January 28, 2022

Stephanie Pollack
Deputy Administrator
Federal Highway Administration
Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE
West Building Ground Floor
Room W12-140
Washington, DC 20590-0001

RE: EV Charging Program Guidance Comments

Dear Deputy Administrator Pollack:

We appreciate this opportunity to comment on the Federal Highway Administration's (FHWA's) development of guidance to implement the EV Charging Program (the Program). If implemented appropriately, the Program will be an important tool for encouraging the development of alternative transportation energy infrastructure including harnessing private sector expertise, resources, and investment in the future of fueling options for consumers. All of this is central to the future of the industry we represent.

The National Association of Convenience Stores (NACS) is an international trade association representing the convenience store industry with more than 1,500 retail and 1,600 supplier companies as members, the majority of whom are based in the United States. The industry includes over 2.3 million employees, generated $548.2 billion in sales in 2020, and are responsible for approximately 80 percent of the motor fuel sold in the United States. Over 116,000 convenience stores, located in every locality around the country, offer transportation fuels to urban, suburban, and rural consumers. In fact, the industry serves the equivalent of about half of the U.S. population every day. And, this is truly an industry of small businesses. Single store operators account for more than 60 percent of the stores in the industry.

The Convenience Industry is Changing to Meet Drivers' Needs

Today, electric vehicles (EVs) are a small proportion of the mix of vehicles across the country – about 2-3 percent of the total. While that number will grow, one of the impediments to that growth is the perception that there might not be enough EV chargers to meet the needs of consumers who drive EVs. This perception may lag behind the fact that chargers have been appearing in more communities, but consumers typically do not see and are not aware of the existence of many of these

chargers until they purchase an EV and install an application on their phones showing where chargers are located.

The best and only certain way to deal with this perception problem (often dubbed "range anxiety") is to have the convenience industry deploy chargers on a widespread basis. Our industry's locations are highly visible, located in the places where consumers desire and are used to refuel their vehicles already, and they typically have large signs that can be seen by drivers showing the fuels they offer and the prices they charge for them. Everyone interested in greater adoption of EVs should want as many of those fuel price signs as possible to list electricity along with its price. When that transparency becomes common, range anxiety will no longer exist – and it is hard to see another path to ending range anxiety.

With that in mind, the convenience industry is eager to be a central part of the greater electrification of transportation. The industry is already making these investments. In 2015, for example, a single store operator in our industry set the record for charging the most electric vehicles in a single day.[1] Charging infrastructure has steadily increased throughout the industry since then and appears to be taking off in larger numbers now. In June 2021, for example, 7-Eleven announced its intention to install 500 fast chargers by the end of 2022.[2] And, NACS and the Fuels Institute are working closely with the industry to help businesses identify and pursue charging opportunities. The Fuels Institute, in fact, has established an electric vehicle council and a resource library as part of these efforts.[3]

Decisions that the FHWA makes to implement the EV Charging Program will be central to the development of the charging market and will influence future programs. We urge you to design the Program with that in mind and to do everything possible to facilitate a robust, competitive private market for EV charging that creates incentives for the private sector to invest more money into charging infrastructure. That will be the best way to maximize the development of infrastructure, enhance the EV market overall, and create a positive consumer experience for EV drivers.

Barriers to Development of the EV Charging Market

To reduce the carbon footprint of the transportation sector, the Biden Administration has committed to adding 500,000 EV charging stations over the next decade. There are, however, hurdles to achieving that goal.

One hurdle is that the electricity market does not rely on the competitive economic model that forms the foundation for most other U.S. markets. It was based on providing electricity to immobile structures like homes, offices, factories and the

[1] See the Department of Energy story on this at: https://afdc.energy.gov/case/2207.
[2] The press release on this announcement can be found at: https://corp.7-eleven.com/corp-press-releases/06-01-2021-7-eleven-charges-forward-with-installation-of-500-electric-vehicle-ports-by-end-of-2022-providing-convenient-charging-options-that-drive-a-more-sustainable-future.
[3] See https://www.fuelsinstitute.org/Councils/Electric-Vehicle-Council.

like – not mobile units like cars and trucks. That is why the electricity model grants regulated monopolies to ensure that infrastructure does not need to be built more than once.

The practice then has been for utilities to spread the cost of investments in EV charging stations across all of their customers – in other words, they use their rate base to fund these investments. Where this occurs, utilities are able to compete with private sector groups without risking a single dollar of their own. This tilts the cost for EV charging infrastructure in favor of utilities such that the private market cannot compete, placing existing and new market participants at a competitive disadvantage which they cannot overcome. That the private market is reluctant to risk capital investing in EV charging infrastructure is entirely predictable when it knows it cannot make a return on that investment given these realities of the electricity markets.

