

IMMEDIATE STAY REQUESTED

No. _____

**In the Court of Appeal for the State of California
First Appellate District, Division ____**

**ECOTALITY, INC.
Petitioner,**

vs.

**CALIFORNIA PUBLIC UTILITIES COMMISSION; MICHAEL R.
PEEVEY, PRESIDENT AND COMMISSIONER; TIMOTHY ALAN
SIMON, MICHEL PETER FLORIO, CATHERINE J.K.
SANDOVAL, AND MARK J. FERRON, COMMISSIONERS
Respondents**

**NRG ENERGY, INC.
Real Party in Interest**

**VERIFIED PETITION FOR WRIT OF MANDATE AND OTHER
APPROPRIATE RELIEF**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Petitioner ECOtality, Inc., certifies that, because these proceedings challenge the anti-competitive impact of an Agreement reached between Respondents and Real Party in Interest, relating to the marketplace in California for electric vehicle charging services, entities or persons, other than the parties to this proceeding, who intend to participate in this marketplace by offering, purchasing, or advocating for such services, may have a financial or other interest in its outcome.

This list of interested non-parties could include all present owners of electric vehicles in California and California utility ratepayers. It also could include persons and entities, other than ECOtality, whose business includes participation, either presently, or in the future, in the California marketplace for electric vehicle charging services. Counsel is unaware of the identities of all such persons and entities, but is aware of the identities of the following potentially interested non-parties:

Better Place
1070 Arastradero Rd, Ste 200
Palo Alto, CA 94304

Car Charging Group, Inc.
1691 Michigan Ave., Suite 601
Miami Beach, FL 33139

Coulomb Technologies
1692 Dell Ave
Campbell, CA 95008

Aloha Systems, Incorporated
8539 Barnwood Lane
Riverside, Calif.

Tesla Motors
3500 Deer Creek
Palo Alto, CA 94304

TechNet
1215 K Street, Suite 1900
Sacramento, CA 95814

City CarShare
1182 Market St, Ste 300
San Francisco, CA 94102

Evercharge
www.evercharge.net

Executed on May 23, 2012, at Los Angeles, California

**WARD L. BENSHOOF
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By: _____
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TABLE OF CONTENTS

INTRODUCTORY STATEMENT..... 3

PETITION 9

I. BENEFICIAL INTEREST OF PETITIONER; CAPACITY OF RESPONDENTS AND REAL PARTY IN INTEREST 11

II. TIMELINESS..... 15

III. JURISDICTION & VENUE 15

IV. INTRODUCTION..... 16

 A. The California Energy Crisis 16

 B. The Agreement Grants NRG Preferential Rights to Build EVCS in California, Using Monies Which Should Have Been Refunded to Ratepayers 17

 C. The PUC’s Unprecedented and *Ultra Vires* Intervention in the EVCS Market 20

 D. The Anti-Competitive Impacts and Preferential Effects of the Agreement: Damage to Petitioner and the Public 22

 E. The PUC’s Disregard of Legislative Directives Requiring It to Consult with Other Responsible Agencies and Impacted Stakeholders, and to Conduct Public Hearings, Before Implementing EVSC Policy of the Sort Envisioned by the Agreement 25

 F. The PUC Breached its Duty to Refund Overcharges to California Ratepayers 26

V. BASIS FOR RELIEF 27

 A. In Entering Into the Agreement Respondents Acted *Ultra Vires*, in Excess of Their Lawful Authority 27

 B. In Entering Into the Agreement Respondents Violated Established Public Policy Favoring Competition 29

C.	In Entering Into the Agreement Respondents Violated Their Obligations to California Ratepayers Under Public Utilities Code Section 453.5	30
D.	In Entering Into the Agreement Without Public Hearings and Inter-Agency/Stakeholder Consultation, Respondents Failed to Conform to Procedures Required by Law	31
VI.	ABSENCE OF OTHER REMEDIES	32
VII.	GROUNDS FOR AN IMMEDIATE STAY.....	33
	PRAYER FOR RELIEF	34
	VERIFICATION	37
	MEMORANDUM.....	38
I.	STANDARD OF REVIEW	38
II.	INTRODUCTION.....	39
III.	BACKGROUND.....	42
IV.	ARGUMENT	43
A.	While Unquestionably an Agency of Substantial Power, Courts Have Reminded the PUC That Its Power Has Clear Limits	43
B.	The Public Utilities Code Provisions Which Authorize the PUC to Conduct Public Hearings and Rule Making Concerning EVCS Policy Do Not Permit It to Establish, in Secret, The Sort of Anti-Competitive Policy Represented in This Instance by the Agreement.....	50
C.	Analysis of the Agreement Provisions Demonstrates the Extent of the Respondents <i>Ultra Vires</i> Market Intervention and the Degree of its Anti-Competitive Impact	51
1.	The General Impact of NRG’s Ratepayer Subsidy on California’s EVCS Marketplace	55
2.	NRG’s Opportunity to Select, and Saturate, The Prime California EVCS Locations	56

3.	Basic Economic Distortions Caused by the Agreement That Will Damage ECOTality and California Consumers.....	57
4.	The Agreement Gives NRG Significant “First Mover” Advantages to Eliminate Competition in the EVCS Marketplace.....	59
5.	NRG’s Deployment of 10,000 “Make Ready” Arrays, and the Adverse Impact of the Agreement’s “Make Ready” Terms	60
6.	The Agreement Permits NRG to Benefit from Substantial Network Externalities to Solidify its EVCS Market Power.....	60
7.	NRG’s Deployment of 200 EV Fast Charging Stations and the High Prices Which NEG Is Permitted to Charge.....	61
D.	Respondents’ Actions in Promoting NRG’s Monopolistic Practices Clearly Are Contrary to California’s Public Policy.....	63
E.	The Agreement Also Violates Respondents’ Duties Under Public Utilities Code § 453.5	67
V.	CONCLUSION	70

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Assembly of the State of California v. Public Utilities Commission</i> (1995) 12 Cal.4th 87	9, 31, 42, 68, 69, 70
<i>Bottoms, et. al. v. Madera Irr. Dist.</i> (1925) 74 Cal.App. 681	53
<i>California Mfrs. Assn. v. Public Utilities Com.</i> (1979) 24 Cal.3d 836	69, 70
<i>California Water & Telephone Co. v. Public Utilities Commission</i> (1959) 51 Cal.2d 478	44, 45
<i>Cellular Plus, Inc. v. Superior Ct.</i> (1993) 14 Cal.App.4th 1224, review denied July 1, 1993	63
<i>Neighbors in Support of Appropriate Land Use v. County of Tuolumne</i> (2007) 157 Cal.App.4th 997	38, 39
<i>Northern Cal. Power Agency v. PUC</i> (1971) 5 Cal.3d 370	42, 63, 65, 66, 67
<i>Pacific Telephone and Telegraph Co. v. Public Utilities Commission</i> (1950) 34 Cal.2d 822	45, 46, 48, 49
<i>Pacific Telephone and Telegraph Co. v. Public Utilities Commission</i> (1965) 62 Cal.2d 634	46, 47, 48
<i>Saleeby v. State Bar</i> (1985) 39 Cal.3d 547	38
<i>Southern California Edison v. Peevey</i> (2003) 31 Cal.4th 781	40
<i>Speegle v. Board of Fire Underwriters of the Pacific</i> (1946) 29 Cal.2d 34	63
<i>Utility Consumers' Action Network v. Public Utilities Commission</i> (2004) 120 Cal. App.4th 644, review denied Nov. 10, 2004.....	7, 40, 41, 48, 49

FEDERAL STATUTES

Federal Power Act § 206 26, 67

STATE STATUTES

Code of Civil Procedure

§ 1021.5..... 35
§ 1085..... 15, 16, 32, 38
§ 1085(a) 38
§ 1087..... 35

California Public Utilities Code

§ 453.5..... 26, 27, 30, 42, 43, 67, 68, 69, 70
§§ 701 et seq.. 28
§ 740.2..... 11, 25, 26, 31, 40, 44, 50, 51
§ 740.3(a) 51
§ 740.3..... 11, 25, 26, 31, 40, 44, 50, 51
§ 740.3(a) 51
§ 740.3(b)..... 25, 26, 51
§ 1759(a) 16, 32
§ 1759(b)..... 16, 32

Cartwright Act (Business & Professions Code)

§§ 16700 to 16770) 29
§ 16700 *et seq.*) 63

Govt. Code § 11340 et seq 16, 32

RULES

FERC Rule 602..... 19

REGULATIONS

18 C.F.R. § 385.602..... 19

CONSTITUTIONAL PROVISIONS

California Constitution, Article VI, § 10..... 15

California Constitution, Article XII 14, 28, 43

OTHER AUTHORITIES

*Public Utilities Comm’n of the State of California v. Allegheny
Energy Supply Company, LLC et al.*, FERC Dck. No. EL02-60-
000 (filed Feb. 25, 2002)..... 16, 17

INTRODUCTORY STATEMENT

ECOtality, Inc. petitions this Court for a writ of mandate or other appropriate relief, to: (a) annul that certain Long-Term Contract Settlement and Release of Claims Agreement (“Agreement”)¹ entered into on April 27, 2012 between the Respondent California Public Utilities Commission (“PUC”) and Real Party in Interest, NRG Energy, Inc. (“NRG”) and its affiliated Dynegy Parties,² which the PUC, NRG and the Dynegy Parties filed in conjunction with a Joint Offer of Settlement with the Federal Energy Regulatory Commission (“FERC”) on that same date; and (b) direct Respondents to withdraw the Agreement filed with FERC as null and void; to seek no further approval of the Agreement from FERC; and to further direct Respondents and Real Party in Interest to cease and desist from any further efforts to otherwise implement any of the Agreement’s terms, on the grounds that the Respondents’ actions in entering into the Agreement constituted an abuse of discretion, exceeding the PUC’s lawful authority.

