Western Resource Advocates ("WRA") and the Southwest Energy Efficiency Project ("SWEEP") submit their legal brief on whether the Commission has jurisdiction over providers of electric vehicle charging services ("EV charging providers") when they are not
regulated utilities. For the reasons below, EV charging providers do not meet the textual
definition of “public service corporations” (“PSCs”) set forth in Article 15, section 2 of the
Arizona Constitution. Even assuming EV charging providers meet the textual definition, they
still should not be subject to Commission regulation because they are not “clothed with a
public interest” under the eight factors set forth in Natural Gas Service Co. v. Serv-Yu

I. EV CHARGING PROVIDERS DO NOT MEET THE DEFINITION OF A
“PUBLIC SERVICE CORPORATION.”

Determining whether an entity is a public service corporation requires a two-step
2006) (“SWTC”). First, the Commission must “consider whether the entity satisfies the literal
and textual definition of a public service corporation” under the Arizona Constitution. Id. The
constitution defines PSCs as “[a]ll corporations other than municipal engaged in furnishing
gas, oil, or electricity for light, fuel, or power . . . .” Ariz. Const. art. 15, § 2. The Arizona
Court of Appeals has explained that “[c]reating and providing electricity to consumers occurs
in three phases: generation, transmission and distribution. First, electricity is generated in
power plants. Next, it is transmitted over high-voltage power lines to distributors. Finally, the
electricity is transformed into low-voltage power and distributed to consumers.” SWTC, 213
Ariz. at 428, n.1 (internal citations omitted).

The PSC definition plainly includes electric utilities such as Arizona Public Service
Company (“APS”) and Tucson Electric Power Company (“TEP”). APS and TEP generate,
transmit, and distribute electricity to their customers’ homes and businesses where the
electricity is used to turn on lights and to power computers and appliances. APS and TEP
therefore furnish electricity for light and power. In SWTC, the court of appeals found that the
definition of a PSC also includes cooperatives that transmit electricity but do not distribute it
to retail customers. Id. at 428, 433, ¶¶ 3, 39.
EV charging providers, on the other hand, are not involved in the generation, transmission, or distribution of electricity. They are customers of a PSC (or operate the charging station on behalf of a customer) and use the electricity furnished to them to provide the service of charging a vehicle battery. Auto parts stores, mechanics, and similar businesses already provide battery charging services for drivers of internal combustion engine vehicles. Similarly, a laundromat is a customer of a PSC and uses electricity furnished by that PSC to provide clothes drying services. Like these businesses, EV charging providers are not engaged in furnishing electricity; rather, they use electricity generated, transmitted and distributed by regulated utilities to provide a service.

Even assuming for argument's sake EV charging providers could be construed as "furnishing . . . electricity," they do so for the purpose of transportation, not for light, fuel, or power. Gas stations are a close analogy. The Commission does not regulate gas stations as PSCs even though they provide motorists with gasoline, diesel, and motor oil, all of which are made from crude oil. While gas stations might appear to meet the textual definition of a PSC by furnishing oil, they do so primarily for the purpose of transportation. If the Commission determines that EV charging providers furnish electricity, it should conclude that (like gas stations) it is for the purpose of transportation, not "light, fuel, or power."

No other state regulates non-utility EV charging providers as PSCs. On the contrary, an increasing number of states have exempted them from regulation, either through legislation or proceedings before a public utility commission. Those states include Arkansas, California,

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Colorado, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Minnesota, Montana, New York, Oregon, Pennsylvania, Utah, Virginia, Washington, and West Virginia. The Commission should similarly conclude that non-utility EV charging providers are not engaged in furnishing electricity for light, fuel, or power, but are merely providing a battery charging service for the purpose of transportation. Because these entities do not meet the textual definition of a PSC, they should not be regulated by the Commission as such.

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7 Idaho Code § 61-119.
13 https://leg.mt.gov/bills/2019/BillHtml/HB0456.htm. Montana House Bill No. 456 was signed by the governor on May 10, 2019 but had not yet been codified as of the filing date of this brief.
17 Utah Code Ann. § 54-2-1.
18 ELECTRIC VEHICLES—CHARGING STATIONS—FEES, 2019 Virginia Laws Ch. 248 (H.B. 1934).
21 This does not mean EV charging providers will be exempt from regulation altogether. For example, they will be subject to the Arizona Consumer Fraud Act, A.R.S. §§ 44-1521 through -1534.
II. THE SERV-YU FACTORS DO NOT SUPPORT REGULATING EV CHARGING PROVIDERS AS PUBLIC SERVICE CORPORATIONS.

Even assuming EV charging providers meet the textual definition of a PSC under the Arizona Constitution, this alone "does not establish an entity as a 'public service corporation.'" SWTC, 213 Ariz. at 431 (internal citations omitted). Under the second part of the PSC analysis, an entity's "business and activities must be such as to make its rates, charges and methods of operation, a matter of public concern, clothed with a public interest to the extent contemplated by law which subjects it to governmental control—its business must be of such a nature that competition might lead to abuse detrimental to the public interest." Id. at 431-32 (internal citations and quotation marks omitted).

