we have worked to resolve these issues in proceedings before state utility commissions across the country. Sierra Club is also a founding member of the

Transportation Electrification Accord,¹ a set of guiding principles on EV regulatory issues that has been joined by over 120 signatories representing labor, environmental, consumer, low-income, vehicle manufacturer, and EV technology company interests, among others. Many of those signatories are parties to this proceeding.

During the workshop, the Sierra Club urged the Commission to identify and take strong and immediate steps to promote electrification of the transportation sector in Vermont as a means of reducing a significant portion of the state's greenhouse gas emissions. On October 6, 2018, the leading international body of climate scientists, the Intergovernmental Panel on Climate Change (often referred to as the "IPCC"), released its most recent climate assessment. This new IPCC report presents the latest scientific consensus, which includes a dramatic acceleration of the expected pace and severity of climate change impacts, even with optimistic projections for the effectiveness and implementation of greenhouse gas reduction strategies.²

This Commission's *Order Opening Investigation*, dated July 9, 2018, explained that "[i]f Vermont is to meet its GHG reduction goal it is critical that these barriers to [EV ownership and EV charging infrastructure] be addressed and eliminated to the extent possible."³ As explained in the IPCC's report, the window for meaningful climate action is rapidly closing – and doing so on a timeline that is far quicker than previously thought – and thus the Commission's opportunity to help address the looming climate crisis is even more pressing than previously understood. With this context in mind, the Sierra Club offers the Commission the following suggestions that respond directly to the October 4, 2018 post-workshop memorandum.

I. The Commission Should Clarify Its Intent to Go Beyond Preparing the Mandatory Legislative Report Required By Act 158.

The Sierra Club urges the Commission to respond to this new sense of climate urgency by clarifying for all stakeholders that the Commission's intended outcomes of this investigation process will include not only the report to the state legislature by July 1, 2019 that is required by Act 158, but will also include a series of Commission orders related to EV policies, as envisioned in the Department of Public Service's June 12, 2018 letter to the Commission.⁴

Beyond identifying the topics and process for comments and workshops, the Sierra Club agrees with the Department of Public Service's assessment that the Commission should set reasonable timetables for staggered orders. With reasonable allowances for stakeholder and Department staff participation, the first order or guidance document could foreseeably be issued in early 2019, and a second order could be issued in June 2019 in advance of the Commission's July 1, 2019 report. Clarifying the Commission's intentions as to both the upcoming processes and the

¹ <https://www.theevaccord.com/>.

² Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5° C*, (Oct. 6, 2018), available at <http://www.ipcc.ch/report/sr15/> (last visited October 12, 2018).

³ Vermont Public Utility Commission, Case No. 12-2660-INV, *Order Opening Investigation*, at 4 (July 9, 2018) (hereafter *Order Opening Investigation*).

⁴ See Vermont Department of Public Service, Letter to the Commission, Attachment II (June 12, 2018) (calling for PUC Orders in December 2018 and June 2019 as part of this investigation).

Commission actions that will come out of those processes would ensure a set of common expectations, shared by all stakeholders, as to the desired objectives and outcomes. Given that the Commission's stated goal of this investigation is to encourage EV adoption in order to reduce transportation sector greenhouse gas emissions,⁵ we believe that providing a concrete set of Commission orders or guidance aimed at both resolving threshold legal and policy issues to provide regulatory and market certainty and incentivizing new EV ownership and the build-out of EV charging infrastructure will be far more effective than simply compiling information for submission to the legislature.

II. Proposals for the Process and Issues Considered as Part of this Investigation.

A. Process

Sierra Club applauds the process of the Commission's investigation thus far, which has facilitated engagement across a variety of state, private, and public interest entities and allowed the Commissioners to hear directly from stakeholders earlier on in the process. Moving forward, the Sierra Club urges the Commission to proceed along lines similar to those suggested in the Department of Public Service in its June 12, 2018 letter, first by identifying a narrowly-defined set of issues, examining those through a comment-and-workshop process, and then issuing an Order or guidance to resolve or clarify those issues.

For each of the topics studied in detail, the objective would be that at the end of the process the Commission would be in a position to provide all stakeholders with a clear path forward – identifying, for example, what information should be included in a utility application to support the deployment of EV infrastructure, as well as the process and standards by which the Commission would rule on the application.

Consistent with our remarks at the October 1, 2018 workshop, Sierra Club encourages the Commission to examine a narrowly-defined set of policy levers available to the Commission, each aimed at promoting increased EV ownership in the state. In selecting the topics that will be considered for each of the deep-dive evaluations, the Commission should strive to limit the number of issues included in each in order to ensure that both the comments and workshops are narrowly drawn toward (a) identifying specific policy options the Commission will consider; and (b) evaluating the merits of each proposal based on their effectiveness at promoting EV ownership in other states and their usefulness here given Vermont's current EV market, demographics, and geography.

