

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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**Proceeding on Motion of the  
Commission Regarding Electric  
Vehicle Supply Equipment and  
Infrastructure**  
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CASE 18-E-0138

**PETITION FOR REHEARING**

**Introduction**

Pursuant to New York Public Service Law § 22 and Section 3.7 of the Commission’s rules and regulations, 16 NYCRR § 3.7, Tesla, Inc. (“Tesla”) files the instant Petition for Rehearing of the Public Service Commission (“Commission” or “PSC”) *Order Establishing Framework for Direct Current Fast Charging Infrastructure Program* (“Order”) issued and effective February 7, 2019 in the above captioned docket (the “Order”).

The Order largely adopted a “Consensus Proposal” developed by stakeholders “to address the short-term economic challenges of installing publicly available and affordable [Direct Current Fast Charging (“DCFC”)]” electric vehicle (“EV”) charging stations.<sup>1</sup> In the Consensus Proposal, “publicly accessible stations” were defined as meaning, essentially, “physically accessible” stations, described as “those allowing access without site-specific physical access restrictions (e.g., supermarkets, malls, retail outlets, rest stops, visitor centers, train stations, hotels, restaurants, and parking garages or lots where DCFC stations are open to the public and will be used by a wide variety of users).”<sup>2</sup> The Proposal’s Sponsors cited studies

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<sup>1</sup> Order, p. 3. (emphasis added).

<sup>2</sup> Order, p. 44. (emph. added.) *See also Id.* at p. 9 (noting that “The Consensus Proposal identifies common program parameters amongst the IOUs, including . . . applicability to only new DCFC facilities that are publicly accessible (i.e., without site-specific physical access restrictions such as radio-frequency identification, security badge, or otherwise limited access)[.]”

showing that increased investments in physically accessible DCFC stations, which the Sponsors described as occurring “[a]long major roads and in urban areas,” eliminated EV drivers’ range anxiety, and was therefore key to increasing EV adoption.<sup>3</sup>

However, without providing any notice of intent to adopt an alternative definition to that set forth in the Consensus Proposal, and without any reasonable record support or rational basis, the Order defines “publicly accessible stations” as meaning, essentially, those stations that are technologically accessible. Specifically, the Order defines “publicly accessible stations” as consisting exclusively of “those . . . stations that utilize both a . . . plug type commonly in use by American and European manufacturers (e.g., Chevrolet, BMW, Mercedes, and Volkswagen) and a . . . plug type commonly in use by Asian manufactures (e.g., Nissan and Mitsubishi).<sup>4</sup> As acknowledged by the Order, such a definition disqualifies Tesla’s charging technology from eligibility for the incentive as the Commission states that “such proprietary technology is not eligible for this incentive”<sup>5</sup> unless Tesla stations are deployed with plugs useable by non-Tesla customers.<sup>6</sup>

Tesla respectfully submits that the Order’s novel definition of “publicly accessible” is unlawful and arbitrary and capricious since it is devoid of record support, lacking a rational basis,<sup>7</sup> and discriminatory.<sup>8</sup> For these reasons, the Order should be reversed and remanded.

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<sup>3</sup> Consensus Proposal, p. 3.

<sup>4</sup> *Id.*, pp. 44 – 45.

<sup>5</sup> See Order, p. 43, fn. 25

<sup>6</sup> See *Id.*, p. 45 (“Tesla uses its own standard . . . which the Commission does not recognize as publicly accessible for purposes of this incentive program . . . Tesla DCFC stations will become eligible for this . . . incentive where their proprietary technology is coupled with plug types that enables use by EVs with Asian and European charging systems.”)

<sup>7</sup> See generally *Matter of Pell v. Bd. Of Educ.*, 34 N.Y. 2d 221, 231 (1975) (in reviewing an agency decision, a court can apply the arbitrary and capricious test; arbitrary agency action is without sound basis in reason and is generally without regard to the facts) (citation omitted).

<sup>8</sup> See *New York State Ass’n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991).

