STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

**FILED**
05-21-10
03:51 PM

May 21, 2010

Agenda ID #9500
Quasi-legislative

TO PARTIES OF RECORD IN RULEMAKING 09-08-009

This is the proposed decision of Commissioner Nancy E. Ryan. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 electronically. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ DeAngelis at rmd@cpuc.ca.gov and Commissioner Ryan's advisor, Andy Campbell, at agc@cpuc.ca.gov. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:oma

Attachment

Decision **PROPOSED DECISION OF COMMISSIONER RYAN**
(Mailed 5/21/2010)

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

| | |
|---|---|
| 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) |

# 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

## 1. Summary

We conclude that 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[1] solely because of that sale, ownership or operation.

## 2. Procedural Background

The issue before the Commission is whether the sale of electricity at retail to the public solely for use as a motor vehicle fuel is subject to the Commission's

[1] All subsequent section references are to the Public Utilities Code, unless otherwise indicated.

regulation under the Public Utilities Act. This question was raised early in the proceeding as a priority matter. In comments filed on October 5, 2009, soon after the Commission issued this rulemaking, parties expressed broad agreement that the Commission should move quickly to clarify the extent of its regulatory authority over the sale of electricity to the public for the sole use as a motor vehicle fuel. Parties confirmed the urgency of this issue at the November 18, 2009 prehearing conference, stating in one instance that "clarity around Section 216 and 218 [of the Pub. Util. Code] are critical in terms of investment in California…." (November 18, 2009 RT 43:11-12.)

The assigned Commissioner agreed that the extent of the Commission's regulatory oversight needed to be addressed expeditiously and, as a result, identified this issue as the first to be addressed in the proceeding, explaining that:

> At the November 18, 2009 prehearing conference and in comments, parties requested the Commission address issues related to the provision of electric vehicle charging services by entities other than the electrical corporations currently regulated by the Commission as public utilities. Parties described the resolution of these issues as "critical" to bringing private investment to California for electric vehicle charging infrastructure and requested the Commission address these issues as soon as possible. I agree.
>
> (Scoping Memo at 3.)

Accordingly, the Assigned Commissioner's Scoping Memo (Scoping Memo) places within the scope of this proceeding the question, stated broadly, of the extent to which Pub. Util. Code §§ 216 and 218 apply to providers of electric charging services for the sole use as a motor vehicle fuel. The Scoping Memo emphasized that these providers could include owners of standalone electric vehicle charging spots that sell a single type of transportation fuel, electric

recharging; owners of shared station arrangements where several types of transportation fuels, including electric recharging, are sold; residential and commercial landlords that provide electric vehicle charging as a service on the premises to tenants, guests of the tenants, customers of the tenants, and perhaps others; condominium associations that provide electric vehicle charging on the premises as a service to the condominium owners, their guests, and others; employers that provide access to recharging facilities as a service to their employees; and potentially others.

Moreover, in an effort to focus the attention of parties on this key issue, the assigned Commissioner put forward a preliminary legal interpretation based on an initial review of parties' comments and the rationale the Commission applied in Decision (D.) 91-07-018[2] concerning the operation of facilities for the sale of compressed natural gas for a transportation fuel. This preliminary interpretation posited that facilities solely used to provide electricity as a transportation fuel do not constitute "electric plant" under the Public Utilities Code and asked parties to provide a legal and policy analysis in response to this preliminary interpretation. (Scoping Memo at 5.) Parties provided the requested analysis in briefs filed on February 8, 2010 and reply briefs filed on March 1, 2010. The arguments presented by parties are summarized below.

---

[2] D.91-07-018, 1991 Cal. PUC LEXIS 509 (July 2, 1991). In D.91-07-018, the Commission found as follows: "Persons operating service stations for the sale of CNG [compressed natural gas], other than those who are public utilities by reason of operations other than operating a service station, are not subject to regulation by this Commission. Those persons may sell CNG at prices they deem appropriate."…"Our jurisdiction on CNG sales is limited to PG&E's side of the meter and the connection to the service stations' side of the meter."
(D.91-07-018, Conclusions of Law 18 and 19).

## 3. Positions of Parties

### 3.1. Southern California Gas Company and San Diego Gas & Electric Company

Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) (collectively SEU) conclude that electric vehicle[3] charging is not a public utility service. SEU cites to D.91-07-018 and D.91-07-017[4] for authority to support its argument, which is that the sale of electricity for the sole use as a transportation fuel is not "power" under the Public Utilities Code. SEU also urges that the Commission place the following issues in Phase 2 for immediate consideration: (1) changes to the Electric Tariffs Rule 18 of Southern California Edison Company (SCE) and Pacific Gas and Electric Company

---

[3] All references to the term "electric vehicles" refer to light-duty passenger plug-in hybrid electric vehicles and battery electric vehicles.

[4] In D.91-07-018 and D.91-07-017, cases involving requests by PG&E and SDG&E, respectively, to expand their natural gas vehicle program, the Commission found that natural gas fuel providers are not subject to Commission jurisdiction. The Commission made analogous findings in both decisions. These findings, as set forth in D.91-07-017, are reproduced below:

> Findings of Fact
>
> 18. Persons operating service stations for the sale of CNG [compressed natural gas] for use solely as a motor vehicle fuel, other than those who are public utilities by reason of operations other than operating a service station, are not subject to regulation by this Commission. Those persons may sell CNG as a motor vehicle fuel at prices they deem appropriate.
>
> 19. Our jurisdiction on CNG sales is limited to SDG&E's side of the meter and the connection to the service stations' side of the meter.

