STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: ELECTRIC VEHICLE CHARGING SERVICE RULE	DOCKET NO. RMU-2020-2020

ORDER ADOPTING NEW RULE

On October 14, 2020, the Utilities Board (Board) issued an order commencing rule making in which it proposed to rescind 199 Iowa Administrative Code (IAC) rule 20.20 regarding electric vehicle (EV) charging service and adopt the following new rule in its place:

199 – 20.20(476) Electric Vehicle Charging Service.

20.20(1) A commercial or public electric vehicle charging station is not a public utility under Iowa Code section 476.1 if the charging station receives all electric power from the electric utility in whose service area the charging station is located. If an electric vehicle charging station obtains electric power from a source other than the electric utility, the determination of whether the commercial or public electric vehicle charging station is a public utility shall be resolved by the board.

20.20(2) A person, partnership, business association, or corporation, foreign or domestic, furnishing electricity to a commercial or public electric vehicle charging station shall comply with Iowa Code section 476.25 and, if applicable, with the terms and conditions of the public utility's tariffs or service rules.

20.20(3) A rate-regulated public utility shall not, through its filed tariff, prohibit electric vehicle charging or restrict the method of sale of electric vehicle charging at a commercial or public electric vehicle charging station.

20.20(4) Electric utilities and entities providing commercial or public electric vehicle charging service shall comply with all applicable statutes and regulations governing the provision of electric vehicle charging service, including but not limited to all taxing requirements, and shall, if necessary, file all appropriate tariffs.

The Notice of Intended Action (NOIA) was published in the November 4, 2020 Iowa Administrative Bulletin (IAB) as ARC 5267C.

The published NOIA identified December 8, 2020, as the deadline for the submission of written comments, and the Board received comments from Iowa 80 Truckstop, Inc. (Iowa 80); the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice; ChargePoint, Inc. (ChargePoint); the Iowa Business for Clean Energy (IBCE); and the Sierra Club Iowa Chapter (Sierra Club). The Board also received a joint comment from the Environmental Law & Policy Center and the Iowa Environmental Council (collectively, the Environmental Commenters) and a joint comment from MidAmerican Energy Company, the Iowa Association of Municipal Utilities (IAMU), the Iowa Association of Electric Cooperatives, and Interstate Power and Light Company (collectively, the Joint Commenters).

On December 21, 2020, the Board held an oral presentation attended by each of the aforementioned entities. On December 30, 2020, the Board issued an order setting January 11, 2021, as the deadline for the submission of additional written comments. The Board received additional written comments from ChargePoint, Sierra Club, IAMU, OCA, the Linn Clean Energy District (LCED), the Environmental Commenters, the Joint Commenters, IBEC, and the Winneshiek Energy District (Winneshiek).

In this order, the Board is rescinding existing rule 20.20 and adopting a new rule 20.20, as shown in the attached Adopted and Filed, which is incorporated into this order by reference. The official rule 20.20 is the version published in the IAB and will become effective 35 days after publication in the IAB.

SUMMARY OF COMMENTS AND ADOPTED RULE

The Board considered all written and oral comments received during the rule-making process and addresses many of the comments received below.

A. General Overview

With respect to the overarching question of whether the Board should modify existing rule 20.20, the Board received comments that covered the spectrum of positions in favor or opposed to such action. On one end, ChargePoint, Sierra Club, and Winneshiek contend current rule 20.20 complies with existing law and constitutes a well-reasoned regulation that the Board should defend.[1] On the other end, the Joint Commenters state existing rule 20.20 suffers from numerous legal defects as found by a majority of administrative rules review committee (ARRC) members — defects that mirror those voiced by the Joint Commenters — and urge the Board adopt the NOIA version of rule 20.20 without modification.

