

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Application of Pacific Gas and Electric  
Company to Revise its Gas Rates and Tariffs  
to be Effective July 1, 2010. (U39G).

Application 09-05-026  
(Filed May 29, 2009)

**NOTICE OF *EX PARTE* COMMUNICATION**

Pursuant to Rule 8.3(a) of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), Clean Energy Fuels Corporation (“Clean Energy”) gives notice of the following *ex parte* communication. The communication was initiated by Warren I. Mitchell, President of Clean Energy. The communication occurred on June 21, 2010, at 11:00 a.m. in the offices of the Commission in San Francisco, and lasted for approximately 30 minutes. The communication was oral and handouts were provided, which are attached to this notice.

Warren I. Mitchell and Mark Sweeney, Clean Energy’s consultant, met with Commissioner Timothy Simon and Karen Shea, Commissioner Simon’s Energy Advisor. Messrs Mitchell and Sweeney reviewed the information contained in the attachments to this notice.

To request a copy of this notice, please contact Michelle Dangott, 818.961.3003 or [mdangott@energyattorney.com](mailto:mdangott@energyattorney.com).

Respectfully submitted,

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Counsel for  
**CLEAN ENERGY FUELS CORPORATION**

Date: June 23, 2010

## Attachment 1

### **The ALJ's Proposed Decision (PD) in PG&E's BCAP on the Compression Cost Component of the G-NGV2 Transportation Charge Should be Modified to Adopt Clean Energy's Recommended \$1.002 Per Therm Estimate or an Alternate Decision Should be Prepared to Accomplish That Result**

- I. In proposing to adopt PG&E's requested compression cost component of the G-NGV2 rate, the PD fails to comply with the specific c requirements of D93-07-054, D.95-11-035 and PU. Code Section 740.3(c). PG&E's proposed \$0.744 per therm compression cost component:
- Is a below cost "incentive" rate which is prohibited by clear Commission policy determined in a decision of statewide applicability (D95-11-035);
  - Is cross subsidized through the core fixed cost account (CFCA) by PG&E's non-participating residential and commercial customers. Cross subsidized utility NGV refueling rates are prohibited by clear Commission policy (D.95-11-035);
    - There is no good reason why non-participating residential and commercial customers should be bearing costs which should be collected directly from third party refueling customers on whose behalf the costs are incurred;
  - Ignores clear Commission policy that prohibits the utility from engaging in anti-competitive conduct directed against non-utility enterprises by using "...any market advantage, based on its monopoly status" (D-95-11-035);
  - Was developed without providing the required "demonstration" that a \$0.744 compression cost component would not be "...unfairly competitive with nonutility enterprises..." as required by Commission policy which the Commission determined was required by state law (D.93-07-054, PU.Code Section 740.3(c));
  - Was developed as claimed by PG&E using an "incremental cost" methodology. PG&E actually calculated the unit "average cost" or fully allocated cost for a highly non-representative sample of only 5 high volume stations. Its approach would have been a reasonable one if the only public access refueling stations that PG&E owned and operated were the 5 refueling stations it included in its study. But PG&E owns and operates 24 public access stations in total.
  - Will not recover the "fully allocated...cost of the service provided," including all applicable fixed and variable costs of providing refueling services to third parties as required by Commission policy;
  - Clean Energy believes that the Commission policy which calls for the compression cost component to be based on the "fully allocated cost of the service provided" requires PG&E to take into account all of the costs it incurs in providing refueling service to third parties at its 24 public access stations, not just a small subset of them based on a biased 5 station sample (D.95-11-035);