Respondents’ action is arbitrary and capricious. By the Agreement, they “punish” NRG for nearly \$1 billion in price gouging by NRG’s predecessors by “requiring” NRG to invest \$102,500,000 in *its own existing*

¹ See Attachment B to Joint Offer of Settlement, filed with the Federal Energy Regulatory, Commission by the PUC, the Dynegy Parties, and NRG on April 27, 2012, a true and correct copy of which is filed herewith as Exhibit 1.

² The “Dynegy Party” entities are: Dynegy Power Marketing, Inc. (now known as Dynegy Power Marketing, LLC), Cabrillo Power I LLC, El Segundo Power, LLC, and Long Beach Generation LLC.

business, providing electric vehicle charging services, subsidizing that investment with a release of valuable ratepayer claims. NRG presently competes with Petitioner and others in the electric vehicle charging services business (“EVCS”) for which NRG has now been granted an enormous subsidy. Such “punishment” is equivalent to a motorist settling his speeding citation by simply being required to buy a faster car, subsidized by the public. It is illusory.

The Agreement, purportedly entered into to settle claims by the PUC on behalf of the California rate-payers for price gouging during the California Energy Crisis, transfers monies that should be refunded to California rate-payers to NRG, the entity now in ownership and control of the Dynegy wrongdoers. If the Agreement stands, it will permit NRG, subsidized by the value of the California ratepayers’ released claims, to establish itself and its subsidiary company, eVgo (hereinafter collectively “NRG”) into a controlling market position for electric vehicle (“EV”) charging facilities in California. The consequence is that NRG will not only be permitted to pursue monopolistic pricing to the injury of California consumers, but also effectively destroy its competitors – including Petitioner ECOtality – in this nascent marketplace, utilizing a rate-payer subsidy. Analysis accompanying this Petition by Dr. C. Paul Wazzan, an

expert economist and Donald Karner, ECOtality's Chief Innovation Officer, confirms this.³

The Respondents and NRG entered into the Agreement in secret, and only made its existence known to the public on approximately March 23, 2012 when California Governor Jerry Brown issued an abbreviated summary of its general terms – essentially limited to the amount of money NRG would supposedly invest in its California EV charging services (“EVCS”) business – in a press release. It was much later – April 27, 2012 -- when the actual terms of the Agreement were first disclosed publicly.

Nevertheless, impacted stakeholders began to immediately express concerns. On April 6, 2012 the Bay Area EV Strategy Council, wrote directly to Governor Brown and Respondents, urging that they reconsider the Agreement terms to assure protection of consumer choice, noting that the announced features of the Agreement raised serious anti-competitive concerns:

A robust market for EV charging services will provide the best pricing for drivers. Ensuring a ‘level playing field’ among service providers is essential to this end. The 18 month exclusivity arrangement on a large number of Level 2 ‘make-ready’ sites could establish a monopoly position

³ See, Declaration of Donald Karner, filed herewith as Exhibit 10 and Declaration of C. Paul Wazzan, Ph. D., filed herewith as Exhibit 11.

through the end of 2014 on a large number of high-value locations that could otherwise be developed by other market participants that do not mandate [like NRG] an exclusive subscriber relationship.⁴

These concerns fell on deaf ears. Respondents refused to allow review of the Agreement by any member of the public, or any other state authority, prior to executing it on April 27, 2012. ECotality sought public review before the PUC in the *Motion of Ecotality, Inc. for Public Review of the Impact of the NRG Energy Inc. Settlement on California's Ratepayers and Electric Vehicle Infrastructure Policy*, filed on April 16, 2012, in R.09-08-009.⁵ In addition, Assembly Concurrent Resolution (ACR) 144 (Fong) was introduced in the California Legislature, calling for public disclosure of the Agreement on April 17, 2012. ACR 144 stated, among other things:

The Settlement has adverse impacts on current negotiations and infrastructure deployment activities by other electric vehicle charging operators in California that will discourage near-term and long-term competitiveness and negatively impact opportunity for a level playing field among electric

⁴ A true and correct copy of the EV Council's April 6, 2012 communication is filed herewith as Exhibit 2.

⁵ A true and correct copy of ECotality's Motion is filed herewith as Exhibit 3.

vehicle charging networks operating in California....⁶

This legislative appeal for transparency was spurned and ECOTality's motion for public review was denied on April 26, 2012 on grounds that the motion was outside the scope of the proceeding.⁷ The very next day, on April 27, 2012 Respondents filed the Agreement with FERC, seeking FERC's formal approval to implement the unlawful terms of its arrangement with NRG. Under FERC's expedited schedule, that approval may be granted as early as May 30, 2012.

Respondents' refusal to subject the Agreement to public review and comment before entering into it violates public hearing procedures followed by the PUC in the past before entering into settlement agreements where much less was at stake. See, e.g. *Utility Consumers' Action Network v. Public Utilities Commission* (2004) 120 Cal. App.4th 644, *review denied* Nov. 10, 2004 (the PUC approved settlement of litigation with SDG&E involving release of a \$175 million claim only *after* conducting thorough public hearings on the settlement proposal).

Using a closed settlement proceeding to enter into an agreement having such far-reaching consequences as that in this case, without consultation with other state agencies charged with responsibilities to

⁶ A true and correct copy of ACR 144 is filed herewith as Exhibit 4.

⁷ A true and correct copy of this Ruling is filed herewith as Exhibit 5.

evaluate and implement EVCS market policies in California; without consultation with any affected stakeholder – other than, of course, NRG; and without opportunity for any notice to, or comment by, the public, is unlawful.

Moreover, entering into the Agreement – regardless of the processes used by Respondents – is *ultra vires* action. The PUC has absolutely no authority to intervene into the EVCS marketplace in California, as contemplated by the Agreement. Specifically, the PUC has no authority to endorse and support one of multiple competitors, indeed the most powerful competitor, and favor that chosen competitor with rate-payer funds to invest in its own business to successfully impose its business strategy and practices on the California consumers, excluding other competitors offering superior services, including Petitioner.

Such action by the Respondents in secretly collaborating with NRG to implement major public policy decisions is indisputably contrary to established public policy in California favoring both free and open competition and public scrutiny and participation in the very sorts of policy decisions which the Agreement purports to implement.

Finally, by transferring \$102,500,000 to NRG to invest in its existing business, funds which should by law be refunded to the California rate payers wronged by the price gouging practices of NRG's predecessors, the Agreement also violates the PUC's clear statutory responsibilities under

the Public Utilities Code. The Supreme Court spoke directly to this practice in 1995 when the PUC made almost the identical decision to divert millions in ratepayer refund money to develop a telecommunications infrastructure in California. The Supreme Court struck this action down as an unlawful exercise of the PUC's powers, and yet the same unlawful acts have occurred once again. *Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal.4th 87.

For all these reasons, Respondents fundamentally abused their discretion in entering into the Agreement, and the Agreement should be annulled.

To these ends, and without any other adequate remedy at law, Petitioner alleges as follows:

PETITION

1. This Verified Petition for Writ of Mandate and Other Appropriate Relief (hereinafter "Petition") challenges the *ultra vires* and illegal actions of the Public Utilities Commission of California ("PUC") in diverting monies that should be refunded to California rate-payers in order to unlawfully establish NRG – a company whose predecessors, the Dynegy Parties, have been described by California's Attorney General as "one of

the most rapacious pirates of the Energy Crisis”⁸ – as the state-subsidized, preferred, and dominant market participant in the emerging and yet fragile EVCS marketplace in the State of California, to the injury of California’s citizens and all other market competitors, including Petitioner.

2. By forgiving the \$1 billion dollar legal liability of NRG’s predecessors for price gouging California ratepayers; by allowing NRG, subsidized by this forgiveness, to expend substantial resources in the California EVCS market that other competitors, including Petitioner, simply cannot match; and by granting NRG preferential contract rights to further its monopolistic position with this business investment, the Agreement also operates as a *de facto*, albeit fatally flawed, implementation by PUC of a type of grant program in EVCS market development in California, but without any procedures for competitive bidding and awarding of grants; without required public notice or hearing; and without making any sort of a record which would permit the lawfulness of its actions to be evaluated.

3. Such action of direct intervention by Respondents into the California EVCS market to establish a single company as the dominant participant, with preferential and quasi-monopolistic concessions conferred

⁸ See, April 26, 2004 Press Release from the Office of the California Attorney General, filed herewith as Exhibit 6.

upon it by the PUC, is unauthorized by law and constitutes an abuse of the discretion.