To be clear, the Board adopted current rule 20.20 because the language is clear and concise, limited in scope, and set forth what the Board viewed as a sound policy that appropriately weighed and considered the myriad positions and interests. Current rule 20.20 clarifies that an EV charging station does not become a public utility solely by virtue of a commercial EV charging transaction with a vehicle, while leaving the legality or the consequences of the transaction between the electric energy generator and the EV charging station to be determined outside of the rule using existing adjudicatory and statutory law. To the Board's eye, the only defect or deficiency in existing rule 20.20 is

[1] ChargePoint contends that no party may seek judicial review of the Board's September 30, 2019 adoption of rule 20.20 because more than 30 days have expired. However, the 30-day judicial review deadline in Iowa Code § 17A.19(3) only applies to contested cases. The 30-day judicial review deadline does not apply to rule makings and, consequently, judicial review of rule 20.20 may be taken at any time.

the ARRC objection and, but for the ARRC objection, the Board would not likely have engaged in the present rule making. However, the ARRC objection is, in and of itself, an appropriate reason to engage in this rule making.

While the "legislature has delegated to the board broad authority to regulate utilities," *East Buchanan Telephone Co-op v. Iowa Utilities Bd.*, 738 N.W.2d 636, 641 (Iowa 2007), the Board's rule-making authority is subject to the provisions and procedures set in Iowa Code chapter 17A. *See* Iowa Code § 476.2(1) (the legislature granted the Board the authority to "establish all needful, just and reasonable rules, not inconsistent with law, to govern the exercise of its powers and duties" subject to the provisions of chapter 17A). The chapter 17A rule-making process includes a review by a bipartisan committee of Iowa legislators, which is required "to watch over administrative rules and to note those which are promulgated without authority or which are deemed arbitrary and capricious." *Barker v. Iowa Dep't of Trans.*, 431 N.W.2d 348, 349 (Iowa 1988).

As recognized by the Iowa Supreme Court, an ARRC objection "has serious consequences." *Id.* Chapter 17A requires ARRC to notify the affected agency of an objection to provide the agency the opportunity to correct the rule. *See Schmitt v. Iowa Dep't of Social Services*, 263 N.W.2d 739, 743-44 (Iowa 1978) (quoting Bonfield, Arthur E., *The Iowa Administrative Procedures Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731 (1975)). Therefore, while appreciating the view expressed by many commenters that current rule 20.20 is well-reasoned, the Board has determined that an EV rule should be adopted that does not contain the deficiencies identified by ARRC.

Several commenters also urge the Board to adopt a safe harbor provision to minimize situations in which an EV charging station would be required to seek a Board ruling to create regulatory certainty. The Environmental Commenters state, for example, that a safe harbor provision would allow for an automatic determination that "an entity is not a public utility and will not be subject to Board regulation." However, the version of rule 20.20 published in the NOIA and adopted herein already contains such a provision. Adopted subrule 20.20(1) clearly and unequivocally provides that an EV charging station is not a public utility if the charging station receives all electric power from the incumbent electric utility. To the extent regulatory certainty is requested in other factual scenarios, interested parties may present those issues to the Board for resolution.

Finally, many commenters suggest the adopted rule should advance a number of policy objectives. IBCE suggests the rule should "enable and encourage both electric vehicle charging as well as solar and other clean energy generation." LCED argues that there is "no need to evaluate whether each EV charging facility generating its own electricity is a public utility [and that there] is every reason to foster a free market, competitive environment for all EV charging stations regardless of the source of their electricity, subject only to safety, tariff and other regulations applicable for interconnection with the electric grid." However, the Board's rules "cannot go further than the law permits." *Kolbe v. State*, 625 N.W.2d 721, 727 (Iowa 2001). Consequently, while perhaps the policies identified by the participants are laudable, the Board's rule making must occur within the confines of the existing statutes, including the statutory definition of "public utility" in Iowa Code § 476.1(3) and the exclusive service territory provisions in § 476.25.

B. Subrule 20.20(1)

As published in the NOIA, proposed, and now adopted, subrule 20.20(1) provides:

> **20.20(1)** A commercial or public electric vehicle charging station is not a public utility under Iowa Code section 476.1 if the charging station receives all electric power from the electric utility in whose service area the charging station is located. If an electric vehicle charging station obtains electric power from a source other than the electric utility, the determination of whether the commercial or public electric vehicle charging station is a public utility shall be resolved by the board.