In Serv-Yu, the Arizona Supreme Court listed eight factors to consider in determining whether a corporation is "clothed with a public interest" and therefore subject to regulation:

1. What the corporation actually does;
2. A dedication to public use;
3. Articles of incorporation, authorization, and purposes;
4. Dealing with the service of a commodity in which the public has been generally held to have an interest;
5. Monopolizing or intending to monopolize the territory with a public service commodity;
6. Acceptance of substantially all requests for service;
7. Service under contracts and reserving the right to discriminate is not always controlling; and
8. Actual or potential competition with other corporations whose business is clothed with public interest.

70 Ariz. at 242; see also SWTC, 213 Ariz. at 432, ¶ 25. There is no presumption that a business activity is regulated by the Commission—rather, the presumption is that it is not. Ariz. Corp. Comm'n v. Cont'l Sec. Guards, 5 Ariz. App. 318, 321 (1968), vacated on other grounds, 103 Ariz. 410 (1968). Moreover, the mere fact that an entity incidentally provides a public
commodity does not warrant regulation—instead, “it must be in the business of providing a public service.” *SWTC*, 213 Ariz. at 432 ¶ 25 (emphasis added).

None of the Serv-Yu factors supports regulating EV charging providers as PSCs, particularly since EV charging is a new industry that has yet to take final shape.

**A. Serv-Yu Factor 1: What the corporation actually does**

In examining this factor, the Commission should consider whether the activities of an EV charging provider would affect “so considerable a fraction of the public that it is public in the same sense in which any other may be called so.” *SWTC*, 213 Ariz. at 432, ¶ 26 (quoting *Serv-Yu*, 70 Ariz. at 240). EV charging is still a nascent industry. However, it is clear by now that many different types of entities will be involved in providing EV charging services, none of which will affect so great a fraction of the public that they should be regulated like a monopoly.

Various EV charging providers manufacture EV chargers for the home. They offer consumers a wide range of chargers at different price points and none dominate the market so much that they threaten a monopoly.

Outside the home, EV charging providers are often retailers, restaurants, or service providers that own and operate charging stations but are primarily engaged in other lines of business such as selling products or services. They provide EV charging and designated parking spots to attract customers, who can recharge their EVs while shopping or dining. Other examples of EV charging providers outside the home are governmental entities and major employers who want to encourage their employees to shift away from gasoline and diesel vehicles.

In some situations, an entity that supplies EV charging equipment and software also operates the charging station for the property owner or “site host.” Either way, the EV charging services are incidental to the primary business of retail, dining, employment, or some other
activity and therefore not the proper subject of Commission regulation. See SWTC, 213 Ariz. at 432, ¶25.

Moreover, none of these different types of EV charging providers affect so many EV drivers that they are “clothed with a public interest.” See id. Although EV charging providers frequently compete with each other for the business of EV drivers, this competition will not be detrimental to the public. On the contrary, competition benefits the public because it tends to reduce the cost of EV charging. There is also no danger of a “disparity in bargaining power” that requires government intervention. See id. at 432, ¶ 24. Again, most EV drivers will be able to charge their vehicles at home. Those who cannot will frequently have access to a number of charging stations hosted by private entities and/or public utilities. The first Serv-Yu factor therefore does not support regulating EV charging providers as PSCs.

B. Serv-Yu Factor 2: A dedication to public use

“[W]hether a company has dedicated its property to public use is a question of intent shown by the circumstances of the individual case.” SWTC, 213 Ariz. at 432, ¶ 28. Charging stations in public places like retail and dining establishments are, of course, available for the public to use. However, they are not dedicated to the “public use” in the same sense as public utility infrastructure. Many businesses provide services to the public but are not rate-regulated by the Commission, such as gas stations, laundromats, and shopping malls. As with these businesses, the EV charging market is competitive in many areas of the state. Although it would be economically wasteful and contrary to the public interest for several electric utilities to build duplicative generation, transmission, and distribution infrastructure, the same does not hold true for EV charging providers. Again, competition benefits the public because it tends to keep EV charging costs low, just as having more than one gas station benefits drivers of internal combustion engine vehicles.

Further, as discussed above, while many EV charging providers offer charging services to the public, they frequently do so in conjunction with other business activities. In that sense,
EV charging providers are not so much “dedicated to the public use” as they are dedicated to their retail or service customers and prospective customers. By contrast, public utilities sell electricity as their core business and do not compete for customers. The second Serv-Yu factor does not support regulating EV charging providers as PSCs.

C. **Serv-Yu Factor 3: Articles of incorporation, authorization, and purpose**

Articles of incorporation authorizing a corporation to act as a public utility are not conclusive but may be considered in the PSC analysis. Serv-Yu, 70 Ariz. at 238. The Commission may also look at a corporation’s stated goal or purpose. See id.; SWTC, 213 Ariz. at 433, ¶ 29. In SWTC, for example, the court of appeals held an electric transmission cooperative was a PSC based in part on its “stated goal of providing reliable electric power to [its] member distributors’ customers,” which “suggest[ed] its purpose is to serve the public.”

