

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 reduction goals.

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

**REPLY BRIEF OF THE  
DIVISION OF RATEPAYER ADVOCATES**

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**I. INTRODUCTION**

Pursuant to the December 29, 2009 Assigned Commissioner Scoping Memo (Scoping Memo), Division of Ratepayer Advocates (DRA) hereby submits this reply brief in Phase One of this Rulemaking (R.) 09-08-009. In addition to DRA, the following parties submitted opening briefs on February 8, 2010: The Utility Reform Network (TURN), Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas and Electric Company (SDG&E) and Southern California Gas Company, Clean Energy Fuels Corporation, Better Place, the Electric Vehicles Service Provider Coalition, Coulomb Technologies, Inc., Interstate Renewable Energy Council (IREC), Environmental Defense Fund (EDF), Green Power Institute, Natural Resources Defense Council (NRDC) and Friends of the Earth (FoE), Western States Petroleum Association (WSPA), and Californians for Renewable Energy (CARE) and North Coast Rivers Alliance (NCRA).

In opening briefs, parties addressed the Scoping Memo's request for a legal and policy analysis on whether third-party electric vehicle (EV) charging facilities are electric corporations and public utilities under California Public Utilities Code Sections 216 and 218. The Scoping Memo offered a preliminary interpretation that facilities solely used to

provide electricity as a transportation fuel do not constitute an “electric plant,” and therefore are not public utilities pursuant to Section 216. The Scoping Memo relied on Decision (D.) 91-07-018, which exempted compressed natural gas (CNG) fueling stations from Commission jurisdiction, as a basis of its interpretation. In opening briefs, many parties, including DRA, found this preliminary interpretation lacking any legal justification, with the potential of undermining many of the Commission’s existing procurement policies, such as those impacting grid reliability and the state’s renewable resource goals.

## **II. DISCUSSION**

### **A. The Commission Has Jurisdiction Over Retail Electric Vehicle Charging Stations**

Several parties engaged in a statutory analysis of Public Utilities Code Sections 216 and 218, to discuss the plain meaning interpretation, legislative intent, and Commission precedent to determine whether electric vehicle charging stations are “electric plant” for purposes of being an “electrical corporation” and “public utility” under the code. Under the Public Utilities Code, an electric corporation is a public utility subject to the jurisdiction, control and regulation of the Commission.<sup>1</sup> An “electrical corporation” includes every corporation, or person owning, controlling, operating, or managing any electric plant for compensation within this state.<sup>2</sup> An “electric plant” is defined as:

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 to be used for the transmission of electricity for light, heat, or power.<sup>3</sup>

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<sup>1</sup> P.U. Code § 216.

<sup>2</sup> P.U. Code § 218.

<sup>3</sup> P.U. Code § 217.

## **1. The Plain Meaning of The Statute Clearly Includes Retail EV Charging Infrastructure Within the Meaning of Electric Plant**

In opening briefs, several parties argued electric vehicle charging stations do not constitute “electric plant.” Better Place states EV charging infrastructure does not constitute “electric plant” because use of electricity by providers of EV charging services to provide transportation fuel for vehicles does not constitute use of electricity for “light, heat, or power,” within the meaning of Section 217.<sup>4</sup> Better Place also contends that the fueling infrastructure will not extend beyond the charging station and meter, and will include none of the substations, wires and switches that make up an electricity system.<sup>5</sup> WSPA makes a similar argument that electricity as a transportation fuel does not constitute use of electricity for “power.” WSPA argues because Legislature did not include the work “fuel” or “automobile fuel” when defining “electric plant,” no such meaning was intended.<sup>6</sup> Coulomb offers no legal analysis on the topic, but agrees with Better Place that electric vehicle service providers (EVSPs) providing bundled charging services are not public utilities subject to Commission jurisdiction.<sup>7</sup> EDF agrees with the Scoping Memo that the Section 217 definition of “electric plant” excludes systems used explicitly for EV charging, but wonders whether it is appropriate for the Commission to rely on D.91-07-018 as the sole weight of authority in support of its decision.<sup>8</sup> SEU agrees with the Scoping Memo’s preliminary interpretation, saying that third party electrical fuel providers are legally indistinguishable from the CNG fuel providers, but offers no further legal analysis.<sup>9</sup>

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<sup>4</sup> Better Place Opening Brief, p. 3.

