

Legal Analysis of Austin Energy's Plug-in EVerywhere Program

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I. Background

Austin, through the efforts of Austin Energy and with federal funds from the American Recovery and Reinvestment Act of 2009, is one of the leading cities when it comes to programs and incentives for the installation of electronic vehicle (EV) charging stations. For those just getting on the EV bandwagon, the different types of charging stations can be classified into three categories.

First, there is the traditional 120 volt AC wall outlet, which almost every home in America possesses. Second, there is the system known as a Level 2 charging station, which operates at 240 volt AC. Third, there is the 500 volt DC high-current charging station (also known as the DC Fast Charge). The programs and incentives offered by Austin Energy deal primarily with Level 2 charging stations. As a general point of reference, a Level 2 charging station will charge a fully depleted battery on a Nissan Leaf in about 6 to 8 hours and a fully depleted battery on a Chevrolet Volt (which has a smaller battery) in about four hours.

Austin Energy essentially offers two different programs as of the writing of this paper. The first is the pilot program called Plug-In Partners dealing with the installation of Level 2 charging stations in residential homes. The second is a program called Plug-In EVerywhere which deals with the installation of Level 2 charging stations in the parking lots of local businesses, non-profits and governmental entities.

The legal issues discussed in this paper are limited to the Plug-in EVerywhere program since the Plug-In Partners program is still in the pilot stages and the parameters of said program are still being defined by Austin Energy. Because there are incentives being offered, however, I have provided a brief summary of the program below.

A. Plug-in Partners

Plug-In Partners is a rebate program for current Austin Energy customers who own an EV. The customer receives a rebate of 50% of the cost of the purchase and installation of a Level 2 charging station with a maximum rebate of \$1,500. Combined with the incentives offered by participating vehicle manufacturers and dealerships, the Plug-In Partners program enables customers to acquire and install a Level 2 charging station almost for free.

In order for the customer to qualify for the rebate, the customer must own a qualifying vehicle and must use an approved contractor to install the charging station. Austin Energy reserves the right to test and conduct research on the station. At any time during the program (three years), Austin Energy may replace the charging station with an Austin Energy-owned charging station. The reason for this ability to replace charging stations is that, from the perspective of Austin Energy, many of the Level 2 charging stations being provided by manufacturers are deemed "dumb" stations. To conduct its research, Austin Energy needs "smart" stations-those that can receive and deliver data.

B. Plug-In EVerywhere

Plug-In EVerywhere, also known as the Station Host Program, will be the primary focus of this article. Under the program Austin Energy offers free Level 2 charging stations to Station Hosts who are willing to pay the installation costs, agree to a three-year commitment to the program and sign Austin Energy's Station Host Agreement. A rebate of \$2,500 for installation costs previously was being offered but the deadline for rebate applications was May 20, 2011.

The program itself is part of the ChargePoint America program sponsored by Coulomb Technologies and made possible by the American Reinvestment Act. Under this program Coulomb Technologies is providing nearly 5,000 fully networked Level 2 (220v) charging stations ("Charging Station(s)") to participating regions in the United States. To learn more about the two programs, visit www.chargepointamerica.com and www.austinenergy.com.

II. THE AGREEMENT

Below is highlights and analysis of the Station Host Agreement.

A. Installation

The Station Host is solely responsible for the cost of installing the charging station while the City essentially retains ownership of said Charging Station (technically the U.S. Government owns the stations until December 31, 2013, at which time ownership reverts to the City.) The Station Host must install the Charging Station and have the Charging Station functioning within 10 days of delivery. The Station Host also must use an authorized contractor.

B. Access to the Public

The Charging Station must be placed in a location that is available for access by the general public on the same terms as all other parking spaces located with the same lot.

In addition, the Station Host should ensure to work with the City and Austin Energy to make sure it remains ADA compliant. Although there are no State or Federal ADA regulations relating to EV Stations the City of Austin has enacted its own rules.

C. Billing

The Agreement and Texas law prevent a Station Host from charging customers for use of charging stations on their property or charging a fee to use the station.¹ This means Austin Energy will be the sole entity that is allowed to charge customers for use of the Charging Stations.

Austin Energy, however, will reimburse the Station Host if the electricity to the charging station flows through the Station Host's meter. This will be done via a credit to the Station Host's electricity bill once every six months.

