

Regulatory Potholes Loom For Expanding Electric Fleet

By **Keith Goldberg**

Law360 (January 25, 2022, 9:50 AM EST) -- Plenty of recent groundwork has been laid for getting more electric vehicles on the road, but solid regulatory frameworks for EV infrastructure must still be erected in order to kick electrification efforts into high gear, policy experts say.

The bipartisan Infrastructure Investment and Jobs Act enacted last fall devotes billions of federal dollars to electric vehicle and charging infrastructure. Meanwhile, states including California, Illinois and New York have recently enacted legislation to fund and otherwise incentivize EV adoption and construction of charging infrastructure and are directing utility regulators to start crafting rules of the road.

But headwinds to widespread EV deployment remain, and experts say regulators must tackle thorny issues including how EV charging infrastructure is regulated and hooked up to the grid, and how electricity rates are designed to accommodate increased EV use, all while ensuring historically underserved communities aren't left behind.

"The utilities, regulators and charging providers are going to have to work in a streamlined and timely fashion if we are going to create a grid that benefits customers," said Garrett Fitzgerald, senior director for electrification at the Smart Electric Power Alliance, a clean power think tank.

Here, EV policy experts identify five regulatory issues that must be addressed in order to accelerate EV deployment in the U.S.

Who Gets Regulated, And By Whom?

Much of the EV policymaking action will occur at the state level, and crafting charging infrastructure policy will be crucial for state regulators, policy experts say.

How that plays out will vary. In states with vertically integrated utilities that have monopolies over their service territories, they will be the ones owning EV chargers. But in deregulated states, charging infrastructure is built and owned by EV charging companies that in many instances resell the electricity they draw from the grid to EV owners.

"The threshold issue is to what extent will a network charging station owner be regulated by state regulatory commissions if they sell energy to their customers," said Morgan Lewis & Bockius LLP energy regulatory partner Levi McAllister, who works extensively on EV issues. "If you're in a state where you're going to be regulated as a utility, or even as a 'utility-light,' it could raise some triggering obligations to

seek certain certifications and permits to build your stations and operate them."

It also raises the question of who is in the best position to own and operate charging stations in a way that ensures the electricity they provide is affordable and doesn't wind up deterring EV adoption, state utility regulators told Law360.

"I think that's going to be an evolving issue and I think more parties will weigh in on that," said Maria Bocanegra, a commissioner on the Illinois Commerce Commission. "Especially as [automakers] roll out new models that are electric."

There's also the question of who will be doing the regulating, as EV policy touches both the power and transportation sectors, and even implicates local land use and planning authorities.

"I don't think this is completely in the domain of energy regulators," said Tim Echols, vice chair of the Georgia Public Service Commission, who's an EV proponent.

Electricity Rate Design

Utility regulators, EV advocates and industry representatives agree that in order to encourage further EV use, electricity rates must be designed to account for the intermittent but peak levels of demand that vehicle charging creates at varying locations on the grid, while making clear to consumers how they're billed.

"There is no rhyme or reason for the charging rates," said Echols of the Georgia PSC. "I don't know how long consumers will stand for that."

If the utilities own the charging infrastructure, a key question is how much of those construction and operating costs can be rolled into their rate base and allow them to earn returns on that infrastructure through customer rates. For third-party owners of charging infrastructure, a key question is how they will be billed by utilities for the electricity they use, which will determine how much they charge EV users.

Experts say another thorny rate design question involves whether to craft rates on so-called demand charges, which are based on charging stations' average peak activity, or use time-of-use rates that go up and down based on electricity demand levels.

While these may be common challenges across states, the potential patchwork of solutions could hinder development of EV charging networks, experts say.

New York, for example, recently enacted legislation that requires utilities to create specific rates for EV charging, but that isn't necessarily the case in other states. Meanwhile, there are many utilities whose footprints encompass multiple states, or that have entered into agreements with neighboring utilities to collaborate on EV infrastructure development, which raises a host of jurisdictional questions for state regulators, said Bocanegra of the Illinois Commerce Commission.

"We're going to see those seams between states or utility service territories," said Bocanegra, who chairs an electricity vehicle working group at the National Association of Regulatory Utility Commissioners, the umbrella advocacy group for state utility regulators. "How do we make sure this isn't resulting in underutilized stations and stranded assets, and a situation where ratepayers are paying

for costs that are unfairly allocated to one jurisdiction?"