4. Although the PUC is vested with discretion to settle litigation, it abuses that discretion when it acts contrary to law and uses the settlement of litigation to implement, in secret, policy decisions which it has no authority to make; which prejudicially disrupt markets it has no authority to regulate; which disregards Respondents' duty to consult with other agencies and impacted stakeholders;⁹ and which shrouds from public view the transfer of rate-payer money to a wrongdoing entity for purposes of allowing that entity to strengthen its own business, thereby enjoying a privileged position in the marketplace, to the irreparable injury of the public and other market participants.

I. BENEFICIAL INTEREST OF PETITIONER; CAPACITY OF RESPONDENTS AND REAL PARTY IN INTEREST

5. ECOtality, Inc. ("ECOtality" or "Petitioner"), incorporated in the State of Nevada, and headquartered in San Francisco, California, is a leader in clean electric transportation and storage technologies with a history in electric transportation dating back to 1989. ECOtality is a California electric vehicle service provider ("EVSP") and competes in the California EVCS market with NRG, and others, to provide equipment and ancillary services for the recharging of electric vehicles.

⁹ California Public Utilities Code Sections 740.2 and 740.3.

6. In particular, ECOTality is the project manager of the competitively bid EV Project, a study on the largest deployment of electric vehicles and charge infrastructure in history, funded by the largest public/private federal transportation electrification grant provided by the U.S. Department of Energy as well as additional competitive grants and private ECOTality funding. In this capacity, ECOTality is currently undertaking large scale residential and public infrastructure deployment activities in California in three of the four regions identified in the Agreement (Bay Area, Los Angeles and San Diego) to be targeted by NRG for additional infrastructure deployments. As of the date of this Petition, ECOTality's residential EVSEP installations in the three regions are approximately as follows: 1245 in the Bay Area; 729 in the San Diego area; and 418 in the Los Angeles area. Additionally, ECOTality's commercial installations in California are as follows: 159 in the San Diego area, with an additional 447 forecasted and 177 in the Los Angeles area with an additional 214 forecasted. Outside of the EV Project, ECOTality has 15 direct sales for commercial/workplace charging stations in the Bay Area. Current DCFC deployment efforts for the EV Project in California ECOTality's DCFC installations are as follows: 13 in the Bay Area; 7 in the San Diego area; and 9 in the Los Angeles area. ECOTality's most recent EV Project Report to the U.S. Department of Energy is filed herewith as Exhibit 7.

7. To further augment infrastructure work in the California market, ECOTality was awarded an \$8 million competitive bid grant from the California Energy Commission to support deployment activities in the San Diego region. In San Diego, ECOTality is working closely with San Diego Gas and Electric and Car2Go to deploy charging infrastructure in traditionally underserved areas of the market as well as to residential and optimal commercial locations. Additionally, the company built on an approximately \$3 million competitively awarded contract from the Bay Area Air Quality Management District to expand the EV Project to the Bay Area in the spring of 2011. At this time, ECOTality is fully engaged in identifying additional residential, Level 2 and fast charging public infrastructure locations in all markets, especially California, to meet the study's deployment optimization objectives.

8. In view of the substantial projected size of the California EVCS market, the ability of ECOTality to fairly compete in the California market is a key component of its business plan. If ECOTality were to be effectively excluded from the California EVCS market as contemplated by the Agreement, ECOTality would incur irreparable injury, suffering severe financial losses. Since some of the general terms of the Agreement were first announced to the public by press releases on March 23, 2012, ECOTality has met resistance in its site negotiation and sales efforts to potential California customers who are under the impression, from

Respondents' press releases, that the Agreement may provide them cheaper alternatives.

9. The PUC is a public agency of the State of California headquartered in San Francisco, California, created by Article XII of the California Constitution and subject to the limitations of those provisions, as well as directives issued from time to time by the California Legislature. Respondent Michael R. Peevey is a commissioner and President of the PUC. Respondents Timothy Alan Simon, Michel Peter Florio, Catherine J.K. Sandoval, and Mark J. Ferron are each commissioners of the PUC.

10. NRG Energy, Inc. ("NRG") is a private company incorporated in the State of Delaware, and headquartered in New Jersey that is engaged in power generation and installation of electric vehicle infrastructure nation-wide, including California. On its website (www.nrgenergy.com) NRG states:

NRG is a Fortune 300 and S&P 500 Company is one of the country's largest power generation and retail electricity businesses. Our power plants provide more than 25,000 megawatts of generation capacity and our retail and thermal subsidiaries serve more than 2 million customers in 16 states.

NRG owns power generation facilities throughout the nation, including facilities in California. By various transactions, NRG is the successor in interest, and guarantor, to the Dynegy Parties, entities sued by the PUC in

2002 for price gouging in the California energy crisis. As the entity presently in control of the Dynegy Parties, NRG agreed to serve as Guarantor of their obligations under the Agreement.

11. NRG has created an affiliated company known as “eVgo” whose business, according to NRG’s website, is described as directly competing with Petitioner and others in the California EVCS market:

The eVgo network created the nation’s first comprehensive, privately funded electric vehicle infrastructure of home charging stations and public fast charging stations, ensuring that EV drivers have complete confidence they will never run out of power on the go.

II. TIMELINESS

12. Respondents did not publically disclose the actual Agreement until April 27, 2012, when it was filed with FERC, the first date Petitioners received a copy. This Petition is being filed less than 30 days from that date.

III. JURISDICTION & VENUE

13. Article VI, Sec. 10 of the California Constitution provides that “[t]he Supreme Court, courts of appeal, and superior courts and their judges have original jurisdiction [in] proceedings for extraordinary relief in the nature of mandamus.” Cal. Code Civ. P. § 1085 similarly provides that

“[a] writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person.”

14. Public Utilities Code § 1759(a) provides that no California court, other than the Court of Appeals and the Supreme Court, shall have jurisdiction to review actions of the PUC. Section 1759(b) provides that “writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure.” [Govt. Code § 11340 et seq. and §1085]. Mandate will issue under § 1085 to correct an “abuse of discretion” or actions which exceed the agency’s powers.

15. Venue is proper in the First District Court of Appeals because the PUC maintains its principal offices in the City of San Francisco, and that City is also the principal place of business for Petitioner.

IV. INTRODUCTION

A. The California Energy Crisis

16. The Agreement arises from litigation initiated by the PUC, on behalf of California rate-payers, against the Dynegy Parties, and others, before FERC in 2002 for price gouging during the highly publicized California energy crisis of 2000-2001. *See Public Utilities Comm’n of the State of California v. Allegheny Energy Supply Company, LLC et al.*, FERC

Dck. No. EL02-60-000 (filed Feb. 25, 2002).¹⁰ In this action, the PUC alleged that when wholesale market energy prices rose dramatically in May 2000, California utilities, and their ratepayers, were made to pay extortion level prices by the Dynegy Parties and other electricity marketers as a result of their market manipulation. *Id.*, at 6. The PUC sought reparations in the amount of \$931,042,585 from the Dynegy Parties on behalf of California ratepayers who were “forced to pay unjust and unreasonable prices and to agree to onerous, unjust and unreasonable non-price terms, in order to secure [necessary] power” at a time when they had no other options.¹¹

B. The Agreement Grants NRG Preferential Rights to Build EVCS in California, Using Monies Which Should Have Been Refunded to Ratepayers

17. On April 27, 2012, the PUC secretly entered into the Agreement with NRG and the Dynegy Parties, to resolve the PUC’s FERC Complaint against those entities. Pursuant to the terms of the Agreement, the \$931,042,585 in unreasonable overcharges imposed upon California ratepayers by the Dynegy Parties is forgiven. In return for this release, NRG, as Guarantor of the Agreement, pays to the PUC \$20,000,000, and agrees to invest an additional \$102,500,000 in NRG’s existing EVCS

¹⁰ A true and correct copy of the PUC’s Complaint (without exhibits) is filed herewith as Exhibit 8. The PUC’s calculation of the Dynegy Parties overcharges appears in Table 1, at page 31 of the Complaint.

¹¹ *Id.*, at p. 3 and Table 1 at p. 31.

business in California, at least \$90,000,000 of which must be spent to build additional electric vehicle charging stations and supporting electrical infrastructure. The PUC grants NRG 18 months of exclusive access to these facilities.¹²

18. The Agreement puts no limits on the profit NRG is able to gain from this ratepayer subsidized investment, and fails to regulate the extent to which NRG could utilize the Agreement to capture California consumers within its contractual subscription programs. By structuring NRG's investment as a legal liability write down; requiring that NRG expend a minimal amount of \$90,000,000 in EVCS facilities regardless of economic consequences; and allowing NRG an additional \$3,000,000 to offset customer costs of utilizing its facilities, Respondents distort NRG's economic incentives and allow it an overwhelming advantage over its competitors, including Petitioner.

19. By granting NRG the right to exclude other competitors for a period of 18 months from using the EVCS infrastructure, the Agreement allows NRG to saturate the EVCS market and further cement its substantial market advantage by virtue of this publicly subsidized first-mover advantage.

¹² Exhibit 1 at pp 2-3, and Attachment B, at p. 25.

20. Respondents and NRG assert that the Agreement provides a “total value to the citizens of the State of California of . . . \$122,500,000.”¹³ This claim is illusory. The primary beneficiary of the Agreement is NRG, who is able to gain a release of nearly \$1 billion in claims by simply agreeing to make capital investments in its existing business. By enabling NRG to assume monopoly power, the Agreement substantially and irreparably injures both the citizens of California as well as entities, such as Petitioner, who seek to compete in the marketplace for EVCS.

