FILED
07-11-13
04:59 PM

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Gas Company (U 904 G) to Establish a Compression Services Tariff	A.11-11-011 (Filed November 3, 2011)

PETITION OF CLEAN ENERGY FUELS CORP. FOR MODIFICATION OF DECISION 12-12-037

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July 11, 2013

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Pursuant to Rule 16.4 of the Commission's Rules of Practice and Procedure, Clean Energy Fuels Corp. (Clean Energy) submits this Petition for Modification of Decision 12-12-037.

I. INTRODUCTION

The Commission granted authority to Southern California Gas Company (SoCalGas) in Decision (D.) 12-12-037 (Decision) to implement the utility's proposed "Compression Services Tariff" (CST). Reaching far beyond the installation of compression facilities, the Decision authorizes unfettered entry by SoCalGas into the natural gas vehicle (NGV) refueling infrastructure market. Clean Energy requests by this Petition that the Commission modify D.12-12-037 to narrow the scope of the CST.

The CST as approved would allow SoCalGas to construct, own and operate on customer property some or all of the equipment required to operate an NGV refueling station. Clean Energy has challenged this program at every opportunity, bringing the Commission's attention to the potential anti-competitive effects of the CST.[1]

While Clean Energy continues to maintain that its Application for Rehearing should be granted, modifying D.12-12-037 could substantially mitigate the anti-competitive effects of the CST. The Commission should more narrowly tailor the scope of SoCalGas's market participation as a utility, relying on policy direction provided to electric vehicle (EV) markets in D.11-07-029 (EV Decision). The EV Decision limited the potential for Utility market entry in competitive markets to those markets that are "underserved." Narrowing the scope of utility entry in this way represents sound policy; it allows the utility to use its monopoly advantages to drive growth in market segments that may not be economic for third-party competitors to serve, while preventing the use of those advantages unfairly in already-competitive markets. This would bring the CST program in line with Public Utilities Code §740.3(c), allowing the Commission to fulfill its obligation "*to ensure that utilities do not unfairly compete with nonutility enterprises*."

The record in A.11-11-011 contains information regarding markets that are adequately served. Testimony from SoCalGas, Integrys and Clean Energy all demonstrated that there are already a number of entities serving the California NGV fleet refueling market.[2] The record requires further development, however, to define and pinpoint "underserved" markets. The Commission should suspend D.12-12-037 to

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1 Clean Energy has challenged the CST program through its January 28, 2013, Application for Rehearing, its March 25, 2013, protest of implementing Advice Letter 4459, and its continued opposition to Advice Letter 4337 seeking approval of a CST contract with the Los Angeles Unified School District. Clean Energy also filed a Motion for Stay of D.12-12-037, demonstrating the clear harm to the market should SoCalGas enter the NGV infrastructure market.

2 1 Tr. 122 (SoCalGas/Reed); 2 Tr. 314 (CEF/Mitchell); 2 Tr. 299 (INT/Zobel).

permit further exploration of "underserved" markets and modify the Decision to conform to its findings.

II. BACKGROUND

A. Commission Policy Direction Has Favored Limited or No Utility Involvement in Low Emissions Vehicle Infrastructure Markets.

In 1990, the Legislature enacted Public Utilities Code § 740.3, directing the Commission to encourage the growth of the Alternative Fuel Vehicle (AFV) market. Section 740.3 directs the Commission to "*evaluate and implement policies to promote the development of equipment and infrastructure needed to facilitate the use of electric power and natural gas to fuel low-emission vehicles*."[3] Section 740.3 also requires the Commission to protect competitive markets:

> *(c) The commission's policies authorizing utilities to develop equipment or infrastructure needed for electric-powered and natural gas-fueled low-emission vehicles shall ensure that the costs and expenses of those programs are not passed through to electric or gas ratepayers unless the commission finds and determines that those programs are in the ratepayers' interest.* ***The commission's policies shall also ensure that utilities do not unfairly compete with nonutility enterprises****.*[4](Emphasis added.)

In setting policy to encourage adoption of AFVs, the Commission cannot allow the utilities to unfairly compete with nonutilities and must protect ratepayers from subsidizing any service for which they do not receive a direct benefit.