(PG&E) and Rule 19[5] of SDG&E's tariff to accommodate electric vehicle service providers and (2) development of tariffs to offer services to electric vehicle charging customers. SEU recommends workshops to determine the role of the utilities in owning and operating electric vehicle charging infrastructure, both residential and commercial/public charging.

### 3.2. PG&E

In contrast to SEU, PG&E submits that entities providing electric vehicle charging are public utilities under Section 216. PG&E cites to California Supreme Court cases *Greyhound*[6] and *Richfield*[7] for the proposition that entities providing electric vehicle charging fall within the "dedication to public use" standard. PG&E also addresses its preferred level of regulation. It suggests that flexible regulation or light-handed regulation is appropriate, including non-price regulation of safety, inter-operability, and reliability of equipment and services. PG&E further suggests no need exists for traditional cost-based regulation of

---

[5] Tariff Rule 18 and Rule 19 are entitled "Supply to Separate Premises and Use by Others," and govern whether and how electricity delivered to a utility end-use customer can be redelivered and/or resold by the customer.

[6] In *Greyhound Lines, Inc. v. Public Utilities Comm*. (1968) 68 Cal.2d 406, the Supreme Court affirmed the findings of the Commission on "dedication to public use" of a commuter bus service, stating: "The various indicia of dedication are not uniformly applicable to different utilities or uniformly useful in answering different questions, and the scope of dedication is not determined by mechanical formulas but ultimately by the fact that the utility has dedicated its resources to a particular enterprise, venture, or undertaking."

[7] In *Richfield Oil Corp. v. Public Utilities Comm.* (1960) 54 Cal.2d 419, the Supreme Court annulled the order of the Commission finding dedication of an oil company to public use by providing service to selected customers under contracts, stating "… the Legislature by its repeated reenactment of the definitions of public utilities without change has accepted and adopted dedication as an implicit limitation on their terms."

pricing, as long as no market power is demonstrated. PG&E also raises the potential that the Federal Energy Regulatory Commission (FERC) would have exclusive jurisdiction over electricity sales to retail entities under the Federal Power Act, 16 U.S.C. §§ 791 *et seq.*, unless FERC disclaims such jurisdiction, citing to *Order Disclaiming Jurisdiction*, Docket No. ER94-775-000 (April 2, 2001).

### 3.3. SCE

Similar to PG&E, SCE argues that the Commission does not have the authority to exempt from regulation entities that SCE describes as, clearly public utilities and load-serving entities under the code. According to SCE, legislation is needed to exempt the retail sale of electricity for use as transportation fuel but that the Commission has discretion to determine the appropriate level of regulatory oversight. SCE suggests the Commission treat entities that provide electric vehicle charging as Electric Service Providers (ESPs).[8] SCE claims the ESP designation will ensure that entities providing electric vehicle charging operate on a level playing field with investor owned utilities under Tariff Rule 22.[9] As another possibility, SCE suggests the Commission regulate the sales of electricity to retail customers at regulated rates, terms and conditions under SCE's Tariff Rule 18. SCE also takes the position that no regulation is required if entities providing charging services sell no electricity but just the charging

[8] Pub. Util. Code § 216(h). An ESP is an entity that provides electric supply services to Direct Access customers within an investor owned utility's service territory. An ESP may also provide certain metering and billing services to its Direct Access customers. ESPs remain subject to the Commission's specific jurisdiction over procurement-related obligations and consumer protections.

[9] Electric Tariff Rule 22 governs Direct Access service to ESPs.

equipment and retain no ownership, management, control or operation of such equipment.

### 3.4. Sacramento Municipal Utility District

Sacramento Municipal Utility District's (SMUD) position is that the Commission should regulate entities providing electricity for electric vehicle charging. In the absence of Commission regulation, SMUD sees complications for infrastructure planning to accommodate electric vehicle growth. According to SMUD, if electricity is sold at a profit, utility status is required. In SMUD's view, regulation depends on the nature of the product sold or the manner of the delivery of the electricity. SMUD believes that exempting electric vehicle charging from regulation would not promote orderly and reliable development of charging. SMUD draws a distinction between electricity and natural gas. SMUD points out that natural gas must be processed (value-added) before it is used as a vehicle fuel and argues that, in the absence of value-added, which does not exist with electricity, regulation is mandated. One exception noted by SMUD is that battery swapping provides a value-added component but charging directly from the grid does not. SMUD notes the importance of imposing the right "rate design" on electric vehicle charging service providers to incent off-peak charging, which, in SMUD's view, cannot be done if fully unregulated.

### 3.5. EV Service Provider Coalition

The EV Service Provider Coalition, consisting of Better Place, Coulomb Technologies, Inc. (Coulomb), and Ecototality/eTec, submitted a joint pleading. They claim that the Commission has no jurisdiction over electric vehicle charging service providers that offer electricity as a form of transportation fuel. This coalition supports the analysis in the Scoping Memo and states that over-reaching jurisdiction will stifle competition, innovation and investment in

the industry. They suggest the Commission adopt tariff rules to facilitate the provision of electric vehicle services in a manner that is as convenient and seamless as possible.