## **Procedural Background**

In April of 2018, “Joint Petitioners”<sup>9</sup> requested that the Commission direct the state’s utilities to modify the rates to provide immediate and long-term rate relief to EV charging station hosts as means of encouraging the deployment of electric vehicles. Specifically, the Petitioners recognized that increasing the numbers of charging stations would alleviate drivers’ concerns over EV range, and thereby support the larger public policy goal of rapidly increasing EV adoption.<sup>10</sup> Towards that end, the Petitioners recommended that the Commission direct the state’s utilities to modify the tariffs charged to EV charging customers.<sup>11</sup> Rate relief was required, to remove the “significant financial barriers to the development of a network of DCFC.”<sup>12</sup>

In June 2018, the Commission opened this docket to consider various EV-related issues and directed staff to convene a technical conference to consider various topics. The “Consensus Proposal”<sup>13</sup> that emerged therefrom “call[ed] for each [of the state’s utilities] to provide an annual per-plug incentive to support third party investment in publicly available direct current fast charging stations to encourage increased electric vehicle penetration.”<sup>14</sup>

On November 3, 2018, the Commission issued a Notice Soliciting Comments on the Consensus Proposal. The Notice directed interested persons to consult the Proposal if they

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<sup>9</sup> The Joint Petitioners were the New York Power Authority (“NYPA”), the New York State Department of Environmental Conservation (“DEC”), the New York State Department of Transportation (“DOT”), and the New York State Thruway Authority (“NYSTA”).

<sup>10</sup> Order, p. 4.

<sup>11</sup> Order, pp. 1 – 2.

<sup>12</sup> NYPA September Comments, p. 2.

<sup>13</sup> Parties to the Consensus Proposal were: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc. (“Con Ed”), NYPA, New York State Department of Environmental Conservation, New York State Department of Transportation, New York State Electric & Gas Corporation (“NYSEG”), New York State Energy Research and Development Authority, New York State Thruway Authority, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc. (“O&R”), and Rochester Gas and Electric Corporation (“RG&E”).

<sup>14</sup> Notice Soliciting Comments (November 23, 2018), p. 1.

wished to provide comment thereon. The Notice provided no indication that the Commission might entertain any definition of the phrase “publicly accessible” other than that contained in the Proposal.<sup>15</sup> Nor had the Order Instituting Proceeding, which identified nine topics for discussion in the preceding technical conference,<sup>16</sup> nor the Notice of Working Group Meeting and Request for Post-Conference Comments, which identified fourteen topics.<sup>17</sup> There was no evidence advanced by any party on whether changing the definition from physical accessibility to technological accessibility would help, or would hurt, the State’s goal of rapidly increasing EV deployment.

Further underscoring that the Commission’s decision to re-define “publicly accessible” was arbitrary and capricious, the Order cites no comment or record basis urging that the definition be changed. Most importantly, the Order contains no analysis or citations to any evidence showing that changing the definition will spur more private sector investment in charging station infrastructure than would the use of the prior definition.<sup>18</sup>

Tesla respectfully submits that disqualifying Tesla from eligibility for the incentive will impede the state’s ability to close the gap between the numbers of plugs it needs, in order to attain the 800,000 zero emission vehicles (“ZEV”) that the state wants on New York roads by 2025. Thus, the Order will fail to leverage and accelerate private investment while prudently investing ratepayer funds, contrary to the Commission’s stated purpose in conducting this proceeding.<sup>19</sup>

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<sup>15</sup> See *supra*, n. 4 and surrounding text.

<sup>16</sup> Order Instituting Proceedings, Issued and Effective April 24, 2018, pp. 4 – 5.

<sup>17</sup> Notice and Request for Working Group Meeting and Request for Post-Conference Comments, Issued August 16, 2018. Indeed, the most relevant topic still identified physical accessibility as having the most relevance. Question 4 stated: “What is the best way for utilities, charging station providers, and site hosts to work together to *locate* charging stations where they best meet electric system, customer and community needs?” (emphasis added).

<sup>18</sup> See Order, pp. 44 – 45.