Decision 95-11-035 rejected SoCalGas's proposals to build NGV refueling stations on customer property, and suggested that utility affiliates be used to develop the NGV refueling market. In defending its policy choice, the Commission highlighted the need to protect competitive markets and to "*avoid giving the utility any market*

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[3] Cal. Pub. Util. Code §740.3.
[4] Cal. Pub. Util. Code §740.3(c).

advantage, based on its monopoly status."[5] The Commission also found that the risks inherent in the SoCalGas NGV refueling proposal to be too "*speculative and risky*" for ratepayers.[6]

Decision 97-12-088 adopted the Affiliate Transaction Rules, an extensive policy framework to facilitate the entry of unregulated utility affiliates into competitive markets and manage the affiliate's potential competitive advantages. While the Rules themselves focus on separation between affiliates and utilities, this decision clearly directs that competitive services should be offered via an unregulated subsidiary rather than an affiliate:

> *We do not wish to adopt a mechanism by which the utility can circumvent the rules we adopt today by offering the products or services itself instead of through an affiliate, especially when the utility's offering is for a competitive or potentially competitive service and might interfere with the development of a competitive market*.[7]

In adopting the Affiliate Transaction Rules, the Commission clearly intended to protect emerging competitive markets and keep in place restrictions on utility entry.

Most recently, the Commission addressed alternative fuel vehicle policy in D.11-07-029. Decision 11-07-029 prohibited the electric utilities from offering Electric Vehicle (EV) recharging services beyond the meter, the traditional point of delivery for utility service.[8] The Decision cited the Commission's obligation under §740.3(c) to ensure that the utilities do not unfairly compete with non-utilities in reaching its decision.[9] The Commission stated that the EV decision was based on AFV policy generally while

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[5] D.95-11-035, 62 CPUC.2d 395, 1995 WL 768974 (Cal.P.U.C.) at *40.
[6] D.95-11-035 at *41.
[7] D.97-12-088, 1997 WL 812239 at *63, 70, Finding of Fact 40.
[8] D.11-07-029, 2011 WL 3375600 (Cal.P.U.C.).
[9] D.11-07-029, 2011 WL 2275600 at *21.

relying specifically on D.95-11-035, an NGV decision.[10] By that same logic, even though D.11-07-029 is an EV decision, it is part of the Commission's AFV policy framework.

B. A Departure from Long-Standing AFV Policy Remains at Issue before this Commission.

Contrary to Commission precedent and policy, the CST allows the utility to own and install NGV refueling infrastructure, specifically natural gas compression, storage and dispensing equipment, beyond the meter on customer property. As identified by SoCalGas, potential customers of the CST include "*customers who own or wish to own NGV refueling facilities…..*"[11]

In February 2012 SoCalGas filed Advice Letter (AL) 4337 seeking permission to provide compression services to the Los Angeles Unified School District (LAUSD), similar to the services described in A.11-11-011. SoCalGas proposed that the contract was simply a deviation of its Rule 2 service, allowed pursuant to §8.2.3 of GO 96-B.[12] After protests from Clean Energy, Integrys Fuels, Inc. and the Division of Ratepayer Advocates (DRA) arguing that the contract was more properly considered a deviation of the pending CST the Commission suspended the AL.[13]

Following evidentiary hearings, briefing and multiple rounds of comments in A.11-11-011 the ALJ submitted a Proposed Decision on November 20, 2011, and the

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10 D.11-07-029, 2011 WL 2275600 at *17.

11 Application of Southern California Gas to Establish a Compression Services Tariff, A.11-11-011 (SoCalGas Application) at 13.

12 SoCalGas Reply to Protests of SoCalGas AL 4337—Compression Services Agreement with Los Angeles Unified School District at 2.

13 Clean Energy Fuel Corp.'s Protest of SoCalGas AL 4337 at 3; DRA Protest to SoCalGas AL 4337 at 2; Integrys Protest to AL 4337, Compression Services Agreement with LAUSD at 1-2.

Commission adopted D.12-12-037 on December 20.[14] Decision 12-12-037 attempted to address some of the concerns of Intervenors in the case by requiring SoCalGas to maintain balancing and tracking accounts, prohibiting ratepayer subsidy of the service and requiring SoCalGas to have marketing language approved by the Commission. Under the terms of the Decision, before actively soliciting business under the CST SoCalGas must submit, and have approved by Resolution, a Tier 3 Advice Letter process including a Tariff and outlining these procedures. The Commission will monitor the competitive impact of the CST by requiring SoCalGas to submit semiannual reports of throughputs served by SoCalGas and other market participants.[15]

Clean Energy filed an Application for Rehearing of D.12-12-037 (Rehearing Application) on January 28, 2013.[16] SoCalGas filed AL 4559, a Tier 3 Advice Letter, on February 4 seeking approval of the CST, website and marketing language, and tracking and balancing accounts.[17] Clean Energy and DRA filed protests of AL 4459, and it was suspended on March 5.[18] Clean Energy filed a Motion for Stay of D.12-12-037 on March 27 citing the irreparable harm to the competitive market should SoCalGas enter the compression services market before the Commission addresses Clean Energy's Rehearing Application.[19]