<sup>5</sup> Better Place Opening Brief, p. 5.

<sup>6</sup> WSPA Opening Brief, p. 5.

<sup>7</sup> Coulomb Opening Brief, p. 4.

<sup>8</sup> EDF Opening Brief, p. 5.

<sup>9</sup> SDG&E and SCG Opening Brief, p. 3.

The arguments are not persuasive and should be disregarded. Better Place and WSPA attempt to distort the meaning of Section 217 by stating electricity for use as a transportation fuel is not a sale for “power.” Both parties place heavy reliance on D.91-07-018, in which the Commission stated “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.”<sup>10</sup> However, as DRA’s opening brief explains in detail, D.91-07-018 cannot be applied in the same context here since that case involved CNG as a fuel resource, and whether CNG fueling stations constituted “gas plant” for purposes of being a public utility.<sup>11</sup> DRA also agrees with SCE that “the same conclusion [of D.91-07-018] cannot be drawn because the sale of electricity for use as transportation fuel *is* a sale of electricity for *power*.”<sup>12</sup> PG&E makes a similar observation, and adds, “Here, the electric vehicle charging activities are inextricably intertwined—and in fact indistinguishable from—the provision of basic retail electric service to end-use customers by a public utility.”<sup>13</sup> The sale of electricity is a sale of *power*, regardless of whether the end user powers a washing machine or an electric vehicle. To determine otherwise would be an unreasonable expansion of the meaning of the words of Section 217.

IREC takes no position on the topic, until more information regarding the potential business models are available, and states the jurisdictional issue hinges on the relationship between the entities involved. DRA agrees. Like DRA, IREC finds that the limited and private nature of the service may serve as an exception to Commission jurisdiction.<sup>14</sup>

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<sup>10</sup> D.91-07-018, p. 58.

<sup>11</sup> DRA Opening Brief, pp. 5-6.

<sup>12</sup> SCE Opening Brief, p. 15.

<sup>13</sup> PG&E Opening Brief, p. 3.

<sup>14</sup> IREC Opening Brief, p. 7. *See also* DRA Opening Brief, p. 3.

## 2. Legislative Intent

Better Place argues there is no evidence of legislative intent to regulate the provision of electricity for transportation fuel.<sup>15</sup> Its only support for this argument is reliance on Public Utilities Code Section 740.3, which states that “the commission's policies [to develop equipment or infrastructure needed for low-emission vehicles] shall also ensure that utilities do not unfairly compete with nonutility enterprises.” According to Better Place, this reference to “nonutility enterprises” shows the Legislature’s intent that other entities participate in the EVSE market.

This argument is not persuasive. The Public Utilities Code clearly exempts certain electric corporations from Commission regulation, including: (1) where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others (§ 218(a)); (2) employing cogeneration technology or producing power from other than a conventional power source (§ 218(b)); (3) employing landfill gas technology (§ 218(c)); (4) employing digester gas technology (§ 218(d)); (5) an independent solar energy producer (§ 218(e)). In addition, other entities, such as facilities that sell CNG at retail for use as a motor vehicle fuel (§ 216(f)), exempt wholesale generators (§ 216(g)), and electric service providers (ESPs) who offer direct access service (§ 216 (h)), are not considered public utilities under Commission jurisdiction. So, while Better Place is correct in pointing out that the Commission is directed to ensure that public utilities do not unfairly compete with nonutility enterprises under Section 740.3, classification as a “nonutility enterprise” depends on whether one falls under any of those exemptions enumerated above. Thus, as explained in DRA’s opening brief, electric vehicle charging stations that sell electricity at retail or for resale are electrical corporations and public utilities subject to Commission regulation, unless specifically exempted by statute.

It also does not follow that Legislature intended to exclude *all* electric vehicle charging stations from regulation. If that was Legislature’s intent, a statute specifically

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<sup>15</sup> Better Place Opening Brief, p. 1.

tailored to electric vehicle charging stations would have been crafted. All CNG fueling stations, in contrast, are specifically exempt per Public Utilities Code Section 216(f). The Legislature had another opportunity to consider exemption of electric vehicle charging stations when it passed Senate Bill No. 626 on October 11, 2009, adding Section 740.2 regarding the role and development of public charging infrastructure.<sup>16</sup> This deliberate inaction by Legislature suggests that retail electric vehicle charging stations are to be regulated by the Commission.