### 3.6. Better Place

Better Place also submitted its own brief. In its brief, Better Place expands upon topics addressed in its joint brief filed with the EV Service Provider Coalition. Better Place reiterates that charging should not be regulated but recognizes the diversity in business models makes determining the boundary between utility/non-utility service difficult. Better Place also submits that no evidence exists of the Legislature's intent to regulate electric vehicle charging. Better Place concludes that electric vehicle charging equipment is not electrical plant because it is not used to deliver "light, heat or power" and, in adopting this interpretation, Better Place relies heavily on D.91-07-018 and cites to Section 740.3[10] for support. Better Place argues that the Commission's prior conclusion that natural gas used as a vehicle fuel is not used for "power" in the sense intended by statute is applicable in the case where electricity is used to charge an electric vehicle battery. Better Place further points out that, like compressed natural gas providers, electric vehicle service providers deploy money, time, effort and technology to provide their customers a service, and do

[10] Section 740.3(a) provides, in pertinent part, as follows: "The commission, in cooperation with the State Energy Conservation and Development Commission, the State Air Resources Board, air quality management districts and air pollution control districts, regulated electrical and gas corporations, and the motor vehicle industry, shall evaluate and implement policies to promote the development of equipment and infrastructure needed to facilitate the use of electric power and natural gas to fuel low-emission vehicles."

not simply sell a commodity. In terms of next steps for this proceeding, Better Place suggests workshops to refine the "exact boundary" of where the responsibility of the investor owned utility ends and the charging providers begins and to refine Rule 18 and Rule 19.

### 3.7. Coulomb Technologies, Inc.

Coulomb expands upon topics addressed in its joint brief filed with the EV Service Provider Coalition to emphasize that the Commission should support the Scoping Memo position that the Commission does not have the regulatory authority regarding the price that an electric vehicle charging facility operator charges for services or other aspects of operation of such facilities. According to Coulomb, only this outcome will enable a market that will encourage competitive market forces to bring benefits to consumers and ensure rapid deployment of the charging infrastructure. Coulomb argues that by treating a charging station as competitive access to the grid as opposed to being a regulated utility, the Commission can foster competition in the nascent infrastructure marketplace and help facilitate rapid deployment.

### 3.8. Clean Energy Fuels Corporation

Clean Energy Fuels Corporation, a provider of vehicle compressed natural gas, offers reasons why natural gas vehicles need to be addressed in this proceeding. It argues that the regulatory framework should err on the side of facilitating the development of robust and vibrant competition in the California alternative fueled vehicle marketplace. As such, no regulation of entities providing electric vehicle charging is appropriate, all pricing should be cost based, and investor owned utilities should not be permitted to rate base electric vehicle investment.

### 3.9. Western States Petroleum Association

Western States Petroleum Association (WSPA) argues that entities providing electric vehicle charging are not public utilities. Instead, it suggests that Rules 18 and 19 apply and that the Commission consider modifying Rules 18 and 19 to provide for the resale of utility power by an electric vehicle service provider for transportation fuel purposes. WSPA finds that electricity as a transportation fuel does not constitute "power" under the code. WSPA also points out that the Legislature did not include the word "fuel" or "automobile fuel" when defining "electric plant" and argues, therefore, that the provision of vehicle fuel is not a utility service. WSPA further states that the regulation of electric vehicle service providers would be contrary to the purpose of public utility regulation – the protection of consumers from monopoly abuses – and to California's policy goal of developing an electric vehicle infrastructure. The future diversity of transportation fuels, WSPA claims, argues against the existence of monopoly service or the need for regulations.

### 3.10. Division of Ratepayer Advocates

The Division of Ratepayer Advocates (DRA) focuses on "dedication to public use," the implicit requirement that applies before finding an entity is a public utility. DRA finds that entities providing electric vehicle recharging satisfy the "dedication" requirement but DRA advocates for a light-handed regulation that focuses on safety, rates, terms and conditions of service, and impact on the electric grid. DRA is concerned about on-peak charging and suggests that, if these entities are not regulated, the Commission will not be able to control peak use. DRA suggests workshops to develop tariff language to discourage on-peak charging. In its reply brief, DRA contends that, if investor owned utilities are permitted to enter into the electric vehicle service provider

market, investor owned utilities should be prohibited from recovering their related expenses and capital from ratepayers.

### 3.11. The Utility Reform Network

The Utility Reform Network (TURN) argues that entities that provide electric vehicle charging offer a utility service and that legislative action is required to change the situation. TURN contends that the analogy to natural gas vehicles (NGV) must take into consideration that Senate Bill (SB) 547 was pending when the Commission issued D.91-07-017 and D.91-07-018 finding NGV fuel sales outside of its jurisdiction. According to TURN, the fact that legislation was passed confirms that the Legislature believed that entities reselling natural gas as a vehicle fuel were public utilities, otherwise the Legislature would not have passed the bill exempting NGV from jurisdiction. While the Commission holds regulatory authority, TURN suggests the Commission use light regulation similar to competitive gas storage providers. TURN did not specifically describe the aspects of gas storage regulation that would be appropriate here.