<sup>19</sup> *Id.*, p. 38.

## **Tesla**

Tesla is a leading developer and manufacturer of electric vehicles, as well as other clean energy products and services. In order to serve its customers, Tesla funds, builds and operates its own network of charging stations and operates these as a service to its customers. The network is not intended to be a profit center for the company. Every Tesla customer is, at the time of vehicle purchase, effectively investing in both a car and in the charging station network.

In 2012, Tesla began developing its network of Superchargers to enable customers to confidently make road trips with quick charging sessions on highly traveled routes. Tesla's charging network and vehicles utilize a Tesla connector which is capable of charging vehicles with both alternating current (Level 1 and Level 2 charging at 110 volts or 240 volts up to 890 amps) and direct current (currently up to 120 kW). When Tesla began developing its charging station network in 2012, other DCFC networks and connector types (CHAdeMO and Combo CCS) were limited to a 50 kW charge rate, thus necessitating the development of a connector and network capable of higher charging rates and quicker charger sessions.

To date, Tesla has largely absorbed the costs of installing and operating an extensive network of charging stations in order to serve its customers. The costs of which are significant. As noted by the New York Power Authority, interconnection costs for DCFC chargers can reach over \$100,000 in some areas of the state.<sup>20</sup> Operating costs can also be significant, as high demand charges are expensive to station operators.<sup>21</sup> Thus, Tesla supported the Consensus Proposal, as it "represent[ed] an important first step to addressing cost barriers for DCFC deployments."<sup>22</sup>

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<sup>20</sup> NYPA Comments, pp. 2 – 3.

<sup>21</sup> *Id.*, p. 2.

<sup>22</sup> Tesla's December 14, 2018 Comments, p. 2.

However, the Order has expressly conditioned Tesla's eligibility to receive the incentive on Tesla's installing CHAdeMO or CCS plugs, which plugs serve only non-Tesla customers.<sup>23</sup>

Given the Commission's recognition that it needs to leverage private investment in order to meet the State's ZEV and GHG reduction targets,<sup>24</sup> Tesla questions whether the Commission gave sufficient consideration to the impact of excluding the one manufacturer whose EVs comprised 80% of the DCFC capable vehicle sales in 2018, and 60% since 2012.<sup>25</sup>

Tesla does not view its charging network as a "walled garden," and has discussed opening the network with other OEMs, however the conversations have yet to be conclusive.

As noted in Tesla's 2018 Q1 Earnings Call:

[W]e're happy to support other automakers and let them use our Supercharger stations. They would just need to pay the share of the cost proportionate to their vehicle usage. And they would need to be able to accept our charge rate or at least – and our connector, at least have an adaptor to our connector. So this is something we're very open to, but so far none of the other car makers have wanted to do this.<sup>26</sup>

Tesla respectfully urges the Commission to refrain from discriminating against Tesla and undermining New York's ability to achieve its ZEV and GHG reduction targets, by reversing the Order and remanding it. The grounds for rehearing are the errors of law and fact described below.

## **Argument**

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<sup>23</sup> The Order was factually incorrect that Tesla customers can use CHAdeMO or CCS, discussed *infra*.

<sup>24</sup> Order, p. 38. *See also* Order, p. 30 (noting the Consensus Parties' calculation that more than 1m500 DCFC plugs are likely needed to support the charging needs of the State's target of 800,000 ZEVs by 2025).

<sup>25</sup> Data specifying vehicle models is available in AFDC data (which database was cited by the Joint Petition, p. 9, n. 39, and Tesla's comments on the Joint Petition, p. 2), specifically, at <https://afdc.energy.gov/data/10567>. *Also See* InsideEV's Monthly Plug In Sales Scorecard, available from <https://insideevs.com/monthly-plug-in-sales-scorecard/>. There are thirteen EV models available for purchase today that are capable of DC fast charging, including the Tesla Model 3, Tesla Model S, Tesla Model X, Chevrolet Bolt, Nissan Bolt, Mitsubishi Outlander PHEV, Volkswagen e-Golf, Ford Focus Electric, Hyundai Ioniq, Honda Clarity BEV, Kia Soul EV, Jaguar I-Pace, and BMW i3.

