

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking on the Commission's own motion to consider alternate-fueled vehicle tariffs, infrastructure and policies to support California's greenhouse gas emissions reduction goals.

R.09-08-009
(Filed August 24, 2009)

**OPENING COMMENTS OF CLEAN ENERGY
FUELS CORPORATION**

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April 5, 2011

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Pursuant to Rule 14.3 of the California Public Utilities Commission's ("Commission's") Rules of Practice and Procedure, Clean Energy Fuels Corporation ("Clean Energy")¹ hereby submits these comments in response to Commissioner Michael R. Peevey's *Proposed Decision Establishing Policies to Overcome Barriers to Electric Vehicle Deployment and Complying With Public Utilities Code Section 740.2*, mailed on March 15, 2011 ("Proposed Decision").²

I. INTRODUCTION.

Clean Energy is pleased to have the opportunity to submit these comments on the Proposed Decision. These comments address the Proposed Decision's prohibition of utility ownership of electric vehicle service equipment ("EVSE") on the customer's side of the meter; its provisions which would allow the cross-subsidization of electric vehicle ("EV") customers; and the addition of D.95-11-035 to the list of Commission natural gas vehicle ("NGV") regulation and policy decisions that will not be revisited. It also clarifies Clean Energy's intent

¹ Clean Energy, a customer of PG&E, SoCalGas and SDG&E, is the largest provider of vehicular compressed natural gas and liquefied natural gas in North America, operating more than 220 natural gas refueling stations in seventeen states and two Canadian provinces. Clean Energy has substantial refueling operations in northern and southern California and has been a leading force in improving environmental quality in California by helping to reduce both criteria pollutants and greenhouse gas emissions associated with conventional motor vehicles in the state that operate using imported petroleum fuels. Clean Energy has a broad customer base in the refuse, transit, shuttle, taxi, police, intrastate and interstate trucking, airport and municipal fleet markets with tens of thousands of vehicles fueling at strategic locations in the United States, Canada and Peru. Its operations have also contributed to reducing California's excessive dependence on petroleum-based fuels in the State's transportation sector. Clean Energy is a publicly traded company with its shares traded on the NASDAQ under the ticker symbol "CLNE."

² Administrative Law Judge Regina DeAngelis granted a request that parties may file opening comments on or before April 5, 2011 by an email message to the Service List. Accordingly, these Opening Comments are timely filed.

in earlier comments filed in this proceeding which recommended that the Commission implement a new Alternate Fuel Vehicle (“AFV”) proceeding.

II. CLEAN ENERGY SUPPORTS THE PROPOSED DECISION’S DETERMINATION THAT CALIFORNIA’S JURISDICTIONAL ELECTRIC UTILITIES SHOULD BE PROHIBITED FROM OWNING ELECTRIC VEHICLE SERVICE EQUIPMENT ON THE CUSTOMER’S SIDE OF THE METER.

The Commission correctly concludes, at page 36 of the Proposed Decision, that jurisdictional electric utilities should be precluded from owning EVSE on the customer’s side of the utility meter. In arriving at this conclusion, the Proposed Decision cites to D.95-11-035 and notes that the customer’s side of the meter is outside the scope of the utilities’ monopoly transmission and distribution market. In adopting this prohibition, the Proposed Decision primarily relies on the adverse impact on developing competition which would result from permitting utilities to compete with non-utility enterprises in serving the EVSE needs of EV customers. The Proposed Decision also concludes that allowing electric utilities to own EVSE on the customer’s side of the meter would not create safety advantages or necessarily reduce EVSE costs for EV customers. Prohibiting utility ownership of EVSE on the customer’s side of the utility meter also preserves clarity about the customer-utility boundary.

The last sentence of Section 740.3(c) of the Public Utilities Code (P.U. Code), which is cited by the Proposed Decision at page 42, is relevant to consideration of this issue. This provision reads: “The commission’s policies shall also ensure that utilities do not unfairly compete with non-utility enterprises.” Clean Energy believes that the most practical and cost-effective way the Commission can ensure compliance with this statutory directive is to not allow utilities to compete with non-utility enterprises in serving developing EVSE markets on the customer’s side of the meter.

