



**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
Alternative-Fueled Vehicle Tariffs, Infrastructure
and Policies to Support California's Greenhouse
Gas Emissions Reductions Goals

Rulemaking 09-08-009
(Filed August 20, 2009)

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) OPENING BRIEF

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I. INTRODUCTION

Pursuant to the January 12, 2010 Assigned Commissioner's Scoping Memo, Southern California Edison Company (SCE) respectfully files its opening brief on the question of whether entities providing electric vehicle (EV) charging services are electrical corporations and public utilities under Public Utilities (P.U.) Code Sections 216 and 218. Specifically, SCE responds to the preliminary interpretation set forth in the Scoping Memo, which relies upon Decision (D.) 91-07-018 to find that persons or corporations (other than the investor-owned utilities (IOUs)) providing EV charging services are not electrical corporations under the P.U. Code, and are not subject to the Commission's jurisdiction as public utilities.¹

The preliminary interpretation is flawed, and should be rejected. The Commission does not have the authority to exempt from its regulation entities that are clearly public utilities and load-serving entities (LSEs) under the P.U. Code. Only the Legislature can provide such exemptions, and it has not done so for the retail sale of electricity for use as transportation fuel, even though the issue has been generally before it on several occasions since 1991. In the absence of a statutory exemption, the Commission has a *duty* to regulate entities captured as

¹ See Scoping Memo, pp. 4-5.

public utilities under the Code (though it has the discretion to determine the appropriate level of regulatory oversight).

However, the Commission does not need to rely on faulty legal grounds (like the preliminary interpretation) to achieve its objectives for the EV market – and for EV charging providers (**hereinafter “EVSPs”**) in particular – because the existing regulatory framework for the retail electricity market in California allows the Commission to do precisely what it seeks to do through the preliminary interpretation, but in a manner consistent with California law.

While the Legislature has not specifically exempted EVSPs from regulation as public utilities, it *has* exempted sales of electricity to retail end-use customers by Electric Service Providers (ESPs) from regulation as public utilities.² ESPs may sell electricity directly to retail end-use customers in the IOU service areas at unregulated rates and outside of the Commission’s regulation as public utilities. But, ESPs (appropriately) remain subject to the Commission’s specific jurisdiction over LSE procurement-related obligations and consumer protections.

Therefore, the Commission should find that EVSPs can sell electricity to retail end-use customers for EV charging at unregulated rates *as ESPs*.

Finding that EVSPs wishing to engage in retail sales of electricity for EV charging at unregulated rates can do so *as ESPs* is not only consistent with California law; it is entirely appropriate from a policy perspective, because:

- Established rules already exist to ensure a level playing field for ESPs operating in the IOUs’ service areas (Rule 22 for SCE). However, the Commission would have to consider whether to modify Rule 22 to allow an ESP to serve only a customer’s EV load.

² See P.U. Code Section 216(h).

- EVSPs selling electricity to retail end-use customers are LSEs.³ As such, they should be subject to all of the obligations of LSEs under California law, including Resource Adequacy (RA) requirements, Renewables Portfolio Standard (RPS), greenhouse gas (GHG) emission reduction goals, as overseen by the Commission. As ESPs, EVSPs would be appropriately subject to these procurement-related obligations. If EVSPs were allowed to serve load free from any regulation whatsoever, and with no procurement-related obligations, they would have an unfair competitive advantage in the retail electricity market, to the detriment of ESPs in particular, from whom EVSPs may acquire market-share.

If EVSPs do not wish to take on LSE obligations, they should be permitted to sell electricity for EV charging to retail end-use customers at *regulated* rates, terms and conditions, under SCE’s Rule 18. Rule 18 already provides for certain limited exceptions to the general prohibition on electric sales to customers for resale, and would have to be modified to permit such resales by EVSPs under appropriate terms and conditions. However, nothing in Rule 18 prevents EVSPs from charging customers at unregulated prices for *other services* they may provide.⁴

For EVSPs that sell no electricity, but rather just sell EV charging equipment and retain no ownership, management, control or operation of such equipment, they are not public utilities or LSEs under the P.U. Code, and may sell EV charging equipment as part of the EV market for such goods.

By working within the existing regulatory framework, the Commission can achieve its objectives *fairly* for all sellers of electricity in the retail electricity market, *consistently* with other

³ See e.g., P.U. Code Section 399.12(g), defining a **retail seller** as “an entity engaged in the retail sale of electricity to end-use customers located within the state, including [electrical corporations as defined in Section 218], [community choice aggregators], and [ESPs].” The definition provides only three exceptions: persons employing co-generation for their own use or the use of its tenants, *etc.*; Department of Water Resources, and a local publicly owned utility.

⁴ Such other services may include parking, information, miles of battery use, or other “membership” services.

policy objectives associated with LSEs in California, and in a manner that provides *appropriate oversight* for grid reliability and consumer protections in the context of the EV market.