- Is a below cost utility refueling rate which is the epitome of the kind of “unfair” utility competition with non-utility enterprises that PU. Code Section 740.3(c) directs the Commission to prevent. (D.95-11-035).
- II. PG&E’s compression cost study only took into account the costs and throughput at an extremely non-representative sample of 5 very high volume stations where the compression cost component is severely biased toward a low number as a result of refueling station economies of scale;
  - The average refueling volume at these 5 stations is 222,500 therms 1.8 times the average annual volume at the 19 stations PG&E didn’t consider in its study;
  - By removing just one station from the PG&E’s 5 station sample, the resulting compression cost component increases by \$0.186 per therm, or 25%, from \$0.744 to \$0.93 per therm;
  - The average per station throughput for the four stations remaining in the sample is still 168,000 therms, or 1.4 times the average throughput for the 19 station not considered by PG&E. Since station unit compression costs are inversely related to station throughput, this strongly suggests that a \$0.93 per therm compression cost would still under-recover PG&E’s third party refueling cost of service;
  - If PG&E’s compression cost component is based on the fully allocated cost of service and forecast throughput at all of PG&E’s 24 public access stations which refuel third party vehicles at the G-NGV2 rate, the corresponding compression cost component is the \$1.002 per therm recommended by Clean Energy.
- III. In adopting PG&E’s compression cost component, the ALJ’s conclusion rests on the answers to just two questions: (1) the assumed development stage of the CNG market; and, (2) the number of stations included in estimating the compression cost component. In the PD, the ALJ answers both questions incorrectly.
  - The developmental stage of the NGV market is irrelevant to the question of what a proper compression cost component would be for PG&E during the BCAP period;
  - PG&E’s compression cost component should be based on PG&E costs of providing third party refueling customers and forecast refueling throughput during the BCAP, not on some hypothetical description of market conditions;
  - In deciding to rely on PG&E’s 5 station sample rather than all 24 public access refueling stations, the ALJ proposes to adopt a compression cost component which is a below cost, cross subsidized “incentive” tariff which is prohibited by Commission policy and state law (as enumerated in Section I above).
- IV. PG&E’s BCAP Proceeding is Item Number 22 on the Agenda for the June 24<sup>th</sup> Commission meeting. The PD should be held for further review and the development of an Alternate PD in light of the serious flaws in the PD that Clean Energy has identified;
- V. The implementation date of PG&E’s BCAP has been changed from the proposed 7/1/10 to 8/1/10 by the PD. This item can be held for further consideration and acted on at the 7/8 Commission meeting without delaying the effective date of the decision.

## Attachment 2

### **The ALJ's Proposed Decision (PD) in PG&E's BCAP on the Compression Cost Component of the G-NGV2 Transportation Charge Should be Modified to Adopt Clean Energy's Recommended \$1.002 per therm estimate or an Alternate Decision Should be Prepared to Accomplish That Result**

- ALJ Wong's PD fails to apply almost two decades of clear Commission policy and legislative direction to the facts in this case and proposes to adopt a prohibited below cost (i.e., "incentive") and cross subsidized (primarily by non-participating core residential and commercial customers) \$0.744 per therm compression cost component of the G-NGV2 rate;
- In conducting the Compression Cost Study which yielded the \$0.744 compression cost component, PG&E ignored entirely the directly applicable provisions of D.93-07-054, D.95-11-035 and of PU. Code Section 740.3(c). PG&E's witness who developed the compression cost study wrongly believed that these provisions of Commission decisions were no longer valid Commission policy and thus he did not conform PG&E's study to their requirements;
- PG&E only took into account the costs and throughput at a 5 high volume station sample (exhibiting significant economies of scale) that is not representative of the costs or throughput at PG&E's remaining 19 stations which provide public access refueling services charged at the G-NGV2 rate;
- PG&E claimed to use an "incremental cost" approach, but instead calculated the "average cost" of providing refueling services at its 5 station sample (i.e., \$0.744 per therm). Clean Energy believes that the direction provided in D.95-11-035 to use the "direct and fully allocated cost of the service being provided" means that all of the utility costs incurred in providing third party refueling services need to be taken in to account in setting the compression cost component, not just the cost of service associated with the highly biased sample of 5 high volume stations. Doing so is necessary to avoid creating a below cost cross subsidized "incentive" rate as PG&E has done in its Compression Cost Study (see Attachment 1, item # 2);
- PG&E's proposed \$0.744 per therm compression cost component adopted by the PD would if approved by the Commission substantially under-recover PG&E's "fully allocated" fixed and variable costs incurred in providing public access refueling services to third party customers;
- PG&E's proposed compression cost component at forecast G-NGV2 throughput would fail to recover \$631,000, or 26% of its estimated \$2,459,000 annual cost of service to provide third party NGV refueling services;
- Below cost (i.e., "incentive") and cross subsidized utility refueling rates are prohibited by previously articulated Commission policy and state law (see Attachment 1, item # 1);
- PG&E would recover this substantial revenue shortfall from non-participating core residential and commercial customers through the Core Fixed Cost Account CFCA)

rather than collecting it directly from the G-NGV2 customers on whose behalf the costs are incurred;