In its December 8, 2020 filed comment, OCA suggests the Board amend proposed subrule 20.20(1) by adding "incumbent" as a modifier to "electric utility" and by adding the following sentence at the end of the subrule: "A commercial or public electric vehicle charging station does not obtain power from a source other than the incumbent electric utility if the electric vehicle charging station is on a separate meter from any other source of power." While stating that it does not oppose OCA's proposed changes, IAMU contends the additional language is not necessary.

The Board will not adopt the changes offered by OCA. Concerning the suggestion to add "incumbent," the Board considers the term unnecessary because the NOIA language already provides that the "electric utility" is the utility "in whose service area the charging station is located." With respect to OCA's proposed additional sentence, under the rule as adopted, if a separate meter provides electric power to the charging station from a source other than the incumbent public utility, then the charging station may seek Board review of that particular configuration and arrangement. The Board is not adopting a rule that provides that a commercial EV charging station using electricity from a separate source and through a separate meter can never meet the statutory definition of a "public utility" — at least based solely on the record created in

this rule making. It is preferable to review and analyze such potential configurations and arrangements on a case-by-case basis, at least initially, before examining a broader exclusion similar to the one proposed by OCA.

ChargePoint suggests amending subrule 20.20(1) such that an EV charging station would not be considered a public utility if it receives all electricity from the incumbent electric utility "pursuant to a filed tariff." The Environmental Commenters and IBCE support ChargePoint's suggestion while the Joint Commenters request the Board reject the request as being both unnecessary and confusing. OCA expressed support for the proposed change while cautioning that the approach could shift much of the litigation to other dockets.

According to ChargePoint, under its proposed language, "[o]nly charging station owners and operators that obtain electricity outside of an approved utility tariff would be required to seek a determination from the Board as to whether they are acting as a public utility." However, not all incumbent Iowa electric utilities are required to file tariffs with the Board. Because the Board does not intend to exclude those electric utility customers from the scope of the rule, the Board will not adopt ChargePoint's proposed language.[2]

Finally, the Environmental Commenters suggest that the version of subrule 20.20(1) published under notice be replaced with the following:

> 20.20(1)(a) For purposes of this rule, customers with on-site generation and electric vehicle charging that is incidental to the customer's business-

[2] Separate from this rule making, the Board is engaged in two other rule makings, Docket Nos. RMU-2019-0020 and RMU-2020-0027, the results of which may mean that chapter 20 and, consequently, rule 20.20, only apply to public utilities that are required to file tariffs with the Board. However, as of the date of this order, those rule makings are not complete and no rule recognizing this potential change has been adopted.

> related requirements are not public utilities and do not need an individual determination by the Board.
>
> 20.20(1)(b) At a minimum, electric vehicle charging is incidental to the customer's business-related requirements in any of the following circumstances:
>
> (i) no individual charging station/unit has an input voltage of more than 240V; or
>
> (ii) the charging stations occupy no more than 25 percent of the available parking stalls including fueling station stalls at a commercial or governmental location; or
>
> (iii) the monthly kWh usage of the charging stations does not exceed 50 percent of the total customer kWh usage.

OCA and IBCE both support the proposed change, opining the language provides additional regulatory certainty.

Similar to the Board's concerns with OCA's proposed sentence discussed above, based on the information submitted in this rule making, the Board is not convinced that an entity providing commercial charging services that are "incidental" to that customer's business could never meet the statutory definition of a public utility or that the proposed paragraph 20.20(1)(b) examples of such incidental use are appropriate in every possible configuration and arrangement. The Board finds it will be preferable to review a claim of incidental use and potential examples of claims of incidental use on a case-by-case basis, at least initially, before considering whether to adopt language similar to that proposed by the Environmental Commenters.

C. Subrule 20.20(2)

As published in the NOIA, proposed, and now adopted, subrule 20.20(2) provides:

> **20.20(2)** A person, partnership, business association, or corporation, foreign or domestic, furnishing electricity to a commercial or public electric vehicle charging station shall comply with Iowa Code section 476.25 and, if applicable, with the terms and conditions of the public utility's tariffs or service rules.