Accordingly, SCE urges the Commission to reject the preliminary interpretation, and find:

- (i) If EVSPs wish to sell electricity to retail end-use customers at unregulated prices, they may do so as ESPs under Rule 22, in which case they would not be subject to the Commission’s general jurisdiction as public utilities, but would be subject to the Commission’s specific jurisdiction over ESPs for procurement-related obligations and consumer protections. The Commission would have to determine whether Rule 22 should be modified to allow an ESP to serve only a customer’s EV load.
- (ii) If EVSPs wish to sell electricity to retail end-use customers, but do not want to be subject to LSE obligations, they may resell electricity to retail-end use customers at regulated prices, terms and conditions pursuant to Rule 18. Rule 18 would have to be modified to allow for such resales.
- (iii) EVSPs can choose not to sell electricity to retail-end use customers, and thereby forgo the regulatory oversight that accompanies retail electricity sales in California. Instead, they can simply operate as sellers of EV charging equipment in the emerging and developing EV market in California.⁵

II.

SUMMARY OF ARGUMENT

Section III of this opening brief discusses why the preliminary interpretation is flawed and should be rejected. In summary:

⁵ Such providers would, for example, sell charge port infrastructure (CPI) and or services such as CPI installation and maintenance, but would not provide EV “charging” through the sale of electricity to retail end-use customers.

1. The preliminary interpretation errs in its reliance on D.91-07-018 to find that *all* non-IOUs providing EV charging services are not electrical corporations or public utilities under the P.U. Code. D.91-07-018 is not applicable in the electricity context for a number of reasons. Most notably, the Commission in D.91-07-018 did not contemplate resellers of electricity operating in residential customer homes, multi-family dwellings, or commercial customer facilities, as is contemplated in the electricity context. In D.91-07-018, the Commission was very clearly focused on the gas station model and gasoline vendors in finding: “[p]ersons operating service stations for the sale of [compressed natural gas], other than those who are public utilities by reason of [other operations], are not subject to regulation by this Commission.”⁶ The discussion and reasoning in D.91-07-018 is explicitly focused on gasoline vendors that were required, under California law, to provide for the dispensing of alternate fuels such as compressed natural gas (CNG).⁷ The Commission found that these particular vendors should be provided the opportunity to sell CNG to the natural gas vehicle (NGV) owners as an unregulated service.

Therefore, D.91-07-018 does *not* provide a basis to completely exempt from regulation electricity sales to retail end-use customers through facilities installed in IOU customers’ homes, residences or businesses. The implications of allowing for wholly unregulated sales of electricity to retail end-use customers in their residences and businesses were *not considered* in D.91-07-018, because the singular focus in that decision was on gas station operators selling CNG to the public for use as an alternative transportation fuel. These implications must be considered by the Commission to reach a reasonable outcome for the issue at hand, because a failure to regulate EVSPs may entail unfair competitive advantages for unregulated EVSPs over other load serving entities (particularly ESPs) and equity issues for existing

⁶ See Ordering Paragraph 18.

⁷ See D.91-07-018, Section 2.4, discussing oil companies and gas station operators concerns with investing in CNG stations due to the possibility of state regulation as a public utility; DRA’s proposal that the Commission allow the sale of CNG at service stations for NGVs, the Commission’s interest in NGV service stations, and the California mandate that the gasoline industry must provide for the dispensing of alternate fuels such as CNG.

regulated resellers in California (*i.e.*, master-metered customers), and most certainly raises consumer protection concerns.

2. The conclusion in D.91-07-018 that facilities delivering CNG for use as transportation fuel are not “natural gas plant” does not hold up in the electricity context. EV charging equipment *is* property owned, controlled, operated or managed in connection with or to facilitate the delivery or furnishing of electricity for *power*.⁸ It is therefore “electric plant” within the meaning of Section 217. Whether the owner, manager, operator or controller of such electric plant is a public utility depends on whether such person or corporation uses it for compensation in this State and in the provision of services or commodities to the public (or a portion thereof).⁹
3. The preliminary interpretation’s reliance on D.91-07-018 as support for nonregulation of EVSPs is questionable, given that the exemption for CNG sales for transportation fuel in D.91-07-018 was superseded by a statutory exemption in Senate Bill (SB) 547, which was not extended to electricity sales. The issue of regulating sales of alternative fuels for transportation has been generally before the Legislature on several occasions since 1991 (*i.e.*, in enacting SB 547 in 1991 and SB 626 in 2009), and the Legislature has provided a statutory exemption from regulation *only* for CNG sales by public service stations.¹⁰

That the Legislature has not changed the law for electricity sales when the issue of regulating sales of alternative fuels for transportation has been generally before is indicative of the Legislature’s intent to leave the law as it stands for electricity sales.

⁸ As opposed to the natural gas context, in which the use of natural gas for *power* is generally understood to mean use of natural gas for *electricity*.

⁹ See *Van Hoosear v. Railroad Commission*, 184 Cal. 553, 554 (1920), finding that Van Hoosear was engaged in a public utility service: “[t]he test to be applied is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them.” See also *Story v. Richardson*, 186 Cal. 162, 167 (1921), explaining “[t]he essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character.”

¹⁰ See P.U. Code Section 216(f).

In the absence of a statutory exemption, the Commission has the *duty* to regulate the retail sale of electricity to the public (but the reasonable discretion to determine the appropriate level of regulation).

4. The preliminary interpretation runs afoul of P.U. Code Section 739.5, wherein the Legislature requires that where electrical service is provided to tenants of apartment buildings or similar residential complexes, the tenants pay the same rates for electric service whether they are served by a master-metered IOU customer or they are directly served by the IOU.¹¹ The notion that the Commission can permit EVSPs to set up master-metered accounts at apartment complexes to resell electricity for motor fuel to the tenants at unregulated prices and with no Commission oversight is inconsistent with the requirements of Section 739.5, which makes residential customers indifferent as to the provider of the electric service.

