

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED
06-10-10
04:59 PM

Order Instituting Rulemaking on the)
Commission's own motion to consider)
alternative-fueled vehicle tariffs,) Rulemaking 09-08-009
infrastructure and policies to support)
California's greenhouse gas emissions)
reduction goals.)
_____)

**OPENING COMMENTS OF CALIFORNIANS FOR RENEWABLE ENERGY AND
NORTH COAST RIVERS ALLIANCE ON THE PROPOSED DECISION IN PHASE 1
ON JURISDICTION OF THE COMMISSION OVER THE SALE OF
ELECTRICITY AT RETAIL TO THE PUBLIC FOR THE SOLE
USE AS MOTOR VEHICLE FUEL**

STEPHAN C. VOLKER (CSB #63093)
svolker@volkerlaw.com
JOSHUA A.H. HARRIS (CSB #222886)
jharris@volkerlaw.com
STEPHANIE L. ABRAHAMS (CSB #257961)
sabrahams@volkerlaw.com
LAW OFFICES OF STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, CA 94612
Tel: 510.496.0600
Fax: 510.496.1366

June 10, 2010

INTRODUCTION

Per Rule 14.3 of the Rules of Practice and Procedure, Californians for Renewable Energy (CARE) and North Coast Rivers Alliance (NCRA) hereby submit comments on Commissioner Nancy E. Ryan’s proposed decision (PD) addressing the California Public Utilities Commission’s (the Commission’s) jurisdiction, or lack thereof, over facilities that sell electricity to the public for use only as a motor vehicle fuel, or Electric Vehicle Service Providers (EVSPs). The PD concludes that the selling of electricity for use as “motor vehicle fuel does not make the corporation or person a public utility within the meaning of Pub. Util. Code § 216 solely because of that sale, ownership or operation.” PD, p. 1. CARE and NCRA disagree with the PD and urge the Commission to determine that it has jurisdiction over EVSPs.

DISCUSSION

4.1. Legal Framework

The PD’s Legal Framework section lays out its analysis of Public Utilities Code sections 216, 217, and 218 with reference to Public Utilities Code sections 740.2 and 740.3 and D.91-07-018. PD, pp. 14-20. The PD concludes that these sections, when read collectively, indicate that the sale of electricity for use as motor vehicle fuel cannot be regulated by the Commission. Specifically, the PD states that, under its interpretation, “the term ‘power’ [in section 217] was not intended to include electricity for motor vehicle fuel” and therefore “the ownership or operation of a facility that sells electricity at retail to the public for use only as a motor vehicle fuel and the selling of electricity 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 Pub. Util. Code § 216 solely because of that sale, ownership or operation.” PD, p. 20.

First, the PD’s reading of the statutory language of section 217 does not comport with the foremost rule of statutory construction whereby “the plain meaning of the statute’s words governs.” *In re Estate of Lewis* (2010) 184 Cal.App.4th 507, 509, citing *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 999. “In other words, if there is ‘no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said,’ and it is not necessary to ‘resort to legislative history to determine the statute’s true meaning.’” *Levin v. United Airlines* (2008) 158 Cal.App.4th 1002, 1020, citing *People v. Cochran* (2002) 28 Cal.4th 396, 400-401 and *People v. Licas* (2007) 41 Cal.4th 362, 367. Accordingly, the PD must first establish that section 217’s statutory directive is ambiguous before it resorts to other statutes or Commission precedent for interpretive assistance. The term “power” in section 217 is not, however, ambiguous.