A number of parties to this proceeding, including Clean Energy, have recommended that the Commission adopt in this proceeding a policy framework for emerging EV markets that errs on the side of protecting and facilitating developing competition.³ Clean Energy agrees with the Proposed Decision’s conclusion that if electric utilities are able to serve the EVSE needs of EV owners on the customer’s side of the meter, developing competition in EVSE markets will be

³ Clean Energy’s Comments, filed November 6, 2009, at pages 3-4; and Clean Energy’s Opening Brief, filed February 8, 2010, at page 10.

harmful. If the electric utilities were able to compete with non-utility enterprises to serve such customer needs, Clean Energy believes that it would create a “barrier to entry” for some non-utility enterprises and would result in a reduced potential market share for others.

Non-utility enterprises considering serving the developing EVSE market would rightly be concerned about the terms and conditions of utility participation in the market, if the utilities were allowed to compete with non-utility enterprises in serving customer EVSE needs behind the primary utility meter. Non-utility enterprises potentially interested in serving the EV market that are familiar with the lessons of utility competition with non-utility firms in NGV refueling markets in California would justifiably be concerned that if electric utilities are permitted to compete with non-utility enterprises behind the meter they would engage in anti-competitive below-cost pricing.

The lessons from utility competition with non-utility enterprises in the NGV refueling market in California are instructive in this regard. D.95-11-035 in effect required California’s jurisdiction energy utilities to sell the alternative fuel vehicle (“AFV”) refueling facilities they owned which were located on customer property. The refueling facilities they were permitted to retain were those located on utility property which provided refueling services to utility fleet vehicles. Some of these utility refueling facilities also provided refueling service to third-party vehicles by way of public access, at some facilities competing with the facilities owned by private firms such as Clean Energy. Among other charges, third party refueling customers served at utility-owned stations are charged a refueling rate that is intended to recover the utility costs associated with compressing the gas to a pressure sufficient to refuel the vehicle’s compressed natural gas tanks.

Despite the requirement in D.95-11-035 that after January 1, 1997, the refueling rates for public access service at utility-owned NGV refueling facilities must recover the fully allocated costs of the service provided, this did not occur. (D.95-11-035, pages 107-108). As of January 1, 1997, none of California’s gas distribution utilities had complied with this Commission order. For most of the period since January 1, 1997, California’s gas distribution companies have had in place anti-competitive below-cost rates for providing refueling services at their public access facilities, rates which have been cross-subsidized by non-participating gas utility customers. PG&E, for example, still charges a below-cost refueling rate today. The revenue shortfall from these below-cost rates have been recovered through the utilities’ balancing accounts from non-

participating core customers. A number of Clean Energy's refueling facilities in California compete directly with utility-owned facilities. Below-cost utility refueling rates have resulted in a loss of profitability and market share by Clean Energy. Clean Energy has had to spend considerable time, effort and money in PG&E's regulatory proceedings attempting to ensure that its refueling rates recover the fully allocated cost of the service being provided as required by clear Commission policy.⁴

The lesson from the natural gas side of the AFV marketplace in California is that there is a significant risk that the electric utilities will charge below-cost rates when competing with non-utility enterprises if they are permitted to own EVSE on the customer's side of the meter. Below-cost pricing of utility services that compete with the services provided by non-utility enterprises is inherently anti-competitive and would impair the development of robust competitive markets for EV recharging services.

In discussing the issue of utility ownership of PEV single meters, submeters and electric vehicle service equipment the Proposed Decision, at page 33, again cites to D.95-11-035. It says the following:

“In 1995, the Commission relied on the criteria adopted in D.93-07-054 to deny requests by utilities for Commission approval of additional funding to support low emission vehicle equipment, including electric vehicle charging equipment. In denying the utilities' request for funding, the Commission found that because low emission vehicles do not constitute a monopoly market, utility participation in the low emission vehicle market should not be as a protected monopolist. The Commission also found no clear ratepayer benefit stemming from a utility's purchase of electric vehicle charging equipment, apart from the benefit gained by the electric vehicle owner. In short, the Commission found that shareholders should bear these costs and found that no reason existed for the utility to be the sole provider of the electric vehicle metering and recharging equipment (D.95-11-035 at 15-19). The Commission also prohibited regulated utilities from using ratepayer funds for charging infrastructure investments. (D.95-11-035 at 35.)”

In Clean Energy's view, the Proposed Decision's determination that electric utilities should be prohibited from owning EVSE on the customer's side of the meter merely reaffirms the Commission's existing policy adopted in D.95-11-035.

