



**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)

**APPLICATION OF PACIFIC GAS AND ELECTRIC
COMPANY (U 39 E) FOR REHEARING OF D.10-07-044**

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I. INTRODUCTION

Pursuant to Public Utilities Code Section 1731(b) and Rule 16.1 of the Commission's Rules of Practice and Procedure, PG&E respectfully file its Application for Rehearing of D.10-07-044 ("Decision").¹ For the reasons discussed in more detail below, the Commission should correct the following legal error in the Decision:

The Decision erroneously concludes that by enacting Sections 740.2 and 740.3 of the Public Utilities Code, the California Legislature intended that sales of electricity to the public for purposes of charging electric vehicles be removed from the Commission's general jurisdiction over such sales under Sections 216 and 218 of the Public Utilities Code.²

¹ D.10-07-044, August 2, 2010, *Decision in Phase 1 on Whether a Corporation or Person that Sells Electric Vehicle Charging Services to the Public is a Public Utility*, R. 09-08-009.

² D.10-07-044, pp. 1, 19- 21, 40, Conclusion of Law 4. See Public Utilities Code Sections 1757(a)(1) and (2) and 1757.1(a)(2) and (3) regarding reviewability of errors of law by the Commission. In addition, because the Decision's conclusion of law regarding the intent of Sections 740.2 and 740.3 to repeal part of the Commission's authority under Sections 216 and 218 was not subject to prior notice or opportunity for public comment, the Decision also appears to violate due process under Sections 1757 and 1757.1. Compare 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 a Motor Vehicle Fuel*, Conclusion of Law 2, p.30 (citing Public Utilities Code Section 216(f) as the basis for concluding that the sale of electricity for use as a motor vehicle fuel is not sale of "power" under Public Utilities Code Sections 216 and 217) with D.10-07-044, Conclusion of Law 4 (citing Public Utilities Code Sections 740.2 and 740.3 as the basis for the conclusion that the Legislature did not intend that the Commission regulate sales of electricity to the public by electric vehicle charging providers as public utilities.)

As PG&E and many other parties to this proceeding have recognized, the Commission's Decision on its authority to regulate or not regulate the sales of electricity by electric vehicle service providers will have profound and significant impacts on California's energy and environmental policies regarding new and increased demands for electricity caused by new electric vehicles sold and operated in the State. As the Commission stated in its Order Instituting Rulemaking (OIR) initiating this proceeding, the Commission's fundamental purpose is:

[T]o consider the impacts electric vehicles may have on our State's electric infrastructure and what actions this Commission should take. We must ensure that the charging of these vehicles does not have adverse impacts on our electric system in terms of reliability, while at the same time recognizing the benefits of these vehicles in achieving California's climate change goals. ...

The Commission will explore in this proceeding how billing components can be appropriately assigned to electric vehicles in order to reflect these costs and benefits. ...

In this proceeding, the Commission also will explore the impact of the electric vehicle rate structure on charging behavior. Large increases in charging during the daytime could increase utility procurement costs and reduce the carbon emission reductions associated with electric vehicle use. Rate design could potentially discourage daytime charging by establishing high daytime rates that reflect the marginal cost of increasing load. Likewise, an electric vehicle tariff can encourage charging during nonpeak hours by establishing rates that reflect the lower procurement costs during these periods.

(R. 09-08-009, August 24, 2009, pp. 2, 14- 15.)

Unfortunately, by disclaiming any authority over the retail electricity prices and rates charged by third parties to members of the public to charge their electric vehicles, the Decision would remove from the Commission one of the Commission's most fundamental areas of authority to address the electric vehicle impacts identified by the OIR: the power to design and approve the retail electricity rates that electric vehicle service providers charge for the electricity they sell to retail customers. This fundamental authority also includes providing electric vehicle owners with time-variant electric rates and other incentives to shift their electricity demands to off peak periods and reduce the negative environmental emissions and increased costs associated

with the increased electricity loads and energy usage resulting from electric vehicle charging.³

If the Commission’s decision on jurisdiction over electricity sales by electric vehicle service providers to the public were simply a matter of economic regulation or deregulation, with no impacts on the California environment or on State energy resources, the decision would be straight-forward – no need for regulation. But the decision is more complex – the growth in electricity demand due to electric vehicles has the potential to significantly and adversely increase environmental pollution, thus undermining one of the most immediate and important opportunities California has to reduce dependence on fossil fuels and mitigate the causes of climate change. PG&E’s Application for Rehearing is intended to redress not only what it sees as the legal error in the Decision, but what it also sees as the unintended and detrimental public policy consequences of that legal error.