The Commission adopted a resolution at its April 4 meeting approving AL 4337 contingent on the approval of AL 4459.[20] The final resolution adopted reflects DRA and

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14 D.12-12-037.
15 D.12-12-037, Ordering Paragraphs 1, 3 and 5, at 65-66.
16 Clean Energy Application for Rehearing (Rehearing Application).
17 SoCalGas AL 4459, Establishment of Compression Services in Compliance with D.12-12-037.
18 Protest of Clean Energy Fuels to SoCalGas AL 4459; DRA Late-filed Protest to SoCalGas AL 4459.
19 Clean Energy Motion for Stay.
20 Resolution G-3481.

Clean Energy comments arguing that the LAUSD contract is only appropriate once the CST is approved.[21]

III. UNFETTERED ENTRY WILL DETRIMENTALLY AFFECT THE COMPETITIVE MARKET AND WILL NOT EXPAND ADOPTION OF NGV

A. Decision 12-12-037 Permits Unfettered Market Entry by SoCalGas

As characterized by SoCalGas, under the tariff, "*SoCalGas will be authorized to provide natural gas compression service*."[22] Decision 12-12-037, however, allows SoCalGas to offer much more than simple compression services. Under the CST, SoCalGas will own most, and in some cases all, of the equipment necessary to operate an NGV refueling station and will provide all operating and maintenance (O&M) services required at those stations.[23] The CST explicitly will allow SoCalGas to own equipment on the customer side of the meter, traditionally considered a competitive market, contrary to the policy direction in D.95-11-035 and D.97-12-088.[24] Under D.12-12-037, once the Tariff is approved, there is no limit to the markets that SoCalGas can serve under the CST, even if the CST will harm competition in those markets.[25]

B. The Market for High-Volume Fleet NGV Refueling is Fully Competitive

NGV vehicle service is particularly attractive to fleet vehicles. As SoCalGas's proposed website language highlights:

> *NGVs are convenient for fleets since the vehicles usually return to the same location each night for refueling. Fleet fueling stations can be conveniently*

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21 Clean Energy Fuel Corp.'s Comments on Draft Resolution G-3481; DRA's Comments to G-3481 approving SoCalGas's agreement to provide compression services to the LAUSD.

22 Application of Southern California Gas Company to Establish a Compression Services Tariff, A. 11-11-011, filed Nov. 3, 2011 (Application).

23 Clean Energy Opening Brief at 3.

24 D.95-11-035 at *40; D.11-07-029 at *17; D.12-12-037, Finding of Fact 4, at 59.

25 D.12-12-037, Finding of Fact 6, at 60. Decision 12-12-037 only identifies potential markets for the CST.

> *located on-site, using either the "fast-fill" or "time-fill" method of fueling. Fast fill refueling is similar to using a gasoline pump and takes minutes to refuel. Time-fill refueling is usually done overnight, in about five to eight hours.*[26]

Since the fleet market, especially the high volume fleet market, is so attractive, there are numerous market participants actively pursuing every opportunity. At the time of the hearings there were 35-40 entities nationwide providing services similar to those provided in SoCalGas's CST, all ready and able to enter the California market at any time.[27] Today that number is 70 and growing.[28] Even SoCalGas acknowledges that any of these current market participants can serve new demand for NGV refueling infrastructure:

> *[C]ertainly there are potential competitors. Intervenors Integrys and Clean Energy stated that they could offer a similar service, and Clean Energy has provided in data response to us a fairly lengthy list of potential competitors. There are parties that can provide similar service.* [29]

Any additional fleet needs can be adequately served by market participants already active in the nationwide NGV market.

The language of D.95-11-035, now 18 years old, demonstrates the Commission's recognition of the importance of protecting competition. At that time the Commission determined that utility interference would harm further third party market development:

> *[T]he opposition to the natural gas vehicle program proposals is vigorous and multi-directional. Parties voice concerns that focus not only on ratepayer interests, but on the effect of utility programs on competition in markets for natural gas and other alternative fuels.*[30]

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26 Advice Letter 4459 at Attachment D.
27 2 Tr. 301 (CEF/Mitchell).
28 Comments and Reply of Clean Energy in Response to October 10 ALJ Ruling at Exhibit A.
29 1 Tr. 122 (SoCalGas/Reed).
30 D.95-11-035 at 30.