### 3.12. Natural Resources Defense Council and Friends of the Earth

Natural Resources Defense Council (NRDC) and Friends of the Earth (FOE) claim that the Commission has and should retain jurisdiction because of the potential increased risk associated with the use of inefficient peak power and unintended impacts to grid management. They rely on the plain language of the Public Utilities Code to argue that electric vehicle charging renders an entity subject to public utility regulation but also express their preference for light-handed regulation. Looking ahead, they explain that regulation must be mindful of the possibility that electric vehicle charging entities will provide

ancillary services to support the grid, energy storage services, charge management aggregation services, and "solar to electric vehicle."

### 3.13. Californians for Renewable Energy and North Coast Rivers Alliance

Californians for Renewable Energy (CARE) and North Coast Rivers Alliance (NCRA) state their preference for regulating electric vehicle charging but prefer "limited, non-pricing regulation." CARE and NCRA suggest that a determination that no regulation is appropriate would require legislative action and, in reply briefs, these parties suggest that the Commission create a new customer class for electric vehicle service providers to control rates.

### 3.14. Interstate Renewable Energy Council

Interstate Renewable Energy Council (IREC) argues that the Commission has no jurisdiction over transactions involving the sale of electricity when a private relationship exists between provider and customer, such as landlord/tenant; shopping center/customer; hotel/guest but admits that the more difficult question to address is the Commission's jurisdiction over public charging spots. IREC notes the lack of information on business models for entities providing electric charging services and finds that this, while not surprising due to the nascent state of the electric vehicle market, makes it difficult to propose solutions to the jurisdiction issue. IREC further notes that Commission jurisdictional analyses are highly fact based. As such, IREC recommends a cautious approach while also proposing that the Commission provide some assurance that in certain situations, electric vehicle charging will be free from Commission regulation. For example, IREC cites to *Story v.*

*Richardson*, (1921) 186 Cal. 162,[11] for the proposition that landlords serving tenants have not dedicated their service to the public. In its reply brief, IREC refers to Rule 18 and Rule 19 as a way to accommodate "resale" by electric vehicle service providers.

### 3.15. Green Power Institute

Green Power Institute claims that vehicle electrification represents an opportunity to convert transportation to run on renewable sources of energy, assuming that the electricity has a significant renewable component. As a result, Green Power Institute points out that a key consideration will be tariffs applicable to charging entities. Green Power Institute does not support extending the Commission's jurisdiction to electric vehicle service providers.

### 3.16. Environmental Defense Fund

Environmental Defense Fund supports excluding providers of electric vehicle charging services from regulation as public utilities and focuses on the need for innovative rate structures to achieve environmental goals.

## 4. Discussion

We conclude that 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

[11] In *Story v. Richardson* (1921) 186 Cal. 162, the Supreme Court found "The test to determine a public use is whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner. The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character."

within the meaning of Pub. Util. Code § 216 solely because of that sale, ownership or operation.

Our conclusion is based on an analysis of the Public Utilities Act and is guided by public policy considerations related to alternative fueled vehicles, including the Legislature's recent efforts to promote the widespread deployment and use of electric vehicles, as reflected in Section 740.2 (added by Stats. 2009, c. 355, (SB 626) § 1), and the efforts by the Commission and the Legislature starting in the early 1990s to encourage the development and use of other alternative fuels. (D.91-07-018; Pub. Util. Code § 216(f), (Stats. 1991, c. 514 (SB 547) § 2); Pub. Util. Code § 740.3 (added by Stats. 1990, c. 791 (SB 2103) § 2.)

In reaching this conclusion early in this proceeding, we are cognizant of the request by parties to address the broad jurisdictional question sooner rather than later to provide regulatory certainty for utilities, entities participating in the electric vehicle markets, and customers for planning purposes prior to the introduction of significant electric vehicles in the market, to remove related potential risk factors associated with investment opportunities in electric vehicle markets, and to provide more certainty around the issues framed in Phase 2 of this proceeding.

### 4.1. Legal Framework

Section 216 defines "public utility" as any "electrical corporation" that performs a service or delivers a commodity, such as electricity, to the public for compensation. One of the critical terms in Section 216, "electrical corporation," is defined in Section 218(a) as any corporation or person "owning, controlling, operating or managing any electric plant for compensation" in California. For purposes of our analysis, we now turn to the term "electric plant" as used in Section 218(a). "Electric plant" is defined in Section 217 as property "owned,

controlled, operated, or managed in connection with or to facilitate the … transmission, delivery, or furnishing of electricity for ***light, heat, or power***." (Emphasis added.)

Under this statutory framework, we are presented with the question of whether "light, heat or power" is provided when selling electricity to the public at retail solely as a motor vehicle fuel. Consistent with the Commission's analysis in 1991 when addressing compressed natural gas for the sole use as a motor vehicle fuel, we find that electricity furnished as a motor vehicle fuel is not "light" or "heat." (D.91-07-018.) In D.91-07-018, the Commission's analysis focused on the term "power" in Section 217 and dismissed the applicability of either the term "light" or "heat" to motor vehicle fuel by giving those terms negligible consideration. Likewise, because of the similarity between the question presented to the Commission in 1991 on the regulation of the sale of compressed natural gas as a motor vehicle fuel and the question we address today, we look to the Commission's reasoning in 1991 for guidance and find that electricity for the sole use as a motor vehicle fuel is not "light" or "heat" under Section 217.