<sup>26</sup> 2018 Q1 Tesla, Inc. Earnings Call. Available from <https://edge.media-server.com/m6/p/nwvzygovo>, beginning at 50 minutes.

New York Public Service Law § 22 allows the Commission to grant and hold a rehearing “if in its judgment sufficient reasons therefore be made to appear.” 16 NYCRR § 3.7(b) states: “Rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. A petition for rehearing shall separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.”

### **Errors of Law**

The Commission cites Public Service Law §§ 5, 65 and 66 as the basis of its authority to adopt and/or modify the Consensus Proposal.<sup>27</sup> The standard a court would use to review a Commission’s decision under any of the foregoing laws is essentially the same. *See, Multiple Intervenors v. Public Service Com.*, 166 A.D. 2d 140 (S.Ct. of N.Y. App. Div. 3<sup>rd</sup> 1991)<sup>28</sup> construing Section 5 (and holding that the appropriate test for review of the Commission’s demand side management orders and opinions was whether the determination was arbitrary and capricious and lacked a rational basis); *New York Tel. Co. v. PSC*, 95 N.Y.2d 40 (Ct. of App. 2000) construing Section 65 (and holding that the Commission’s determinations are entitled to deference and may not be set aside unless they are without rational basis or without reasonable support in the record); and *Black Radio Network, Inc. v. PSC*, 253 A.D.2d 22 (App. Div. 3d Dept. 1999) construing Section 66 (and holding that “as a general rule, courts should defer to the PSC on questions involving that agency’s special expertise . . . Nonetheless . . . , the courts may scrutinize the PSC’s determination to ensure that it is not . . . irrational and unreasonable.”). The standard is also the same where a court is reviewing an agency’s interpretation of a settlement

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<sup>27</sup> Order, p. 17.

<sup>28</sup> The Order cites to this case as illustrative of its Authority. Order, p. 17.

agreement to determine whether the agency had a rational basis to support its decision). *United Water N.Y., Inc. v. PSC*, 252 A.D. 2d 810 (App. Div. 3<sup>rd</sup> Dept. 1998).

The Order’s novel re-definition of “publicly available” was unlawful, as it fails both the rational basis and reasonable record support tests. The re-definition is also unlawful, as it results in a rate that is discriminatory, contrary to Public Service Law § 65.2 and § 65.3. A discriminatory and disparate impact adds to the lack of a rational basis in the record, particularly where an agency has utterly failed to substantiate its conclusion that it has a basis for doing so). *See New York State Ass’n of Counties, supra*, 78 N.Y. 2d at 166.

### **1. The Commission Erred in Re-Defining a Term Critical to the Consensus Proposal Without Record Support**

As indicated above, the Commission was well aware that both the Consensus Proposal and the Joint Petition that preceded it, exclusively defined “publicly accessible stations” as meaning stations that are physically accessible.<sup>29</sup>

The Commission was clearly bound to notify the public if it was intending to re-define “public availability” and thus the eligibility of customers.<sup>30</sup> This is especially the case, given that the Commission is already on record as having defined the term as meaning “physically accessible.” In Case 13-E-0199, *In the Matter of Electric Vehicle Policies*, where the Commission was inquiring whether it had jurisdiction over “publicly available Charging Stations,” the Commission highlighted only the importance of public accessibility to increasing

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<sup>29</sup> *See supra*, n. 2, and surrounding text. *See also* Joint Petition, p. 9, stating:

In fact, a recent review of reports on EV incentive effectiveness has as its first recommendation: install more charging stations, including DCFC stations in metro areas and along major travel corridors, which “are likely to have an outsized effect on [EV] adoption in the next few years.”