21. The Agreement and accompanying Offer of Settlement were submitted to FERC on April 27, 2012 for approval under federal adjudicative standards that do not require FERC to grant a hearing, or even consider, whether the Agreement is valid under California law.¹⁴ Initial public comments to FERC were required to be submitted by May 17, 2012. ECOTality, not a party to the FERC proceeding, made its objections known by filing of a motion to intervene.¹⁵ As of the date of this Petition, FERC had not yet determined whether it would even allow ECOTality’s objections

¹³ Exhibit 1, Attachment B, at p.1.

¹⁴ FERC Rule 602 and 18 C.F.R. § 385.602 require FERC to determine whether a settlement is “fair and reasonable and in the public interest” but does not specifically require an analysis of compliance with state law.

¹⁵ A true and correct copy of ECOTality’s Motion to Intervene filed with FERC, including its statement of objections to the Agreement, is filed herewith as Exhibit 9.

to be received. FERC is expected to issue its final order on the Agreement sometime on or after the last day for reply comments: May 29, 2012.

C. The PUC's Unprecedented and *Ultra Vires* Intervention in the EVCS Market

22. The PUC's authority, both constitutional and legislative, includes a variety of regulatory and planning responsibilities. This authority, however, does not confer upon Respondents the power to agree to the terms of this settlement, where the effect of their actions is to literally pick the "winner" – NRG – and the "losers" – everyone else – in California's nascent EVCS market. Specifically, Respondents have absolutely no authority to:

- secretly collaborate with one of several competitors– creating the most powerful player in the marketplace, to the exclusion of all others;
- erect new barriers to entry in the California EVCS market which Petitioner and others must now overcome, including the immediate creation of a scarcity of suitable locations for EVCS equipment installation by allowing NRG, subsidized by ratepayer funds, to swiftly capture the prime geographic locations for its equipment;
- endorse a particular business model – NRG's inflexible subscriber system – offered by a single competitor to the

exclusion of alternative arrangements offered by NRG's competitors, such as Petitioner, which would widen consumer choices;

- allow the NRG the substantial advantage of first access to a new and fragile marketplace with massive public subsidies, permitting it to “cherry pick” and saturate the most valuable real estate locations for commercial charging facilities, with resources it is required to spend that both distort its own economic choices and are of such a scale that no other competitor could hope to match;
- secretly agree with that company on a detailed and complex structure as to *how* the company will provide services to California consumers in a market that the PUC is without authority to regulate, and declare: *where* in California those services will be provided; under *what terms and conditions*; for *how long*; and, finally, for what period of time those operations will enjoy *exclusive access* to a highly sought after customer base; and
- permit NRG to implement a pricing scheme for its services designed to force California consumers to purchase its wholly unregulated subscription plans by making the alternative – single use by a non-subscriber – economically prohibitive to EV consumers.

23. In choosing to directly intervene in California's nascent EVCS market in this fashion, Respondents have acted well in excess of their lawful authority.

D. The Anti-Competitive Impacts and Preferential Effects of the Agreement: Damage to Petitioner and the Public

24. After extensive studies undertaken immediately after the Energy Crisis, the PUC carefully calculated the excessive price charged California rate-payers by NRG's predecessors as amounting to \$931,042,585.¹⁶ Similarly, in its most recent filing with the SEC, NRG itself valued its exposure to the PUC's claims of price gouging at \$940 million.¹⁷

25. Nevertheless, the Agreement requires NRG to pay only \$20 million in cash to compensate California rate-payers for the nearly \$1 billion in price gouging by the Dynegy Parties.¹⁸ Beyond that, the Agreement details a secretly created program of unprecedented PUC-supported marketplace intervention under which NRG will invest no less than \$102,500,000 in its own California EVCS business, including a minimum of \$90,000,000 to install 200 electric vehicle charging stations

¹⁶ Exhibit 8 at Table 1, p. 31.

¹⁷ NRG valued the claim at \$940 million at page 50 of its most recent 10-K filing with the Securities and Exchange Commission (SEC). See, <http://phx.corporate-ir.net/phoenix.zhtml?c=121544&p=IROL-secToc&TOC=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDE0NDUzMDUtMTItMDAwNDkzL3RvYy9wYWdl&ListAll=1&sXBRL=1>

¹⁸ See Exhibit 1, Attachment B, § 3(a)(ii) (cash payment of \$20 million).

known as “Freedom Stations” and to install the necessary hardware to support the installation of 10,000 charging units at 1,000 homes, offices and commercial locations known as “Make Ready Stubs.”¹⁹

26. Instead of directing NRG to make these facilities available for free to rate-payers or the general public, the arrangement allows NRG to charge customers for using the Freedom Stations and gives NRG a significant market advantage to install its own electric charging units at the Make Ready Stubs (in addition to the lower cost of capital it enjoys from writing down the legal liability of its predecessors in interest). The Agreement places no limit on the profits that NRG can reap.

27. Moreover, the Agreement allows NRG the opportunity to unfairly lock California consumers into NRG’s unregulated²⁰ subscription plans by permitting NRG to charge non-subscribers fees that are so excessively high (\$7 to \$15 per charge during On-Peak hours)²¹ that no consumer would have any rational economic choice *but* to become an NRG subscriber.

28. Allowing the Respondents and NRG to implement this subscription forcing scheme would have the inevitable consequence of

¹⁹ *Id.*, at §§ 3(a)(i) (investment of \$102,500,000) and 4(a) and 4(c).

²⁰ The Agreement is explicit that nothing in its terms will permit the PUC to exercise regulatory authority over NRG pursuant to the Public Utilities Code. See, Exhibit 1, Attachment B, at pp. 38–39.

²¹ See Exhibit 1, Attachment B, at pp. 21–22.

fortifying NRG's monopoly position. Once NRG captures California EVCS consumers as contract subscribers, with the ability to impose financial disincentives and penalties for contract termination, it will become exceedingly difficult, if not impossible, for other competitors including Petitioner to compete for those consumers' business.

29. The Agreement calls for a small portion of the settlement to be invested in a Technology Demonstration Program, EV Opportunity Program, and EV Car Sharing Project (Exhibit 1, Attachment B, § 4(d)), each of which also provides further competitive advantages to NRG. The \$102,500,000 "value" of the settlement is simply the amount of capital that NRG is required to invest for its own business purposes, and does not reflect any actual benefit to the public or the true cost or actual profit to NRG.²²

30. Because the Respondents and NRG brokered the Agreement in secret, no calculations or modeling performed by either party concerning its economic assumptions and impacts have been disclosed, including, but not limited to: (1) the profits NRG stands to make by this arrangement; (2) the capital investments NRG, in the absence of the Agreement, would have made in its California EVCS business as part of its normal business plan to

²² The actual benefit to NRG is in excess of \$817 million, as derived from NRG's own estimate of its legal liability exposure of \$940,000,000 less the purported (although illusory) \$122,500,000 "value" of the settlement.

continue to expand in the California market; (3) the boost to the NRG contract subscriber base that NRG anticipates to gain from the excessive prices the Agreement permits it to charge non-subscribers; (4) the EVCS market share which NRG, with the PUC's support, intends to capture from its competitors; and (5) the long term impacts on California consumers of financing NRG's monopolistic business strategy through the release of ratepayer claims.

E. The PUC's Disregard of Legislative Directives Requiring It to Consult with Other Responsible Agencies and Impacted Stakeholders, and to Conduct Public Hearings, Before Implementing EVSC Policy of the Sort Envisioned by the Agreement

31. By Public Utilities Code Section 740.2, the Legislature has directed the PUC, "in consultation with the Energy Commission, State Air Resources Board, electrical corporations, and the motor vehicle industry" to "evaluate policies to develop infrastructure sufficient to overcome any barriers to the widespread use of plug-in hybrid and electric vehicles", and, to "adopt rules" addressing the subject. By Public Utilities Code Section 740.3, the Legislature directed the PUC, "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" to "evaluate and implement policies to promote the development of equipment and infrastructure needed to facilitate the use of electrical

power and natural gas to fuel low emission vehicles”. The PUC was specifically directed to “hold public hearings” as part of implementing these responsibilities. (Pub. Util. Code § 740.3(b)).

32. The Agreement contemplates the implementation of an EVCS infrastructure project and policy and, as such, falls directly under the broad subject matters addressed by Sections 740.2 and 740.3. The Legislature expressed its clear direction to the PUC, in both of these sections, that before making such fundamental policy decisions, the PUC was to not only consult with other state agencies, and impacted stakeholders, but also to fully vet its proposed decisions through public rulemaking or other hearings. By entering into the Agreement in secret, Respondents violated its own agency precedent and these clear statutory duties.

F. The PUC Breached its Duty to Refund Overcharges to California Ratepayers

33. California Public Utilities Code § 453.5 requires:

Whenever the commission orders rate refunds to be distributed, the commission shall require public utilities to pay refunds to all current utility customers, and, when practicable, to prior customers, on an equitable pro rata basis without regard as to whether or not the customer is classifiable as a residential or commercial tenant, landlord, homeowner, business, industrial, educational, governmental,

nonprofit, agricultural, or any other type of entity.