If the parent companies of California's electric utilities want to get into the business of supplying EVSE on the customer's side of the meter, they have the option of doing so through

⁴ Clean Energy's Reply Comments, filed November 6, 2009, at page 6.

unregulated subsidiaries that can pursue market opportunities on the same terms and conditions as are faced by non-utility enterprises, with any transactions with the regulated utility subject to the Commission's affiliate transaction rules.

III. THE COMMISSION'S PHASE 2 DECISION SHOULD NOT ALLOW CROSS SUBSIDIZATION OF EV CUSTOMERS BY NON-PARTICIPATING UTILITY CUSTOMERS.

In its Order Instituting Rulemaking in this proceeding, the question was asked: "How should the Commission ensure that any policies developed related to electric vehicles provide a level playing field for transportation fuels and technologies?"⁵

In its Opening Comments, the Division of Ratepayer Advocates said: "The level playing field can be achieved through adopting consistent policies applied to all alternative fuel vehicles." (page 19). In its Reply Comments, Clean Energy said: "Clean Energy...believes that the appropriate 'level playing field' can...be achieved by ensuring that the gas and electric utilities' rates for products and services provided to the AFV market are fully cost-based and are not cross-subsidized by non-participating customers." (page 9).

Clean Energy believes that an important objective of Commission policy should be to preserve a "level playing field" among competing AFV technologies. Since California's jurisdictional energy utilities include both gas and electric utilities, for the Commission this means preserving a "level playing field" between electric and natural gas vehicles. Clean Energy believes that the Commission can best accomplish this objective by ensuring that the rates charged for natural gas and electric vehicle refueling are fully cost-based and are not cross-subsidized by the broad base of mostly non-participating ratepayers; and that the costs of establishing service to AFV customers are recovered consistent with the utilities' Commission approved service establishment rules without permitting any new cross-subsidy of AFV service establishment costs by the broad base of predominantly non-participating utility customers. Unfortunately, the Proposed Decision departs from this important "no cross subsidies" principle in at least two areas.

For example, it appears that the utility costs of providing non-residential direct current quick charging services are perhaps significantly higher than the utility costs of providing 120 and 240 volt alternating current charging services. At page 22, the Proposed Decision states:

⁵ R.09-08-009, Question 37, at page 27.

“At this time we do not see a reason to treat non-residential electric vehicle charging differently from other types of non-residential electricity usage. We find that, at this early market stage, any additional cost placed on the system should be reflected in existing rates applicable to non-residential customers. Therefore, no need exists to develop rates specifically for customers with quick charge facilities.”

To eliminate the proposed ongoing cross-subsidy of quick charging customers apparently authorized by the Proposed Decision, Clean Energy believes that the electric utilities should be required to propose, in the 2013 rate design proceeding provided for in the Proposed Decision, new non-residential quick charging rates that will fully recover the utility costs incurred in providing non-residential quick charging services.

Secondly, with respect to the service establishment costs governed by Electric Tariff Rules 15 and 16, at page 50, the Proposed Decision concludes that:

“Between the effective date of this decision and June 30, 2013, all service facility upgrade costs in excess of the residential allowance should be treated as common facility costs rather than being paid for by the individual EV charging customers.”

Under the existing service establishment rules these excess costs would be recovered from the PEV customer that causes the cost to be incurred. In adopting a different approach, what the Proposed Decision authorizes is the cross subsidization of facility upgrade costs incurred to provide service to EV customers by the broad body of ratepayers consisting almost exclusively of non-participating customers. Clean Energy does not believe that this cross subsidy provided for in the Proposed Decision should be permitted, even temporarily.

IV. THE COMMISSION SHOULD ADD D.95-11-035 TO THE LIST OF COMMISSION NATURAL GAS VEHICLE REGULATION AND POLICY DECISIONS THAT WILL NOT BE REVISITED IN THIS PROCEEDING.

At page 59, the Proposed Decision says:

“The January 12, 2010 Assigned Commissioner’s Scoping Memo included natural gas vehicle (NGV) issues in the scope of this proceeding in recognition of the fact that such vehicles play an important role in the Commission’s overall goal of reducing greenhouse gas emissions. The Scoping Memo did not identify specific NGV issues that must be addressed in

this proceeding and stated that this proceeding would not revisit the existing NGV rules and policies adopted in D.91-07-018 and D.93-07-054.”⁶

In its Reply Brief,⁷ Clean Energy argued that D.95-11-035 should be added to the two earlier foundational decisions which would not be reconsidered in this proceeding. As Clean Energy noted in its Reply Brief, it believes that this omission in the Scoping Memo was likely the result of an oversight. To date, the Commission hasn’t acted on Clean Energy’s recommendation.