The process could proceed as follows:

Deep-Dive Into First Set of Identified Issues:

1. Commission identifies issues to be studied in detail: October-November 2018;
2. Stakeholder Comments: November 2018;

⁵ *Order Opening Investigation* at 2.

3. PUC Workshop, with Department staff presenting the Commission's proposed order or guidance: December 2018;
4. Stakeholder Reply Comments: December-January 2018;
5. Commission Issues Order or Guidance: February 2018.

Deep-Dive Into Second Set of Identified Issues:

1. Commission identifies issues to studied in detail: October-November 2018;
2. Stakeholder Comments: February-March 2019;
3. PUC Workshop, with Department staff presenting the Commission's proposed order or guidance: April 2019;
4. Stakeholder Reply Comments: April-May 2019;
5. Commission Issues Order or Guidance: June 2019.

B. Policies for Consideration

The Sierra Club encourages the Commission to examine the extent to which the following policies could successfully encourage EV ownership and EV charging infrastructure in Vermont:

1. Resolve threshold policy and legal questions to provide market certainty for EV service providers and the owners and operators of EV charging stations in order to encourage private sector investment.
 - a. Approximately two dozen states have confirmed, through public utility commission orders, commission policies, and/or legislation that the utility regulatory commissions in those states will not exercise jurisdiction over non-utility owners or operators of EV charging stations solely based on the provision of EV charging services. Vermont should do the same.
 - b. Similarly, utility tariffs should be revised to permit non-utility owners or operators of EV charging stations to charge by the kilowatt hour (kWh), the common unit for electricity sales. This supports price transparency and fairness for EV drivers and better enables providers of EV charging to employ pricing practices that reflect real-world grid conditions and improve grid efficiency and flexibility to the benefit of all electricity customers, whether they drive an EV or not.
2. Resolve threshold policy and legal issues to provide regulatory certainty for all stakeholders by clarifying the role for electric utilities in supporting EV adoption, including deployment of EV charging infrastructure. Utilities are uniquely positioned to address infrastructure and vehicle-grid

integration issues, particularly for undeserved but critical market segments, like multi-unit dwellings, where would-be EV drivers face unique challenges. The Commission should provide guidance on the scope of utilities' role and the process for regulatory review. Many state utility commissions have provided such guidance and/or authorized utility investment and cost recovery in the normal course of utility regulation.⁶

3. Review current utility rates for compatibility with transportation electrification ("TE") use cases,⁷ and, where rates are not optimized to support TE, the Commission should direct or lead a process to develop new rates. Core issues to address should include time-variant electricity rates for Level 2 charging of conventional EVs,⁸ particularly at home, and demand charges in the context of Direct Current Fast Charging.⁹

III. The Commission Should Not Regulate EV Charging Providers Simply Based on Those Providers Offering Battery Charging and Related Services.

The Sierra Club urges the Commission, at the earliest possible time, to resolve any jurisdictional uncertainty and to clarify that the Commission will not regulate third-party owners or operators of EV charging equipment simply by virtue of owning or operating such equipment. The Commission should address this threshold issue before addressing other topics, as resolving this lingering question would provide regulatory and market certainty for all participants in order to help promote the creation and operation of new EV charging infrastructure throughout the state. Moreover, as demonstrated in both in scholarly literature,¹⁰ and in real world experiences,¹¹ building out EV charging infrastructure is a highly effective tactic for increasing EV ownership, and thus implementing policies that encourage EV infrastructure development to the fullest extent possible will help speed EV ownership in Vermont.

⁶ For example, Washington, Michigan, Ohio, Massachusetts, Florida, Oregon, Utah, Nevada, California, and Kentucky, among others.

⁷ Examples of "use cases" might include (1) at-home charging of passenger EVs; (2) public charging at Level 2 or Direct Current Fast Charging stations; (3) charging of medium- and heavy-duty fleets that are publicly or privately owned, among others.

⁸ At least 45 utilities across the country already implement time-of-use rates to help encourage EV charging during off-peak hours.

⁹ To varying degrees, new tariffs with limited or suspended demand charges for high-power charging of light-, medium- and heavy-duty electric vehicles have been implemented in California, Oregon, Hawaii, New York, Rhode Island, Maryland, Connecticut, and Washington, D.C.

¹⁰ See, e.g., Shanjun Li, et al., *The Market for Electric Vehicles: Indirect Network Effects and Policy Design*, Journal of Environmental and Resource Economists (2017) (concluding that in some markets a given subsidy provided to EV infrastructure will increase EV sales by more than twice that of the same subsidy offered toward an EV purchase).

