

**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

**MOTION OF ECOTALITY, INC. FOR PUBLIC REVIEW OF THE IMPACT
OF THE NRG ENERGY INC. SETTLEMENT ON CALIFORNIA'S
RATEPAYERS AND ELECTRIC VEHICLE INFRASTRUCTURE POLICY**

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Pursuant to Rule 11.1 of the California Public Utilities Commission (CPUC or Commission) Rules of Practice and Procedure, ECotality, Inc. submits this motion for public review of the settlement between the CPUC and NRG Energy, Inc. (NRG), announced on March 23, 2012 (Settlement). The motion relates directly to policy issues addressed in this rulemaking.

I. EXECUTIVE SUMMARY

The Commission has negotiated the Settlement to resolve long-standing claims against NRG for overcharges for electricity delivered to ratepayers during the 2000-2001 energy crisis. The Settlement raises the question of whether the resolution, which directly returns only 2% of California's original claim to ratepayers, is in the ratepayers' best interest. Moreover, by focusing Settlement value in the electric vehicle (EV) infrastructure market, instead of ratepayer refunds, the Settlement also raises an important matter of state policy explicitly within the scope of this rulemaking:

“competition in the [EV] charging infrastructure market.”¹ The structure of the Settlement thus transformed litigation under the Federal Power Act on behalf of ratepayers into a state initiative on EV infrastructure policy that could reduce the attractiveness of the California market for other electric vehicle service providers (EVSPs).

The structure of the Settlement thus invites three important and related inquiries of state policy that must be answered by the Commission before the Settlement can be submitted for FERC approval:

- ✓ Does the Settlement maximize benefits to California ratepayers, the intended beneficiaries of the litigation, or are there more constructive alternatives, which preserve the public policy intentions for EV infrastructure market development in California?
- ✓ Will the Settlement maintain a level playing field in California’s EV charging infrastructure market, or does it carry the potential to impair competition among different developing business models?
- ✓ Does the Settlement negatively impact establishment of EV charging infrastructure currently underway in California in response to Commission policies?

While the Commission has endeavored to avoid public debate of the Settlement under Government Code §11126(e)(2)(A), the Commission would benefit from closer state scrutiny. Indeed, there are indications that Governor Brown intends for the Commission to address public concerns before finalizing the Settlement.² In fact, the Commission may be *required* to provide for public review of the Settlement as a result of its focus on EV infrastructure. By using ratepayer funds to provide monopoly-like benefits to a

¹ R.09-08-009 at 22; see also at 19, 21.

² Electric Vehicle Discussion List, *How to badly handle \$150M EVSE funding & get away with it* (April 12, 2012) at <http://www.evd.org/archive/index.html#nabble-td4551247> ("Governor Brown applauded the Public Utilities Commission's settlement with NRG because it will jump-start the construction of a \$100 million electric vehicle superhighway and keep California ahead of the curve on electric vehicle technology," press secretary Gil Duran said Tuesday. "We trust that the PUC will consider any valid concerns that might be raised before the settlement is finalized.")

single market participant, the Settlement has become an extension of the EV infrastructure rulemaking process, and rulemaking – a quasi-legislative act -- requires an open, public process. For these reasons, the Commission should invite public comment on the settlement and potential alternatives.

A public review will reveal that the Settlement shortchanges ratepayers, whose interest would be best served by cash refunds. In addition, it will show that:

- The Settlement uses ratepayer funds to provide exclusive market access to one private company at the expense of other market participants, thereby tilting the playing field in California’s EV charging infrastructure market and impairing competition.
- The Settlement, by funding NRG’s private investment with ratepayer funds, will significantly harm future investment in electric vehicle charging infrastructure currently underway in California by private companies acting in response to Commission policies.