Regarding the term "power," we note that "power" is not an all encompassing term. For example, the term "power" as used by Section 217 does not include electricity used for light or heat. If it did the terms "light" and "heat" would be redundant verbiage. The cannons of statutory interpretation compel us to give meaning to all terms and words used in the code, and to read those terms in harmony with each other, to the extent possible. As such, we know the Legislature did not intend "power" to be defined as fungible electricity that powers any and all devices, since it does not apply to electricity used for light or heat. We also find that "power" does not include the use of electricity to charge

vehicle batteries that will later be used to fuel mechanized transportation. We are guided in this interpretation by Sections 740.2 and 740.3, which according to *in pari materia* analysis show that charging electric vehicles is not "power" under Section 217.

Section 740.2 requires the Commission to address the load serving entity side of the plug. The Commission is charged with insuring grid reliability and infrastructure upgrades, integration of renewable energy resources, developing (but not regulating) technology advancements, removing legal barriers, and addressing the shifting of emissions to the electrical industry. Section 740.2 is deafeningly silent on the Commission's role in regulating electric vehicle chargers pursuant to Sections 216 and 217.

Section 740.3 requires the Commission to work with the California Energy Commission, California Air Resources Board and other stakeholders to promote the development of infrastructure needed to facilitate the use of electric power and natural gas to fuel low-emission vehicles. We note that in Section 740.3 the legislature speaks of electric power and natural gas in the same breath. As such we must read this code as not acknowledging, conferring, or expanding jurisdiction upon the Commission for low-emission vehicle fueling for such an interpretation would violate Section 216(f), since Section 740.3 addresses electric power and compressed natural gas equally.

Additionally, Section 217 was enacted in 1915 and last amended in 1937. It is inconceivable that the Legislature would have foreseen the role of the modern vehicle in today's economy and the ability of that vehicle to be charged in the manner in which it is today and in the future will be. Expanding the term "power" to include vehicle fuel, and therefore a significant and vital portion of our economy and everyday life is beyond the plain meaning of the statute.

Charging a vehicle battery is more akin to moving electricity from place to place; the act of charging does not "power" anything. Only at a later time when the vehicle is engaged does the battery's stored electricity fuel the car. Moreover, even at that later time we find the electricity is "fuel" not "power" as explained above and for reasons similar to D.91-07-018.

D.91-07-018 addressed whether the retail sale of compressed natural gas for use as a motor vehicle fuel, "in a manner similar to the retail sale of gasoline for vehicles," constituted "power" within the context of Section 221.[12] The Commission concluded such a finding would "expand the meaning of words to an unnecessary degree" and rejected regulatory authority over the activity. Importantly, the statutory language of Section 221 (regarding gas) and Section 217 (regarding electricity)[13] is nearly identical statutory language.

In addition, in D.91-07-018, the Commission reasoned as follows in finding that the sale of compressed natural gas for the sole use as a vehicle fuel falls outside the scope of our regulatory authority:

> And we believe 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. After all, we do not believe anyone would seriously contend that a gas station operator is a "pipeline corporation" subject to our jurisdiction merely

---

[12] Pub. Util. Code § 221 (defines "gas plant" as property "owned, controlled, operated, or managed in connection with or to facilitate the . . . transmission, delivery, underground storage, or furnishing of gas, natural or manufactured, except propane, for light, heat, or power").

[13] Cal. Pub. Util. Code § 217 (defines "electric plant" as property "owned, controlled, operated, or managed in connection with or to facilitate the . . . transmission, delivery, or furnishing of electricity for light, heat, or power").

> because he has pipes in his station which deliver "fluid substances except water through pipe lines." (Pub. Util. Code §§ 227 and 228; *cf. Richfield Oil Corp. v. PUC* (1960) 54 C2d 419, and (1961) 55 C2d 187.)

The Commission's reasoning in 1991 is directly relevant to the circumstances today. In both instances, the Commission is considering a commodity used to fuel motor vehicles. Moreover, in both instances, the energy source, electricity today and compressed natural gas in 1991, can assist with reducing the impact of motor vehicle emissions on the environment. And, as the Commission found in 1991, we do not believe anyone would seriously contend that a vehicle fueling station operation is an electrical corporation subject to our jurisdiction merely because it has facilities used to transmit electricity.

The critical role of the Commission's reasoning in D.09-07-018 in today's analysis is influenced by the subsequent amendment to Section 216 that, in essence, adopted the Commission's conclusion in D.91-07-018. This amendment, contained in subsection (f) of Pub. Util. Code § 216 (added by Stats. 1991, c. 514 (SB 547) § 2, effective Oct. 7, 1991), exempted the sale of a different type of motor vehicle fuel, not electricity but compressed natural gas, from regulation by the Commission as a Section 216 public utility.

Specifically, SB 547 amended Pub. Util. Code § 216 to include subsection (f), which states:

> The ownership or operation of a facility that sells compressed natural gas at retail to the public for use only as a motor vehicle fuel, and the selling of compressed natural gas 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 this section solely because of that ownership, operation, or sale.