Section 217 defines “Electric plant” as any facility that “facilitate[s] the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power.” CARE and NCRA agree with the PD’s conclusion that EVSPs do not furnish electricity for light or heat (although some of the electricity delivered to standard electric vehicles will become both light and heat as the operator employs the headlamps and heating devices on the car). CARE does not, however, agree with the PD’s position that the sale of electricity to power a car is not properly categorized as the “furnishing of electricity for . . . power.” The term “power” is broad, unambiguous, and clearly includes the powering of cars. Indeed, it is hard to conceive of another category that more aptly describes the electricity sold by EVSPs because it is the electricity itself that propels – or powers – the car forward. Specifically, the electricity sold is motive power, or

“any power used to impart motion; any source of mechanical energy.”¹ The PD’s position that the provision of electricity to drive motor vehicles is not the “furnishing of electricity for . . . power” ignores the plain meaning of the unambiguous statutory language of section 217.

The PD makes a distinction between the terms “power” and “fuel,” stating that EVSPs provide “fuel” to electric vehicles and not “power.” PD, p. 17. Further, it relies on D.91-07-018, wherein the Commission determined that the provision of compressed natural gas (CNG) for use by motor vehicles does not constitute the furnishing of power to those vehicles’ owners. *Id.* But CNG is fuel.² It must be burned to create energy to power a vehicle. It goes through a *chemical change*³ before it *becomes* power. Thus, it is not “power” in of itself; it is fuel. Electricity, on the other hand, is not “fuel”; it is *already* power. Electric vehicles use stored electricity *directly*, without need for any chemical change. Thus, the electricity sold at EVSPs cannot be categorized as fuel. Rather it is “power” within the unambiguous meaning of that term in section 217.

Furthermore, as discussed above, the PD’s reference to Commission precedent is unnecessary – and indeed improper – where the statutory language is unambiguous. Thus, the PD’s discussion of the parallels between the CNG case (D.91-07-018) and the present proceeding is inappropriate.⁴

¹ <http://dictionary.reference.com/browse/motive+power>

² Fuel is most commonly defined as “combustible matter used to maintain fire, as coal, wood, oil, or gas, in order to create heat or power.” <http://dictionary.reference.com/browse/fuel>

³ <http://dictionary.reference.com/browse/chemical+change>

⁴ To the extent that the history surrounding D.91-07-017 is relevant, the PD’s conclusion regarding the Legislature’s subsequent passage of SB 547 and consequent creation of 216(f) is incorrect. The Legislature passed SB 547 to create a statutory exemption from Commission regulation for vendors of CNG for use as motor vehicle fuel. If the Legislature had believed that

Additionally, the PD’s distinction between “power” and “fuel” would create a stark inconsistency in its interpretation of the term “power.” To label the provision of electricity for motor vehicle use as “fuel” because it is stored in a battery would put many household uses of electricity also into that category (and therefore outside of the Commission’s scope of regulatory authority) including the charging and recharging of battery-powered razors, tools, toys, flashlights, cameras, hand-held vacuums, go-carts, and lawnmowers. No one would claim that the provision of electricity for these household uses cannot be regulated by the Commission because they first involve storage of the electricity in a rechargeable battery. Yet there is no meaningful difference between these household uses of electricity and EVSP’s provision of electricity to power EVs.

The PD also asserts that the term “power” should be read in light of its meaning in 1915, when section 217 was originally passed, or alternatively, in 1937, when it was last amended. PD, p. 16. The plain meaning canon of construction, however, does not lock in time the meaning of the words used in each statute. Such an interpretive rule would be impossible to apply. Here, there are numerous examples of uses of electricity “that the Legislature” could not “have foreseen” at the time it passed section 217 that are nonetheless regulated by the Commission.

