

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

09-01-10
04:59 PM

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 No. 09-08-009
(Filed August 20, 2009)

**APPLICATION OF THE UTILITY REFORM NETWORK
FOR REHEARING OF DECISION 10-07-044**

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September 1, 2010

**APPLICATION OF THE UTILITY REFORM NETWORK
FOR REHEARING OF D.10-07-044**

In accordance with Section 1731 of the Public Utilities Code and Article 21 of the Commission’s Rules of Practice and Procedure, The Utility Reform Network (TURN) seeks rehearing and reconsideration of D.10-07-044, issued (mailed to the parties) on August 2, 2010.

I. Introduction

The Commission committed legal error in D.10-07-044 by concluding that “the legislature did not intend that this Commission regulate providers of electric vehicle charging services as public utilities pursuant to §§ 216 and 218.”¹ The Legislature has said no such thing. The plain language of Sections 216 and 218² (language that the decision never sets out, much less analyzes) makes clear that under the Public Utilities Code a provider of electric vehicle charging services who provides such services to the public for compensation is an “electrical corporation” and a “public utility” as those terms are defined in the statutes. Absent enactment of a statute that would exempt electric vehicle charging services from the definition of “electrical corporation” or “public utility” (similar to the exemption for compressed natural gas sold at retail set forth in Section 216(f)), the plain language of Sections 216 and 218 controls.

As the Commission is well aware, there was a very recent legislative effort to create a statutory exemption that would have exempted suppliers of electricity solely for use to charge electric vehicles while ensuring the agency maintained sufficient authority to

¹ D.10-07-044, p. 1; *see also* Conclusion of Law 4.

² Unless otherwise noted, all statutory references herein are to the California Public Utilities Code.

properly manage and address the issues that will come with the increased demand that such vehicle charging loads will create. That effort failed, in no small part due to the resistance of the entities likely to emerge as vehicle charging service suppliers in the future. At the time it issued D.10-07-044, the Commission thought it could influence the operations of these entities through mechanisms other than direct regulation. The subsequent experience before the California Legislature illustrates precisely why the agency should embrace, rather than resist, the existing statutory language that makes suppliers of electricity solely for use to charge electric vehicles subject to Commission regulation. As many parties noted prior to the adoption of D.10-07-044, the fact that the Commission has such regulatory authority does not dictate how the Commission applies such authority. The Commission could choose to apply a very light regulation during the initial start-up of this new industry. In this way, the Commission can avoid unnecessary battles should the need for more stringent regulation arise in the future, such as if the entities providing electric vehicle charging services resist or work against the Commission's efforts to enable this new industry to develop in a manner most beneficial for California and its residents.

Of course, these more practical implications are merely the beneficial fall-out of getting the legal questions answered correctly. The Commission must grant rehearing of D.10-07-044 to correct the decision's legal error.

II. The Plain Language of Public Utilities Code Sections 216, 217 and 218 Makes Clear That Providers of Electric Vehicle Charging Services Meet The Definition of Public Utilities Subject To The Commission's Jurisdiction and Regulation.

In D.10-07-044, the Commission included the following as Conclusion of Law 4:

It is reasonable to conclude, consistent with the underlying rationale of the Public Utilities Code and Sections 740.2 and 740.3, that the legislature did not intend that this

Commission regulate providers of electric vehicle charging services as public utilities pursuant to §§ 216 and 218.

TURN submits that this conclusion represents legal error. As the Commission has recognized in recent decisions

Statutory interpretation principles generally ascribe to the “plain meaning” rule, such that the language of a statute should be examined first, giving the words their usual, ordinary meaning. If the language is clear and unambiguous, the plain meaning should be followed.³

The plain language of §§ 216 and 218 makes clear that providers of electric vehicle charging services are “public utilities” as defined in the statute if they offer those services to the public for compensation. Under the Public Utilities Act a person or corporation that owns or operates a facility that sells electricity at retail to the public for use as a motor vehicle fuel is subject to the Commission’s regulation. Property “owned, controlled, operated, or managed in connection with or to facilitate the ... transmission, delivery, or furnishing of electricity for light, heat or power” is “electric plant.”⁴ A corporation or person “owning, controlling, operating or managing any electric plant for compensation” is an “electrical corporation” under Section 218. And if an electrical corporation performs a service or delivers a commodity to the public for compensation, it becomes a “public utility” under Section 216.

If there were any ambiguity in the language of §§ 216 and 218 on this point, under the principle *expressio unius est exclusion alterius*⁵ the Commission should look to the

³ Decision on Rehearing of Resolution E-4133, D.08-03-023, 2008 Cal. PUC LEXIS 95, *7 (citing Curle v. Superior Court (2001) 24 Cal.4th 1057, 1063).

⁴ Public Utilities Code, Section 217.