Moreover, the preliminary interpretation runs contrary to the Commission's longstanding principle that unregulated persons should not be allowed to resell electricity without affording the ultimate consumer any recourse as to rates and conditions of service.¹² Resales of electricity to retail end-use customers have long been prohibited in the IOU service territories, with limited exceptions, all of which are at *regulated* rates, terms and conditions of service under Rule 18.

5. The preliminary interpretation erroneously assumes that an EVSP can procure its electricity from the IOU under a retail tariff, and resell the electricity to retail end-use customers at unregulated rates and in the absence of any oversight by the Commission. Sales for resale in interstate commerce are the exclusive jurisdiction of FERC. SCE understands that FERC has not exercised jurisdiction over the sales for resale under Rule 18 because they are at rates, terms and conditions regulated by the Commission. In the absence of Commission-regulated rates, terms and conditions of service, the IOUs' sales for resale to the EVSPs would be subject to the exclusive

¹¹ See P.U. Code Section 739.5(a).

¹² See D.92109, citing D.63562; also D.99-10-06.

jurisdiction of FERC, and the sale for resale tariffs would be wholesale, not retail, rates.

EVSPs procuring electricity under wholesale tariffs for resale to retail end-use customers should be subject to the same obligations as other LSEs in California. Otherwise, EVSPs will have an unfair economic advantage in the retail electricity market in California.

Section IV of this opening brief explains why the preliminary interpretation is unnecessary for the Commission to achieve its objectives, because the Commission can achieve its objectives for the EV market in a manner consistent with California law by working within the existing regulatory framework. In summary:

1. The preliminary interpretation is unnecessary, because the Legislature has *already* provided a means in the P.U. Code for EVSPs to serve retail end-use customer load at unregulated prices and without being subject to regulation as a public utility. Pursuant to Section 216(h) of the P.U. Code, any person or corporation can sell electricity directly to retail end-use customers without being subject to the Commission's jurisdiction as public utilities. Such persons or corporations are known as ESPs. They are not subject to the Commission's jurisdiction as public utilities, and may sell electricity directly to retail end-use customers at unregulated prices, terms and conditions of service. However, as LSEs, ESPs remain subject to the Commission's specific jurisdiction for procurement-related obligations, like RA and RPS, as well as for consumer protections.

Therefore, the Commission should find that EVSPs that wish to sell electricity to retail end-use customers at unregulated prices can do so as ESPs (under Rule 22).¹³ In so doing, the Commission would appropriately rely on the existing regulatory framework to ensure consistency with California law and policy, fairness and a level playing field for all LSEs in the retail electricity market, and maintain appropriate

oversight for grid reliability and consumer protections in the context of the EV market.

2. If an EVSP does not wish to be subject to the obligations of LSEs for procurement and consumer protections, then it should be permitted to resell electricity to end-use customers at a *regulated* rate pursuant to Rule 18.¹⁴ Nothing in Rule 18 would prevent an EVSP from charging customers at unregulated prices for *other services* it may provide. It would simply disallow a profit on the resale of electricity.
3. EVSPs can forgo the selling of electricity and simply sell EV charging equipment to retail end-use customers. EVSPs that simply sell EV charging equipment (including batteries) to retail end-use customers, and maintain no ownership, operation, management or control of the equipment, are not electrical corporations under the P.U. Code, and are not subject to the Commission's regulation as public utilities.

Section V of this opening brief explains why the Commission should exert jurisdiction over EVSPs for consumer protections, even if it adopts the preliminary interpretation despite its legal infirmities.

Continued from the previous page

¹³ However, the Commission would have to consider whether to modify Rule 22 to allow an ESP to serve only a customer's EV load. Currently, Rule 22 does not allow for split load service.

¹⁴ Rule 18 would have to be modified to allow for such resale subject to appropriate terms and conditions. Currently, Rule 18 allows for resales only in limited circumstances, all of which are at regulated rates, terms and conditions of service.

III.

THE COMMISSION SHOULD REJECT THE PRELIMINARY ANALYSIS AS INCONSISTENT WITH CALIFORNIA LAW

A. The Preliminary Interpretation Fails to Account for Any Differences Among EVSPs that May Be Relevant in the Legal Analysis

As a threshold matter, the question of the Commission’s jurisdiction over EVSPs operating in California cannot be addressed generally for all EVSPs. No provision of P.U. Code *specifically* exempts EVSPs from the Commission’s jurisdiction as public utilities or otherwise. Rather, the P.U. Code describes certain attributes and activities of entities that are to be regulated as public utilities in California. Thus, an examination of the Commission’s jurisdiction over EVSPs necessarily requires consideration of the attributes and activities of EVSPs. Any analysis that seeks to draw a general conclusion for all EVSPs in the absence of such consideration would be flawed.

The Scoping Memo attempts to draw a general conclusion for all EVSPs. While identifying EVSPs as entities that vary in attributes and activities,¹⁵ the Scoping Memo nevertheless disregards these relevant facts in reaching a sweeping conclusion that none of the EVSPs that operate in California – either today or in the future – are public utilities under the Code. The Scoping Memo contains no analysis of the issues. Rather, it points to a 1991 decision in the natural gas context (D.91-07-018) for support for its finding that facilities used by EVSPs are not “electric plant” and therefore EVSPs are not “electrical corporations” subject to Commission’s jurisdiction as public utilities. For reasons explained below, D.91-07-018 does not support the preliminary interpretation, and as a result, the conclusion reached in the Scoping Memo is in error.