These impacts will materially undermine the Commission’s policies established in this rulemaking. The Settlement’s approach also runs contrary to the Legislative concern regarding the competitive effect of Commission policies in Public Utilities Code §740.3(c). This section directs: *“The commission’s policies shall also ensure that utilities do not unfairly compete with nonutility enterprises.”*

The Settlement, by mandating infrastructure development using ratepayer funding and by providing market exclusivity, directly contravenes the spirit if not the letter of the law regarding commission support of monopoly competition in the charging market. A review of the Settlement is thus required within the scope of this proceeding.

II. BACKGROUND

The Settlement stems from decade-old litigation³ involving a long-term contract under which Dynegy, Inc., a co-owner of generation in California with NRG, sold electric power to the California market during the energy crisis in the early 2000s.⁴ The California Parties⁵ originally sought reparations from NRG⁶ on behalf of California consumers who were overcharged for electricity under the contract.⁷ NRG currently values the claim at \$940 million.⁸ The Settlement, which includes a \$100 million charging infrastructure investment opportunity for NRG and only a \$20 million cash payment satisfies this claim for reparations for these overcharges in the interest of ratepayers.

³ The California Public Utilities Commission filed a complaint against Dynegy and other suppliers in Docket EL02-60 on February 25, 2002. The California Electricity Oversight Board filed a complaint against all sellers to the State in EL02-62. Collectively, the CPUC and the CEOB are referred to herein as the “California Parties.”

⁴ This litigation against Dynegy is a part of the cases before FERC arising out of the California Energy Crisis, including San Diego Gas & Electric Co. et al., FERC Docket No.EL00-95, Investigation of Practices of the California Independent System Operator and the California Power Exchange, FERC Docket EL00-98, and related dockets, Puget Sound Energy, EL01-10, and the appeals arising out of those cases: CPUC v. FERC, Ninth Circuit Nos. 01-71051, et al., and 01-71934, et al., and related dockets.

⁵ The CPUC has joined in the various litigation arising out of the Energy Crisis, as described in footnote 6 *supra*, with multiple other parties including the California Attorney General, and the three investor-owned utilities: SCE, PG&E and SDG&E.

⁶ NRG assumed Dynegy’s liability as a part of the acquisition of Dynegy assets in 2006.

⁷ *Section 206 Complaint, Public Utilities Commission of California v. Allegheny Energy Supply, et al.*, Docket EL02-60, filed February 25, 2002. During the energy crisis, electricity prices rose to unprecedented levels due to alleged market manipulation, rendering the traditional utilities unable to meet the credit obligations necessary to buy electricity to serve their customers. The State of California initiated a program in which it purchased electricity from suppliers and re-sold it to the utility customers. As part of this program, Dynegy and 21 other suppliers entered into multi-year contracts to sell electricity to the State. These complaints allege that the prices of those contracts were unreasonably high, resulting from the market prices produced by illegal market manipulation. The complaints seek abrogation of the contracts and refund of the contract payments in excess of a reasonable market price.

⁸ NRG values the claim at \$940 million at page 50 of its most recent 10-K filing with the Securities and Exchange Commission (SEC).

<http://phx.corporate-ir.net/phoenix.zhtml?c=121544&p=IROL-secToc&TOC=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDE0NDUzMDUtMTItMDAwNDkzL3RvYy9wYWdl&ListAll=1&sXBRL=1>

The Settlement, if approved, would represent one of many energy crisis disputes that have been litigated on behalf of California ratepayers. In the past, however, refunds have simply been returned to *all bundled ratepayers* through the Energy Resource Recovery Account (ERRA) to reduce the generation components of their rates. Southern California Edison Company's current General Rate Case Phase 2 testimony describes this process:

*In its estimated 2012 ERRA forecast proceeding revenue requirement, SCE is including generator refunds received in 2011 that have not already been included in retail rate levels. As shown on Line No.15 of Table 3 in Appendix A, SCE is estimating the December 31, 2011 credit balance recorded in the Energy Settlements Memorandum Account of \$35.060 million. SCE is including this estimated amount in its 2012 ERRA forecast proceeding revenue requirement to be refunded to bundled service customers in 2012.*⁹

Return of generation refunds to all bundled ratepayers through the ERRA is the most logical, fair and direct way to return overcharges to customers. The overcharges affected all bundled customers in proportion to their ERRA generation allocations, and a return through the ERRA thus offsets the overcharge in the same manner.