Since 1995, the NGV market has grown at a compound annual average rate of 33.28% without any utility participation.[31] The growth rate of the NGV market depends on the period of time used, but regardless of the measure used, NGV growth has not been inadequate:

- ✓ Growth from 1997 through 2011 was 21.2%;[32]
- ✓ Growth from 2000 through 2011 was in the range of 13.44%;[33] and
- ✓ Growth from 2006 through 2010 was 6.61%.[34]

The CST, as written, threatens to slow the continued growth of this thriving competitive market.

C. SoCalGas's Entry into the High Volume Fleet NGV Refueling Infrastructure Market Will Not Lead to Incremental Growth in the NGV Refueling Market

In order to reap increased environmental and health benefits as a result of the CST, the introduction of the CST must lead to growth above and beyond the market growth that would have occurred had SoCalGas not entered the market.[35] If the "growth" is merely SoCalGas's displacement of other competitors, the CST will not lead to incremental health and environmental benefits.[36] As demonstrated above, SoCalGas's entry into the market is likely to only displace other competitors, not encourage market growth.

As SoCalGas agreed in hearings, there are a number of factors that influence NGV market growth.[37] These factors include:

- ✓ Availability of attractive NGV vehicle options; [38]

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31 2 Tr. 190 (SoCalGas/Reed); Exh. CEF-8.
32 *Id*.
33 *Id*.
34 *Id*.
35 1 Tr. 175 (SoCalGas/Reed).
36 *See* Clean Energy Opening Brief at 24.
37 1 Tr. 148 (SoCalGas/Reed).
38 1 Tr. 146-47 (SoCalGas/Reed).

- ✓ The prices of NGVs from original equipment manufacturers as compared to conventional vehicles;[39]
- ✓ The economic climate;[40]
- ✓ Customer confidence in NGV options and related infrastructure;[41]
- ✓ Age of existing fleet vehicles;[42]
- ✓ Need of a fleet owner for additional cars;[43]
- ✓ Cost and development of other AFV including electric vehicles;[44] and
- ✓ Government incentives.[45]

SoCalGas's market entry will not address any of these factors.[46] Even if SoCalGas can offer its compression services at a lower price as a result of its lower cost of capital, its price advantage does not impact any of these factors.

The Commission's determination in D.12-12-037 that there is an unmet market need that SoCalGas will serve relies on a flawed customer survey.[47] Clean Energy's Opening Brief demonstrates the many infirmities in the survey, and they will not be reiterated here.[48] Ignoring the survey's many flaws and relying on unclear math, SoCalGas argues that the survey results illustrate that the CST will lead to the construction of 20-40 incremental NGV refueling stations.[49] SoCalGas acknowledged that, at most, the establishment of 20-40 stations is "*more likely*" under the CST but it did not claim they will be incremental to what would otherwise occur in the market:

> *I don't think it's possible to say that any customer that took advantage of the tariff and that that was their motive for adopting natural gas vehicle fuel at this point in time would never in the future, you know, have adopted it. So -- so incremental doesn't*

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39 1 Tr. 148 (SoCalGas/Reed).
40 1 Tr. 147, 151 (SoCalGas/Reed).
41 1 Tr. 148 (SoCalGas/Reed).
42 1 Tr. 154 (SoCalGas/Reed).
43 1 Tr. 154 (SoCalGas/Reed).
44 1 Tr. 147 (SoCalGas/Reed).
45 1 Tr. 147 (SoCalGas/Reed).
46 In Evidentiary Hearings SoCalGas acknowledged this fact. See 1 Tr. 146-148 (SoCalGas/Reed).
47 D.12-12-037 at 48-49. Clean Energy Opening Brief at 25-29. Clean Energy's Opening Brief outlines the failings of SoCalGas's customer survey. Those arguments are incorporated by reference here.
48 Clean Energy Opening Brief at 25-29.
49 1 Tr. 69-70 (SoCalGas/Reed); Exh. SCG-2 at [].

> *necessarily mean they would never adopt it, but, in light of the responses to the survey, it means make them more likely*.[50]

As SoCalGas Witness Reed acknowledged: "*[t]here is no way to be certain until the tariff is available how many customers will sign up for it*."

D. Unfettered Market Entry by SoCalGas Will Result in Displacement of Existing Competitors in the High Volume Fleet NGV Refueling Infrastructure Market.