For reasons stated above, customers using the charging stations will pay Austin Energy for the electricity. Currently, Austin Energy offers charge cards for \$25 which provides them with unlimited charging at the Stations for six months.

D. Maintenance and Repair

Austin Energy will repair a damaged or faulty Charging Station up until December 31, 2013. After this date, if a Charging Station is materially damaged or destroyed, the cost of repair is borne by the Station Host. Additionally, if Austin Energy denies in writing a request by a Station Host to repair a Charging Station after the December 31,

¹ *A person or retail electric utility may not provide, furnish, or make available electric service at retail within the certificated service area of a municipally owned utility that has not adopted customer choice.* Texas Utilities Code §39.105. See also Austin City Code §15-9-121.

2013, deadline, the Agreement automatically terminates.

The December 31, 2013, deadline is linked to the warranty provided by Coulomb Technologies under the ChargePoint America program. Therefore, a Station Host cannot look to the manufacturer for additional maintenance support after the 2013 deadline. As Austin Energy will own the Charging Station after this deadline it will be completely in their ballpark on whether or not to repair a damaged or faulty Charging Station

E. Access by Austin Energy

Access to the Charging Station by Austin Energy is mandatory from the hours of 7:00 A.M. to 7:00 P.M. In case of emergency, Austin Energy reserves under the Agreement 24 Hour access to the Charging Station.

F. Signage

The Charging Stations will be pre-labeled by Austin Energy and Coulomb Technologies. The Station Host is prohibited from tampering with any of the labeling on the Charging Station. In addition, the Station Host is required to install signage provided by Austin Energy to identify the Charging Stations and the parking space as electric vehicle parking. (The signs may include the logo of Austin Energy.) The Station Host bears the cost of installation of these signs under the Agreement.

The Station Host may install additional lit or unlit signs to promote the Charging Stations so long as the signs do not violate any city ordinance and the Station Host acquires written permission from Austin Energy. From my communications with Austin Energy they have been working proactively to help Station Hosts acquire additional signage for marketing purposes including helping Station Hosts navigate the City's zoning laws.

G. Liability

The Agreement is silent as far as liability for injuries or property damage suffered by Customers. In addition, there is no indemnification clause because it is a municipal contract.

Further, the Agreement limits the liability of the parties excluding special or consequential damages including such things as business interruption, loss of profits, or expenses incurred from the malfunction of or inability to use the Charging Stations.

Station Hosts should inquire with their legal counsel and policy provider as to whether their current insurance policy would cover injuries or property damage sustained by Customers when using the Charging Station. Since the City would more than likely be protected from such claims through governmental immunity the Station Host can expect that if a law suit is filed the Station Host will be named as a responsible party even though it does not own the Charging Station itself.

H. Assignability

The Agreement is not assignable unless written consent is acquired. When selling the real property a Station Host should be careful to notify the potential purchaser of the existing Agreement with Austin Energy and its terms. If written approval for an assignment can be obtained from Austin Energy the Station Host will want to include assumption and assignment language in its Contract for Sale and have legal counsel draft any other required documents.

I. Improvements to the Property

If a Station Host is considering major improvements to the Property including the parking lot it must consider any implications this will have under the Agreement.

For example, under the Agreement, a Charging Station may not be removed for longer than 15 business days with written permission from Austin Energy.²

Additionally, if improvements are needed and the Station needs to be removed temporarily, the Station Host will bear the entire cost of removing and re-installing.

IV. Conclusion

Ideally a Station Host would desire to charge its customers for the use of the Charging Station since they are bearing the cost of installation. This is not an available option in Austin as Austin Energy must take necessary steps so as not to open the market to competition.

The Agreement itself though is pretty straightforward and equitable to both parties involved. Legal counsel for Austin Energy did a good job of balancing interests ensuring the Charging Stations do not cause interference to the Station Hosts business while leaving access to Austin Energy open for such things as research and development and market analysis. Additionally, by avoiding a lease or license situation the drafters were able to mitigate the risk of all parties involved.

Overall the program is a good one. The installations will bring more jobs to Austin and lead to economic development within the City. The Station Host will be able to brand themselves as green leaders and the City can do its necessary early research so that when the EV market expands the City will be well prepared.

* I would like to thank Rachel May and Stuart Reilly of Austin Energy, for their time and assistance in answering all of my questions.

² Section 6(d).

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