The inherent diversity in the EV charging market makes it difficult to analyze this factor without focusing on a particular owner or operator. Again, however, many companies that provide EV charging services are engaged in other types of businesses such as retail, dining, or office space. Others are employers of EV drivers. They provide EV charging as an amenity, like parking or delivery service, but it is not their primary purpose or “goal.” Even EV charging equipment suppliers usually have a primary purpose of providing equipment and software to site hosts so the hosts’ EV-driving customers can charge their vehicle batteries, not of providing “reliable electric power,” which in all cases is delivered by a regulated utility. The third Serv-Yu factor does not support regulating EV charging providers as PSCs.

D. **Serv-Yu Factor 4: Dealing with the service of a commodity involving the public interest**

The fourth Serv-Yu factor indicates regulation may be necessary when an entity provides a commodity of such importance that it would harm the public interest if the commodity were overpriced. Here, again, EV charging providers offer a service that benefits the public, but this service does not involve the “public interest” in the same way that an electric utility does when it generates, transmits, or distributes electricity. The concern about
over-charging customers does not apply to EV charging providers because EV drivers have several means of charging their vehicle batteries. Many of them can do this at home. For longer trips, or when EV drivers need to charge their vehicles away from home, they often have numerous charging providers vying for their business. In areas not adequately served by the competitive market, utility investment in EV infrastructure will be appropriate. However, this alone does not make EV charging a public service “commodity,” particularly at this early stage of the EV charging market.

E. **Serv-Yu Factor 5: Monopolizing the territory with a public service commodity**

Again, EV charging providers do not provide a “public service commodity.” Even if they did, however, the decentralized nature of the EV charging market raises no monopolization concerns and, as discussed above, illustrates the fundamental difference between the business of furnishing electricity as a public utility and the business of providing EV charging as an amenity to existing or prospective customers. Of course, it benefits the public for EV charging providers to collaborate with public utilities on issues concerning the impact on the electric grid, but the Commission does not need to assert its jurisdiction for such collaborations to occur. Indeed, they are already occurring.

F. **Serv-Yu Factors 6 and 7: Acceptance of substantially all requests for service and service under contracts/reserving the right to discriminate**

The sixth Serv-Yu factor reflects the idea that an entity cannot effectively choose to engage in business as a public utility by accepting all or substantially all requests for electric power, then escape being regulated or refuse to extend service to a particular customer. See *Consolidation Coal Co. v. Martin*, 113 F.2d 813, 817 (6th Cir. 1940); *Wingrove v. Public Serv. Comm'n*, 81 S.E. 734 (W. Va. 1914), cited in Serv-Yu, 70 Ariz. at 238. The seventh Serv-Yu factor clarifies that an entity cannot avoid regulation as a PSC merely by providing service under private contracts and reserving the right to discriminate against customers. Serv-Yu, 70 Ariz. at 241-242.
These factors do not apply to EV charging providers and, if anything, weigh against finding them to be PSCs. Whereas a regulated utility might have a financial incentive to refuse service to a customer who is remote or expensive to serve, EV charging providers have no reason to refuse service to anyone. If for some reason a charging provider did refuse service to an EV driver, then unlike an electric utility customer, the driver could usually find charging services at home or at another charging provider location.

G. **Serv-Yu Factor 8: Actual or potential competition with other corporations whose business is clothed with the public interest**

The eighth Serv-Yu factor also does not weigh in favor of regulating EV charging providers as PSCs. There is no indication that charging providers will compete with traditionally regulated utilities for business. In most cases, EV charging providers will purchase electricity to supply the charging station from the utility. The EV policy statement adopted by the Commission on January 16, 2019 encourages utilities to “deploy EV charging stations in identified areas of inadequate coverage, such as . . . rural and low-income areas, multi-dwelling units, [and] interstate corridors or highways” and allows them to recover the prudent costs in rate base. But by definition, “areas of inadequate coverage” are places where there is little if any competition from non-utility EV charging providers. Such providers certainly will not compete for the primary business of electric utilities—generation, transmission, and distribution of electricity.

Finally, the Commission’s January 2019 EV policy also states that regulated utilities “should work with non-regulated utilities to determine the location of charging and DC fast charging infrastructure where joint investment and ownership may be appropriate.” This contemplates collaboration, not competition.

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22 See Decision No. 77044 at p. 8, Docket No. RU-00000A-18-0284.
III. CONCLUSION

In sum, non-utility EV charging providers do not “furnish” electricity, and even assuming they do, it is for transportation rather than “light, fuel, or power.” In addition, such providers are not “clothed with a public interest” under the eight factors articulated in Serv-Yu. The Commission should accordingly determine that non-utility EV charging providers are not PSCs as defined in the Arizona Constitution and should not be regulated as such.

If the Commission decides to regulate EV charging providers as PSCs, it could conceivably assert jurisdiction over numerous other businesses that provide similar services such as gas stations, auto parts stores, mechanics, cell phone charging kiosks, RV parks that allow connection to the park's electricity supply, and airports that connect planes to a hangar's electricity supply while parked. The reason the Commission does not regulate these businesses is because, like EV charging providers, they are not PSCs.

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