In the litigation which the Agreement purports to settle, the PUC, pursuant to Section 206 of the Federal Power Act, sought a refund for California ratepayers of the excessive charges paid by the ratepayers in 2000-2001 to the Dynegy Parties, amounts alleged by the PUC to be nearly \$1 billion.²³ To the extent the PUC enters into an agreement to settle those claims, Public Utilities Code § 453.5 requires the PUC to refund that settlement on a *pro rata* basis to the California ratepayers, on whose behalf the PUC originally brought the action. In breach of this duty, the PUC entered into an Agreement which permits the wrongdoing parties to aggrandize to themselves the vast majority of the settlement “value” for their own competitive advancement.

V. BASIS FOR RELIEF

A. In Entering Into the Agreement Respondents Acted *Ultra Vires*, in Excess of Their Lawful Authority

34. Petitioner realleges and incorporates herein each of the allegations set forth above in each of the preceding paragraphs, as though fully set forth herein.

35. By its substance and design, the Agreement was intended to, and in fact does, constitute a collaborative effort between Respondents and one private utility, NRG, to fund and implement a program of electric

²³ See PUC Complaint, Exhibit 8, at p. 2 and p. 31, Table 1.

vehicle charging stations in California, thereby establishing NRG in a controlling market position to the detriment of all other competitors. The PUC has no authority to intervene in the California EVCS market in this fashion.

36. Subject to direction from the Legislature and the limitations of due process, the PUC was established to regulate public utilities and common carriers. Cal. Const., art. XII ss. 1, 6. The PUC is limited to the authority to “supervise and regulate public utilities”, including setting “just, reasonable [and] sufficient rates to be charge by utilities.” Pub. Util. Code §§ 701 et seq.²⁴

37. Neither the PUC’s constitutional or legislative authority gives it the power to agree to do what it did in this manner through the Agreement. Rather, in choosing to directly intervene in California’s nascent EVCS market in this collaborative fashion with one of many market participants, and to use monies that should have otherwise been refunded to ratepayers to subsidize the favored company’s business, Respondents have acted well in excess of their lawful authority, thereby committing an abuse of discretion.

²⁴ Section 701: “The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”

B. In Entering Into the Agreement Respondents Violated Established Public Policy Favoring Competition

38. Petitioner realleges and incorporates herein each of the allegations set forth above in each of the preceding paragraphs, as though fully set forth herein.

39. California's Cartwright Act (Cal. Bus. and Prof. Code §§ 16700 to 16770) codifies a strong public policy in this state favoring vigorous competition and condemning arrangements, such as the Agreement, which restrain competition. This strong policy applies specifically to the EVCS market in California. For the reasons alleged in the foregoing paragraphs, and established in the accompanying Declarations of C. Paul Wazzan, Ph. D. and Donald Karner, Respondents' actions threaten free and open competition in this market and are thus indisputably contrary to this established public policy.

40. As in many other enterprises, capturing the most favorable real estate locations is key to establishing a position in the California EVCS market. By giving NRG an 18 month head start, subsidized by ratepayers, the Agreement permits NRG to "cherry pick" 1,200 of the most favorable California real estate locations for EVCS in a manner that will not only saturate the market, but permanently disadvantage its competitors, including Petitioner, by relegating them to much less valuable secondary locations.

41. Furthermore, unlike Petitioner and many other competitors, NRG's business model is based upon contract subscription services for its charging facilities. The Agreement forces California consumers into NRG's subscription plans by specifically allowing NRG to charge non-subscribers prices so excessively high that no rational individual would pay such fees. The Agreement allows NRG to establish rates of between \$7 and \$15 for a charge during On-Peak hours, charges well in excess of the price of gasoline for the equivalent vehicle use, necessarily forcing EVCS consumers into NRG's unregulated subscription plans as the only viable economic alternative, denying consumers effective freedom of choice and damaging Petitioners.

42. For all of these reasons, approval of the Agreement constituted an abuse of Respondents' discretion and should be annulled.

C. In Entering Into the Agreement Respondents Violated Their Obligations to California Ratepayers Under Public Utilities Code Section 453.5

43. Petitioner realleges and incorporates herein each of the allegations set forth above in each of the preceding paragraphs, as though fully set forth herein.

44. Public Utilities Code § 453.5 requires the PUC to refund any settlement reached through the refund proceeding it initiated before FERC on a *pro rata* basis to the California ratepayers, on whose behalf that action was originally brought. By entering into an Agreement, Respondents

abused their discretion by diverting refund money for a completely separate purpose, actions which, by law, they are forbidden to do. *Assembly v. Public Utilities Commission* (1995) 12 Cal.4th 87.

D. In Entering Into the Agreement Without Public Hearings and Inter-Agency/Stakeholder Consultation, Respondents Failed to Conform to Procedures Required by Law

45. Petitioner realleges and incorporates herein each of the allegations set forth above in each of the preceding paragraphs, as though fully set forth herein.

46. Assuming *arguendo* that Respondents in fact have the authority to utilize monies rightfully belonging to California ratepayers to intervene in the EVCS market by secret collaboration with NRG, it is clear from the expressions of the Legislature when it addressed the same subjects – planning for, evaluating, and implementing EVCS policy in California – that the Legislature expected the PUC’s actions on these subjects to be taken in full public view, after consultation with other concerned agencies, and impacted stakeholders. Public Utilities Code §§ 740.2 and 740.3. Respondents engaged in *none* of these public consultations in arriving at the Agreement with NRG.

47. In taking actions to plan, evaluate and implement EVCS policy in California as part of a secret settlement agreement, Respondents failed “to conform to procedures required by law” and consequently abused their discretion.

VI. ABSENCE OF OTHER REMEDIES

1. Petitioner realleges and incorporates herein each of the allegations set forth above in each of the preceding paragraphs, as though fully set forth herein.

2. Petitioner has no adequate legal remedy other than the writ relief sought of this Court by this original proceeding to review the validity of Respondents' actions. California Public Utilities Code § 1759 (a) provides that no California court, other than the Court of Appeals and the Supreme Court, shall have jurisdiction to review actions of the PUC, and thus Petitioner could not have commenced this proceeding in any lower court. § 1759 (b) provides that "[t]he writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure." [Govt. Code § 11340 et seq. and §1085]. No other remedy, other than writ of mandamus, is provided for as an avenue of judicial review for the actions taken by Respondents in this instance.

3. Respondents, maintaining that they had no obligation to allow for public review or comment on the Agreement, filed it with FERC on April 27, 2012, seeking FERC's approval, action which Petitioner is informed and believes, and on that basis alleges, is imminent. Unless the writ relief prayed for herein is granted, Petitioner is informed and believes, and on that basis alleges, that FERC will promptly approve the Agreement,

allowing Respondents and NRG to implement its unlawful terms without judicial review.

VII. GROUNDS FOR AN IMMEDIATE STAY

1. An immediate stay is necessary because, as set forth below, unless prevented by this Court from taking further steps to implement the Agreement, Respondents threaten to do so as early as May 30, 2012.

2. As this Petition is written, the Respondents and NRG are proceeding forward full speed before FERC to obtain that agency's approval to implement the Agreement. ECotality's effort to slow down the proceeding, and open up the Agreement to public review and comment before it was submitted to FERC, was summarily rejected by the Respondents.²⁵

3. The proceedings before FERC allow comments to that agency only by parties to its proceeding – which, to date, has not included ECotality because, until the Agreement was filed, it had no legal interest in the matters before FERC sufficient to qualify it as a party. Hence, to simply bring its objections to FERC's attention, ECotality was required to make a Motion to Intervene in those proceedings, which it has done.²⁶

²⁵ See Exhibit 5.

²⁶ See Exhibit 9.

4. ECOtality has no assurance that FERC will allow it to intervene, or hear any of its objections. In any event, the issue as to whether the Respondents' actions in entering into the Agreement constituted an abuse of discretion under California law is a matter within the exclusive jurisdiction of this Court.

5. The FERC approval process is an expeditious one. Initial comments were due on May 17, 2012, with final reply comments due on May 29, 2012.

6. Petitioner is informed and believes, and on that basis alleges, that it is the intent of Respondents and NRG to immediately commence the implementation of the Agreement after FERC approval – an event which could occur as early as Wednesday, May 30, 2012.

7. Petitioner thus respectfully requests that this Court exercise its power to stay Respondents' and Real Party in Interest from taking any further steps to obtain FERC approval, or otherwise implement the Agreement, until its validity under California law can be finally and fairly determined by this Court.

PRAYER FOR RELIEF

WHEREFORE, as remedies for the causes of action asserted above, Petitioner prays that this Court:

1. Issue an immediate temporary stay directing Respondent to promptly withdraw its April 27, 2012 request for FERC's approval of the Agreement and ordering both Respondent and Real Party in Interest to cease and desist from any further actions to gain approval or, or otherwise implement, the terms of the Agreement;

2. Issue a peremptory writ of mandate pursuant to Code of Civil Procedure § 1087 ordering the PUC, its employees, agents, officers, and all persons acting on the PUC's behalf, to take all steps necessary to annul the Agreement;

3. Should it deem such action necessary and appropriate, issue an alternative writ directing Respondent to show cause why it should not be ordered to forbear from entering into or implementing the Agreement, and upon the return of the alternative writ, issue a peremptory writ as set forth in ¶ 2 of this prayer;

4. Declare that the PUC abused its discretion, and acted contrary to law, in entering into the Agreement and that, for that reason, the Agreement is null and void;

5. Award to Petitioner reasonable attorneys' fees, pursuant to Code of Civil Procedure § 1021.5;

6. Award to Petitioner costs of suit; and

7. Order and direct such further relief as this Court deems just and proper.

Dated: May 23, 2012

Respectfully submitted,

WARD L. BENSHOOF
SHIRAZ D. TANGRI
ALSTON & BIRD LLP

By:

Ward L. Benshoof
Attorneys for Petitioner
ECotality, Inc.