¹⁵ See Scoping Memo, pp. 3-4.

B. D.91-07-018 Does Not Support the Sweeping Exemption in the Preliminary Interpretation Because the Commission in D.91-07-018 Exempted Only Service Station Facilities and Did Not Consider the Implications of Exempting Residential or Commercial Charging Facilities from its Regulatory Oversight

D.91-07-018 does not support the Scoping Memo’s preliminary interpretation that EVSPs are not “electrical corporations” subject to Commission jurisdiction as public utilities. In D.91-07-018, the Commission was narrowly focused on gas (or service) stations and gasoline vendors in finding: “[p]ersons operating service stations for the sale of CNG, other than those who are public utilities by reason of [other operations], are not subject to regulation by this Commission.”¹⁶ The discussion and reasoning in D.91-07-018 is *explicitly focused* on service stations selling transportation fuel to the public:

DRA proposes that the Commission should adopt rules and tariff provisions which would allow private entities to either transport or purchase natural gas from PG&E for resale at a service station for NGVs. This would serve to foster a competitive market for the sale of CNG. If CNG is a viable alternate fuel, then third parties other than utilities may be willing to invest in NGV service stations and accept the market risks associated with such an investment. Moreover, regulations in California mandate that the gasoline industry must provide for the dispensing of alternate fuels such as CNG. These vendors should be provided the opportunity to sell gas to this potential new market as an unregulated service.”¹⁷

The Commission found that the facilities used by these service stations were not gas plant as defined in P.U. Code Section 221 because CNG was not furnished for “power” so long as it was “sold in a manner similar to the retail sale of gasoline for vehicles.”¹⁸

Thus, the Commission in D.91-07-018 exempted from its regulation only the sale of CNG by service station operators:

¹⁶ See Ordering Paragraph 18 of D.91-07-018 (emphasis added).

¹⁷ See D.91-07-18, p. 56; also p. 16, where the Commission describes the sale for resale issue as involving “whether selling CNG at a gas station makes the seller a public utility.”

¹⁸ D.91-07-018, p. 58.

“Persons and corporations operating service stations for the sale of CNG, other than those who are public utilities by reason of [other operations], are not subject to regulation by this Commission.”¹⁹

In contrast, the Scoping Memo inappropriately expands the holding of D.91-07-018 to include all EVSPs, even those that would set up facilities in customers’ homes, residential complexes or commercial customer facilities to sell electricity for use as transportation fuel. These sales models were *not contemplated* in D.91-07-018. The only model contemplated in D.91-07-018 for purposes of Commission regulation was the gas (or service) station model.²⁰

The implications of allowing wholly unregulated sales of electricity to retail end-use customers in their residences and businesses were not considered in D.91-07-018, and *must* be considered by the Commission to reach a reasonable outcome for the issue at hand. As an initial matter, allowing for the unregulated sale of electricity to retail end-use customers in residential complexes runs afoul of Section 739.5 of the P.U. Code. It also runs contrary to the Commission’s longstanding principle that customers should not be subject to electricity sales by entities that are not accountable to the Commission for their terms and conditions of resale, and raises equity concerns for existing *regulated* resellers in California (*i.e.*, master-metered customers under Rule 18). These issues are discussed in Section III.E below.

Moreover, allowing wholly unregulated sales of electricity to retail end-use customers could provide an undue preference (and unfair competitive advantage) for EVSPs over other LSEs in California, because EVSPs would appear to have no procurement-related obligations if they purchase power at wholesale. The preliminary interpretation assumes that the EVSP would take generation service from an IOU or ESP, which would include the costs associated with the IOU’s or ESP’s procurement obligations, such as RA and RPS, and the EVSP would be free to

¹⁹ D.91-07-018, Conclusion of Law 4; *see also* Finding of Fact 18.

²⁰ The only CNG fueling option contemplated in D.91-07-018 was the customer-owned and operated CNG station on customer’s property, for use in fueling customer’s fleets of 20 or more vehicles. This model would not involve a sale for resale or a public utility service, and was therefore not included in the Commission’s analysis of regulation over sales for resale of CNG by service stations in D.91-07-018. *See* D.91-07-018, pp. 12-13, 35-36.

resell electricity at unregulated prices. However, as discussed in Section III.F below, SCE believes the sale for resale to the EVSPs could instead be subject to FERC’s jurisdiction if the Commission declines to regulate the resale by the EVSP to the end-use customers (as is done today under Rule 18), and the EVSP could purchase power at wholesale. Under those circumstances, EVSPs that sell electricity to retail end-use customers should be required to comply with the same procurement-related obligations that apply to the IOUs and ESPs in California.

Furthermore, EVSPs would appear to have no consumer protection requirements under the preliminary interpretation, as do all other LSEs in California.²¹ There is no basis for allowing EVSPs to serve load without any of the obligations for consumer protections, reliability or the public policy requirements imposed on other LSEs under California law.

None of the above issues were considered in D.91-07-018. Therefore, D.91-07-018 does *not* provide support for an exemption from Commission regulation for the electricity sales by EVSPs to retail end-use customers.