PD, p. 16. In fact, if anything, the Legislature’s determination to include the extremely inclusive

section 217’s use of the term “power” clearly did not include such activities, then there would have been *no reason* to create a specific statutory exemption. The fact that the Legislature created the CNG exemption indicates its understanding that under the plain meaning interpretation of section 221, sellers of CNG for use as motor vehicle fuel *would normally fall* within the Commission’s authority. It thus created the exemption for CNG sellers. No such exception exists for EVSPs. Thus, under the doctrine of *expressio unius est exclusio alterius* (“the expression of one is the exclusion of the other”) EVSPs are not exempted from the scope of the Commission’s regulatory authority – unless and until the Legislature specifically includes them in section 216(f)’s exemption or creates a similar separate exemption for EVSPs.

phase “light, heat, and power” indicates its intent to define the Commission’s authority very broadly.⁵

The PD also relies on the recently enacted section 740.2 as support for its determination that EVSPs do not provide “power” to their customers and therefore the Commission does not maintain jurisdiction over EVSPs. Section 740.2, however, requires the Commission to “adopt rules to address . . . infrastructure upgrades necessary for widespread use of plug-in hybrid and electric vehicles and [to address] the role and development of public charging infrastructure.” Pub. Util. Code § 740.2(a). Subsection (a) thus seems to be directing the Commission to exert the *exact authority* that the PD is claiming that the Commission does not retain. To “adopt rules to address” the “development of public charging infrastructure” requires the Commission to retain authority over these “public charging” facilities, including EVSPs. Thus, contrary to the PD, section 740.2 supports the Commission’s exercise of jurisdiction over EVSPs.

4.2. Policy Considerations

The PD asserts that, as a policy matter, regulation by the Commission would discourage “widespread use of electric vehicles.” PD, p. 22. The rationale underlying this conclusion, however, is not entirely clear.

For example, the PD states that “[i]t is unlikely that imposing the statutory framework supported by Section 216 on facilities selling electricity to the public for the sole use as a motor vehicle fuel would result in ‘widespread deployment’ of electric vehicles.” PD, p. 21. Yet a wholly *unregulated* market could lead to major price volatility and a lack of safety regulations

⁵ Indeed, it is hard to imagine that the Legislature did not intend for the phrase “light, heat, and power” to include *all* uses of electricity. How else could one conceivably use electricity other than for light, heat, or power?

and oversight regarding uniformity of services that would discourage early entrants into the EV marketplace. Furthermore, lack of regulation would restrain growth of EVSPs because of the uncertainty inherent in the future of the marketplace. Indeed, the PD acknowledges these significant problems by including the section entitled “Immediate Need for Additional Consumer Protection,” wherein the PD asks the Legislature to immediately fill the regulatory gap that would be present if the Commission fails to assert jurisdiction over EVSPs. PD, p. 23. Such new regulation could take years, however, severely hindering the development of a robust EV marketplace.

Furthermore, the Legislature has already spoken on this issue. As discussed above, section 740.2 directs the Commission to take a active role in regulating all aspects of EV charging, including EVSPs, and encouraging rapid deployment of EVs. The PD decision to punt this issue back to the Legislature is contrary to the words and intent of section 740.2.

Finally, the PD’s determination that Commission regulation would slow market development ignores multiple calls by parties to this proceeding to employ “regulation light,” whereby the Commission would maintain jurisdiction over EVSPs, but not treat them identically to other utilities. This approach was addressed by CARE and NCRA in their Opening and Reply Briefs, as well as by PG&E, Sacramento Municipal Utility District, the Division of Ratepayer Advocates, and The Utility Reform Network. PD, pp. 5-12. The PD’s all-or-nothing approach to regulation does not address this middle-ground regulatory approach that many parties believe would not only be appropriate, but also extremely effective for achieving rapid deployment of EVs throughout the state.

CONCLUSION

For the above stated reasons, CARE and NRCA request that the PD be substantially rewritten to embrace Commission jurisdiction over EVSPs.⁶

Dated: June 10, 2010

Respectfully submitted,

/s/ Stephan C. Volker

STEPHAN C. VOLKER

Attorney for CALifornians for Renewable Energy,
Inc. (CARE) and North Coast Rivers Alliance
(NCRA)

⁶ CARE and NCRA do not include herewith a subject index listing the recommended changes to the proposed or alternate decision or an appendix setting forth proposed findings of fact and conclusions of law because the changes requested would fundamentally change the PD.