Clean Energy demonstrated throughout the proceeding that rather than leading to incremental growth, SoCalGas's entry into competitive markets is likely to only displace competitors already active in the NGV refueling infrastructure market.[51] As D.12-12-037 acknowledged, as a result of its utility status, SoCalGas has a number of competitive advantages.[52] As a result of these clear competitive advantages, SoCalGas is likely to win every competitive bid that it seeks. For example, due to its lower cost of capital SoCalGas will be able to finance new stations at a much lower cost than its competitors.[53] The result is that other competitors will be displaced from serving new market opportunities.

SoCalGas's contract with LAUSD provides an example of the likelihood that the CST will simply displace other market participants. Clean Energy diligently pursued the LAUSD contract but ultimately lost the opportunity to serve LAUSD to SoCalGas.[54]

E. SoCalGas's CST Is Targeted at Adequately Served Markets.

Decision 12-12-037 approves SoCalGas's plan to target fleet customers under the CST. The Decision does not address the potential for the development of a

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50 1 Tr. 175 (SoCalGas/Reed).
51 *See* Clean Energy Opening Brief 54-58.
52 D.12-12-037 at 23-24.
53 2 Tr. 317-318 (CEF/Mitchell).
54 Clean Energy Protest of SoCalGas AL 4337 at 3.

residential market. More importantly, the Decision makes no distinction between the high-volume fleet market, which is fully competitive, and underserved fleet markets.

The driving factor for the CST was SoCalGas's desire to broadly serve the NGV fleet market. SoCalGas claimed in A.11-11-011 that its potential CST customers include new NGV refueling stations, CHP and peaking generation. The survey used to justify the CST, however, belies this intention; SoCalGas failed to demonstrate CHP and peaking plant demand for additional NGV refueling infrastructure.[55] Instead, "*the majority of respondents [to the survey] were fleet owners*."[56] SoCalGas's intentions are further clarified by its AL 4559 filing: all of the proposed website language focuses on fleet refueling.[57]

SoCalGas claims that, within its targeted markets, it will serve small fleet customers currently overlooked by Clean Energy.[58] SoCalGas's claims ignore the fact that Clean Energy has specifically targeted proposals to serve small, proprietary fleet customers. Under these proposals, Clean Energy will:

> *[P]rovide vehicle financing, because that reduces the impact on the incremental costs between a gasoline or diesel vehicle and a natural gas vehicle. We will provide private grants. We will provide vehicle incentives of about $3,000 per vehicle* [59]

Not only are most segments of the NGV fleet refueling infrastructure market healthy and growing, this growth has occurred without interference from the Commission.

While the scope of the CST threatens existing, competitive markets, there are market segments where SoCalGas's entry could be beneficial. As discussed below,

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55 Exh. SCG-1 at 10-11 (SoCalGas/Reed).
56 1 Tr. 167 (SoCalGas/Reed).
57 AL 4459 at Attachment D.
58 D.12-12-037 at 47, quoting Opening Brief of SoCalGas at 20.
59 2 Tr. 306 (CEF/Mitchell).

limiting the CST's scope to home NGV refueling, Unified School District bus fleets[60] and non-proprietary, low volume municipal fleets (excluding, among others, Port, Airport, Transit and Refuse properties) would encourage growth in those markets while protecting competitive markets otherwise.

IV. THE COMMISSION SHOULD LIMIT THE SCOPE OF SOCALGAS'S PARTICIPATION IN THE NGV REFUELING INFRASTRUCTURE MARKET TO "UNDERSERVED" MARKET SEGMENTS.

A. The Commission's Direction in D.11-07-029 to Limit Any Potential Utility Participation in EV Markets to "Underserved" Markets Should Inform the Commission's Policy in the NGV Markets.

Decision11-07-029 is the most recent policy statement on the Commission's AFV framework and provides sound direction when addressing the NGV market. In D.11-07-029, the Commission upheld the meter as the traditional boundary for utility service, prohibiting utility participation in competitive markets. The utilities argued that if they are prohibited from providing electric vehicle charging service and related infrastructure, EV markets would not adequately develop. The Commission considered this evidence and concluded that competitive markets are:

> *[N]ecessary for electric vehicles to achieve their full potential in California, and that allowing utilities to compete in this market will be a hindrance. For the Commission to reconsider the prohibition, the utilities must demonstrate the presence of underserved markets or market failures in areas where utility involvement is prohibited.*[61]

The Commission elaborated on the potential for the blanket prohibition to be lifted in particular circumstances:

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60 The Unified School District bus fleet market is competitive and served by third-party providers today. Nevertheless, if the Commission were to grant this Petition to Modify, drawing a reasonable boundary between utility and competitive markets, Clean Energy would withdraw its protest to Advice Letter No. 4337 seeking approval of a contract between SoCalGas and LAUSD.