As described above, many states allow utilities to charge all of their electricity customers, regardless of the type of vehicle they drive (or if they drive at all), for investments in EV charging stations via their customers' monthly electric utility bills. There is no public policy rationale for pursuing this approach with respect to refueling, as it will only decrease transparency and competition, increase costs, and stifle innovation.

The use of rate base or passing along the costs of a project to all ratepayers makes sense for projects that benefit the whole, such as generation plants, transmission grid, and interconnection systems. Funding necessary electricity infrastructure investments to carry the electricity to fixed locations through rate increases therefore makes sense and should be done for the increasing future demands our electricity grid will face.

EVs move from place to place rather than remaining in one spot. Policy should enable the motoring public to access every benefit that our competitive market system has to offer. If that customer interface is funded through consumer utility bills, consumers will collectively pay far more than they should for the chargers and electricity to fuel EVs.

That cost burden will hit hardest on those least able to afford it. Individuals who struggle to pay their monthly bills should not be required to underwrite investments that the private sector is willing and better equipped to make. EV drivers – who today have above-average incomes and drive cars that cost much more than average – can and should pay the costs of charging their vehicles. As EVs become more common in less affluent communities, it will be especially important that drivers know that they will pay the smallest amount possible due to retail price competition.

Another hurdle to a competitive EV charging market is that some states classify businesses that sell electricity for the purpose of charging EVs as utilities, effectively prohibiting such sales from anyone other than utilities. Federal policy preempting these state regulations should be established, allowing non-utilities such as fuel retailers to resell electricity for refueling commercially.

In addition to the challenges fuel retailers face investing in EV charging infrastructure, there are challenges with the electricity market that must be addressed before a robust EV chargingmarketplace is viable. Utilities do not simply charge their commercial customers a fixed price forelectricity that is used. Instead, commercial consumers are charged a rate for the energy itself, billed as kilowatt-hours (kWh), and then an additional rate to provide reserve capacity when needed, known as a demand charge, billed as kilowatts (kW).

Demand charges are based on the largest amount of power that a business needs at a particular time during the entire month. They are there to compensate the utility for having enoughpower in reserve to meet spikes in demand. While this system may make sense for stationary electricity users, private businesses that have short, but high spikes in their power needs due to deployment of fast chargers for EVs will be hit hard by this pricing structure. Utilities' demand charges make it verychallenging for private companies to offer electricity to EV drivers at a price that is competitive with gasoline or diesel.

DC Fast Chargers require a large amount of power in a short time frame to recharge vehicles quickly. A DC Fast Charger pulls 150% more power than a typical store and fueling operation combined does at its peak moment in a month. Accordingly, when businesses offer EVcharging, these large demand costs restrict profitability and increase the cost for drivers of EVs to"refuel." DC Fast Chargers are capable of filling a vehicle up half-way in about 20 minutes and 80 percent of the way in about 35 minutes. For a customer, a charge can cost anywhere from $10 to $30 depending how much charge is required to refuel the battery. For a typical business, addinga single DC Fast Charger can increase its monthly bill by about $1,600. The demand portion of this bill is $1,500 and the energy portion of this bill is $100.

However, it is very difficult for businesses to have consumers fully pay the demand charge. Thebusiness would have to precisely know ahead of time how many people would use its chargers over the course of an entire month in order to do that. If it turned out to make the wrong assumptions, consumers could be dramatically undercharged or overcharged – leading to difficult consumer protection questions or business losses, respectively. No matter the incentive for charging infrastructure, the ongoing costs for electricity, particularly demand charges which cannot effectively be passed through to consumers today, make profitability near impossible to achievefor private businesses without changes.

Fuel retailers getting hit with demand charges also cannot compete with a utility that has substantially lower costs for energy and power. Utilities have excess capacity and much lower energy costs that allow them to offer EV charging with little impact to their bottom line. What's more, demand charges are compounded so a fuel retailer will be saddled with higher demand charges for every additional charger available to their customers. That will make it more difficultfor retailers to deploy DC Fast Chargers and give consumers the benefit of competitive pricing. The utility

demand pricing model could not be further from the current retail fuel model, where increased consumption and volume results in efficiencies and lower costs for consumers. Theutility model, then, will not work for EV charging on a large scale.

The challenges with electricity pricing as it exists today threaten to stunt the growth of theEV market. Modernizing the electricity market for electricity as a transportation fuel should be addressed at the federal level. For example, a new rate or pricing structure could be developed to ensure businesses offering EV charging only pay the costs that utilities pay for the electricity, without demand charges. Such a wholesalerate would allow businesses to offer charging, compete, and develop the competitive market for EV charging. Demand charges are the greatest barrier to entry to mass adoption of DC Fast chargers by private business, even greater than the large capital costs to install DC fast chargers.