- Commission policy articulated in D.95-11-035 expressly prohibits the utility from engaging in anti-competitive conduct by using *“any [emphasis added] market advantage, based on its monopoly status.”* (see Attachment 1, item # 4) The use of the CFCA to recover revenue shortfalls from G-NGV2 service instead from non-participating core residential and commercial customers is just such a prohibited advantage. There is no valid reason why non-participating customers should be bearing these costs;
- Clean Energy’s \$1.002 therm recommendation is the only compression cost proposal which at forecast throughput would actually recover PG&E’s “fully allocated” fixed and variable costs incurred in providing NGV refueling services to third parties, thereby eliminating any cross subsidy. Consequently, it is consistent with the requirements of D.93-07-054, D.95-11-035 and PU. Code Section 740.3(c);
- As PG&E did in developing its Compression Cost Study, the PD completely ignores the provisions of D.93-07-054 applicable to the provision of utility refueling services to third party customers in a competitive market (see Appendix 1, item # 3);
- D.93-07-054 states: “The utility will be required to demonstrate that each element of its LEV program is not unfairly competitive with nonutility enterprises, and to discontinue the offending program element if, and when, it interferes with the development of a competitive market.” (see Appendix 1, item # 3);
- Basing PG&E’s compression cost component on its fully allocated cost of service at all 24 stations would put it on a consistent basis with the Sempra Energy Utilities (SEUS) which used a fully allocated cost approach, including the costs of all of their public access refueling stations in developing their current Commission approved compression rate adder;
- Approving Clean Energy’s proposed \$1.002 per therm compression cost component would leave PG&E’s overall G-NGV2 rate, on a gasoline gallon equivalent (GGE) basis, \$0.93 lower than Bay Area retail per gallon gasoline prices. PG&E would continue to have a substantial price advantage relative to gasoline prices.
- The implementation date of PG&E’s BCAP has been changed from the proposed 7/1/10 to 8/1/10 by the PD. This item can be held for further consideration and acted on at the 7/8 Commission meeting without delaying the effective date of the decision.

## Commission Policy on Setting the Rates for Utility NGV Refueling Services Provided to Third Parties

### I. Clear Commission policy and state law prohibit below cost and cross subsidized “incentive” utility NGV refueling rates:

“Section 740.3(c) [of the Public Utilities Code (PU Code)] also states that the ‘commission’s policies shall also ensure that utilities do not unfairly compete with nonutility enterprises.’ The record in this proceeding demonstrates that if ratepayers subsidize the cost of CNG service, the resulting below-cost prices will skew the economic signals in a manner that will create a competitive disadvantage to those offering competing fuels and to any other providers of CNG. This is unfair competition because of the utilities’ ability to rely on captive, regulated customers to provide the subsidy, rather than depend on retained earnings, as would any competitor.” (D.95-11-035, Page 30).

At Findings of Fact Number 47 of D.95-11-035, the Commission concluded that a rate for refueling AFVs that is below cost and cross subsidized by other customers would be an “incentive rate.” (Page 120).

Even “incentive rates,” when the legislative authority existed for the Commission to set them were subject to express limitations. In D.95-11-035, at Page 106, the Commission stated:

“Public Utilities Code Section 745 states that the Commission may establish ‘incentive tariffs’ to apply to gas sold for use as a vehicle fuel, but that the tariffs must be designed to recover costs and should ‘not result in any direct or indirect subsidy from residential gas and electric customers.’” (D.95-11-35, page 106).

“[Public Utilities Code] Section 745 grants us discretion to establish special incentive tariffs for natural gas and electricity to fuel LEVs. Such tariffs must cover the full cost of the service provided and be designed to minimize adverse effects on other ratepayers.” (D.93-07-054, page 5).

“...the express authority under which we have approved both incentive tariffs and refueling station programs expires, effective January 1, 1997. The Legislature may very well have recognized that as the alternative vehicle market develops, these subsidies and market boosts have an even greater likelihood of influencing market development in an unfair and potentially inefficient manner. We will honor the January 1, 1997 sunset date included in both of the code sections currently at issue by making sure that no utility is offering compressed natural gas at subsidized rates as of that date.” (D.95-11-035, Page 108).