61 DRA-1, Attachment 2 at 16.

> *Should utilities present evidence in an appropriate proceeding of underserved markets or market failure in areas where utility involvement is prohibited, we will revisit this prohibition. Should the Commission revisit this issue, we will revisit the concerns outlined above, among others, including the potential cost-subsidization implications of any utility proposal to own public electric vehicle service equipment.*[62]

Decision 12-12-037 dismisses D.11-07-029 as "*not…pertaining to natural gas facilities.*"[63] While the direct holding in D.11-07-029 pertains to EV, it is part of a general policy framework for AFV, or low emission vehicle (LEV), markets. The Commission's reasoning in D.11-07-029 relied on policies that established the rules for all AFV markets. For example:

> *The guidelines we adopt today are also generally consistent with prior Commission precedent in the area of **low emission vehicles**. In D.05-05-010, the Commission determined that it would support reasonable funding for the utilities' **low emission vehicle** customer education programs, provided that the customer education programs primarily furthered the goals of ratepayer safety and reliability of electric and **natural gas systems**, controlled ratepayer costs, and informed customers about related load impacts and methods for mitigating them in a manner that is responsive to their and the public's needs.*[64]

Just as D.11-07-029, an EV decision, relies on D.95-11-035, an NGV decision, as establishing AFV policy, the Commission should rely on D.11-07-029 for direction when addressing the CST.

The commitment of the Commission to the development of competition in the EV charging market should inform the policy for NGV refueling or the Commission risks that competition in the NGV market will lag behind that of EV. Accordingly, the Commission

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62 D.11-07-029 at 21-22.
63 D.12-12-037, Conclusion of Law 9, at 63.
64 *Id*. at *28.

should limit utility involvement in the NGV refueling infrastructure services market to those market segments that are "underserved."

Decision 11-07-029 did not define "underserved" and directed that the meaning of the term should be explored in the "appropriate proceedings." The market need for the CST was a material issue in A.11-11-011, and the identification of markets as "underserved" is a natural extension of that discussion. As a result, A.11-11-011 is clearly an appropriate proceeding for the consideration of which NGV markets are "underserved." Even though the Commission did not heed D.11-07-029's direction when issuing D.12-12-037, the Commission should take this opportunity to reopen the proceeding in order to explore the concept of "underserved" within the NGV refueling infrastructure market.

B. "Underserved" Should Be Defined as Markets that are Uneconomic to Serve Absent the Utility's Market Participation

Clean Energy suggests that the Commission should define "underserved" markets as those that are marginally economic. A marginally economic market is a market where the potential profits may not be sufficient to cover the costs of service. If a third-party competitor is not ensured to profit from a new market, it will not invest in that market. Since traditional competitive market participants are unlikely to serve the market, market development will stall.

There may be NGV refueling infrastructure market opportunities that can be profitable for the Utilities but may not be economic for other market participants. As noted in D.12-12-037, one of SoCalGas's many advantages as a result of its utility status is its lower cost of capital.[65] The cost of capital of other market participants is around twice that of SoCalGas.[66] A lower cost of obtaining capital to finance the provision of services means the ability to offer the service at a lower price. Likewise, leveraging of existing billing, marketing and corporate infrastructure could permit a lower cost of service. While these advantages are unfair in fully competitive markets, they may allow SoCalGas to serve and profit from "underserved" markets.

C. The Boundary Between Competitive and Underserved Markets in the NGV Refueling Infrastructure Market Requires Further Exploration.

The record in A.11-11-011 is insufficient to determine if there are NGV refueling infrastructure markets that are underserved, and, if yes, which market segments are underserved. The record in A.11-11-011 should be reopened in order to identify the NGV refueling infrastructure markets that are currently served and underserved, and to limit SoCalGas's CST to only those markets that are underserved.

The Commission should solicit information from SoCalGas and other market participants regarding the state of competition in various market segments. As demonstrated throughout A.11-11-011, Clean Energy and its competitors are already adequately serving most high-volume fleet customers. As a starting point for exploring underserved markets, Clean Energy submits to the Commission that potential underserved markets may include home NGV refueling business, Unified School District bus fleets, and non-proprietary, low volume municipal fleets (excluding, among others,

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65 D.12-12-037 at 32.
66 2 Tr. 318 (CEF/Mitchell).