Finally, federal policy should maintain the ban on commercialized Interstate rest areas, including disallowing EV charging within federal Interstate rights of way. This will ensure that off-highway businesses are not discouraged from investing in EV charging. Our industry has supported the ban on commercial activity and electric charging should be treated no differently from any other commercial service. If EV charging is opened up at Interstate rest areas, it will undercut private sector investments in that infrastructure at Interstate exits. That will mean fewer,not more, EV chargers. The bipartisan infrastructure bill that became law kept this ban in place and did not include an exception for EV chargers. Regulatory efforts to the contrary should be stopped.

FHWA Guidance

FHWA should administer the grant program, consistent with the language of the Infrastructure Investment and Jobs Act (IIJA), to help overcome current market impediments and incentivize private sector investment. The text of the IIJA, which created the Program, in fact, includes provisions that FHWA must take into account that would help overcome some of these impediments. Key provisions of the law on which FHWA requested comments in its notice, include the below provisions. Note that not every topic on which FHWA solicited comment is addressed:[4]

> *3. The proximity of existing off-highway travel centers, fuel retailers, and small businesses to EV charging infrastructure acquired or funded under the Program*

This is an important consideration and should be read along with the requirement that applicants provide information on proposed locations and include information on "the availability of onsite amenities for vehicle operators, such as restrooms or food facilities". Together, these provisions of the IIJA indicate that traditional fueling sites, or other commercial locations with similar amenities, should be the preferred locations

[4] For ease of reference, the numbering below reflects the numbering used by FHWA in its notice requesting comments.

for infrastructure funded by the Program. Drivers will not make sufficient use of charging at sites that do not have the amenities that they need, particularly when considering the times it will take to charge electric vehicles. That means restrooms, food, beverages, security, and similar hallmarks of the refueling experience that drivers have come to expect.

The "proximity" language indicates that it is not impossible that the location preferences for these amenities could be filled by chargers near a traditional fueling site. But, in most instances, the best way to fulfill the language of the IIJA would be for the fueling infrastructure funded by the Program to be located at traditional fueling sites. That would ensure that all the envisioned amenities remain available to drivers during the refueling process.

It is also worth noting that traditional fueling sites, at interstate exits and elsewhere, typically are found in clusters near other such sites. That is because these locations have been found to be the most convenient and/or visible locations for drivers to stop to refuel. The competition among such sites that are grouped in proximity provides tremendous benefits to vehicle drivers. It promotes vigorous competition among fueling locations not only on the prices of fuel, food, and other goods and services, but also on the quality of those goods and services. For example, sites that are known for higher quality coffee or sandwiches regularly draw more customers than other sites located nearby. And that, in turn, creates strong market incentives for the other sites to improve their offerings to customers.

Drivers of electric and vehicles powered by other energy sources want and deserve the benefits of similar market dynamics with vigorous competition on price and quality of goods and services used as a way to try to bring those customers to fueling locations.

4. The need for publicly available EV charging infrastructure in rural corridors and underserved or disadvantaged communities

While this is an important consideration, in our experience rural and other disadvantaged communities present many of the same market characteristics as other markets. It is worth noting that even among Americans who live in rural areas, 86 percent of them live within 10 minutes of a convenience store. While there may be some types of commercial offerings that are in shorter supply in rural areas, these markets are not underserved by our industry. In particular, fueling services are broadly available throughout the nation. Drivers of traditional gasoline- and diesel-powered vehicles do not have range anxiety. They know they can find fuel when they need it. Disadvantaged urban communities are also well-served by this industry. In all, 93 percent of Americans live within 10 minutes of a convenience store and do not suffer from range anxiety when driving their traditional vehicles.

The same can and should be true for people in rural and other disadvantaged communities that choose to drive vehicles fueled by alternative energy such as electricity. Those drivers would be well-served and would not have range anxiety if the

infrastructure for such alternatives closely followed traditional fueling infrastructure. That is why the Program should look to the existing refueling industry as a preferential set of locations for siting new infrastructure. Using these sites will ensure that the locations chose are ones that drivers frequent on a convenient basis without altering their driving patterns. The needs of people in all areas – including disadvantaged areas – will be met by following what is already grown up in response to consumer needs.

5. The long-term operation and maintenance of publicly available EV charging infrastructure to avoid stranded assets and protect the investment of public funds in that infrastructure

This aspect of the Program demonstrates a recognition that making federal investments to enhance the private market and competition among private sector participants must be a leading priority of Program structure. Private sector participants in a market have a strong financial incentive to invest in maintenance and avoid stranded assets. They have money at stake if they don't do that. The public sector does not have a market incentive to continue to make investments in, and improvements to, existing infrastructure. That is one reason why the out-of-service rates of early EV chargers were so high.