While very limited public information is available on the Settlement, which has been held confidential by the parties, it is clear that it does not take this traditional ratemaking approach. Instead of returning refunds to ratepayers, the Settlement is designed to fund EV infrastructure. A fact sheet provided by NRG, which is attached as Exhibit A, describes the key elements of the Settlement.

- ▶ *A \$50.5 million investment in a minimum of 200 electric vehicle (EV) fast-charging Freedom Station sites (including at least one DC fast charger) installed at strategic commercial & retail locations.*

⁹ A.11-08-002, Application of Southern California Edison Company (U338E) For Approval of its Forecast 2012 ERRA Proceeding Revenue Requirement, Exhibit SCE-1 (Snow) at 76.

- ▶ *A \$40 million investment in electrical infrastructure to support the installation of a minimum of 10,000 additional charging stations (“make readies”) in at least 1,000 multifamily and workplace locations as well as areas of public interest like schools and hospitals.*
- ▶ *A \$5 million investment in development and deployment of new EV charging services including battery storage, high power chargers and a vehicle-to-grid pilot program.*
- ▶ *A \$4 million investment in additional EV charging services and EV charging technology to be agreed upon by NRG and the CPUC.*
- ▶ *A \$20 million direct payment to California electric ratepayers.*

Infrastructure development would focus on the Los Angeles Basin, San Francisco Bay Area, San Joaquin Valley and San Diego County. Importantly, the Settlement would confer exclusivity on NRG at the “make ready” sites for 18 months before competitors would have access to the use of these sites.

The Commission has heralded the Settlement as “the best deal” available. The information that has been provided by NRG, however, suggests that the Settlement would fail to maximize ratepayer benefits and tilt the playing field in the EV charging infrastructure market toward a single market participant. The principles of the Settlement thus raise implications for both EV charging market competition and ratemaking – state policy issues within the scope of this rulemaking.

III. THE SETTLEMENT PRESENTS STATE POLICY ISSUES THAT REQUIRE PUBLIC REVIEW.

A. The Settlement's Impact on the EV Infrastructure Market and Consumer Choice Requires Public Review.

1. The Settlement's Impact on Competition in the Charging Infrastructure Market Falls within the Rulemaking's Scope.

The Commission instituted this rulemaking to examine comprehensively issues related to EV market development, including the effect of Commission policies on EV charging infrastructure. More specifically, the Commission posed questions in its Order Instituting Rulemaking (OIR) regarding policy measures that could be undertaken to encourage competition in this market. Most relevant to this Motion is Question 13 in its request for comments on *Commercial and Public Charging Infrastructure and Policy*:

What policies should the Commission adopt to facilitate competition and innovation in the commercial and public infrastructure market?¹⁰

The Commission also sought comments on related issues of competition:

*What statutory changes, if any, should the Commission propose to the legislature to encourage innovation and competition in the charging infrastructure market?*¹¹

*What policies should the Commission adopt to encourage competition and innovation in the market for residential infrastructure development for PHEV[s] and BEVs?*¹²

The OIR reveals the Commission's awareness that care must be taken in the development of EV infrastructure policy to encourage competition and innovation. The Commission has developed policies in the OIR that are expressly intended to protect and encourage customer choice and competition in new markets for EV charging

¹⁰ OIR 09-08-009 at 21.

¹¹ *Id.* at 22.

¹² *Id.* at 19.

infrastructure and services, and that take care to preserve a level playing field for market participants.¹³

The concern regarding the competitive effect of Commission policies was also addressed in another context by the Legislature in Public Utilities Code §740.3(c). This section directs: “*The commission's policies shall also ensure that utilities do not unfairly compete with nonutility enterprises.*”

The Settlement, by mandating infrastructure development using ratepayer funding and by providing market exclusivity to a single EVSP, clearly treads on the question of competition in the charging market. A review of the Settlement is thus required within the scope of this proceeding.