<sup>30</sup> *See, e.g., Matter of Alvarado v. State of N.Y., Dept. of State, Div. of State Athletic Commn.*, 110 AD2d 583, 488 NYS2d 177 [1<sup>st</sup> Dept 1985].



customer acceptance and use of EVs.<sup>31</sup> The Commission’s decision to exclude Tesla’s technology and charging stations as currently developed was a “bolt from the blue” and is unlawful.<sup>32</sup>

If the Commission wished to investigate whether departing from its prior decisions was warranted, it should have alerted the public and stakeholders in the Notice Soliciting Comments on the Consensus Proposal, in any of the two requests for comment on specified topics, or it could have issued a new notice soliciting comments about technology eligibility.

## **2. The Commission Erred in Re-Defining a Term Critical to the Consensus Proposal without a Rational Basis in the Record**

The public is entitled to assume the Commission will behave consistently.<sup>33</sup> As no would-be commenter had any reason to believe they needed to put on a case regarding “technological availability,” it is not surprising that very few parties did comment on the topic, and where they did, their comment was sparse. Nevertheless, in the few instances where statements were made – for example, by both the Joint Petitioners and the Consensus Proposal Sponsors – the authors were clear that they were agnostic as to technological differences, given the far more pressing need to enlist the resources of all would-be investors in charging stations so as to achieve the State’s ZEV and GHG reduction targets. Thus, the Joint Petitioners stated:

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<sup>31</sup> See May 22, 2013 Notice of New Proceeding and Seeking Comments, Case 13-E-0199, p. 2, where the Commission stated:

The availability of Charging Stations is vitally important to increased customer acceptance and use of PEVs, Public Charging Stations may be installed in garages, parking lots, or next to parking spaces along public streets. The availability of public Charging Stations at numerous locations will allow customers to charge vehicles while parked overnight (e.g., at or near residences and hotels), at work, conducting errands, or at shopping, eating and entertainment venues (e.g., at or near shopping malls, arenas and stadia, or in commercial entertainment districts).

<sup>32</sup> *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (1999) (finding FERC’s method for reaching a decision as lacking adequate support in the record since it was made without having forewarned the parties of the factual material on which it would rely, and providing an opportunity for rebuttal).

<sup>33</sup> See e.g., *Proceeding on Motion of the Commission to Enable Community Choice Aggregation Program; Proceeding on Motion of the Commission as to the Policies, Requirements and Conditions for Implementing a Community . . .* 2018 N.Y. PUC LEXIS 131, CASE 14-M-02241 Case 15-E-0082 (March 16, 2018).

Presently in New York State, there are only 78 DCFC plugs at 44 stations that are publicly available to all EV drivers. There are an additional 120 DCFC plugs that are available exclusively for Tesla EVs. However, New York will need approximately 1,500 total DCFC plugs to adequately support the amount of projected BEVs likely operating under the ZEV mandate regulations in 2025.<sup>34</sup>

The Consensus Proposal Sponsors stated likewise.<sup>35</sup> While the statement notes there are different plugs, it does not say whether the 1500 plugs needed are specifically for non-Teslas, it is reasonable to conclude that more Tesla plugs are needed for NY to meet its ZEV mandate regulation by 2025. In fact, The U.S. Department of Energy (“DOE”) tool used to develop the 1500 DCFC estimate does not specify connector types.<sup>36</sup> Moreover, the DOE’s EV charging database includes Tesla Superchargers as “Public Stations.”<sup>37</sup>

Given these statements by the Consensus Proposal’s Sponsor, the Order’s “bolt from the blue” is even more troubling. The Commission clearly found that “[i]n order to meet the State’s ZEV and GHG reduction targets, the Commission [must] leverage[e] and accelerat[e] private investment while prudently investing ratepayer funds.”<sup>38</sup> However, the Order will have the opposite effect and will undercut the State’s efforts “to meet the State’s ZEV and GHG reduction targets.” More to the point, the Order fails to explain whether the program is in fact a “prudent invest[ment of] ratepayer funds,” given that it would now be excluding the one manufacturer whose EVs comprised 80% of the DC fast charging capable vehicle sales in 2018, and the program would be incentivizing charging stations that cannot be utilized by the overwhelming majority of EVs on the road today, and/or that are likely to be on the road in the foreseeable future.