Port, Airport, Transit and Refuse properties).[67] While exploring these markets further the Commission should consider, at a minimum:

- ✓ The average number of vehicles in these fleets;
- ✓ The age of the fleets;
- ✓ The cost to install the needed infrastructure;
- ✓ The cost and availability of NGV vehicles;
- ✓ Fuel use per vehicle;
- ✓ The presence of any competitors currently willing and able to serve these markets; and
- ✓ The cost and availability of other AFV to serve similar needs.

Upon the appropriate development of the record, the CST should be modified to limit SoCalGas's NGV refueling market infrastructure service to the markets that have been determined to be "underserved" or demonstrate market failure.

The Commission should also adopt additional anti-competitive protections to ensure that SoCalGas's participation in underserved markets does not harm the fully competitive markets.[68] First, SoCalGas, or another regulated monopoly utility offering this service, shall inform through public notice or other public means all of their market leads upon initial contact. This measure was first suggested by Integrys during the proceeding, but likely requires further exploration in light of the proposed modifications to D.12-12-037.[69] This measure will help to equalize the information advantages that SoCalGas has as

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[67] A list of California municipalities and school districts is attached as Attachment B.

[68] Clean Energy continues to assert that anti-competitive protections are not sufficient to protect the NGV infrastructure market from the harm that will stem from SoCalGas's unfettered entry into the NGV market.

[69] Integrys Comments and Reply in Response to Administrative Law Judge Ruling of October 10, 2012 at 2.

a virtue of its position as the first point of contact for customers interested in NGV refueling infrastructure services.

Second, the Commission must elaborate on the Balancing and Tracking Account measures to be used to protect ratepayers from potentially subsidizing service under the modified CST. As demonstrated in the Rehearing Application and Protests to AL 4459, the Decision did not provide adequate direction to ensure there is no risk to ratepayers under the CST.[70] Even after the proposed modifications to the CST, it is important that the Commission protect general ratepayers.

Finally, the Commission should review the CST every five years to determine if the tariff is still needed to promote the identified underserved markets that it was designed to promote. As will be described in Section V.B below, SoCalGas's service of otherwise underserved markets should have the ultimate impact of making once unprofitable markets, profitable and competitive. As once underserved markets become competitive, the presence of SoCalGas in those markets presents the same competitive concerns that it does in today's fully competitive markets. In these periodic reviews, the Commission should revisit the status of these markets using the same criteria used to establish what markets are currently underserved. As markets become competitive, SoCalGas should be prohibited from further serving that market.

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[70] *See* Rehearing Application at 28-29; Clean Energy Protest of AL 4459 at 2-4.

V. MODIFICATION OF D.12-12-037 TO LIMIT THE SCOPE OF SOCALGAS'S PARTICIPATION IN THE NGV REFUELING INFRASTRUCTURE IS IN THE PUBLIC INTEREST.

Public Utilities Code §740.3 directs the Commission to encourage the development of NGV and EV markets. Decision 12-12-037 violates the Commission's obligations under § 740.3 by allowing SoCalGas to use its unfair advantages to serve competitive markets. Restricting SoCalGas's CST to underserved markets not only cures each of these defects, it allows the competitive market to develop unharmed and encourages growth in undeveloped market sectors.

A. Limiting SoCalGas's Service to "Underserved" Markets will Avoid Injury to Competition and Fulfills the Commission's Obligation Under PU Code §740.3.

Throughout A.11-11-011, SoCalGas argued that its participation in the NGV refueling infrastructure market would lead to NGV market growth and increased opportunities for other market participants.[71] On the other hand, Clean Energy demonstrated that the impact of SoCalGas's entry would instead displace legitimate competitors unable to compete with SoCalGas's unfair advantages from serving new market opportunities.[72] By modifying D.12-12-037 to limit SoCalGas service to underserved markets, the Commission can address Clean Energy's concerns while also empowering SoCalGas to meet its goals of encouraging NGV market growth.

Limiting SoCalGas's entry to underserved markets will ensure that SoCalGas does not unfairly compete with nonutility market participants, and will cure D.12-12-037's violation of §740.3(c). Since underserved markets are marked by a failure of traditional competition, SoCalGas will not be unfairly competing with legitimate

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71 *See* SoCalGas Opening Brief at 14-16.
72 Clean Energy Opening Brief at 54-59.

competitors for market opportunities. SoCalGas can enter and serve underserved markets without the threat that it will displace another market participant or discouraging new market participants from offering their services in California.

B. Limiting SoCalGas's Service to "Underserved" Markets Will Ensure SoCalGas's Participation Leads to Incremental NGV Growth.

