

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



**FILED**  
06-10-10  
04:59 PM

Order Instituting Rulemaking on the Commission's own motion to consider alternative-fueled vehicle tariffs, infrastructure and policies to support California's greenhouse gas emissions reduction goals.	Rulemaking 09-08-009 (Filed August 20, 2009)
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**OPENING COMMENTS OF EV SERVICE PROVIDER COALITION  
REGARDING PROPOSED DECISION IN PHASE 1**

In accordance with Rule 14.3 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, the EV Service Provider Coalition ("Coalition") submits the following comments regarding the 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 ("Proposed Decision").<sup>1</sup>

The Coalition strongly supports the Proposed Decision, and appreciates the care and thoughtful legal analysis reflected in the PD's resolution of Phase 1 jurisdictional issues. The Commission should adopt the Proposed Decision, with minor clarifications as discussed below.

**I. Introduction**

It is impossible to overstate the importance of the Commission's Phase 1 decision to the future development of the market for electric vehicle ("EV") services in the state of California. Virtually every major automobile manufacturer is producing or planning to produce electric vehicles at commercial scale in the near future. Regulators and industry standards agencies have realized that they need to resolve important public policy issues and develop industry-wide standards as soon as possible in order to accommodate the anticipated demand for electric

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<sup>1</sup> The EV Service Provider Coalition consists of Better Place, Coulomb Technologies and Ecotality/eTec. All are EV service providers and parties to this proceeding.

vehicles and EV services. The Commission has taken a leadership role by initiating this proceeding, and by prioritizing key issues for resolution in Phase 1. Adoption of the Proposed Decision will resolve threshold regulatory issues that are currently an obstacle to investment and development of a strong California market for EV services.

**I. The Proposed Decision correctly concludes that providing electricity for use as a motor vehicle fuel does not make an EV service provider a “public utility” under Section 216 of the California Public Utilities Code.**

The Proposed Decision carefully examines the question of whether EV service providers should be considered “public utilities” as defined in Section 216 of the California Public Utilities Code, and arrives at a conclusion that is consistent with applicable statutes, the Commission’s own previous decisions, and the state’s policy interest in encouraging investment in EV infrastructure.

Almost twenty years ago the Commission determined in Decision 91-07-018 that the sale of compressed natural gas for use as a vehicle fuel did not involve the use of a “gas plant,” defined as facilities “owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, underground storage or furnishing of gas...for light, heat or power.”<sup>2</sup> The Proposed Decision, applying similar reasoning, comes to the same conclusion with respect to the virtually identical definition of “electric plant,” thus harmonizing both the relevant statutory provisions and established precedent.

The Proposed Decision correctly recognizes that there is a fundamental difference between using compressed natural gas and electricity to power vehicles and the non-transportation uses intended at the time that the definitions of “gas plant” and “electric plant” were originally conceived in the early 1900s.<sup>3</sup> And the Proposed Decision recognizes that in the

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<sup>2</sup> D.91-07-018 at 57-58.

<sup>3</sup> Proposed Decision at 16.

case of electricity used for charging batteries, the consumption of electricity during charging is both physically and temporally separated from the operation of the vehicle, making the function of an EV service provider fundamentally different from that of a utility delivering electricity for “light, heat or power”:

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.<sup>4</sup>

Looking beyond statutory interpretation, the PD observes that the regulation of public utilities, as defined in Section 216, was designed for the purpose of protecting consumers from abuses by monopoly companies providing vital services.<sup>5</sup> The PD correctly concludes that this regulatory approach is not appropriate or necessary in the case of providers of transportation fuels, given the diversity of market participants, low barriers to entry, and the number of competitive alternatives.<sup>6</sup>

As the Proposed Decision points out, clarifying that EV service providers are not public utilities serves the very important public policy of encouraging rapid development and deployment of low-emissions vehicles.<sup>7</sup> Public Utilities Code Section 740.2 requires that the Commission assist with the widespread deployment and use of plug-in hybrid and electric vehicles in the state. EVs can only be widely deployed and used if there is infrastructure to support them. That means finding charging solutions for range extension, homes without driveways, apartment buildings, businesses and public agencies, and long distance EV drivers that need access to charging options located outside of their electric utility’s service territory.

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<sup>4</sup> Proposed Decision at 17.

<sup>5</sup> Id. at 21.

<sup>6</sup> Id.

<sup>7</sup> Id. at 21-22.

The members of the EV Service Provider Coalition and many other EV service providers are working on those solutions, but that work depends largely on private investment. Private investment, in turn, requires regulatory certainty. The industry is poised to take off in California, but this will only happen if there is at least a measure of assurance that an EV service provider will not be treated like an electric utility. The Proposed Decision provides this assurance, and should be adopted by the Commission.