While SB 547 does not refer to the Commission's action in D.91-07-018 or D.91-07-017, one can reasonably argue that SB 547 effectively codified or affirmed the exemption provided in D.91-07-018.

Some parties, including TURN and SCE, disagree with our conclusion. They argue that the plain language of Section 216 establishes Commission jurisdiction over providers of electric vehicle charging services and that the Legislature did not codify or affirm the Commission's findings in D.91-07-018 but instead abrogated the Commission's findings by the subsequent passage of subsection (f) to Section 216. This reasoning is not supported by the history of Section 216(f). D.91-07-018 remains valid precedent.

The Commission issued D.91-07-018 on July 5, 1991. Under the Public Utilities Code and the Rules of Practice and Procedure, parties are provided with 30 days to file applications for rehearing to challenge the legal basis of a Commission decision.[14] During that time, TURN timely filed an application challenging the cost allocation component of the decision, not the jurisdictional finding. No other party filed an application for rehearing. A few months later, on October 5, 1991, the Governor signed SB 547 into law. As such, parties to D.91-07-018 had the opportunity to challenge the jurisdiction issue but did not. The subsequent action of the Legislature regarding SB 547 only resulted in further strengthening the Commission's decision. No inference can be draw that the Legislature found that the Commission acted beyond its authority, and no evidence of this concern is found in the legislative history of SB 547. At most, one can argue that the Legislature in SB 547 came to the same conclusion as

[14] Pub. Util. Code § 1731; Rules of Practice and Procedure, Rule 16.1, Application for Rehearing.

D.91-07-018 and found the Commission's rationale on the jurisdiction issue valid and reasonable.

For these reasons, consistent with D.91-07-018, the Legislature's subsequent support of this decision through SB 547, and the eventual enactment of SB 547, chaptered as Pub. Util. Code § 216(f), we find that under the existing statutory framework, the term "power" was not intended to include electricity for motor vehicle fuel and conclude that 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.

### 4.2. Policy Considerations

In addressing the question of whether the sale of electricity solely used for motor vehicle fuel falls under the definition of electricity used for "power," as that term is used in Section 217, we also consider the complex question of whether public policy goals weigh in favor of Commission regulation of electricity used solely for motor vehicle fuel. In answering this question, we look for guidance from recent legislation, specifically Section 740.2 (added by Stats. 2009, c. 355, (SB 626) § 1). This recently enacted legislation renewed the state's public policy goal of encouraging the use of alternative fuels to power motor vehicles to reduce greenhouse gas emissions. Earlier legislation, adding Section 740.3, announced this policy by directing the Commission to promote policies to facilitate the use of electric power to fuel low emission vehicles. (Pub. Util. Code § 740.3 (added by Stats. 1990, c. 791 (SB 2103) § 2.) We also look

to the fundamental reason for utility regulation, the protection of consumers from monopoly abuse, and whether such concerns exist here.

The purpose of public utility regulation is to protect consumers from unreasonable rates for vital services created by an industry's inclination toward natural monopoly. (*Gay Law Students Assoc. v. Pac. Tel. & Tel.* (1979) 24 Cal.3d 458, 467-477.) The diversity of the transportation fuel market, which includes multiple substitutable products and varied sellers, precludes the need for utility regulation. The future diversity of transportation fuels themselves argues against the need for regulation. If the price of electric fuel is high compared to gasoline, diesel, biodiesel, or compressed natural gas, consumers may have the flexibility to switch fuels in the short run or purchase alternative fueled vehicles in the long run. Additionally, within the electricity fuel market, barriers for new providers to offer charging services are low since the electric system is already ubiquitous. In contrast, if the price of electricity or natural gas used for "light, heat or power" in a home or business is too high, few alternatives exist. As such, we find that the fundamental reason for utility regulation, the protection of consumers from monopoly abuse, does not exist here.

Beyond consumer protection, we find that other public policy considerations support our legal analysis. The Legislature has recently praised the benefits of an electric vehicle infrastructure as a major component of the state's efforts to promote the use of low emission vehicles. In Section 740.2 (Stats. 2009, c. 355 (SB 626) § 1), the Legislature directed the Commission to assist with the "widespread deployment and use of plug-in hybrid and electric vehicles." It 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. As

the Supreme Court stated "Such broad regulation as that provided by the Public Utilities Act could not help but have a substantial impact on the development of any industry subject to it." (*Richfield Oil Corp. v. Pub. Util. Comm.* (1960) 54 Cal.2d 419, 431.) Again, we find that our legal analysis is consistent with the state's policy of supporting a vibrant market in electric vehicles.

Moreover, our decision today is consistent with the State's other policy goals such as, the Renewable Portfolio Standards (RPS), Resource Adequacy (RA), the Emissions Performance Standard (EPS) and the Assembly Bill (AB) 32 programs. NRDC, SMUD, SCE and others suggest that a Commission finding that electric charging service providers are not public utilities could create opportunities for these entities to circumvent these programs. This argument overlooks the fact that, before electric charging service providers can sell any electricity, the utility or other load serving entity that sold the electricity to the charging entity has complied with these various mandates. In other words, utilities and energy service providers remain bound to the existing requirements of RPS, RA, EPS, and AB 32 programs, even for that portion of their electricity sales that is ultimately delivered to charging service providers and vehicle owners for the use as a motor vehicle fuel. It is unnecessary to impose these important policies directly on the charging service providers to ensure that the policies are complied with. The Commission's finding in today's decision in no way allows electricity sales to circumvent these requirements.