Decision 12-12-037 concludes that the CST is proper as it will lead to incremental growth in the NGV market, but as demonstrated above, SoCalGas will only displace current market competitors. If SoCalGas instead invests in underserved markets, SoCalGas's entry will actually lead to clear incremental market growth. Since SoCalGas can profitably serve markets that would otherwise be ignored by market participants, any additional adoption of NGV is incremental to what would have occurred absent SoCalGas's entry. This increased adoption of NGV will provide the same incremental environmental and public interest benefits that SoCalGas highlighted in A.11-11-011.

Additionally, SoCalGas's entry into underserved markets may create new NGV refueling infrastructure market opportunities. Since SoCalGas will use its cost of capital to finance projects that would not otherwise occur, it will be creating new competitive opportunities when it acts in a general contractor role and solicits bids on these projects.

If Sempra Energy Utilities (SEU) goal is simply to profit off the competitive NGV fleet refueling infrastructure market, an unregulated SEU subsidiary can enter the competitive market at any time. Meanwhile, SoCalGas can use its regulated monopoly advantages to develop the currently underserved NGV infrastructure market.

VI. CONCLUSION

For all of the foregoing reasons, Clean Energy urges the Commission to adopt this Petition for Modification.

Respectfully submitted,

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July 11, 2013

ATTACHMENT A

CLEAN ENERGY PROPOSED MODIFICATIONS

PROPOSED MODIFICATIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS

Strike Findings of Fact 7-11 and add the following new Findings of Fact:

7. The CST would allow SoCalGas to provide service beyond the customer meter, the traditional point of utility delivery.
8. Unless the CST is limited to uneconomic markets, there is no assurance that the CST will lead to incremental expansion in the use of natural gas as a vehicle fuel in the Los Angeles area.
9. SoCalGas's low cost of capital is an unfair competitive advantage over non-utilities in the competitive market for NGV refueling infrastructure services.
10. SoCalGas's access to a large, captive customer base, its brand equity and its information advantages result in unfair competitive advantage over non-utilities in the competitive market for NGV refueling infrastructure.
11. The same advantages that are unfair in a competitive market make SoCalGas well suited to serve underserved natural gas refueling infrastructure markets.

Strike Findings 15-16 and add the following new Findings of Fact:

15. SoCalGas's reputation with customers provides it with an unfair competitive advantage in competitive markets.
16. SoCalGas's access to customer information provides it with an unfair competitive advantage in the provision of compressed gas services.

Strike Findings of Fact 22 and 24 and add the following new Findings of Fact adjusting Finding of Fact numbering accordingly:

22. Large fleet natural gas refueling infrastructure markets are adequately served.
23. Limiting SoCalGas's entry into underserved, uneconomic markets will eventually increase competition in those markets and will expand choice for customers.
24. A proceeding must be opened to determine what NGV refueling infrastructure markets are underserved.
25. Underserved, uneconomic natural gas refueling markets may include home refueling, unified school district bus fleets and low volume, nonproprietary municipal fleets.

Strike Conclusions of Law 6-12 and 18 and add the following new Conclusions of Law:

6. In adopting the Affiliate Transaction Rules, D. 97-12-088, the Commission intended to discourage utilities from offering new competitive services and encouraged the offering of these services through unregulated affiliates.
7. The CST runs contrary to the principles of D.95-11-035 by permitting utility ownership of NGV refueling infrastructure beyond the meter.
8. The CST violates §740.3 (c) because it would allow SoCalGas to use its utility advantages to unfairly compete with non-utility entities in competitive markets.
9. D.11-07-029 sets policy for low emissions vehicles generally.
10. D.11-07-029 permits utilities to provide services beyond the meter if the utility can show that the market is underserved.
11. If a market is underserved, the utility advantages are not unfair since no other competitor can economically compete.
12. Since increasing competition in underserved markets is in the public interest and since the pricing methodology assures reasonable rates, and since the reporting, cost tracking and marketing regulations prevent SoCalGas from acquiring an unfair advantage in a competitive market, authorizing the filing of tariffs for the service is consistent with the law.

The Law Sentence of Ordering Paragraph 1 Should Read:

The advice letter filing shall comply with the policies and regulations adopted in ordering paragraphs 2-7.

A new Ordering Paragraph 2 should be inserted and the remaining Ordering Paragraphs should be renumbered accordingly:

2. Southern California Gas Company shall provide service under the Compression Services Tariff only to markets the Commission determines are underserved. Underserved markets may include home refueling, Unified School District fleets

and low volume, non-proprietary municipal fleets. The Commission shall revisit its categorization of specific markets every five years.