VERIFICATION

I am the attorney for the commenting parties herein, CALifornians for Renewable Energy, Inc. (CARE) and North Coast Rivers Alliance (NCRA), and am authorized to make this verification on their behalf. The statements in the foregoing document are true to the best of my knowledge, except matters that are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of June 2010 at Oakland, California.

/s/ Stephan C. Volker
STEPHAN C. VOLKER
Attorney for CALifornians for Renewable
Energy, Inc. (CARE) and North Coast
Rivers Alliance (NCRA)

CERTIFICATE OF SERVICE

I hereby certify that I have on this 10th day of June 2010, served a copy of the

**OPENING COMMENTS OF CALIFORNIANS FOR RENEWABLE ENERGY AND
NORTH COAST RIVERS ALLIANCE ON THE PROPOSED DECISION IN PHASE 1
ON JURISDICTION OF THE COMMISSION OVER THE SALE OF
ELECTRICITY AT RETAIL TO THE PUBLIC FOR THE SOLE
USE AS MOTOR VEHICLE FUEL**

on each party named in the official service list for Rulemaking 09-08-009 by electronic service, and by U.S. mail for those parties who have not provided an electronic mail address.

Copies were also sent via United States Postal Service to Commissioner Nancy E. Ryan and Administrative Law Judge Regina DeAngelis.

Executed this 10th day of June, 2010 at Oakland, California.

/s/ Teddy Ann Fuss
Teddy Ann Fuss

ELECTRONIC MAILING LIST:

fdms@electradrive.net
pierojd@udel.edu
angie_doan@plugsmart.net
kevin.webber@tema.toyota.com
cread@ecotality.com
syndi.driscoll@ladwp.com
SDPatrick@SempraUtilities.com
npedersen@hanmor.com
david.patterson@na.mitsubishi-motors.com
helsel@avinc.com
Janet.Combs@sce.com
Bob@EV-ChargeAmerica.com
liddell@energyattorney.com
andrew.mcallister@energycenter.org
kwalsh@fiskerautomotive.com
ek@a-klaw.com
rpopp@teslamotors.com
lms@cpuc.ca.gov
Yulee@theICCT.org
nsuetake@turn.org
jay@pluginamerica.org
ssmyers@att.net
cjw5@pge.com
Ann.Bordetsky@betterplace.com

Jason.Wolf@betterplace.com
epetrill@epri.com
jody_london_consulting@earthlink.net
jharris@volkerlaw.com
svolker@volkerlaw.com
jwiedman@keyesandfox.com
gmorris@emf.net
richard.lowenthal@coulombtech.com
bchang@svlg.org
shears@ceert.org
toconnor@edf.org
wwester@smud.org
aconway@dmv.ca.gov
Bob@EV-ChargeAmerica.com
kleacock@dmcgreen.com
krose@dmv.ca.gov
mlaherty@cisco.com
mschreim@core.com
roberto.bocca@weforum.org
mrw@mrwassoc.com
EGrizard@deweysquare.com
hugh.mcdermott@betterplace.com
than.aung@ladwp.com
GO'neill@energy.state.ca.us
colleenquin@gmail.com
kldavis@midamerican.com
AYergin@gridpoint.com
martin.liptrot@ge.com
jung.zoltan@epa.gov
jviera@ford.com
mkarwa@leviton.com
hillary.dayton@fluor.com
Douglas.Marx@PacifiCorp.com
kmorrow@etecevs.com
AChavez@ecotality.com
Adrene.Briones@ladwp.com
Leila.Barker@ladwp.com
Marcelo.DiPaolo@ladwp.com
Oscar.Alvarez@ladwp.com
Oscar.Herrera2@ladwp.com
Priscila.Castillo@ladwp.com
Scott.Briasco@ladwp.com
david.eaglefan@gmail.com
leilani.johnson@ladwp.com
jellman@winnr.com
tatsuaki.yokoyama@tema.toyota.com
dsiry@codaautomotive.com
bock@avinc.com
dickinson@avin.com
klynch@cityofpasadena.net