Therefore, consistent with our prior decision in D.91-07-018, we find that the fundamental purpose of public utility regulation and California's public policy goal of encouraging widespread use of electric vehicles would not be furthered by regulation of 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.

### 5. Immediate Need for Additional Consumer Protection

Some parties commented on the need for additional consumer protection oversight of the retail sale of electricity for motor vehicle fuel. Currently, the sale of "motor fuel," as governed by the Bus. & Prof. Code, does not include the retail sale of electricity used for motor vehicle fuel. The Bus. & Prof. Code contains important consumer protection laws, including Bus. & Prof. Code §§ 12300-12314 (Standards of Weights and Measures), §§ 12500-12517 (Weighing and Measuring Devices), §§ 16600-17365 (Preservation and Regulation of Competition), and §§ 17500-17930 (Representations to the Public).

We agree that further amendments to the Bus. & Prof. Code may be appropriate. Such amendments would be consistent with the Legislature's action following the Commission's issuance of D.91-07-018. At that time, the Legislature promptly addressed consumer protection. Recognizing that compressed natural gas was not traditionally considered a "motor fuel" and that its use as such potentially created a gap in applicable consumer protection laws, the Assembly Committee on Utilities and Commerce drew attention to the need to classify compressed natural gas "as a 'motor fuel' for purposes of the Bus. & Prof. Code to avoid creating an entity not subject to any consumer protections laws whatsoever." (Bus. & Prof. Code § 13404.)

This is an area that may require review by the Legislature to expand, if necessary, those protections governing "motor fuel" to include electricity.

### 6. Home Charging Equipment Installation Streamlining

Issues relating to charging installation streamlining are included within the scope of this proceeding (Scoping Memo at 6). Installation streamlining

issues are prioritized as the current customer experience in establishing electric charging service presents a potential barrier to the widespread use of plug-in hybrid electric vehicles and battery electric vehicles.

On March 16, 2010, the Commission, in collaboration with the California Air Resources Board and the California Energy Commission, held a Joint Energy Agency workshop entitled "Electric Vehicle Workshop: Accelerating the Installation of Home Charging Equipment." The purpose of the workshop was to identify steps the State Legislature, the Commission, and other state regulatory agencies and local governments can take to streamline single-user residential charging installations.

Workshop panelists included representatives from automakers, charging equipment manufactures, charging equipment installers, local government officials, California Department of Housing and Community Development officials, large municipal utilities and investor-owned utilities. Panelists made a number of recommendations to the Commission, the State, and local governments to improve the current customer experience related to establishing service.

The Scoping Memo indicated the role of the Commission with respect to charging infrastructure streamlining issues is unclear. (Scoping Memo at 6.) In support of this position, workshop panelists indicated installation streamlining is a core competency of local jurisdictions, but that utilities the Commission regulates have a role to play. (March 16, 2010 RT 39.)

Workshop panelists suggested utilities would benefit from early identification of who is purchasing electric vehicles to anticipate whether the distribution system is adequate, provided this information-sharing did not violate customer privacy. (March 16, 2010 RT 156.) To address this issue, the

Commission-regulated utilities could develop jointly with automakers a formalized notification process to quickly identify charging locations at the time of plug-in electric vehicle purchase. Formalized charging location identification practices could help expedite customer premise installation processes, particularly where electric vehicle charging equipment voltage requirements exceed the existing customer premise utility service panel size.[15] A formalized notification process may further allow the utility to conduct outreach and education to customers regarding safe charging requirements and educate the customer regarding time variant rate options that encourage off-peak charging.

Further, March 16 workshop panelists observed that the charging equipment installation time itself is *de minimis*; the installation delay frequently arises in the hand-off of responsibility from one participant in the process to another; i.e., from the customer to the automaker, to the equipment installer, to the local utility, to the local government permitting and inspection official (March 16, 2010 RT 18). Some automakers appear to be addressing this challenge by selecting charging equipment installation companies that will oversee these handoffs.

In general, the Commission supports efforts on the part of trade alliances, regional and local governments, utilities, and industry actors to partner and work in parallel to the Commission rulemaking process toward common sets of best practices to prepare for the deployment and widespread use of plug-in electric vehicles. The Commission intends to continue its consideration in Phase

[15] Commission consideration of issues related to transmission and distribution system impacts, and electric system benefits due to electric vehicle charging, including cost allocation, are scoped into Phase 2 of the proceeding.

2 of the proceeding of installation streamlining as part of a broader effort to prepare for the deployment of plug-in electric vehicles at the end of this year (2010).

## 7. Phase 2

This proceeding will remain open for consideration in Phase 2 of this proceeding of a number of additional issues as identified preliminarily in the Scoping Memo. Some of the issues we will potentially address in a Phase 2 decision are as follows:

- Any health and safety issues related to electric vehicle charging and the associated infrastructure;
- The appropriate utility role in the provision of electric vehicle charging services to the public;
- The appropriate utility role with respect to charging equipment on the customer's side of the meter;
- Ways in which the utilities can further help to streamline the installation of home charging infrastructure;
- Cost allocation, including a consideration of the circumstances in which the costs of any distribution system upgrades should be borne by an individual customer or be recoverable from all customers;
- Principles for electric vehicle time-variant rates to align rates with system costs and impacts;
- Metering requirements;
- Any modifications to tariff rules needed to implement the adopted pricing policies, e.g., Electric Rule 18/19;
- Development of appropriate smart charging programs or policies to manage the impacts of electric vehicle charging on the grid;
- Intra - and inter - utility billing policies; and
- Other issues required to comply with SB 626.