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<sup>34</sup> See Joint Petition Preliminary Statement, p. 9.

<sup>35</sup> See Consensus Proposal, p. 3 and n. 11.

<sup>36</sup> U.S. Department of Energy. EVI-Pro Lite Tool. Available from <https://afdc.energy.gov/evi-pro-lite> NY infrastructure requirement estimate based on 800,000 electric vehicles.

<sup>37</sup> U.S. Department of Energy. Electric Vehicle Charging Station Locations. Available from [https://afdc.energy.gov/fuels/electricity\\_locations.html#/find/nearest?fuel=ELEC](https://afdc.energy.gov/fuels/electricity_locations.html#/find/nearest?fuel=ELEC)

<sup>38</sup> Order, p. 38.

### 3. The Commission Erred in Approving a Discriminatory Rate

For the Commission to have changed a definition that was critical to the Proposal, discriminated against Tesla, and potentially thwarted its own mission, it was required to provide a reasoned basis for doing so. *See New York State Ass'n of Counties*, 78 N.Y. 2d at 166 (a discriminatory and disparate impact adds to the lack of a rational basis in the record, particularly where an agency has failed to substantiate its conclusion that it has a basis for doing so).

The Commission's Order also creates a discriminatory program that violates Public Service Law § 65.2 and § 65.3. Section 65.2 of Public Service Law states that "No...electric corporation...shall directly or indirectly, **by any special rate, rebate, drawback or other device or method**, charge, demand, collect or receive from any person or corporation a greater or less compensation for... electricity...**than it charges, demands, collects or receives from any other person or corporations for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.**"

[emphasis added]. Tesla provides its charging services to members of the public under the same circumstances and conditions as other charging operators that are eligible for the program. Yet given the special incentive method, Tesla will be paying significantly more for electricity than other network operators.

For example, an eight charger Tesla station in Rochester Gas and Electric's territory that has a peak demand of 300 kW and consumes 20,000 kWh per month will pay nearly *3.5 times more* than a non-Tesla station of the same size and usage profile. The program as modified and approved by the Commission is in direct violation of § 65.2, as well as § 65.3 which states "No... electric corporation... shall make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality, or to any particular description of service in

any respect whatsoever, **or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.**” [emphasis added]. The Commission’s Order will subject Tesla to electricity costs more than double that of other providers of DCFC services, or require Tesla to deploy equipment for non-Tesla EVs at significant costs in order to qualify for the program, which is undue and unreasonable prejudice that puts Tesla at a disadvantage to other charging operators.

#### **4. The Commission’s Failure to Meet its own Principles Underscores its Lack of Basis**

The genesis of this proceeding was a request to provide rate relief to DCFC operators. In its Order and in reference to Ratemaking Principles, the Commission states that “by incentivizing DCFC stations through a transparent annual incentive instead of through a demand charge exemption as proposed by some commenters, the Commission is being consistent with past approaches to rate design.”<sup>39</sup> The Commission’s decision, however, violates *five* of the ten rate principles adopted in the Reforming the Energy Vision by discriminating against a particular technology, in this case Tesla’s charging stations, and promoting an outcome that is inconsistent with New York’s policy goals.<sup>40</sup> The five rate design principles include (with emphasis added):

1. Encourage outcomes: Rates should encourage desired market and policy outcomes including energy efficiency and peak load reduction, improved grid resilience and flexibility, and reduced environmental impacts **in a technology neutral manner.**
2. Policy transparency: Incentives should be explicit and transparent, and **should support state policy goals.**

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<sup>39</sup> See Order, p. 37

<sup>40</sup> See Case 14-M-0101 “Order Adopting a Ratemaking and Utility Revenue Model Policy Framework”. Appendix A May 19, 2016. .