LCED argues that "EV charging station regulations best serve the public interest when they unleash free market forces to drive down costs and increase choice, and are balanced with fair regulation of existing utilities." Therefore, LCED proposes the Board add language that would allow an EV charging station to use distributed generation that is either owned by the station or by a contractor and is installed on or near the station so long as it "exclusively serves the onsite needs of the EV charging station, its buildings and facilities."

The Board will not adopt the concepts proposed by LCED at this time for several reasons, not the least of which being that it is entirely unclear from the record what "onsite needs" means and whether that is intended to include EV charging services for compensation. Further, if "onsite needs" is intended to include commercial sales, the record created in this rule making is insufficient to demonstrate that a commercial EV charging station could never meet the definition of a public utility under every conceivable distributed generation configuration.

D. Subrule 20.20(3)

As published in the NOIA, proposed, and now adopted, subrule 20.20(3) provides:

> **20.20(3)** A rate-regulated public utility shall not, through its filed tariff, prohibit electric vehicle charging or restrict the method of sale of electric vehicle charging at a commercial or public electric vehicle charging station.

OCA states that EV charging presents the potential for unique conflicts of interest for public utilities. OCA contends that an electric utility may view an EV charging station not just as a customer, but also as a potential competitor. To address the potential conflict, OCA recommends the Board adopt language prohibiting rate-regulated electric utilities from unreasonably discriminating against EV charging customers.

Iowa law already prohibits discrimination in a public utility's rates, services, and regulations. *See* Iowa Code § 476.3(1) (providing that if the Board "finds a public utility's rates, charges, schedules, service, or regulations are unjust, unreasonable, discriminatory, or otherwise in violation of any law, the [Board] shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, service, or regulations to be observed and enforced"); § 476.5 (providing that no public utility may make "any unreasonable preferences or advantages as to rates or service"). Because Iowa law already addresses discrimination in rates and services, the Board will not adopt the language proposed by OCA at this time.

OCA predicts that the conflict of interest issue may become so serious that the Board may need to initiate an investigation into the utilities' own EV charging operations and the manner in which they treat competing EV charging facilities. If OCA's prediction comes to fruition, as part of any investigation, the Board may revisit this issue and OCA's proposed language.

E. Subrule 20.20(4)

As published in the NOIA, proposed, and now adopted, subrule 20.20(4) provides:

> **20.20(4)** Electric utilities and entities providing commercial or public electric vehicle charging service shall comply with all applicable statutes and regulations governing the provision of electric vehicle charging service, including but not limited to all taxing requirements, and shall, if necessary, file all appropriate tariffs

No parties objected to this language and the Board adopts subrule 20.20(4) as published in the NOIA.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Amended 199 Iowa Administrative Code rule 20.20, as shown in the attached "Adopted and Filed" notice, incorporated into this order by reference, is adopted by the Utilities Board.

2. The "Adopted and Filed" notice attached to this order shall be submitted to the Administrative Code Editor for review and publication in the Iowa Administrative Bulletin.

UTILITIES BOARD

Geri Huser Date: 2021.04.07 12:35:51 -05'00'

Richard Lozier Date: 2021.04.06 14:53:27 -05'00'

ATTEST:

Anna Hyatt Date: 2021.04.07 16:28:30 -05'00'

Joshua J Byrnes Date: 2021.04.06 14:54:45 -05'00'

Dated at Des Moines, Iowa, this 7th day of April, 2021.

UTILITIES DIVISION [199]

Adopted and Filed

The following amendment is adopted:

Item 1. Rescind rule 199—20.20 and adopt the following **new** rule in lieu thereof:

199—20.20(476) Electric vehicle charging service.

20.20(1) A commercial or public electric vehicle charging station is not a public utility under Iowa Code section 476.1 if the charging station receives all electric power from the electric utility in whose service area the charging station is located. If an electric vehicle charging station obtains electric power from a source other than the electric utility, the determination of whether the commercial or public electric vehicle charging station is a public utility shall be resolved by the board.

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20.20(3) A rate-regulated public utility shall not, through its filed tariff, prohibit electric vehicle charging or restrict the method of sale of electric vehicle charging at a commercial or public electric vehicle charging station.

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