Charging Infrastructure Reliability and Interoperability

With billions of federal and state dollars being earmarked for building out EV charging infrastructure networks, experts say regulators must ensure those networks are being built in locations where they're needed, and that the electric grid can handle the intermittent, but increased, demand from EV charging.

"Uptime and reliability are a real issue for [vehicle] fleet owners," said Heidi Sickler, policy director for BP unit Amply Power, which provides charging management services for vehicle fleets. "If you are rewarding the deployment of EV charging assets that are going to be stranded, you are essentially throwing away all this money."

Reliable charging infrastructure also means infrastructure that allows any type of vehicle to plug in, experts say. For example, electric vehicle giant Tesla Inc. has built a worldwide network of fast-charging stations, but they currently can only be used by Tesla drivers.

"We need to make sure that at the very least, the [vehicle] manufacturers and charging companies are able to speak to each other in the same language," Fitzgerald of the Smart Electric Power Alliance said.

Holland & Knight LLP energy partner Steve Humes, who frequently works on EV issues, said several states are advancing policies that allow utilities to help build charging infrastructure and earn ratepayer returns as long as the infrastructure can be used by all EV models.

"We're moving in the direction where it's just like gas stations," Humes said. "You can't have a fleet of gas stations that are only going to power certain vehicles."

Environmental Justice and Equity

The Biden administration and many states have made environmental justice a key part of their clean energy plans. There's a lot of federal, state and private funds going into vehicle electrification, but experts say that without clear policy direction from regulators, money will continue to flow mainly to wealthier areas where there's more perceived EV demand and exacerbate the inequality for historically marginalized communities.

"We've left some of these communities behind and are creating charging deserts," Fitzgerald said. "Regulators are aware of this, and you'll see specific requirements that funding needs to go into communities that are designated as overburdened."

For example, Illinois' landmark Climate & Equitable Jobs Act enacted last year makes environmental justice and equity a priority, and transportation electrification directives include expanding public fast-charging stations in low-income communities and using settlement funds from the Volkswagen emissions-cheating scandal to expand EV infrastructure in environmental justice communities.

But Bocanegra of the Illinois Commerce Commission said the environmental justice benefits of EVs aren't just measured in dollars spent, and that it will be a challenge for state regulators to fully define them, whether it's something like improved air quality or less heavy-duty truck traffic in heavily polluted communities.

"It's going to be interesting to see how state regulators are able to not only address their state objectives, but also potentially have to adhere to federal metrics, if those metrics are tied to federal dollars," Bocanegra said.

But ensuring EV policies address environmental justice and equity concerns starts with ensuring marginalized communities participate in the regulatory process, experts say. That could include making sure they can afford to participate in formal rulemaking proceedings as well as beefing up communications and outreach programs touting the benefits of vehicle electrification.

After all, EV infrastructure projects are still major infrastructure projects. Such projects can be a hard sell to communities that have been sacrifice zones for heavy industry and otherwise underinvested in, said Andrea Marpillero-Colomina, a clean transportation advocate for environmental group GreenLatinos.

"The art of policymaking that isn't actually captured in policy is the trust-building," Marpillero-Colomina said. "The only way you can build trust is to implement policies where people see the impact in their neighborhoods."

Grid Interconnection

Expansion of EV and charging infrastructure rests on how easily it can connect to the grid, so interconnection policy must be a regulatory priority, experts say.

"If an entity wants to install 20 chargers in a particular service territory and has all of its other problems solved, all of that is for naught if it can't get the interconnection it needs," McAllister of Morgan Lewis said. "While there may be capacity today for some interconnections, there may not be without distribution grid upgrades."

Bocanegra of the Illinois Commerce Commission said the costs of power line extensions and other grid upgrades can discourage companies that want to install charging stations and ultimately delay EV fleet adoption, so it's imperative for regulators to ensure their interconnection rules can accommodate EV infrastructure and ensure upgrade costs are allocated fairly. She said existing interconnection rules for new renewable power projects are an obvious template, but acknowledged there are bottlenecks currently stymieing wind and solar developers in many states.

"Potentially, vehicle electrification and charging stations face similar challenges if we don't get ahead of it," Bocanegra said.

Fitzgerald of the Smart Electric Power Alliance said he's also concerned that regulators aren't considering the potential for vehicles, especially vehicle fleets, to put power back onto the grid while charging.

"That's something that will need to change, sooner rather than later," Fitzgerald said.

--Editing by Marygrace Anderson and Alyssa Miller.