2. The Settlement Would Undermine Competition in the EV Charging Market.

Elements of the Settlement could affect competition in the EV charging market, ultimately impairing progress toward California’s EV goals. Giving ratepayer funds to a single competitor for private investment and providing that competitor 18-month exclusivity in “make-ready” sites materially departs from the goal of encouraging competition.

The Commission rightly anticipates criticism for providing NRG a profit-making opportunity.¹⁴ NRG overcharged California ratepayers during the energy crisis, and California sought reparations in the form of a cash payment. Simple logic would

¹³ See e.g. D.11-07-029 at 36-37 (Customer choice in metering options is means of promoting customer satisfaction, encouraging technological advancement, and creating a level playing field for EVSPs); *Id.* at 49 (Potential savings from utility ownership of EVSE outweighed by potential harm – limiting customer choice, dampening competition that may yield cost reducing innovation); *Id.* at 68 (competitively neutral Guiding Principles for education and outreach).

¹⁴ See <http://science.kqed.org/quest/2012/03/30/california-utility-commission-defends-100-million-ev-charging-deal/>

suggest that if ratepayers were harmed, ratepayers should receive direct compensation. By allowing NRG, instead, to make EV infrastructure investments that will return a private profit, the Settlement would take funds out of ratepayers' hands and place them directly in the hands of a single electric vehicle service provider (EVSP) to the disadvantage of its competitors. In fact, The Settlement thus not only shortchanges ratepayers, it rewards NRG for past offenses with an exclusive infrastructure development opportunity. No other EVSP has the advantage of direct ratepayer funding of their investments and business growth.

The 18-month exclusivity arrangement provided to NRG adds insult to injury. In a letter to Governor Brown and the Commissioners dated April 6, 2012, attached as Exhibit B, The Bay Area EV Strategic Council (EV Council) observed that the 18-month exclusivity arrangement for "make ready" sites could give NRG a competitive edge. It concluded that the Settlement element "*could establish a monopoly position through the end of 2014 on a large number of high-value locations that could otherwise be developed by other market participants that do not mandate an exclusive subscriber relationship*". In fact, the monopoly could persist for up to 5½ years in some cases; final installations have to be completed within 4 years, and the 18-month exclusivity period commences on each installation when it is completed. This preferential treatment is precisely the type of policy the Commission must avoid "*to facilitate competition and innovation in the commercial and public infrastructure market*" as the OIR intended. Ensuring a level playing field, without a tilt toward a single market participant, is essential to robust competition and will promote "*the best pricing for drivers.*"

The EV Council suggested that a competitive bidding process for arrangements would be superior to the Settlement. Without competitive bidding, the Settlement could limit investments by other market participants and “*thereby slow EV charging network growth over the long run.*” In addition, “[p]rivate investors... may be inclined to move resources to other states as a result of the competitive bias in the settlement.”

The Commission took a step forward in the OIR and D.11-07-029, seeking to encourage competition in the infrastructure market. Submitting the Settlement to FERC without modification will set the Commission two steps back on the road to a robust EV charging market.

3. The Settlement Would Limit Consumer Choice to a Single Player.

The Commission has established as policy in the OIR a position favoring customer choice in EV charging equipment, metering, and related services. The Commission’s position in support of customer choice makes sense, because optimizing customer choice allows consumers to shop for the goods and services that best fit their needs, encourages technical innovation by market participants competing to serve EV users, lowers costs, and allows the markets to grow and expand without artificial constraints.

The Settlement’s 18 month exclusivity provision appears to be antithetical to the Commission’s policy in favor of customer choice. It would not only take away customer choice at a crucial point in early market development, but also may well discourage new companies from entering the market in the future, further limiting customer choice to the detriment of California consumers.