3. Decision-making: Rates should encourage **economically efficient and market-enabled decision-making, for both operations and new investments, in a technology neutral manner.**
4. Customer-orientation: The customer experience should be practical, understandable, and **promote customer choice.**
5. Economic sustainability: Rate design should reflect a long-term approach to price signals and the ability to **build markets independent of any particular technology or investment cycle.**

The Order fails to meet the Commission’s REV principles. For example, the Order is distinctly **not** technologically neutral, given that it qualifies eligibility on use of a particular charging technology. The Order also fails to explicitly or transparently explain the math – how is it that disqualifying Tesla will support the goal of reducing range anxiety. The Order **contravenes** market-enabled decision-making and customer choice, given its disqualification of the one OEM that is serving the bulk of EV drivers on the roads today.

Having utterly failed to explain how the decision will further the Commission’s REV principles, the Order’s re-definition of “publicly available” lacks a rational basis.

#### **5. The Commission’s Factual Error Heightens the Discriminatory Nature of its Decision and Constitutes Further Evidence of its Lack of Rational Basis**

The Commission’s sole effort to justify its exclusion of Tesla and Tesla customers rests on its assumption that Tesla EVs drivers will be able to avail themselves of non-Tesla plugs.<sup>41</sup> Presumably, the Commission believes that if Tesla EV drivers can charge at non-

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<sup>41</sup> See Order, p. 45 (“ . . . some Tesla vehicles can connect to CHAdeMO DCFC plugs with an adaptor.”)

Tesla plugs, they too can benefit from reduced range anxiety, regardless of who installed the plug.

The Commission errs. The Tesla Model 3, the best-selling EV in 2018 that comprised approximately 60% of all DC fast charging capable vehicle sales, cannot currently utilize the CHAdeMO adapter. The Tesla-CHAdeMO adapter is currently only available for Model S and Model X vehicles. The adapter costs \$450 for customers to purchase, and a small percentage of Tesla customers have elected to purchase the adapter.

The Commission states in its Order that Tesla will become eligible for the per plug incentive when chargers are “coupled with plug types that enables use by EVs with Asian and European charging systems,” but footnote 29 adds it is not prescribing *which* charging technology Tesla should deploy (i.e., CHAdeMO versus SAE CCS).<sup>42</sup> However, the Commission is prescribing that Tesla deploy *another* technology other than its own. Doing so imposes an unreasonable burden on Tesla. To qualify, Tesla would be required to either create an entirely new business segment at a significant cost that can service, manage and bill drivers of other OEMs, or would require Tesla to find willing partners to co-develop sites.<sup>43</sup> While Tesla has worked with other network operators to co-locate stations, opportunities are likely limited for this program. Some operators are interested in locating chargers at *existing* Tesla stations. In those circumstances, the other operators’ chargers would be eligible for the incentive because they are new stations, but Tesla’s chargers would be ineligible because they are *existing* stations. Moreover, not all charging operators have the same market needs at a given time. For example, one operator may already have a

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<sup>42</sup> See Order at p. 44.

<sup>43</sup> It is important to note that Tesla does not sign exclusive arrangements with site hosts that would bar other network operators from deploying stations at the same location.

market or area sufficiently covered and not have resources, interest or a sufficient customer demand to develop additional stations.

Furthermore, the Commission imposing a requirement for a charging provider to change their business model and to deploy specific technologies is inconsistent with the Commission's Declaratory Ruling in 13-E-0199 which declared "The Public Service Law does not provide the Commission with jurisdiction over (1) publicly available electric vehicle charging stations; (2) the owners or operators of such charging stations, so long as the owners or operators do not otherwise fall within the Public Service Law's definition of 'electric corporation;'. . . ."<sup>44</sup>

If Tesla is dissuaded from investing in charging stations to serve its customers, fewer EVs might be purchased in New York, putting New York's ZEV goals further out of reach. Thus, the policy outcome of the Commission's decision is counter-productive. Such error in fact warrants reversal and remand.

### **Conclusion**

For the reasons set forth herein, the Order should be reversed and remanded.



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<sup>44</sup> Declaratory Ruling on Jurisdiction Over Publicly Available Electric Vehicle Charging Stations. Case 13-E-0199. Issued November 22, 2013.

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