VERIFICATION

I am the authorized officer of Petitioner in this matter. I have read the foregoing Petition for Writ of Mandate Other Appropriate Relief and know its contents. The facts alleged in this petition are within my own personal knowledge, and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on May 23, 2012 at Phoenix, Arizona.

ECOtality, Inc.

By:

Donald Karner
Chief Innovation Officer

MEMORANDUM

Petitioner, ECotality, Inc., respectfully submits this Memorandum of Law in support of its Verified Petition for Writ of Mandate or Other Appropriate Relief, filed herewith.

I. STANDARD OF REVIEW

“A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . .” Code Civ. Proc. § 1085(a).

Mandate will issue pursuant § 1085 to “correct an abuse of discretion or the actions of an administrative agency which exceed the agency’s legal powers.” *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562 (emphasis in original omitted). An agency abuses its discretion when it: (a) acts arbitrarily or capriciously; (b) when it fails “to conform to procedures required by law;” and (c) when its actions are “unlawful or indisputably contrary to established public policy.” *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004, quoting *Lewin v. St. Joseph Hospital of Orange* (1978) 82

Cal.App.3d 368, 386. In reviewing the agency's action for abuse of discretion,

The reviewing court exercises 'independent judgment' in determining whether the agency action was 'consistent with applicable law.'

Neighbors in Support of Appropriate Land Use, supra, at 1004, quoting *Associated Builders & Contractors v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.

II. INTRODUCTION

This Petition asks for review and annulment of truly unprecedented action taken by the Respondents, action which violated the PUC's own precedent, venturing well beyond their lawful authority to the substantial damage of not only Petitioner, but also to the citizens of California.

Behind the closed doors of a settlement negotiation, Respondents purported to enter into an Agreement with NRG, the successor and corporate guarantor to parties which the PUC had accused of bilking California ratepayers of nearly \$1 billion dollars during the Energy Crisis. The Agreement not only constitutes *ultra vires* actions of the most extreme sort, but, as established by the supporting Declarations of Dr. C. Paul Wazzan, expert economist, and Donald Karner, ECOtality's Chief

Innovation Officer,²⁷ also threatens to allow NRG to dominate and destroy all meaningful competition in California's fledging EVCS market.

Public agency action having the potential of such far-reaching consequences is normally undertaken not in secrecy but in full public view, with consultation and hearings that solicit the input of other agencies, impacted parties, and the general public. Such was the express intent of the Legislature when it directed the PUC to undertake public process to evaluate and make rules for California's EVCS market. Pub. Util. Code §§ 740.2 and 740.3.

Petitioner recognizes that public litigants, including the PUC, are usually entitled to conduct their settlement *negotiations* with the same sort of privacy that private litigants enjoy. *Southern California Edison v. Peevey* (2003) 31 Cal.4th 781. However, there is no privilege for a public agency to *adopt* a settlement in secret, and, even if there were, it would clearly end when the settlement agreement clashes with, and defeats, other explicit Legislative and constitutional directives. *Utility Consumers' Action Network v. Public Utilities Commission* (2004) 120 Cal.App.4th 644, 655, *review denied* Nov. 10, 2004.

The PUC itself has recognized in the past the critical importance of vetting its settlement proposals through public proceedings – particularly

²⁷ The Declaration of Dr. Wazzan is filed herewith as Exhibit 11, and the Declaration of Mr. Karner is filed herewith as Exhibit 10.

where controversial matters are concerned. Such was the case, for instance, in *Utility Consumers' Action Network, supra*. In that case, petitioner brought a writ of review arising out of public hearings held by the PUC on the merits of a proposal to settle litigation with SDG&E over whether certain PUC orders imposed upon SDG&E were confiscatory. In evaluating this proposed settlement, the PUC was careful to allow full public review and comment. 120 Cal.App.4th at 651.

Respondents acted contrary to the procedures which they recognized were required in the *Utility Consumers Action Network* matter and have refused to allow any public process, or even any public notice of what they were intending, before they entered into the Agreement.

This was clearly contrary to law. Once Respondents made the decision to not confine the Agreement with NRG to simply the receipt of monetary consideration for the release of claims, but rather elected to use the Agreement as a device to make major EVCS policy decisions and investments and to subsidize, through the release of ratepayer claims, a private entity in order to implement those policy choices, basic notions of fairness and due process, as well as clear directives of the California Legislature, demanded that it open up its proposed actions to review by other state agencies, impacted stakeholders, and the interested public. Moreover, where issues of fair and open competition are involved, the law requires Respondents to act on a public record, where they have the burden

of demonstrating adequate consideration of anti-trust policies. *Northern Cal. Power Agency v. PUC* (1971) 5 Cal.3d 370, 377-378.

Respondents also plainly acted *ultra vires* in entering into the Agreement. Respondents have only that authority to make public policy which the Constitution and the Legislature have conferred upon it. That authority manifestly does *not* include what Respondents did here: intervene in the nascent EVCS market in California to secretly structure a massive investment program into that market by one company, a program which positions that company with a ratepayer subsidized investment to unfairly compete and monopolize the marketplace, to the injury not only of Petitioner, but to the citizens of California as well.

Finally, the law requires that monies that should be refunded to California ratepayers are in fact refunded. Pub. Util. Code § 453.5. These funds may not be diverted for other purposes, such as subsidizing NRG's EVCS business. *Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal.4th 87.

The Respondents had no authority to enter into the Agreement, and, consequently, it should be annulled by this Court.

III. BACKGROUND

The material facts are set forth in the Petition as Statement of Facts and not repeated here.

IV. ARGUMENT

A. **While Unquestionably an Agency of Substantial Power, Courts Have Reminded the PUC That Its Power Has Clear Limits**

As an agency established by the Constitution, the PUC enjoys substantial powers, but they are not nearly as unfettered as assumed by Respondents in entering into the Agreement.

In establishing the PUC's procedures, the Constitution specifically qualifies the PUC's authority to act as being "subject to statute and due process." (Art. XII, § 2). The Constitution provides the PUC with the explicit power to fix rates and establish rules for all "public utilities subject to its jurisdiction." (*Id.* § 6) It further provides that through the exercise of its "plenary power" the Legislature may confer further authority on the PUC. (*Id.*, § 5). And yet, the measure of the lawfulness of Respondents' actions consistently remains a very fundamental inquiry: does the PUC, whether by Constitutional or statutory delegation, have the authority which it purports to exercise?

In terms of the unprecedented EVCS policy decisions Respondents undertook in this instance to implement through their secret Agreement with NRG, Respondents can point to no constitutional or legislative authority to justify their actions. No law exists which empowers the PUC to endorse one of many competitors in a marketplace, adopt its business

model for all of California, and then subsidize the chosen company with the release of valuable ratepayer claims to establish a monopolistic position in that market.²⁸

Moreover, regardless of the wisdom and economic impact of Respondents' actions, no provision of law authorizes Respondents to implement fundamental and far-reaching EVCS policy decisions in secret, collaborating with only the favored entity chosen through back room negotiations to carry out those policies, subsidizing that entity with the release of valuable ratepayer claims, and then excluding the public and other impacted stakeholders entirely from the process. To the contrary, the Legislature has made clear that Respondents may not act alone, in secret, but rather must consult with other agencies and stakeholders, and must allow the public to review and comment upon what it is doing with regard to regulating utilities in the EVCS market. The provisions of California Public Utilities Code §§ 740.2 and 740.3, discussed in Section B, *infra*, provide two explicit examples.

When Respondent PUC has engaged in similar *ultra vires* activity in the past, it has been struck down. For example, in *California Water & Telephone Co. v. Public Utilities Commission* (1959) 51 Cal.2d 478, the PUC had assumed that its authority to regulate the terms on which the

²⁸ See accompanying economic analysis of the Agreement by anti-trust expert, Dr. C. Paul Wazzan, filed herewith as Exhibit 11.

petitioner water company could extend into new areas and the services it must provide in the new territory, gave it the power to compel the petitioner to extend its services to a wholly new community, on terms that the utility found objectionable and had never agreed to. The PUC had ordered petitioner to enter into a contract with the new community, on terms directed by the PUC, and then ordered the utility to specifically perform that contract. After a review of the limits of the PUC's delegated authority, the Supreme Court struck down the PUC's actions as unlawful:

The commission may properly regulate the terms on which extensions into new areas may be voluntarily made and it may regulate the service which must be given within an area to which the utility is dedicated. But this is not to say that the commission may compel a water utility to extend its mains into a wholly new proposed residential community on terms other than those agreed to by the utility. It cannot.