cjuennen@ci.glendale.us
dave.barthmuss@gm.com
mbaumhefner@nrdc.org
ffletcher@ci.burbank.ca.us
flangit@ci.azusa.ca.us
andrea.moreno@sce.com
Case.Admin@sce.com
case.admin@sce.com
sfr@sandag.org
mpsweeney@earthlink.net
julian.durand@qualcomm.com
vsmith@qualcomm.com
DNiehaus@SempraUtilities.com
mike.ferry@energycenter.org
sephra.ninow@energycenter.org
siobhan.foley@energycenter.org
sbadgett@riversideca.gov
vic@theprossergroup.com
jlehman@anaheim.net
coutwater@libertyplugins.com
forest.williams@mindspring.com
chappella@co.monterey.ca.us
trae@kpcb.com
lburrows@vpvp.com
diarmuid@teslamotors.com
mdjoseph@adamsbroadwell.com
edwin.lee@sfgov.com
johanna.partin@sfgov.com
dfugere@foe.org
eric@ethree.com
jheibult@nrdc.org
smui@nrdc.org
BWT4@pge.com
ELL5@pge.com
filings@a-klaw.com
tjl@a-klaw.com
david@dwassociates.us
bcragg@gmsr.com
cassandra.sweet@dowjones.com
jguzman@nossaman.com
mgo@goodinmacbride.com
mmattes@nossaman.com
robertgex@dwt.com
Diane.Fellman@nrgenergy.com
cem@newsdata.com
axtw@pge.com
regrelpuccases@pge.com
l1hg@pge.com
SAZ1@pge.com
sfr2@pge.com

aaron.singer@bmw.com
saluja@capricornllc.com
a.vogel@sap.com
Sven.Thesen@betterplace.com
xingxin.liu@sap.com
Sean.Beatty@mirant.com
dietrichlaw2@earthlink.net
Karin.Corfee@kema.com
michael.schmitz@iclei.org
kfox@keyesandfox.com
jhall@calstart.org
philm@scdenergy.com
sfsarris@greenfuseenergy.com
mnelson@mccarthylaw.com
dgrandy@caonsitegen.com
jamie@jknappcommunications.com
jme@pge.com
bdicapo@caiso.com
e-recipient@caiso.com
cchilder@arb.ca.gov
ekeddie@arb.ca.gov
marcreheis@wspa.org
dmodisette@cmua.org
gina@wspa.org
jluckhardt@downeybrand.com
Julee@ppallc.com
Ralph.Moran@bp.com
lmh@eslawfirm.com
abb@eslawfirm.com
ttutt@smud.org
atrowbridge@daycartermurphy.com
sas@a-klaw.com
californiadockets@pacificorp.com
michelle.mishoe@pacificorp.com
carmine.marcello@hydroone.com
ahl@cpuc.ca.gov
agc@cpuc.ca.gov
clu@cpuc.ca.gov
ctd@cpuc.ca.gov
crv@cpuc.ca.gov
cwl@cpuc.ca.gov
bsl@cpuc.ca.gov
eks@cpuc.ca.gov
fxg@cpuc.ca.gov
fcc@cpuc.ca.gov
gtd@cpuc.ca.gov
jw2@cpuc.ca.gov
lau@cpuc.ca.gov
lwt@cpuc.ca.gov
mc4@cpuc.ca.gov

mwt@cpuc.ca.gov
mc3@cpuc.ca.gov
ska@cpuc.ca.gov
pva@cpuc.ca.gov
rmd@cpuc.ca.gov
rl4@cpuc.ca.gov
smk@cpuc.ca.gov
scr@cpuc.ca.gov
ahuang@arb.ca.gov

U.S. POSTAL SERVICE MAILING LIST:

Commissioner Nancy E. Ryan
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Administrative Law Judge Regina DeAngelis
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102