## **II. The Coalition supports appropriate consumer protections.**

The Proposed Decision notes that the California Business and Professions Code contains various provisions applicable to other motor vehicle fuels, and acknowledges that it may be appropriate for the California Legislature to apply similar protections to electricity used as a motor fuel.<sup>8</sup> The PD specifically mentions Business and Professional 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). The EV Service Provider Coalition notes that many consumer protection statutes generally applicable to businesses operating in California already apply to EV service providers. However, consistent with the PD's recommendation, the Coalition would support consideration of appropriate legislative changes to consumer protection laws applicable to providers of "motor fuel" if needed in order to protect EV owners and users of EV services. The wellbeing and protection of consumers of EV services is certainly in the best interest of all concerned. The Coalition agrees with the PD that such statutory changes would require further review by the Legislature.

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<sup>8</sup> Id. at 23.

**III. The final decision should clarify that the Commission is *not* determining that a sale of EV services constitutes a retail sale of electricity.**

As noted above, the Proposed Decision reaches exactly the right decision on the question of whether an EV service provider is a “public utility” as defined in the California Public Utilities Code. However, given the nascent state of the industry and the diverse nature of services likely to be provided by EV service providers, it is very important that the wording of the Commission’s decision not be misconstrued to be finding, as fact, that EV service providers are reselling electricity. The Commission need not (and obviously cannot) make a factual determination that any or all EV service providers are selling electricity in order to reach the legal conclusion that they should not be defined as public utilities under Section 216. The Proposed Decision’s discussion of the issue suggests that the Commission understands this important distinction, but the use of the words “sells electricity at retail” within the text of the decision might be mistakenly read as a presumption that EV service providers are selling electricity when they are not. In Appendix A the Coalition suggests language changes to address this ambiguity.

Alternatively, the Commission could insert language in the text of the decision and in the Conclusions of Law: 1) clarifying that it is not clear at this point whether any EV service provider would, in fact, “sell” electricity; 2) noting that it appears that many EV service providers will *purchase* electricity at retail for the purpose of charging EV batteries and not sell electricity at all; and 3) stating that the use of the words “sell electricity at retail” are used in order to provide clarity regarding the interpretation of Section 216 and that they should not be interpreted as implying that the Commission has made any determination that EV service providers will, in fact, “sell electricity at retail.”

#### IV. Conclusion

For the reasons discussed, above, the EV Service Provider Coalition encourages the Commission to adopt the Proposed Decision, with the changes suggested herein. The Coalition looks forward to working with the Commission and other stakeholders to tackle the many issues identified for Phase 2. Together we can create a safe and effective network of EV infrastructure and services for California EV users.

Dated: June 10, 2010

Respectfully submitted,

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**APPENDIX A  
RECOMMENDED CHANGES TO TEXT, FINDINGS OF FACT, CONCLUSIONS OF  
LAW**

<b>Page</b>	<b>Recommended change</b>
13 (first paragraph in Discussion section)	Replace existing sentence with: We conclude that selling EV charging services to the public, where associated electricity is 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.
15 (first sentence of first full paragraph)	Under this statutory framework we are presented with the question of whether “light, heat or power: is provided when selling <del>electricity</del> <u>EV charging services</u> to the public <del>at retail solely as a motor vehicle fuel.</del>
15 add new footnote at the end of previous sentence	Footnote: A number of parties have pointed out in comments that there is no one definition of an EV service provider. Indeed, it is reasonable to expect that the entities providing EV services and the type of services provided will be diverse. Given this diversity, it is important to clarify that this decision does not attempt to, and does not need to, define or classify particular EV services in order to address the threshold issue of how to interpret Sections 216, 217 and 218 of the Public Utilities Code in the context of EV charging services.
20 (final paragraph of Section 4.1)	For these reasons, ... <del>the ownership or operation of a facility that selling electricity at retail EV charging services to the public, where associated electricity is 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....</del>
21 (final paragraph, 4 <sup>th</sup> sentence)	It is unlikely that imposing the statutory framework supported by Section 216 on <del>facilities selling electricity to the public for the sole use as a motor vehicle fuel</del> <u>the sale of EV charging services</u> would....
22 (first full paragraph, 3d sentence)	Replace the word “electricity” with “EV charging services”
22 (final paragraph, first sentence)	Replace existing sentence with: 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 EV charging service providers.
23 (first sentence of Section 5)	Replace “the retail sale of electricity for motor vehicle fuel” with “EV charging service providers” throughout sentence.
Finding of Fact 11	Eliminate the words “sale of”
Conclusion of Law 2	Replace “electricity at retail” with “EV charging services” and add the

	words “where electricity is” before “for use...” and delete “and the selling of electricity at retail from that facility to the public for use only as a motor vehicle fuel”
Conclusion of Law 3	Replace all words after “regulation of” with “EV charging service providers”
Conclusion of Law 4	Revise to read: It is reasonable to conclude that selling EV charging services to the public, where associated electricity is 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.
Ordering Paragraph 2	Revise to read: The sale of EV charging services to the public, where associated electricity is 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.

PROOF OF SERVICE

I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2600 Capitol Avenue, Suite 400; Sacramento, California 95816; telephone (916) 447-2166.

On June 10, 2010, I served the attached *OPENING COMMENTS OF EV SERVICE PROVIDER COALITION REGARDING PROPOSED DECISION IN PHASE 1* by electronic mail or, if no e-mail address was provided, by United States mail at Sacramento, California, addressed to each person shown on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 10, 2010, at Sacramento, California.

/s/

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