51 Cal.2d at 501.

Likewise, in *Pacific Telephone and Telegraph Co. v. Public Utilities Commission* (1950) 34 Cal.2d 822, the PUC argued that it had "implied powers" to regulate a contract which the petitioner utility had entered into with its affiliated parent holding company, a contract whose terms the PUC argued presented opportunities for abuse and avoidance of its regulation

over the subsidiary. Yet, the Supreme Court rejected the PUC's "implied authority" argument:

There is no public policy against affiliated corporations, however, and the commission can treat them differently only to the extent the Legislature so provides or to the extent that they are used as a device to defeat the exercise of powers the commission has been granted. The Public Utilities Act is silent on the question of affiliated corporations, and only the Legislature can properly decide whether they present such dangers of abuse that the commission should have broader regulatory powers over them than it now has.

34 Cal.2d at 832.

Similarly, in *Pacific Telephone and Telegraph Co. v. Public Utilities Commission* (1965) 62 Cal.2d 634, the PUC purported to exercise another "implied power," this time to order a "roll-back" and refunds of a utility's rates that it had previously approved. In annulling this order as *ultra vires*, the Supreme Court, in language particularly applicable to the instant case, reminded the PUC that it had only such powers as the Legislature chose to confer upon it:

As amended in 1911 section 23 of article XII of the California Constitution specifies in pertinent part that the commission 'shall have and exercise such power and jurisdiction to

supervise and regulate public utilities * * * and to fix the rates to be charged * * * as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the * * * Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. * * *’ As to the scope of the commission’s powers in this respect ‘we look to the legislation enacted * * * principally the Public Utilities Code So doing, we have concluded that the Legislature has not undertaken to bestow on the commission the power to roll back general rates already approved by it under an order which has become final, or to order refunds of amounts collected by a public utility pursuant to such approved rates * * *.

62 Cal.2d at 649-650.

Finally, after conducting a thorough review of the Public Utility Act and finding that the PUC had no delegated authority to order rate roll-backs and refunds, the Supreme Court refused to find a back door basis for that authority in the PUC’s “public policy” arguments:

Such arguments should be addressed to the Legislature, from whence the commission’s authority derives, rather than to this court. As suggested by Pacific, if the Legislature believes

there is a problem of unjust enrichment of a utility pending a possible rate-reduction order or any need to ‘take the profit out of delay,’ it may deal with those questions through appropriate legislation. So far, it has not done so.

Id. at 655.

As in *Pacific Telephone and Telegraph Co.*, *supra*, the PUC is sure to advance “public policy” reasons here, as well – i.e. the “need” for EVCS infrastructure in California to encourage the use of electric vehicles²⁹ -- as justification for the unlawful means which they chose to reach that end. The PUC will point out that if it has the authority to litigate, it has the authority to settle claims, a point that ECOTality does not dispute.

However, the authority to settle claims does not imply the power to reach whatever sort of settlement agreement it wishes to – *regardless* of whether it ignores the statutory jurisdiction of co-equal state agencies: *regardless* of its impact on others; and *regardless* of whether it undermines California’s strong public policy favoring open and competitive marketplaces.

In fact, as the Court held in *Utility Consumers’ Action Network*, the PUC’s authority to settle litigation exists, but *only* “as long as the

²⁹ This “Field of Dreams” argument which is one of the PUC’s fundamental policy assumptions underlying the Agreement – build recharging facilities and consumers will buy electric vehicles – is subject to considerable debate within the EVCS industry, debate which Respondents denied themselves the benefit of by refusing to subject the Agreement to public review and comment.

agreement is not inconsistent with state laws.” 120 Cal.App.4th at 655.

Held the Court:

Despite its broad discretion in ratemaking and matters of energy policy, the PUC cannot change state law (see Cal. Const., art III, § 3) and therefore it cannot enter into settlement agreements that would change state law or that would enjoin it from enforcing state law. If the settlement agreement was intended to make any change in state law, then this court must disapprove it.

Id.

The analysis of Respondents’ authority to enter into the Agreement should be the same as the Supreme Court’s analysis in *Pacific Telephone, supra*: if the Legislature believes that Respondents should have the authority to establish and implement EVCS policy in secrecy, without consulting anyone and, when so doing, disregard the clearly anti-competitive impacts of its actions, allowing the successor to companies described by the Attorney General as “one of the most rapacious pirates of the Energy Crisis” to *profit* from their wrongdoing, the Legislature could grant Respondents that authority. It has not.

Rather, following the same course of analysis in the instant case as was utilized by the Supreme Court in each of the decisions cited above, focusing on the source of the PUC’s authority – the Public Utilities Code –

one readily determines there are only *two* provisions which give the PUC any authority on the subject of the EVCS market in California, and both demonstrate how far beyond its lawful authority Respondents proceeded in secretly negotiating the Agreement with NRG.

B. The Public Utilities Code Provisions Which Authorize the PUC to Conduct Public Hearings and Rule Making Concerning EVCS Policy Do Not Permit It to Establish, in Secret, The Sort of Anti-Competitive Policy Represented in This Instance by the Agreement

As discussed above, the Legislature has addressed the subject of the PUC's role in California's EVCS twice: by Public Utilities Code §§ 740.2 and 740.3.

Public Utilities Code §740.2, which charges the PUC with the responsibility to “evaluate policies to develop infrastructure sufficient to overcome any barriers to the widespread deployment and use” of electric vehicles, expressly directed that, in doing so, the PUC pursue “consultation with the Energy Commission, the State Air Resources Board, electrical corporations, and the motor vehicle industry,” and that, after doing so, the PUC engage in a public rule-making proceeding, with all of its procedural protections for concerned parties.

Yet, it is an undisputed fact that in arriving at the Agreement with NRG, Respondents proceeded in secret, without consulting any stakeholder or other agency, and without the opportunity for the protections of public hearings where impacted parties could comment. Such a secretive

procedure for making the sort of far-reaching policy decisions represented in the Agreement's provisions is plainly contrary to the consultation and public rule-making proceedings directed by §740.2.

Likewise, through Public Utilities Code §740.3, the Legislature tasked the PUC to “evaluate and implement policies to promote use of electric power and natural gas to fuel low-emission vehicles,” expressly requiring, again, that the PUC undertake this evaluation and implementation only after consultation with stakeholders and other agencies (§740.3(a)) and “public hearings” (§740.3 (b)).

In entering into the Agreement, Respondents ignored the Legislature's explicit direction that implementation of the EVCS infrastructure policies be undertaken in the light of day, only after consultation with other stakeholders and interested agencies, and after the policies selected by Respondents for their official endorsement and support were subjected to public hearings. In taking such action as part of a secret settlement proceedings, the PUC violated §740.3.

C. Analysis of the Agreement Provisions Demonstrates the Extent of the Respondents *Ultra Vires* Market Intervention and the Degree of its Anti-Competitive Impact

That the Agreement constitutes not a simple “garden variety” settlement of a lawsuit, but rather a series of far-reaching and detailed (but, unfortunately, very poorly thought out) policy judgments by Respondents

becomes more and more apparent the further one drills into the complex structure of the Electric Vehicle Charging Station Project (“EVCSP”) which the Agreement would implement – 36 single spaced pages of complex terms and conditions.³⁰

As strongly as Petitioner opposes the Respondents’ actions in entering into the Agreement, that is not to say that their goals were wrongful. To the contrary, Petitioner believes that, in their haste to achieve a settlement, Respondents denied themselves the benefit of any input from anyone other than NRG, and thus may have been unaware of the damaging impact the Agreement would have; how contrary to law it is; and what a deeply flawed policy it actually represents. Indeed, many of the provisions of the EVCSP that NRG will implement as part of its existing EVCS business appear to spring from good intent on the part of Respondents. These include provisions to locate charging stations in low income areas (Agreement, § 4 (a) (ii)) and requirements that NRG provide employment preference to “formerly incarcerated individuals who are seeking lawful self-sufficient career opportunities” and “employees from the historically disadvantaged or underrepresented classes, including women, minorities and disable veterans.” (*Id.*, at § 4 (a) (vi) (3) (C)).

³⁰ Exhibit 1, Attachment B at § 4 (pages 13 to 49).

At the same time, it must also be said that even when an agency acts wisely, if its acts are – as in this instance – clearly beyond its authority, they remain null and void nevertheless. As the court held in *Bottoms, et. al. v. Madera Irr. Dist.* (1925) 74 Cal.App. 681, 702:

The wisdom of the agreement has nothing whatever to do with its *ultra vires* character. If the agreement procured is not one authorized by the [Legislature], it is illegal, even though there is no taint or color of moral wrong. It is not a question of right or wrong. It is simply a question of legality or illegality.

And yet, the fact remains that the Agreement is fundamentally flawed by its anti-competitive structure, a structure which irreparably injures both for the citizens of California and companies such as Petitioner.