**3. The Commission Cannot Rely on D.91-07-018 to Renounce Jurisdiction Over Retail Electric Vehicle Charging Stations For Legal and Policy Reasons**

Parties that wish the Commission to disclaim jurisdiction over electric vehicle charging stations place too much emphasis on D.91-07-018, drawing parallels with electric vehicle charging to the CNG fueling stations.<sup>17</sup> As DRA’s opening brief explains, however, whether CNG vehicle fueling stations are “gas plant” for purposes of being a public utility is a completely different legal issue from whether an electric vehicle charging station is an “electric plant.”<sup>18</sup> As stated above, CNG fueling stations are also exempted by Public Utilities Code Section 216(f), rendering the discussion of jurisdiction in D.91-07-018 moot.

But CNG and electricity as transportation fuel also have divergent policy considerations. Simply because CNG and electricity are both alternative-fuel vehicle fuel resources, it does not follow that the same policies should apply given significant differences. CNG is stored, whereas electricity is extracted from the grid in real-time. For this reason, the Commission must exercise some form of regulation over retail electric vehicle charging. For example, should retail electric vehicle stations allow consumers to charge their vehicles during peak hours, and at a price lower than the

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<sup>16</sup> [Stats 2009 ch 355 § 1 \(SB 626\)](#), effective January 1, 2010.

<sup>17</sup> Better Place, p. 7.

<sup>18</sup> DRA Opening Brief, pp. 6-7.

wholesale price of energy? Should retail electric vehicle stations be allowed to procure cheaper, “dirty” power (i.e., coal) over a more expensive renewable resource? The Commission’s rules regarding procurement practices of the utilities should apply to all entities offering electricity for sale in the market. Also, consumer protection rules may be necessary. For example, what is a customer’s recourse if a charging station damages the battery or equipment while charging? Such questions need to be addressed to determine if there is a need for Commission regulation and oversight.

DRA agrees with SCE that service stations selling electricity as a transportation fuel can choose to operate as ESPs subject to Rule 22 and the rules with respect to direct access service, should a retail electric vehicle charging station not wish to submit to full Commission regulation.<sup>19</sup> As noted by SCE, an ESP is subject to the Commission’s jurisdiction for purposes of Resource Adequacy, Renewable Portfolio Standard, and consumer protection.<sup>20</sup> DRA also agrees with SCE that, alternatively, a retail electric vehicle charging station should be able to resell electricity under Rule 18, since the utility providing power is already subject to the Commission’s procurement rules.<sup>21</sup>

Many parties who advocate for Commission jurisdiction propose that retail electric vehicle charging stations should be subject to “light regulation”. This light regulation should be focused on benefiting ratepayers and creating a competitive market environment. Key functions to be regulated include interoperability, reliability, grid impact, and safety functions. DRA agrees with NRDC/FoE that regulatory flexibility may be adopted, by imposing certain requirements, such as registration and certification procedures to allow only qualified personnel to install, remove, repair or maintain equipment.<sup>22</sup>

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<sup>19</sup> SCE Opening Brief, p. 21.

<sup>20</sup> SCE Opening Brief, p. 20.

<sup>21</sup> SCE Opening Brief, p. 22.

<sup>22</sup> NRDC/FoE Opening Brief, pp. 16-17.

DRA recommends that the Commission not regulate the rates and fees that these resellers charge.

Creating interoperability rules and standards should be coordinated with the Smart Grid proceeding. The rules must also be designed to minimize grid impact under an alternative scenario that in the next few years the demand grows faster and larger than anticipated.

If the Commission authorizes the traditional utilities to enter into EVSP business, they should not be allowed to rate-base the charging equipment. This will help level the playing field. If the EVSE is rate-based, it would create disincentives for the third-party EVSPs to enter the market, since the cost of the equipment would be subsidized by all ratepayers, resulting in lower cost or even no costs to the PEV customer. In the long run the lack of competition would tend to increase the cost to the ratepayers. The utilities should be allowed to own charging equipment for their own fleet as long as there are no direct or indirect cost increases for ratepayers.

Respectfully submitted,

/s/ LISA-MARIE SALVACION

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March 1, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of “**REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES**” to the official service list in **R. 09-08-009** by using the following service:

**E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

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Executed on **March 1, 2010** at San Francisco, California.

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