II. CONTRARY TO THE DECISION, SECTIONS 740.2 AND 740.3 OF THE PUBLIC UTILITIES CODE DO NOT EXPRESSLY OR IMPLIEDLY REPEAL THE COMMISSION’S AUTHORITY TO REGULATE THE SALE OF ELECTRICITY AND FACILITIES USED FOR THE SALE OF ELECTRICITY TO THE PUBLIC BY ELECTRIC VEHICLE SERVICE PROVIDERS UNDER SECTIONS 216, 217 AND 218 OF THE PUBLIC UTILITIES CODE

The Decision concludes that, as a matter of law and based on an interpretation of Sections 216, 218, 740.2 and 740.3 of the Public Utilities Code, the California Legislature did not intend that the Commission regulate sales of electricity to the public by electric vehicle service

³ The Decision agrees with PG&E and other parties that the Commission’s retail rate design authority is fundamental to the Commission’s ability to address how electric vehicles impact the electric grid and affect the integration of renewable energy resources. (Decision, pp. 21, 28.) However, the Decision then inexplicably disclaims any need to use that fundamental authority, arguing instead that retail rate design policies are unneeded because “The charging provider will have a strong incentive to operate its business in a manner that is compatible with the needs of the electric grid.” (*Id.*, p. 28) This does not seem to be credible, given that there is no legal requirement that wholesale electricity customers reflect wholesale rate designs in their prices and rates to retail customers. In any event, the Commission does not have authority to regulate the rate design of sales for resale of electricity to electric vehicle charging service providers, because such sales for resale are under the exclusive jurisdiction of the Federal Energy Regulatory Commission.

providers as public utilities.⁴ The Decision cites no ambiguity in existing Sections 216 and 218 for its conclusion, nor does it cite any express terms in Sections 740.2 or 740.3 as support for a conclusion that those Sections expressly or impliedly amended or repealed the Commission’s general jurisdiction over sales of electricity to the public under Sections 216 and 218. Instead, the only support the Decision states for its interpretation is that Sections 740.2 and 740.3 did not affirmatively grant the Commission authority to directly regulate electric vehicle charging service providers as public utilities. (Decision, p. 20.)

The problem with this statutory interpretation is that there is no latent or actual ambiguity in the Commission’s fundamental statutory authority in Sections 216 and 218, and no indication whatsoever in the “plain meaning” of more recent Sections 740.2 and 740.3 that the Legislature intended to expressly or impliedly repeal its broad grant of authority to the Commission to regulate and oversee sales of electricity to the public under Sections 216 and 218. In fact, the text of both Sections 740.2 and 740.3 focus primarily on the activities of public utilities and the rates they would charge customers for electric vehicle charging services, rather than activities by non-utilities. For example, Section 740.3(a)(1) refers to the “sale-for-resale and rate-basing” (public utility terms) of electric vehicle equipment and infrastructure. Section 740.3(b) refers to “policies” on “rates, equipment and infrastructure” for electric vehicles. Section 740.3(c) expressly requires that the Commission’s “policies authorizing utilities” to develop electric vehicle infrastructure “ensure” that the “cost and expenses” are not passed through to “electric or gas ratepayers” unless the Commission finds that the programs are “in the ratepayers’ interests”

⁴ D.10-07-044, pp. 1, 19- 21, 40, Conclusion of Law 4.