C. The Rationale in D.91-07-018 Does Not Hold Up in the Electricity Context Because EV Charging Equipment Facilitates the Provision of Electricity for Power and is Therefore Electric Plant under the P.U. Code

The Scoping Memo’s preliminary interpretation states:

“Facilities that are solely used to provide electricity as transportation fuel do not constitute “electric plant” pursuant to [P.U. Code Section] 218 [*sic*].²² Thus, an entity owning, controlling, operating, or managing electric vehicle charging facilities is not an “electric corporation” pursuant to P.U. Code Section 218 and not a “public utility” pursuant to [P.U. Code Section] 216, unless an entity falls under [Sections] 216 and 218 for other reasons.”²³

²¹ See e.g., P.U. Code Section 394 *et seq.* for consumer protection requirements for ESPs; *also* P.U. Code Section 739.5.

²² Electric plant is defined in Section 217 of the P.U. Code, not Section 218.

²³ Scoping Memo, pp. 4-5.

The key to this interpretation is the finding that the “facilities” – or EV charging equipment – used by EVSPs are not electric plant.²⁴ The Scoping Memo provides no analysis of the issue. Rather, it relies on the rationale applied in D.91-07-018, wherein the Commission considered whether gas stations providing CNG for use as transportation fuel were “gas corporations” using “gas plant.” Focusing on the sale of CNG by gas (or service) stations (as is emphasized in the quote below), the Commission reasoned that gas stations selling CNG solely for use as transportation fuel do not use gas plant (under Section 221)²⁵ and are therefore not gas corporations (under Section 222):²⁶

“Under these statutes, a fleet operator owning a CNG pump for its own fleet clearly does not fall within the statute. And we believe it is expanding the meaning of words to an unnecessary degree to equate the word “power” in Section 221 to include CNG which is sold in a manner similar to the retail sale of gasoline for vehicles. . . . After all, we do not believe anyone would seriously contend that a gas station operator is a “pipeline corporation” subject to our jurisdiction merely because he has pipes in his station which deliver “fluid substances except water through pipe lines.”²⁷

The Commission does not explain in D.91-07-018 why it finds the sale of CNG for transportation fuel by gas stations is not a sale of CNG for *power*. It merely reasons by analogy. Yet, the Commission’s conclusion is not unreasonable given that in the natural gas context, the sale of natural gas for *power* is typically equated with the sale of natural gas for *electricity*.

²⁴ Electric plant is defined to include “all real estate fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.” P.U. Code Section 217.

²⁵ Gas plant is defined to include “all real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, underground storage, or furnishing of gas, natural or manufactured, except propane, for light, heat, or power.” P.U. Code Section 221.

²⁶ A “gas corporation” includes “every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this state, except where gas is made or produced on and distributed by the maker or producer through private property alone solely for his own use or the use of his tenants and not for sale to others.” P.U. Code Section 222.

²⁷ D.91-07-018, p.58.

However, in the electricity context, the same conclusion cannot be drawn, because the sale of electricity for use as transportation fuel *is* a sale of electricity for *power*. In which case, the facilities (EV charging equipment) used to deliver the electricity would be electric plant within Section 217, the persons or corporations using such facilities for compensation in this state are electrical corporations as provided in Section 218, subject to the Commission’s jurisdiction when they offer services or deliver commodities to the public or any portion thereof.²⁸ This analysis is supported by the fact that the Legislature, in Section 216(f), explicitly provided that facilities selling CNG to the public for use as motor fuel were not public utilities, but provided no such exemption for electricity sales for EVs, as discussed below.

D. The Exemption Provided in D.91-07-018 Has Been Superseded by a Specific Statutory Exemption That Was Not Extended to the Electricity Sector

The preliminary interpretation’s reliance on D.91-07-018 as support for nonregulation of EVSPs is questionable, given that the exemption for CNG sales for transportation fuel in D.91-07-018 was superseded by a statutory exemption in SB 547, which was not extended to electricity sales.

In SB 547, enacted shortly after D.91-07-018, the Legislature provided an exemption from the definition of a public utility for facilities selling CNG to the public for use as transportation fuel:

“The ownership or operation of a facility that sells compressed natural gas at retail to the public for use only as a motor vehicle fuel, and the selling of compressed natural gas at retail from that facility to the public for use only as a motor vehicle fuel, does not make the corporation or person a public utility within the meaning of this section solely because of that ownership, operation, or sale.”²⁹

²⁸ See fn. 8, *supra*.

²⁹ P.U. Code Section 216(h) (emphasis added).

Of note is the Legislature's exemption for facilities selling CNG *to the public* for use as motor fuel. Like the Commission in D.91-07-018, the Legislature exempted only facilities that sell CNG in a manner similar to the retail sale of gasoline for vehicles (*i.e.*, the gas or service station model). It did not exempt sales in customers' homes, residential complexes or commercial facilities. Thus, like D.91-07-018, the statutory exemption in SB 547 provides no support for the sweeping nonregulation of EVSPs as proposed in the preliminary interpretation.

However, even more important for the Commission's consideration is the fact that the Legislature did not enact a similar exemption for the sales of electricity as use for motor fuel, despite its awareness as early as 1991 of electricity as an alternate fuel for low-emission vehicles (LEVs), and its express objective to further substantial market penetration of electric and CNG-fueled vehicles.