Clean Energy believes that the Proposed Decision’s heavy reliance on D.95-11-035 as settled precedent is reason enough why its provisions should not be reconsidered in this proceeding or in any subsequent rulemaking focusing on the Commission’s policies with regard to NGVs.

D.95-11-035 represents the culmination of an evolutionary process which occurred in the early to mid-1990’s beginning with D.91-07-018. During this period the Commission redefined the practical meaning with regard to the pricing of utility products and services of the legislature’s admonition to the Commission in P.U. Code Section 740.3(c.) that it “. . . shall also ensure that utilities do not unfairly compete with non-utility enterprises.” During the early to mid-1990s, the Commission’s interpretation of how P.U. Code Section 740.3(c.) applied to the utilities’ low emission vehicle programs changed dramatically. D.95-11-035 represents the culmination of that process of evolution and the Commission’s most recent and complete statement of policy on the subject.

D.95-11-035 precluded California’s energy utilities from using ratepayer money to own electric and natural gas vehicle refueling equipment on the customer’s side of the meter. The practical effect of the decision was to require that the utilities sell such equipment they already owned and to only provide refueling and recharging services to AFVs from facilities located on utility property.

D.95-11-035 established a clear standard requiring that utility products and services be priced to recover the fully allocated utility costs of providing the products or services, and that the cost of these products or services should not be cross-subsidized in any way by non-participating “captive” utility customers. Acknowledging statutory limits to the policy discretion

⁶ See also, Scoping Memo, page 11.

⁷ Clean Energy’s Opening Brief, filed February 8, 2010, at page 7.

of the Commission, the policy and pricing guidelines set forth in D.95-11.035 were determined by the Commission to be required by state law (P.U. Code Section 740.3(c.)).

D.95-11-035 defined sound public policy in requiring that where the utilities compete with non-utility enterprises, the utilities compete fairly, policy which need not and should not be open to reconsideration in this proceeding. Clean Energy believes that the pricing policy and guidelines for utility AFV products and services, and the limitation on the scope of permissible utility programs set forth in D.95-11-035 must remain intact if the Commission's overall policy objective of promoting the emergence and development of robust competition in AFV markets is to be fulfilled. These principles and pricing policies, Clean Energy believes, are as applicable to the AFV marketplace in California today as when they were first issued.

V. THE COMMISSION SHOULD ACKNOWLEDGE CLEAN ENERGY'S CLARIFICATION THAT THE NEW ALTERNATE FUEL VEHICLE PROCEEDING IT RECOMMENDED EMBRACED BOTH ELECTRIC AND NATURAL GAS VEHICLES.

At page 59, the Proposed Decision addresses a recommendation made by Clean Energy at an earlier stage in the proceeding. According to the Proposed Decision: "In this rulemaking, Clean Energy argued that the Commission should initiate a periodic, perhaps biennial, statewide AFV proceeding similar to the Low Emissions Vehicle Proceeding that was in place during the 1990s and continued until 2005." Clean Energy argued that the current approach of considering NGV issues in General Rate Cases and Biennial Cost Allocation Proceedings does not allow the Commission to develop consistent statewide policy and results in NGV issues receiving less attention from senior utility management.⁸

As a point of clarification, Clean Energy's recommendation in the cited passages was that the proposed AFV proceeding would address both EV and NGV issues. The challenges of achieving statewide policy consistency and the appropriate level of attention of senior utility management apply to both EVs and NGVs. Clean Energy's concern was not limited to NGVs. Clean Energy understands and accepts that constraints on Commission resources make it reluctant to initiate a new proceeding at this time.

⁸ Clean Energy's Comments, filed November 12, 2010, at pages 6-7.

VI. **CONCLUSION.**

Clean Energy is grateful for the opportunity to provide these comments and looks forward to the opportunity to work with the Commission and other stakeholders as this important proceeding moves toward a conclusion.

Respectfully submitted,



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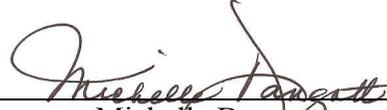
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April 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of *Opening Comments of Clean Energy Fuels Corporation* on all parties of record in proceeding *R.09-08-009* by serving an electronic copy on their email addresses of record and by mailing a properly addressed copy by first-class mail with postage prepaid to each party for whom an email address is not available.

Executed on April 5, 2011, at Woodland Hills, California.



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