– all terms relating to public utility regulation.⁵ Nowhere does Section 740.3 indicate any intention by the Legislature to repeal the Commission’s fundamental authority to regulate the sale of electricity to the public under Sections 216, 217 and 218.

Likewise, more recently enacted Section 740.2 references consultation among the Commission, the Energy Commission, “electrical corporations, and the motor vehicle industry,” and requires the Commission to adopt rules to address, *inter alia*, impacts on “electrical infrastructure,” “grid stability and the integration of renewable energy resources,” ensuring that electric vehicle technologies work “across service territories,” and shifting greenhouse gas emissions responsibilities from the transportation sector to “the electrical industry.” All these references are consistent with the Legislature’s intent to supplement the Commission’s existing authority to regulate public utilities, not that the Commission’s pre-existing authority under Sections 216, 217 and 218 was intended to be restricted and supplanted.

Moreover, the Legislature’s prior exclusions of discrete activities and facilities from Commission jurisdiction under Sections 216 and 218 indicate that, when the Legislature intends to exempt an activity from the Commission’s broad public utility jurisdiction, it does so by specific amendment to Sections 216 and/or 218, not by implication or indirectly by enactment of another statute. For example, Sections 216(d), (e), (f), (g) and (h) all represent the Legislature’s express exemptions of certain activities or facilities that otherwise would be subject to the Commission’s general jurisdiction over public utilities under Section 216(a) - (c). Of particular

⁵ The Decision cites the reference to “nonutility enterprises” in the last sentence of Section 740.3(c) as support for its interpretation that Section 740.3 is focused on regulation of non-utility electric vehicle service providers. (Decision, p. 20.) However, as the sentence and its context make clear, the Legislature was focusing on regulation of *public utilities* for the purpose of preventing *utilities* from competing unfairly against non-utilities, not for the purpose of defining the scope of the Commission’s authority over public utilities generally.

note is Section 216(f), a provision enacted by the Legislature in 1991 that expressly removed the Commission's jurisdiction over the sales of natural gas to the public for use in compressed natural gas vehicles. To the extent that the Decision is contending that the intent of Section 740.3, enacted *a year before* Section 216(f), was to exempt sales of natural gas for motor vehicle use from Commission jurisdiction under Section 216 (and thus, by analogy, sales of electricity for electric vehicles as well), that interpretation is totally negated by the fact that enactment of Section 740.3 *preceded* Section 216(f), which if the Decision were correct would have mooted any need for the Legislature to adopt the natural gas exemption a year later in Section 216(f).

Likewise, the Legislature in Sections 218(b), (c), (d), (e) and (f) has adopted very specific exemptions from the Commission's general public utility jurisdiction under Section 218(a). Thus, the Decision is not credible in arguing that the Legislature intended Sections 740.2 and 740.3 (individual statutes enacted years apart) to constitute implied or express repeals of the Commission's general jurisdiction over the sales of electricity to the public, and the facilities used for such sales, under Sections 216, 217 and 218 of the Public Utilities Code.⁶

⁶ Even assuming *arguendo* that the meaning of Sections 740.2 and 740.3 is ambiguous, the legislative history indicates the opposite from the Decision's conclusion that the Legislature intended to repeal the Commission's authority under Sections 216 and 218. For example, the introduction to the April 21, 2009, Senate Energy, Utilities and Communications Committee analysis of SB 626, the bill enacting Section 740.2, stated that "Under current law, **the CPUC must protect ratepayers** and the interest of ratepayers. **Cost and expenses of programs should not be passed to ratepayers unless those programs are in the ratepayer's interest.**" (emphasis added.) The April 28, 2009, Senate Transportation & Housing Committee analysis of SB 626 stated at page 3 that "Proponents note that the impact of plug-in vehicles on California's **electric utility systems and infrastructure** could be significant, unless **utilities** are able to shift the time that **consumers** charge them to off-peak periods. They assert that **utilities need to** evaluate potential impacts of large numbers of plug-in vehicles on their systems and to **develop strategies to address this electrical load.** This bill directs the PUC to begin that process." (emphasis added.) Likewise, the June 29, 2009, Assembly Transportation Committee analysis stated at pages 3 and 6 that: "**EXISTING LAW: 1) Confers to CPUC regulatory authority over public utilities**, including electrical corporations and gas corporations, as defined. ... **The CPUC supports the need to develop rules and adopt policies to determine the infrastructure and pricing structures** for widespread deployment of plug-in hybrid and electric vehicles." (emphasis added.) Finally, on third reading of the bill, the Senate Rules Committee analysis stated at page 3 : "Specifically, this bill requires the PUC...to adopt rules to address: ...6. The