In particular, as noted in D.91-07-018, Section 740.2 of the P.U. Code (as it stood in 1991) directed the Commission to explore various means of furthering the "legislative goal of achieving substantial market penetration" of electric- and CNG-fueled vehicles,³⁰ including:

- Evaluating and implementing policies to promote the development of equipment and infrastructure needed to facilitate the use of electric power and natural gas to fuel LEVs; and
- Ensuring that utilities do not unfairly compete with nonutility enterprises.³¹

Yet, despite these express legislative goals and mandates to further the substantial market penetration of electric- and CNG-fueled vehicles, the Legislature declined to exempt electricity sales for motor fuel from the statutory definitions of electric plant, electrical corporation or public utility, as it did for CNG sales in SB 547. The Legislature *could have* done so in SB 547, but did not. This is compelling evidence of legislative intent contrary to the conclusion reached in the preliminary interpretation.

³⁰ See D.91-07-018, p. 2, quoting Section 740.2 as it existed in 1991. It was repealed under its own terms in 1997, and re-enacted in 2009 as part of SB 626.

³¹ See D.91-07-018, pp. 2-4, quoting Section 740.3.

Recently, the Legislature renewed its goals and mandates for electric-fueled vehicles in SB 626, effective January 2010 (codified at Section 740.2 of the P.U. Code). And, once again, the Legislature did not exempt electricity sales for motor fuel from the Commission's jurisdiction, as it did for CNG sales in SB 547.

That the Legislature has not changed the law for electricity sales when the issue of regulating sales of alternative fuels for transportation has been generally before it – and it has changed the law (narrowly) for CNG sales – is indicative of the Legislature's intent to leave the law as it stands for electricity sales, requiring the Commission to regulate all electricity sales to retail end-use customers in California.³²

E. The Preliminary Interpretation Runs Afoul of Section 739.5 of the P.U. Code and the Commission's Longstanding Regulation of Electricity Resales to Retail End-Use Customers

In allowing for the unregulated sales of electricity for use as transportation fuel to tenants in apartment buildings and similar residential complexes, the preliminary interpretation runs afoul of Section 739.5 of the P.U. Code, which mandates the regulation of master-metered sales to residential customers. In particular, that statute directs the Commission to:

“[R]equire that, whenever gas or electric service, or both, is provided by a master-metered customer to users who are tenants of a mobilehome park, apartment building, or similar residential complex, the master-metered customers shall charge each user of the service at the same rate that would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation.”

Thus, under Section 739.5, an EVSP that sets up a master-metered account at an apartment complex or similar residential complex to sell the tenants electricity for EV charging

³² See *Estate of McDill*, 14 Cal.3d 831, 837-38 (1975), providing “[t]he failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.” See also *Vesely v. Sager*, 5 Cal. 3d 153, 167 (1971); *Bishop v. City of San Jose*, 1 Cal.3d 56, 65 (1969); *Williams v. Industrial Acc. Com.*, 64 Cal.2d 618, 620 (1966); *Alter v. Michael*, 64 Cal.2d 480, 482 (1966); *Kusior v. Silver*, 54 Cal.2d 603, 618 (1960).

would be required to charge the tenants the *same rate* that would apply if the tenants were receiving service directly from the IOU.³³ Moreover, the master-metered customer is required to distribute any refunds or rebates received from the IOU to the tenants on a proportional basis,³⁴ and the Commission is directed to accept and respond to complaints from customers concerning the requirements of Section 739.5.³⁵

None of these requirements would be met if EVSPs (or landlords) could simply establish a master-metered account at a residential complex and sell the electricity at unregulated rates without any oversight by the Commission. The Commission’s objectives for the EV market must be reconciled with the requirements of Section 739.5.

Moreover, the Commission’s objectives for the EV market must be reconciled with its longstanding principle that unregulated persons or entities should not be allowed to resell electricity without affording the ultimate consumer any recourse as to rates and conditions of service.³⁶ Resales of electricity to retail end-use customers have long been prohibited in the IOU service territories with limited exceptions, all of which are at regulated rates, terms and conditions of service under Rule 18.

Accordingly, the Commission’s objectives for the EV market must be reconciled with the requirements of Section 739.5, *and* with the longstanding principle that any electricity resales to retail end-use customers (if permitted) should be regulated. In SCE’s view, they should be reconciled by finding that EVSPs can either sell electricity at *regulated* rates, terms and conditions of service pursuant to Rule 18 (which implements P.U. Code Section 739.5 and governs retail resales), or they can sell electricity at *unregulated* rates,³⁷ terms and conditions of service pursuant to Rule 22 (as ESPs). SCE discusses these issues further in Section IV, below.

³³ See P.U. Code Section 739.5(a).

³⁴ See P.U. Code Section 739.5(b).

³⁵ See P.U. Code Section 739.5(c).

³⁶ See D.92109, citing D.63562; *also* D.99-10-06.

³⁷ By “electricity” SCE means the electric commodity itself, and not the services associated with the delivery of it to retail end-use customers, because electricity delivery, even under a direct transaction with an ESP, is paid for by the end-use customer at regulated rates.