“On January 1, 1997, the Commission loses its express discretion to establish special

incentive tariffs for the use of natural gas and electricity as vehicle fuels (PU Code Section 745)..." (D.95-11-035, Findings of Fact Number 4, page 106).

- II. **Commission policy requires that the utility rates for third party NGV refueling services be based on the "direct and fully allocated cost of the service provided" (including both the fixed and variable costs applicable to third party refueling). PG&E claimed it used an "incremental cost" approach but what it did was calculate the "average cost" for just the 5 station sample. This would be a reasonable approach if PG&E only owned and operated the stations it included in its sample. Clean Energy believes that the "fully allocated cost of the service provided" means the cost incurred at all 24 of PG&E stations that provide third party refueling services, not just the cost for the 5 station sample. By proposing to set the compression rate component at the remaining 19 stations based on the rate that would be applicable for the 5, PG&E is attributing economies of scale to the 19 which in fact they don't exhibit. The result is a prohibited below cost, cross subsidized "incentive" compression cost component.**

"The Commission should direct the utilities to file natural gas tariffs that will allow for gradual transition from the current rate levels to rates that reflect the direct and fully allocated long-run marginal cost of the service being provided." (D.95-11-035, Findings of Fact Number 103, Page 126; Conclusions of Law Number 13, Page 128). "The transition should be completed no later than January 1, 1997." (D.95-11-035, Page 108).

- III. **Commission policy requires the utility "...to demonstrate that each element of its LEV program is not unfairly competitive with nonutility enterprises." PG&E failed to provide any such demonstration in this proceeding:**

"The utility will be required to demonstrate that each element of its LEV program is not unfairly competitive with nonutility enterprises, and to discontinue the offending program element if, and when, it interferes with the development of a competitive market. We have altered the phrasing of this provision from that proposed by the ALJ because we are convinced that the relevant standard is the one set forth in Sections 740.3 and 745.5. The terms of this guideline supports and is obviously subordinate to both state and federal statutes dealing with anti-competitive behavior" (D.93-07-054, Page 27).

PG&E provided no demonstration in its Compression Cost Study that its proposed \$0.744 compression cost component "is not unfairly competitive with non-utility enterprises." The evidence provided by Clean Energy shows that PG&E's proposed compression cost component is "unfairly competitive" with non-utility enterprises since it is a below cost cross subsidized "incentive" rate component.

IV. **Commission policy prohibits utilities from using “any market advantage, based on its monopoly status” to unfairly compete with non-utility NGV refueling service providers:**

“There are many companies that are interested in competing in the market for the construction and operation of refueling stations at customer or other private sites. Any future utility station program must be designed to avoid giving the utility **any** [emphasis added] market advantage, based on its monopoly status. Among other things, construction, operation, and commodity charges must be fully compensatory.” (D.95-11-035, Pages 87-88).

Clean Energy believes that PG&E’s ability to recover the significant revenue shortfall from its proposed below cost “incentive” compression cost component from non-participating core residential and commercial customers through the operation of the Core Fixed Cost Account (CFCA) rather than directly from the G-NGV2 customers who benefit from the service provides just such a prohibited utility “market advantage, based on its monopoly status.”

V. **The Commission’s prohibition against below cost and cross subsidized utility NGV refueling charges is required not only by Commission policy but state law.**

“The requirement that the utility’s LEV programs not be anti-competitive is derived from the Commission’s general responsibility to guard against anti-competitive utility behavior and from the specific language in Public Utilities Code Sections 740.3 and 745.5.” (D.93-07-054, Findings of Fact #19, Page 36).

“The utility will be required to demonstrate that each element of its LEV program is not unfairly competitive with nonutility enterprises, and to discontinue the offending program element if, and when, it interferes with the development of a competitive market. ***We have altered the phrasing of this provision from that proposed by the ALJ because we are convinced that the relevant standard is the one set forth in Sections 740.3 and 745.5. The terms of this guideline supports and is obviously subordinate to both state and federal statutes dealing with anti-competitive behavior***” [emphasis added]. (D.93-07-054, Page 27).

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of *Notice Ex Parte Communication* on all parties of record in proceeding ***A.09-05-026*** 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 June 23, 2010, at Woodland Hills, California.

A handwritten signature in cursive script, appearing to read "Michelle Tang", is written over a solid horizontal line.

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