III. CALIFORNIA’S ENERGY AND ENVIRONMENTAL POLICIES SUPPORT A BROAD INTERPRETATION OF THE COMMISSION’S AUTHORITY TO REGULATE SALE OF ELECTRICITY TO THE PUBLIC BY ELECTRIC VEHICLE SERVICE PROVIDERS, PARTICULARLY THE RATE DESIGNS NEEDED TO INCENT RETAIL CUSTOMERS TO CHARGE THEIR VEHICLES OFF-PEAK IN ORDER TO REDUCE ENVIRONMENTAL IMPACTS

PG&E respectfully believes that the Decision’s legal and public policy reasoning, although well-intentioned, is flawed. If sustained, the Decision would exempt a potentially large and fast-growing part of California’s electricity markets from a broad array of energy policies designed to manage and mitigate the resource and environmental impacts of electricity load growth in the State.

The practical result would be continued confusion and lack of coordination among electricity providers, motor vehicle manufacturers, and third-parties who would offer electric vehicle support services and equipment - just at the very time when motor vehicle manufacturers are beginning to mass market a new generation of electric vehicles in California and when customers need seamless support and infrastructure to operate and maintain those electric vehicles. Even current initiatives by the Commission to promote electric vehicle deployment - such as streamlining the installation of electric vehicle charging infrastructure and flowing through demand charges to retail electric vehicle customers to provide appropriate price signals - would be removed from the reach of the Commission’s policies and regulation by the Decision’s broad disclaimer of CPUC authority and jurisdiction.

PG&E recommends that the Commission grant its application for rehearing and, instead of exempting the entire third-party electric vehicle electricity charging market from direct

impact of widespread use of plug-in hybrid and electric vehicles on achieving the state’s AB 32 goals and renewables portfolio standards, **including what steps should be taken to address shifting emissions reductions from the transportation sector to the electrical industry.**” (emphasis added.) These and other references to the legislative history of Section 740.2 can be found at <http://www.assembly.ca.gov/acs/acsframeset2text.htm>.

Commission oversight, the Commission should exercise its wide latitude to supervise and regulate such electric vehicle charging services - especially the design of time-variant rates to retail customers - on a “light-handed” or “market-based” basis, consistent with the Commission’s authority to establish rules and standards for the reasonableness of public utility rates and terms of service under the Public Utilities Code.

IV. CONCLUSION

PG&E respectfully disagrees with the legal conclusion and the energy policy consequences and implications of the Decision. Instead, we recommend that the Commission use its broad authority under the Public Utilities Code to institute a framework of “light handed” supervision and regulation of third party electric vehicle charging services and infrastructure investments, especially the rate designs used for the sale of electricity by electric vehicle service providers. This alternative regulatory framework will avoid negative and adverse impacts on California’s energy and environmental policies, while also promoting, integrating and fostering electric vehicle deployment in California under predictable and streamlined regulation generally.

Respectfully Submitted,
CHRISTOPHER J. WARNER

By: _____ /s/
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Dated: September 1, 2010

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL OR U.S. MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, Post Office Box 7442, San Francisco, CA 94120.

On the **1st day of September 2010**, I served a true copy of:

**APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 E) FOR
REHEARING OF D.10-07-044**

- [XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service list for **R.09-08-009** with an e-mail address.
- [XX] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service list for **R.09-08-009** without an e-mail address.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this **1st day of September 2010** at San Francisco, California.

/s/

MARY SPEARMAN