Paragraph 11401(f)((6) of the IIJA ensures that funds under the Program must be used in conjunction with a private entity. We read that provision as reinforcing the need to ensure the long-term operation and maintenance of new infrastructure and recognizing that that is an area in which the private sector brings advantages to the table that are not always present for public sector entities.

6. Existing private, national, State, local, Tribal, and territorial government EV charging infrastructure programs and incentives

The Program must take into account other programs and incentives available. These include state and local incentive programs as well as the funding that utilities may receive through rates enforced on all of their other customers. The Program should be a way to bring more infrastructure online that creates a vibrant competitive market with many retailers offering charging and other services. But, that can only happen if federal funds avoid compounding the advantages of other funding sources and instead focus on projects that rely principally or entirely on private market funds.

7. Fostering enhanced, coordinated, public-private or private investment in EV charging infrastructure

Section 11401(f) of the IIJA, which created the Program, includes requirement for applications seeking grants from the Program requiring that they show engagement with stakeholders "to foster enhanced, coordinated, public-private or private investment in electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, or natural gas fueling infrastructure". This private sector aspect of investment will only be accomplished when private sector participants in the market have a reasonable possibility of earning a return on their investments. This

means the issues relating to the current electricity pricing system and demand charge practices should be worked out through a collaborative process before the application is submitted.

This reading of the law is made clear in part by the language in section 11041 (f)(5) which delineates "considerations" for FHWA to take into account in selecting grant applications. In particular, the considerations include that applications should "support a long-term competitive market for electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, or natural gas fueling infrastructure that does not significantly impair existing electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, or natural gas fueling infrastructure providers". This provision relates directly to the potential for utility owned or operated electric vehicle charging stations to undercut other private providers of chargers in the market either through rate-based subsidies, demand charges imposed on those competitors, or both. These are examples of an unlevel playing field for market participants that will stunt the growth of charging. Grants should be used to create incentives to end those outdated practices or, at the least, try to provide some balance to match the economic advantages that some utilities have.

It is also important to note that the requirement in the "considerations" that grant funds "enable or accelerate the construction of charging or fueling infrastructure that would be unlikely to be completed without Federal assistance" disfavors funding any project for which a utility it is funded through the rate base. That is because such approved rates represent a promise by the utility to its regulator that such projects will be built. Any federal funds going to such projects funded by the utility rate-base, then, would undoubtedly be built regardless of whether federal funds are provided. Utilities that use such funding mechanisms, therefore, in most instances should not receive grants for any infrastructure paid for with ratepayer funds. If such utilities wanted to engage in additive projects that were not paid for with ratepayer funds, that would be a different matter and might be a better fit for the Program in light of this statutory "consideration."

8. Meeting current and anticipated market demands for EV charging infrastructure, including with regard to power levels and charging speed, and minimizing the time to charge current and anticipated vehicles

These are important considerations. Many charging locations around the country remain Level 2 chargers that take too long for vehicle drivers to use to charge on-the-go. Such chargers have a place as a part of an overall charging network, but they are not a substitute for the traditional refueling that vehicle drivers are used to having access to with traditional vehicles. The Program should use its resources to build fast chargers that increase driver convenience and minimize wait times for charging. That is needed – particularly when drivers travel on interstates – because drivers do not want to overly prolong travel times in order to recharge their vehicles.

9. *Any other factors, as determined by the Secretary*

One important factor to note involves the language in IIJA regarding payment methods. That language, which must be addressed in grant applications, says "payment methods to ensure secure, convenient, fair, and equal access." We urge FHWA to allow private sector businesses to determine the payment methods that they accept. These businesses are strongly incentivized to accept the types of payments that their customers want to use and make it easy for payments to be made. But, much of the payment ecosystem today is characterized by antitrust problems. The Department of Justice and the Federal Trade Commission both have active investigations of Visa open today.[5] There is also long-running litigation against Visa, Mastercard and the largest credit card issuing banks pending in the U.S. District Court for the Eastern District of New York in MDL-1720. These are just the tip of the iceberg of the antitrust problems that characterize credit cards in the Unites States today. The FHWA should not require or favor acceptance of any credit cards due to this widespread market failure and the likelihood of changes in the law due to the antitrust violations that characterize the market today. American consumers do not face inconvenience or problems paying for goods and services that they want to purchase today. FHWA should take care not to mandate any forms of payment because the risk is very high that such an action would bolster an antitrust problem that is currently being investigated. Any consideration by FHWA of payment methods should only come in close consultation with the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission.

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We appreciate the opportunity to provide comments on FHWA's implementation of the Program. The decisions made in this process will be consequential for the development of an alternative fueling infrastructure that serves American consumers. We look forward to continued opportunities to provide feedback on FHWA's efforts.

Sincerely,

Doug Kantor
NACS General Counsel

[5] See the Wall Street Journal story about the DOJ investigation here and the Digital Transactions story about the FTC investigation here.