⁵ The Commission has described *expressio unius est exclusion alterius* as a “basic statutory principle of statutory interpretation” meaning “the express inclusion of something in a

statutory treatment of compressed natural gas sellers. In the early 1990s the Legislature expressly exempted from regulation as a public utility the sale of CNG at retail for use only as a motor vehicle fuel. The appropriate interpretation of the Legislature's action is that the explicit exemption did not imply any intent to also exempt from regulation as a public utility the sale of electricity at retail for use only as a motor vehicle fuel; to the contrary, it should be interpreted as the exclusion of electric vehicle charging services from any similar treatment. As noted at the outset, the Legislature has not created any express statutory exemption for electric vehicle charging service providers.

III. The Commission Committed Legal Error By Relying On Sections 740.2 and 740.3 To Determine The Extent Of Its Regulatory Authority Over Electric Vehicle Charging Service Providers.

The "Legal Framework" discussion in D.10-07-044 begins with the assertion, "Under the California Constitution, only the legislature can confer new powers on the Commission, so we have to look for evidence as to the legislature's intent on this question."⁶ The decision then posits that since the legislature has not expressly granted the Commission authority to regulate electric vehicle charging service providers, but rather only the limited authority set forth in Sections 740.2 and 740.3, the only conclusion is that "under existing laws, we do not have jurisdiction to broadly regulate electric vehicle charging service providers as public utilities."⁷

As noted above, the Commission's logic does not comport with the plain language of Sections 216, 217 and 218 of the Public Utilities Code. The fact that electric vehicle

statutory provision implies that other things are excluded, even if the exclusion is not express." D.07-11-049, issued in R.06-10-005 (DIVCA Rulemaking), 2007 Cal. PUC LEXIS 627, *5.

⁶ D.10-07-044, p. 19.

⁷ *Id.*

charging stations did not exist at the time those statutes were enacted or last amended does not change their application to such service providers. If under the plain language of the statute such entities meet the statutory definitions of electric plant, electrical corporation and public utility, they fall within the Commission’s regulatory jurisdiction absent any exemption under the statute. Notably absent from the Commission’s decision is any cite to the specific language of Sections 216, 217, or 218, much less any analysis of that language in support of its conclusion that it lacks authority under those statutes to regulate electric vehicle charging service providers, even where those providers offer services to the public for compensation. Instead, the decision looks to Sections 740.2 and 740.3 for support of its conclusion that it lacks such authority.

The Commission characterizes Sections 740.2 and 740.3 as “only grant[ing] limited authority to the Commission to set rules related to electric vehicle charging.”⁸ Even if this were true, it would be irrelevant for the purposes at hand. In determining whether providers of electric vehicle charging services are public utilities subject to the Commission’s jurisdiction and regulation under the Public Utilities Code, the question is whether Section 740.2 or 740.3 contains any provision that is inconsistent with sections 216, 217 and 218. Neither does and, therefore, neither should be read as restricting the Commission’s authority described in Sections 216, 217 and 218.

But the contention that Sections 740.2 and 740.3 granted any additional authority to the Commission is itself erroneous. The decision states that rather than treat electric vehicle charging service providers as public utilities, “the legislature intended that we use

⁸ *Id.*, at 19.

the authority granted in § 740.2 to address the potential impacts of vehicle charging”⁹ It makes a similar assertion about Section 740.3: “Therefore, we conclude that § 740.3 further demonstrates that the legislature did not intend the Commission to treat all electric vehicle charging providers as public utilities pursuant to §§ 216 and 218.”¹⁰ These assertions have no support in the plain language of the statutes, as nothing in Section 740.2 or 740.3 grants the Commission any authority that it did not already have. Rather, Section 740.2 directs the agency to evaluate policies and adopt rules to address six specified points, but makes no mention of any addition to (or reduction of) Commission authority. And Section 740.3 took a similar approach when the Legislature addressed compressed natural gas service providers in the early 1990’s. In addition to directing the Commission to evaluate certain policies and to adopt rules addressing specified points, the statute required public hearings and a Commission-submitted progress report starting in 1993 and every two years thereafter. It also set standards that the new policies were to meet. But again, it did not make any mention of additional Commission authority, or any change to existing Commission authority.¹¹

The decision notes that Section 740.3(c) requires the Commission to “ensure that utilities do not unfairly compete with nonutility enterprises,” then concludes that this “further demonstrates that the legislature did not intend the Commission to treat all electric

⁹ D.10-07-044, p. 20.

¹⁰ *Id.*

¹¹ Of course, Public Utilities Code reflects a legislative change to the Commission’s authority over compressed natural gas service providers otherwise meeting the definition of a “public utility” under the statute: Section 216(f) explicitly exempted “sellers of compressed natural gas at retail to the public for use only as a motor vehicle fuel” from the statutory definition of public utility in Section 216. As noted earlier, the absence of any similar statutory exemption for providers of electric vehicle charging services offered to the public for compensation cannot be ignored, and supports the conclusion that such providers are public utilities under the definition set forth in Section 216.

CERTIFICATE OF SERVICE

I, Serrita Teer, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On September 1, 2010, I served the attached:

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FOR REHEARING OF DECISION 10-07-044

on all eligible parties on the attached list **R.09-08-009** by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this September 1, 2010, at San Francisco, California.

/S/
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