F. The Preliminary Interpretation Errs in Assuming that EVSPs Can Procure Electricity from the IOUs Under Retail Tariffs -- Particularly if the Commission Declines to Regulate the Resale to the End-Use Customers -- Because Sales For Resale in Interstate Commerce are FERC Jurisdictional Transactions

The preliminary interpretation erroneously assumes that an EVSP can procure its electricity from the IOU under a retail tariff, and resell the electricity to retail end-use customers at unregulated rates and in the absence of any oversight by the Commission. Specifically, the preliminary interpretation states:

“The Commission would not have regulatory authority regarding the price that an electric vehicle charging facility operator charges for charging services or other aspects of the operation of such facilities unless the charging facility operator is a public utility by reason of its operations other than providing electric charging. The price that a provider of charging services pays for electricity would vary based on the provider’s relationship with its load-serving entity. For example, the customer of an investor-owned utility would pay a rate according to a tariffed rate schedule. . . .”³⁸

SCE disagrees, particularly if the EVSP’s resale of electricity is not subject to the Commission’s regulation. Sales for resale in interstate commerce are the exclusive jurisdiction of FERC.^{39 40} SCE understands that FERC has not exercised jurisdiction over the sales for resale under Rule 18 because the resales permitted thereunder are at rates, terms and conditions regulated by the Commission. However, in the absence of Commission-regulated rates, terms and conditions of service, the IOUs’ sales for resale to the EVSPs would be subject to the

³⁸ Scoping Memo, p. 5 (emphasis added).

³⁹ Section 201(b)(1) of the Federal Power Act grants the FERC jurisdiction over wholesale sales of electricity. Section 201(d) defines “sale of electric energy at wholesale” as a “sale of electric energy to any person for resale.”

⁴⁰ See *United States v. Public Utilities Commission of California et al.*, 345 U.S. 295 (1953) (sale for resale is subject to FERC’s exclusive jurisdiction when nearly all power sold to a reseller is redistributed); *City of Oakland v. FERC*, 754 F.2d 1378 (9th Cir., 1985) (resale of electricity to individually metered tenants is sale for resale subject to FERC’s exclusive jurisdiction, and reseller is entitled to wholesale rates); also *Department of the Navy v. Pacific Gas and Electric Corp.*, 49 F.E.R.C. 61, 383 (1989) (relying on *Oakland* and *Public Utilities Commission* to find that, where a utility sells electricity to a purchaser that resells the electricity to individually metered consumers that are billed according to the actual amount of energy they consume, the utilities’ sales are FERC jurisdictional).

exclusive jurisdiction of FERC, and the sale for resale tariffs would be wholesale, not retail, rates.

Because wholesale tariffs do not include costs associated with procurement-related obligations under California law for LSEs (including RA, RPS and GHG emission reductions), EVSPs procuring electricity under wholesale tariffs for resale to retail end-use customers should be subject to the same obligations as other LSEs in California. Otherwise, EVSPs will have an unfair economic advantage in the retail electricity market in California.

IV.

THE COMMISSION SHOULD REJECT THE PRELIMINARY ANALYSIS AS UNNECESSARY TO ACHIEVE ITS OBJECTIVES FOR THE EV MARKET

As discussed above, the preliminary interpretation errs in its sweeping conclusion that none of the EVSPs that operate in California – either today or in the future – are public utilities under the P.U. Code. The Commission should not – and *need* not – disclaim all jurisdiction over EVSPs for concerns of a competitive EV marketplace. It can – and should – seek to achieve its objectives for the EV market within the existing regulatory framework in California for retail electricity market participants.

As previously noted, no statutory exemption from the definition of public utility or electrical corporation has been provided for EVSPs selling electricity at retail to the public for use as transportation fuel.⁴¹ However, the Legislature *has* exempted from regulation as public utilities ESPs entering into direct transactions with retail end-use customers.⁴² Therefore, EVSPs that wish to sell electricity to retail end-use customers at unregulated prices can do so as ESPs, and would not be subject to the Commission’s jurisdiction as public utilities. However, as ESPs, EVSPs would be subject to the Commission’s jurisdiction for RA, RPS, and consumer protections, among other areas.

⁴¹ See Section III.D, *supra*.

⁴² See P.U. Code Section 216(h).

Finding that EVSPs wishing to sell electricity to retail end-use customers at unregulated prices must do so as ESPs (under Rule 22) should have significant appeal to the Commission:

- It allows EVSPs to sell electricity to retail, end-use customers at unregulated prices and without being subject to the Commission’s jurisdiction as public utilities, under established rules (Rule 22) to allow for a level playing field.
- It avoids the creation of a new type of LSE in California that has none of the procurement-related obligations or consumer protection requirements of other LSEs in California. Under the preliminary interpretation, EVSPs could sell electricity to end-use customers at unregulated prices, while avoiding regulatory oversight by the Commission, for consumer protections and otherwise. This approach would create an undue preference for EVSPs over other LSEs, like ESPs, who are subject to procurement-related obligations (like RA and RPS) and must satisfy minimum consumer protection requirements.⁴³ There is no basis for such a preference for any LSE in California.
- It avoids the legally questionable assumption of the preliminary interpretation that an EVSP can buy its electricity from an IOU under retail tariffs and resell it to end-use customers at any price it wishes. SCE understands that a sale for resale is a FERC-jurisdictional transaction, and would be subject to FERC-jurisdictional tariffs, particularly if the Commission declines to regulate the EVSPs’ resales to the retail end-use customer, as it does under SCE’s Rule 18 for other resales in California.
- As discussed in Section III.E above, it does not run afoul of Section 739.5 of the P.U. Code, as the preliminary interpretation would appear to do.
- It does not run afoul of a longstanding principle of the Commission that customers should not be subject to electricity sales by entities that are not accountable to the Commission for their terms and conditions of resale.