¹¹ See Dory Smith, "KC Metro leads the nation in EV adoption," Kansas City Business Journal (June 7, 2017) available at <https://www.bizjournals.com/kansascity/news/2017/06/07/kc-metro-electric-vehicle-adoption.html> (last visited October 12, 2018) (noting that utility's rapid EV charging infrastructure build out resolved both consumer awareness and range anxiety barriers leading to rapid growth in EV ownership).

As we explained in the October 1, 2018 workshop, the language of 30 V.S.A. § 203 indicating the Commission has jurisdiction over any company “engaged in the manufacture, transmission, distribution, or sale of gas or electricity direct to the public or to be used ultimately by the public for lighting, heating, or power, and so far as relates to their use or occupancy of the public highways” is substantially similar to the “light, heat, or power” language found in the corresponding statutory language of states such as Massachusetts and New York, that have concluded the relevant state agency does not have jurisdiction over non-utility owners or operators of EV service equipment simply by virtue of owning or operating that equipment.¹² We note that, as indicated by Commissioner Tierney in her remarks during the October 1, 2018 workshop, were the Commission to decline to exercise jurisdiction over EV charging providers, other sources of government oversight may be available to protect the public, such as the Attorney General’s Office for purposes of consumer protections or the Department Transportation related to weights and measures.¹³ Moreover, the consistent judgment from regulators throughout the country has been that such companies are providing a service (here, the charging of an EV battery) rather than providing “light, heat, or power.” As other states have determined, non-utility owners or operators of EV charging stations are selling EV charging services, that is, the use of specialized equipment which allows the customer to do only one thing: charge an EV’s battery.

At the same time, it is important to note that such a decision should serve a limited purpose: to protect *non-utility* owners and operators of EV charging stations from being transformed into “public utilities” subject to Commission regulation solely by virtue of operating charging stations. Any Commission decision should be clear that it does not affect the legal status of an otherwise-regulated “public utility” that already meets the statutory definition of that term. If a utility sought to own charging stations, those stations would be part and parcel of the plant in service, capping an infrastructure chain that is owned and operated by a regulated entity. The end user would be the EV driver. In short, the initial legal status of the owner or operator is critical.

This approach tracks the Massachusetts and New York decisions described above, which held that *non-utility* owners of EV charging stations are excepted from regulation as utilities, and found that charging stations owned or operated by *otherwise-regulated utilities* are squarely within their jurisdiction.¹⁴ In a similar jurisdictional ruling, the California Public Utilities

¹² Mass. Dept. of Pub. Utilities, Order No. 13-182-A (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.P.S.C., Case 13-E-1099, at 4 (Nov. 14, 2013) (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.”)

¹³ Vermont Public Utility Commission, *Transcript of Workshop Held on October 1, 2018*, at 194, Case No. 18-2660-INV.

¹⁴ See N.Y.P.S.C., Case 13-E-1099 (finding that “we do have jurisdiction over the owner or operator of a Charging Station, where that owner or operator *otherwise falls within the PSL §2 (13) definition of ‘electric corporation.’*”); Mass. Dept. of Pub. Utilities, Order No. 13-182-A (finding that entities otherwise subject to the

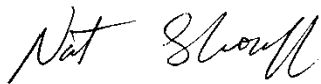
Commission put it bluntly: “To the extent an investor-owned utility provides electric vehicle charging services, provision of such services will not affect the utility’s status as a public utility.”¹⁵

To the extent that the Commission has any lingering doubts about the validity of making a similar determination in Vermont, one simple solution is for the Commission to request that the legislature modify the existing language of 30 V.S.A. § 302 by adding a sentence reading: “Notwithstanding any other language in this chapter, the Public Utility Commission shall not consider a provider of EV charging services to be a utility or otherwise subject to regulation by the Commission under this chapter solely as a result of providing EV charging services.” Given that we view the existing Vermont statutory language as already excluding regulation of non-utility EV charging service providers, the Commission need not wait for legislative clarification and could instead clarify the Commission’s understanding of its own jurisdictional authority in line with the determinations made by New York, Massachusetts, and other states, while concurrently requesting the legislature offer further jurisdictional certainty by adopting the proposed language.

IV. Conclusion

Thank you for the opportunity to offer suggestions on appropriate next steps as the Commission continues its work on the vitally important goal of electrifying transportation in Vermont. Should you have any questions about the information provided in this letter, we can be reached at the contact information listed below.

Sincerely,



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DPU’s jurisdiction “may recover costs associated with ownership and operation of electric vehicle supply equipment.”).

¹⁵ *Decision in Phase 1 On Whether a Corporation or Person That Sells Electric Vehicle Charging Services To the Public Is a Public Utility* at 21, D.10-07-044, 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 (filed July 29, 2010), California Public Utilities Commission.