B. The Settlement’s Potential Impact on Ratepayers Requires Public Review.

1. The Settlement’s Impact on Ratepayers Falls within the Rulemaking Scope.

The traditional and most equitable ratemaking approach to settling overcharges to ratepayers would be to negotiate a cash settlement and return the value through the ERRA process, as noted above. To the extent the Commission elects, instead, to use the Settlement to fund EV infrastructure, its approach moves into the scope of this rulemaking.

This rulemaking encompasses a variety of ratepayer funding issues. For example, D. 11-07-029 placed an emphasis on setting rates to encourage off-peak charging.¹⁵ In addition, the OIR asked:

*Should the electric vehicle rate structure be designed to align rates with the system costs and benefits of PHEVs and BEVs, and if so, how? Should the Commission assign additional costs and benefits attributable to PHEVs and BEVs to specified electric vehicle rate classes or socialize the costs and benefits attributable to PHEVs and BEVs to all customer classes? Should the PHEV and BEV rate classes bear existing rate component costs?*¹⁶

Questions regarding potential ways of offsetting EV user costs or offsetting other socialized costs of EV infrastructure thus are also relevant in this rulemaking.

The Settlement, having stepped into the scope of this rulemaking, must be reviewed publicly to ensure its alignment with the Commission’s EV infrastructure policy. Are ratepayer funds best used to fund capital investment by a single private market participant, which will be used to generate private profits? Or would the value be better used by returning it directly to ratepayers, still within the scope of EV policy,

¹⁵ See e.g., D.11-07-029 at 14-16.

¹⁶ OIR at 25.

through EV rate reductions, utility distribution infrastructure funding or other mechanisms? To fulfill its statutory ratemaking obligations, the Commission must provide for a public review of these issues before submitting the Settlement to FERC for approval.

2. Alternative Settlement Structures Could Provide Greater Benefits to Ratepayers in a Competitively Neutral Manner.

The Commission should provide reparations to all bundled ratepayers in the traditional manner: a cash settlement returned through the ERRR process. If the Commission intends instead to use the funds to advance EV policy, however, it should consider alternatives that would benefit ratepayers more directly and provide those benefits in a competitively neutral manner. Some potential alternatives that merit exploration include:

- ✓ Utilizing funds to support the development of systems (including meter data management systems) facilitating sub-metering of transportation energy.
- ✓ Reducing subsidies provided by non-EV customers for EV customer infrastructure costs excess of the utility allowance.
- ✓ Reducing the off-peak charging rates to further encourage off-peak charging.
- ✓ Reducing demand charges to entice additional private sector investment in publicly available charging

Each of these alternatives would advance California EV policy goals, but would do so in a competitively neutral manner.

IV. REVIEW OF THE ISSUES RAISED IN THIS MOTION BY FERC IS AN INADEQUATE REMEDY.

An argument could be made that the reasonableness of settlements entered into to resolve litigation before FERC should be reviewed by FERC. While this may be the usual process, the process is inadequate for review of the Settlement.

ECOtality understands that the Settlement remains an agreement in principle and has not been finalized by the Commission. Under these circumstances, Commission reconsideration is appropriate and could result in beneficial modifications. Once the Settlement has been executed, however, additional contract obligations to defend the agreement could be triggered, preventing an objective review by the Commission.

In addition, the Settlement is no longer a purely federal matter. The Commission has transformed litigation under the Federal Power Act on behalf of ratepayers into a state initiative on EV infrastructure policy. The issue of EV policy was never raised in the underlying FERC proceeding, and California EV infrastructure policy does not fall within FERC's jurisdiction. Policy issues that are uniquely Californian should be addressed in California by California policymakers.

V. CONCLUSION

For all of the foregoing reasons, ECOtality requests that the Commission publicly disclose the Settlement and provide for public review and comment before submitting the agreement to FERC.

Respectfully submitted,

A handwritten signature in cursive script that reads "Evelyn Kahl".

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