⁴³ See e.g., P.U. Code Sections 380, 399.11 *et seq.*, 365.1, 394 *et seq.*

- It imposes no obligations on EVSPs that simply sell EV charging equipment to end-use customers, and otherwise maintain no ownership, control, operation or management of the EV charging equipment. EVSPs that simply sell EV charging equipment (including batteries) to retail end-use customers, and maintain no ownership, operation, management or control of the equipment,⁴⁴ are not electrical corporations under the P.U. Code, and are not subject to the Commission’s regulation as public utilities. Therefore, EVSPs can choose not to sell electricity to retail-end use customers, and thereby forgo the regulatory oversight that accompanies electricity sales in California. Instead, they can simply operate as sellers of EV charging equipment in the emerging and developing EV market in California.
- It does not require a faulty analysis of the P.U. Code to carve-out EVSPs from the Commission’s regulation as public utilities, as the preliminary interpretation does.

If an EVSP does not wish to be subject to the obligations of LSEs for procurement and consumer protections, then it should be permitted to resell electricity it buys under an IOU’s retail tariff to end-use customers at a regulated rate under Rule 18, which would need to be modified to allow this specific exemption under appropriate terms and conditions.⁴⁵

By working within the existing regulatory framework, the Commission can achieve its objectives *fairly* for all sellers of electricity in the retail electricity market, *consistently* with other policy objectives associated with LSEs in California, and in a manner that provides *appropriate oversight* for grid reliability and consumer protections in the context of the EV market.

⁴⁴ SCE does not consider a straight “sale” of EV charging equipment to include an EV equipment leasing or subscription arrangement, under which the EVSP essentially sells electricity to a retail end-use customer by charging the customer for the on-going provision of EV battery charging services and/or charged EV battery exchanges based kilowatt-hour usage, the amount of time spending charging, a flat rate per charge, a flat rate per charged battery, or a monthly subscription rate, *etc.* Rather, SCE considers this type of EVSP service to include the resale of electricity, which, in IOU service areas, should be required to be done under Rule 22 (as an ESP) or under Rule 18 (as a regulated resale).

⁴⁵ Indeed, SCE would presume that Rule 18 applies to any EVSP’s retail sales of electricity, unless the EVSP is registered and providing service as an ESP.

V.

EVEN IF THE COMMISSION ADOPTS THE PRELIMINARY INTERPRETATION, IT SHOULD STILL FIND THAT EVSPS ARE SUBJECT TO THE COMMISSION'S JURISDICTION FOR CONSUMER PROTECTIONS

If the Commission adopts the preliminary interpretation – which as discussed above it should not – it should find that EVSPs are subject to the Commission's jurisdiction for consumer protections under P.U. Code Section 394 *et seq.* of the P.U. Code. The reach of the Commission for consumer protections under P.U. Code Section 394 *et seq.* is quite broad, and appears to encompass EVSPs.

Specifically:

“As used in this section, “electric service provider” means an entity that offers electrical service to customers within the service territory of an electrical corporation, but does not include an electrical corporation, as defined in Section 218, does not include an entity that offers electrical service solely to serve customer load consistent with subdivision (b) of Section 218 [*i.e.*, cogeneration technology used for specified purposes], and does not include a public agency that offers electrical service to residential and small commercial customers within its jurisdiction, or within the service territory of a local publicly owned electric utility. “Electric service providers” includes the unregulated affiliates and subsidiaries of an electrical corporation, as defined in Section 218.”⁴⁶

The above definition of an ESP contains no express exemption for EVSPs, and the exemptions in the definition do not apply to an EVSP unless it is a public agency offering service to residential and small commercial customers within its jurisdiction. Certainly, the EVSPs described in the Scoping Memo consist largely of private entities.⁴⁷ Thus, the consumer protection provisions of Section 394 *et seq.* should apply to EVSPs.

⁴⁶ Section 394(a) of the P.U. Code.

⁴⁷ See Scoping Memo, pp. 3-4.

VI. CONCLUSION

SCE appreciates the opportunity to submit this opening brief. For the reasons discussed above, SCE urges the Commission to reject the preliminary interpretation, and find:

- (i) If EVSPs wish to sell electricity to retail end-use customers at unregulated prices, they may do so as ESPs under Rule 22, in which case they would not be subject to the Commission's general jurisdiction as public utilities, but would be subject to the Commission's specific jurisdiction over ESPs for procurement-related obligations and consumer protections. The Commission would have to determine whether Rule 22 should be modified to allow an ESP to serve only a customer's EV load.
- (ii) If EVSPs wish to sell electricity to retail end-use customers but do not want to be subject to LSE obligations, they may resell electricity to retail-end use customers at regulated prices pursuant to Rule 18. Rule 18 would have to be modified to allow for such resale subject to appropriate terms and conditions.
- (iii) EVSPs can choose not to sell electricity to retail-end use customers, and thereby forgo the regulatory oversight that accompanies electricity sales in California. Instead, they can simply operate as sellers of EV charging equipment in the emerging and developing EV market in California.

These findings are consistent with law, ensure a level playing field for all LSEs, appropriately protect consumers, and allow for the development of a competitive market for EV charging equipment and services in California.

Respectfully submitted,

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February 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of **SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) OPENING BRIEF** on all parties identified on the attached service list(s) in proceeding R.09-08-009. Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address.
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Executed this **10th day of February, 2010**, at Rosemead, California.

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