

## **DOT Floats EV Charging Rule As Regulatory Gaps Linger**

By **Linda Chiem**

*Law360 (June 10, 2022, 9:50 PM EDT)* -- The Biden administration's efforts to standardize a nationwide electric vehicle charging network may run headlong into obstacles posed by different charging technologies and still-developing state and local regulations governing rates, project development and grid management.

The U.S. Department of Transportation proposed minimum standards on Thursday for installing, operating and maintaining electric vehicle, or EV, charging stations that receive federal funding from a new \$5 billion program created by the bipartisan Infrastructure Investment and Jobs Act, which became law in November.

The goal is to build the first-ever national network of 500,000 EV charging stations along America's highways — roughly five times the number of stations that are currently available nationwide — and bring uniformity to what so far has been a hodgepodge of charging options that are often proprietary and not easily accessible. The proposed minimum standards are a baseline for what could be the eventual rules of the road, encouraging state and local entities to start charting out what they will need to kickstart their EV infrastructure-building efforts.

"The administration wants a national network of chargers in the truest sense of the term, meaning they want chargers located in every state, equidistant from one another, and available to all," Morgan Lewis & Bockius LLP partner Levi McAllister, head of the firm's electric vehicles working group and energy commodity trading and compliance working group, told Law360. "[So] people can feel comfortable that if they have an electric vehicle, they can charge it at any charger, that they don't have to find a particular charger that has a certain speed or a certain connector."

### **User-Friendly and Accessible**

The DOT's Federal Highway Administration will gather comments over the next two months on the proposed minimum standards, which would apply to state and local projects seeking funding from the newly created \$5 billion National Electric Vehicle Formula Program.

Mona E. Dajani, global co-head of Pillsbury Winthrop Shaw Pittman LLP's energy and infrastructure projects team, said the proposal "finally moves EVs in the right direction" and would help encourage more widespread adoption of EVs in the U.S. She said the "proposed rule incorporates best practices in the EV space and provides job creation and energy security [and] independence."

Industry stakeholders excited about the prospects for expanding new EV infrastructure across the country will be watching closely to see how the federal government balances these new efforts with ongoing challenges such as high inflation, supply chain bottlenecks and overburdened electricity grids.

Under the proposed federal standards, the EV chargers would have to be built along FHWA-designated alternative fuel corridors, which are highway segments where drivers can plug in to recharge electric vehicles or refuel with hydrogen, propane and natural gas. They would have to be positioned every 50 miles along those corridors and no more than 1 mile off the highway. And they would have to be publicly available year-round, 24 hours a day, seven days a week, with minor exceptions for necessities such as maintenance.

In a significant move, the proposed rule seeks to establish "universal" fast-charging capabilities at those stations. Currently, EVs across North America can use the same standard plug for normal-speed charging, known as Level 1 or Level 2 charging, which can typically take hours. But when it comes to faster-speed charging known as Level 3 charging — through direct-current fast chargers, or DCFCs — the plugs can vary depending on the EV manufacturer. Tesla, for example, uses a proprietary plug for its Supercharger stations.

The DOT's proposed rule would require publicly available EV charging stations to have at least four DCFC ports that can simultaneously charge multiple EVs. And those ports should be compatible with Combined Charging System, or CCS, plugs or connectors that are the most common types being used by new EV makers today.

Byron Brown, senior counsel in Crowell & Moring LLP's government affairs and environment and natural resources groups, told Law360 that it's still unclear whether there will be a mix of proprietary and nonproprietary connectors at EV charging stations that receive federal funding under the new program.

"Do the proposed standards adequately address technological innovation?" he said. "I think there's been an assumption that the federal funding would not be used for proprietary charging stations. But the proposal seems to indicate that a proprietary charging station could be co-located at a charging station where the chargers are not proprietary."

"There's a lot of variables that states will still have to navigate through in order to comply with this, but it does give states a fair amount of flexibility," Brown said.

### **Transparent Pricing**

The proposed rule also seeks to give EV users more upfront pricing. The cost of charging an electric vehicle will vary depending on network rates in the region, the charging level or speed, and the time of day the car is being charged, among other factors.

To that end, federally funded EV chargers would be required to display and base the price of electrical charge by kilowatt hour, meaning the cost would be displayed as "\$/kWh." Some states restrict the ability to display charges based on kilowatt hour, so the DOT said it is open to considering whether prices should be displayed in another format, such as by the minute or by the mile.

"Two of the biggest concerns that potential EV owners have is the ability to find a charger when you need it and the ability to know what you're paying," McAllister of Morgan Lewis said. "Unlike when you and I pull our cars into the gas station and the price on every gas station is located right there on the

corner ... you don't have that transparency with EV chargers."

While state regulators and utilities determine the actual EV charging prices, the U.S. DOT wants to ensure that consumers are told what those rates are from the start and for them to know that the price won't change once they plug in for a particular charging session.

"It all comes down to: What are the rules that a state has in place as it relates to the sale of energy at retail?" McAllister said. "And then the utilities who are in that state that are providing energy for sale at retail: What rules do they have on file in their publicly available tariffs that have been approved by their state regulators?"

### **Buy America Requirements**

The DOT said that all EV charging stations funded through the National Electric Vehicle Infrastructure program are subject to Build America, Buy America Act requirements. Under the bipartisan infrastructure law, federally funded infrastructure projects are required to use American-made iron, steel, construction materials and manufactured products. But agencies can issue special waivers as needed.

Given ongoing domestic sourcing and manufacturing challenges, this is going to be an especially tricky area, experts said.

"For the charging stations themselves, I question whether there's sufficient U.S. capacity at the moment to actually manufacture all the charging stations that the law envisions being built," said Brown of Crowell & Moring. "Some of the early comments that I've seen questioned whether this is achievable or whether this is a fool's errand. That remains to be seen."

Brown said the FAQ document that the DOT issued Thursday alongside the proposed EV charging standards didn't address the Buy America issue other than to say it applies. So that's something the DOT is going to have to issue more guidance on before finalizing the standards, he said.

It's also unclear how helpful the proposed standards will be in courting private developers to join state, local and tribal governments in building the EV charging stations. Pillsbury's Dajani said that some pushback might come from stakeholders who say the government needs to offer more, like matching public fast-charging capabilities with private infrastructure incentives and tax credits, for example.

And there are also political headwinds to contend with.

"A lot of Republicans are against this because they allege it will ... skyrocket the cost for electricity in an aging grid that won't be able to handle the extra demand," Dajani said.

--Editing by Jill Coffey.