Additionally, as indicated in the Scoping Memo, we will continue to leave open the possibility that the Commission should consider natural gas vehicle-related policies while developing policies that apply to electric vehicles. Parties have suggested workshops as a possible means of developing these issues. We agree that workshops may be helpful. More details regarding process will be provided after a prehearing conference is held in Phase 2.

## 8. Conclusion

After having considered all the arguments presented by parties in this proceeding, we conclude that 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. In Phase 2 of this proceeding, we will consider a number of other issues raised by parties. We will convene a prehearing conference to initiate Phase 2 and more fully define the issues and the appropriate processes to address those issues.

## 9. Comments on Proposed Decision

The proposed decision of the assigned Commissioner Nancy E. Ryan in this matter was mailed to parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

## 10. Assignment of Proceeding

Nancy E. Ryan is the assigned Commissioner and Regina DeAngelis is the assigned Administrative Law Judge in this proceeding.

## Findings of Fact

1. The Commission's March 16, 2010 workshop was transcribed. The assigned Administrative Law Judge advised parties of her intention to enter the transcript into the record. No party objected.

2. Consistent with the Commission's analysis in 1991 when addressing compressed natural gas for the sole use as a motor vehicle fuel, we find that electricity furnished as a motor vehicle fuel is not "light" or "heat."

3. Regarding the term "power," we note that "power" is not an all encompassing term.

4. The term "power" as used by Section 217 does not include electricity used for light or heat.

5. The term "power" does not include the use of electricity to charge vehicle batteries that will later be used to fuel mechanized transportation. We are guided in this interpretation by Sections 740.2 and 740.3, which according to *in pari materia* analysis show that charging electric vehicles is not "power" under Section 217.

6. Section 740.2 is deafeningly silent on the Commission's role in regulating electric vehicle chargers pursuant to Sections 216 and 217.

7. In Section 740.3 the Legislature speaks of electric power and natural gas in the same breath. As such we must read this code section as not acknowledging, conferring, or expanding jurisdiction upon the Commission for low-emission vehicle fueling for such an interpretation would violate Section 216(f), since Section 740.3 addresses electric power and compressed natural gas equally.

8. Section 217 was enacted in 1915 and last amended in 1937 and it is, therefore, inconceivable that the Legislature would have foreseen the role of the modern vehicle in today's economy and the ability of that vehicle to be charged in the manner in which it is today and in the future will be. Expanding the term "power" to include vehicle fuel, and therefore a significant and vital portion of our economy and everyday life is beyond the plain meaning of the statute.

9. The Commission's reasoning in 1991 is directly relevant to the circumstances today. In both instances, the Commission is considering a commodity used to fuel motor vehicles.

10. Moreover, in both instances, the energy source, electricity today and compressed natural gas in 1991, can assist with reducing the impact of motor vehicle emissions on the environment. And, as the Commission found in 1991, we do not believe anyone would seriously contend that a gas station operation is an electrical corporation subject to our jurisdiction merely because it has facilities used to transmit electricity

11. In addressing the question of whether the sale of electricity solely used for motor vehicle fuel falls under the definition of electricity used for "power," as that term is used in Section 217, we also consider the complex question of whether public policy goals weigh in favor of Commission regulation of electricity used solely for motor vehicle fuel.

12. The purpose of public utility regulation is to protect consumers from unreasonable rates for vital services created by an industry's inclination toward natural monopoly.

13. Beyond consumer protection, we find that other public policy considerations support our legal analysis.

14. Our decision today is consistent with the state's other policy goals set forth in the RPS, RA, ESP and the AB 32 programs.

## Conclusions of Law

1. It is reasonable to enter the March 16, 2010 workshop transcript into the record of this proceeding.

2. It is reasonable to conclude, consistent with D.91-07-018, the Legislature's subsequent support of this decision through SB 547, and the eventual enactment of SB 547, chaptered as Pub. Util. Code § 216(f), that under the existing statutory framework, the term "power" was not intended to include electricity for motor vehicle fuel and that 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.

3. It is reasonable to conclude that, consistent with our prior decision in D.91-07-018, we find that the fundamental purpose of public utility regulation and California's public policy goal of encouraging widespread use of electric vehicles would not be furthered by regulation of 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.

4. It is reasonable to conclude that 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.

## O R D E R

**IT IS ORDERED** that:

1. The March 16, 2010 workshop transcript is entered into the record of this proceeding.

2. 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.

3. Rulemaking 09-08-009 remains open for Phase 2.

This order is effective today.

Dated _____, at San Francisco, California.

## INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause an electronic mail with the link to the filed document to be served upon the service list to this proceeding. The service list I will use to serve the link of the filed document is current as of today's date.

Dated May 21, 2010, at San Francisco, California.

/s/ OYIN MILON
Oyin Milon

## N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.