As established by the verified Petition and the supporting Declarations of ECOtality's Chief Innovation Officer, Donald Karner and Dr. C. Paul Wazzan, an experienced anti-trust economist with the Berkeley Research Group, the Agreement presents a substantial risk of allowing NRG to maintain an anti-competitive, monopoly position by enabling a predatory pricing scheme and, for that reason, it is not only unlawful, but it is wrong. In his analysis, Dr. Wazzan summarizes these risks as follows:

[T]he Agreement releases California ratepayer claims for alleged overcharges by the Dynegy Parties during the

California Energy Crisis in return for the commitment by NRG to invest \$102,500,000 in the California EVCS market. In economic terms, NRG's \$102,500,000 investment is subsidized by the value of the PUC's claims against the Dynegy Parties for price gouging. My analysis identifies a substantial risk that, using this subsidy, NRG will be able to establish a dominant position in the California electric vehicle charging station market by engaging in a predatory scheme to capture the best geographic locations for their charging stations and otherwise saturate the market. The predatory scheme enabled by the terms of the Agreement is one which permits NRG to contract with host locations (i.e., the owners of the locations where the charging stations will be built) at below economically justifiable costs. For example, if the risks which my analysis identifies in fact are realized, NRG will be able to charge less for the installations, provide a larger share of revenues, or otherwise engage in what would be sub-optimal pricing but for the subsidy in order to secure locations. Once armed with the best locations (which essentially creates barriers to entry for other competitors), NRG will be able to extend their network of electric vehicle charging stations to expand their lead/first-mover advantage

into a dominant, monopolistic position. Once the monopoly position is secured, NRG will be able to charge monopoly prices to California consumers.

Wazzan Declaration, Petition, Exh. 11, at ¶ 4.

1. The General Impact of NRG’s Ratepayer Subsidy on California’s EVCS Marketplace

Dr. Wazzan identifies several respects in which NRG’s publicly subsidized \$102,500,000 investment into the California EVCS market will impact competition:

- “First, NRG is likely to enter the market more aggressively in response to the subsidy” creating the risk of crowding out “private investment by non-subsidized firms”³¹;
- “Second, NRG’s pricing decisions are likely to be strongly affected by the subsidy” with the ultimate consequence of driving “the non-subsidized firms from the marketplace, leaving the subsidized firm with market control.”³²
- “Third, the impact of a subsidy on a market with asymmetrically sized participants can be especially severe. NRG is a vertically integrated Fortune 300 energy company. Its primary competitors for the provision of EVCS in California are smallish, startup-type

³¹ Id., at ¶ 10.

³² Id., at ¶ 11.

firms Subsidizing the dominant firm (NRG) will increase its already-large competitive advantage relative to these smaller rivals” further injuring competition.³³

2. NRG’s Opportunity to Select, and Saturate, The Prime California EVCS Locations

The Agreement allows NRG to choose a minimum of 1,200 locations to install at least 200 “Freedom Stations” and 1,000 “Make Ready” stubs. As in any customer service industry, the geographic location of a company’s EVCS stations is critical to that company’s success. As explained by the Karner Declaration³⁴ the Agreement thus gives NRG an enormous advantage. Supported by rate-payer money, the Agreement gives NRG an 18 month lead over all of its competitors to cherry pick 1,200 of California’s most favorable real estate locations for EV charging. ECOtality and other competitors will be relegated to much less favorable secondary locations.

Mr. Karner also explains that NRG will not only have the ability to lock up California’s prime EV charging locations, the numbers of sites it will select – 1,200 – could literally saturate the marketplace, making it difficult for anyone else, including ECOtality, to get a meaningful competitive foothold for some time. As Mr. Karner establishes:

³³ *Id.*, at ¶ 12.

³⁴ Exhibit 10, at ¶¶ 9-10.

The numbers of EV vehicles in California is still small, and, even under the most robust of projections, is predicted to remain so into the near future. A modest number of EV drivers do not require an infinite number of charging stations – at least not at a sufficient level to make such stations profitable. As a consequence, it is entirely possible that NRG’s 1,200 sites may soak up such a large proportion of the existing and anticipated EV consumer demand, that there would be almost nothing left for ECOtality, and other competitors, damaging those business as well as the ability of California consumers to choose amongst EV service providers competing with one another for their business.

Id., at ¶ 10.

3. Basic Economic Distortions Caused by the Agreement That Will Damage ECOtality and California Consumers

The Agreement structures NRG’s massive investments in its California EVCS business as minimal amounts of funds that NRG is required to spend, regardless of economic justification, to settle the legal liability of its affiliated Dynegey entities to California ratepayers. The Karner Declaration demonstrates that approaching the marketplace with over \$100,000,000 in funds that a company is required, by a settlement, to spend, regardless of whether a particular expense makes any economic

sense, fundamentally distorts that marketplace to the damage of other competitors and, ultimately, consumers. *Id.* at ¶¶ 11-14.

While ECOTality believes that it can effectively compete with NRG on a level playing field, with both parties motivated by the same basic market principals – one of which is to earn a profit on capital invested.

However, one of the most damaging aspects of the Agreement's basic structure is that it places NRG into the California marketplace with \$102,500,000 that it is **required** to spend, regardless of whether those expenditures meet the investment risk and rate of return criteria which all other companies' responsibilities to their investors and shareholders require that they use. As Mr. Karner explains:

Not being subject to normal economic constraints, this \$102,500,000 could be used by NRG to take steps which, while making no economic sense, serve to so underprice the terms and conditions which ECOTality could offer a customer, as to destroy the ability of ECOTality and others to compete at all.

Id., at ¶ 14.

After competition is destroyed in this fashion, such power would place NRG in a position to then charge, after the term of the Agreement ends, whatever prices they choose – all to the ultimate injury of not only ECOTality, but California's consumers as well.

4. The Agreement Gives NRG Significant “First Mover” Advantages to Eliminate Competition in the EVCS Marketplace

Dr. Wazzan’s analysis describes the potential predatory pricing scheme that the Agreement would allow by conferring upon NRG significant “first mover” advantages. Speed to the marketplace gives a company advantages in three areas: “preemption of scarce assets, and buyer switching costs, and technological leadership.”³⁵ By advantaging NRG in two of these critical areas – preempting scarce assets, *i.e.* the prime EVCS locations, and creating significant buyer switching costs – Dr. Wazzan concludes that the Agreement creates further anti-competitive risks:

In short, the Agreement’s subsidy presents a substantial risk of creating significant barriers to entry for NRG competitors. It is my opinion that NRG, by use of the subsidy will probably have locked in the best geographic locations, and the majority of consumers will be very reluctant to join a limited or less extensive competing network. This will not only damage NRG’s competitors, it will damage competition generally.³⁶

³⁵ Wazzan Declaration, Exhibit 11, at ¶ 19.

³⁶ *Id.*, at ¶ 24.

5. NRG’s Deployment of 10,000 “Make Ready” Arrays, and the Adverse Impact of the Agreement’s “Make Ready” Terms

Section 4(c) of the Agreement describes in detail the opportunity NRG will have to use its settlement with Respondents to install “Make Ready” Stubs and Arrays. A “Make-Ready” stub is installed to "make" a location "ready" to install an electric car charging station. The Agreement provides for the installation by NRG of at least 10,000 “Make-Ready” arrays over four years, at 1,000 sites, primarily at multi-family housing locations and workplaces, but also areas of public interest like schools and hospitals.

Mr. Karner’s Declaration addresses in detail the respects in which the “Make Ready” provisions of the Agreement will actually hinder EVCS deployment by increasing the costs of infrastructure for future EV drivers. Moreover, as explained by Mr. Karner, these provisions create conditions conducive to a monopoly for NRG in Multi-Development Units (MDUs) in California, damaging ECotality and other NRG competitors, and, as a result, may impede the rollout of the EV fleet. Exhibit 10., at ¶¶ 15-21.

6. By Encouraging the Growth of A Powerful NRG Network, The Agreement Permits NRG to Erect Barriers to Entry of Others in the EVCS Market

Dr. Wazzan describes how “[i]t can be extremely difficult for new firms to enter markets where incumbent firms have established a large base or network of stations”; that “[i]n the market for electric vehicle charging

stations, there are likely to be strong natural a barriers to entry”; and that such barriers include the ability of incumbent firms to establish their own networks of users.³⁷

Dr. Wazzan reviews the respects in which the Agreement places NRG in a preferential position to establish a powerful customer network of users, including enabling NRG to implement a pricing scheme that would have the effect of motivating consumers “to join NRG’s subscription plan”.³⁸ Additional factors come in to play through this force of networking, including being able to offer consumers benefits which will further attract them to NRG’s business model. In Dr. Wazzan’s opinion: “By offering these benefits to consumers via the network that the Agreement enables NRG to establish in California, NRG’s market dominance will increase”.³⁹

7. NRG’s Deployment of 200 EV Fast Charging Stations and the High Prices Which NEG Is Permitted to Charge

In addition to the “Make Ready” stubs and arrays, NRG is given the opportunity under the Agreement to install at least 200 EV charging stations, or “Freedom Stations,” across California. Not only does the Agreement allow NRG to charge customers for using these facilities, but,

³⁷ Wazzan Declaration, Exhibit 11, at ¶¶ 25-26..

³⁸ *Id.*, at 31

³⁹ *Id.*, at 34

as explained by Mr. Karner, the Agreement allows NRG to use a pricing mechanism which it can use to force consumers to enter into NRG's unregulated subscription plans. Exhibit 10, at ¶¶ 22-24.

This results because, unlike ECotality, NRG's basic business model revolves around subscription plans which, for a monthly fee, provide its customers certain services. *Id.*, at ¶ 22. Non-subscribers will be allowed access to the 200 Freedom Stations provided for by the Agreement, but NRG is permitted to charge these consumers exceedingly high prices: \$7 to \$15 per charge during on-peak hours. Mr. Karner demonstrates that these prices are not only much higher than consumers would pay if they were NRG subscribers, the high prices allowed by the Agreement would exceed the equivalent price of gasoline, eliminating any fuel cost saving by electric vehicle use. *Id.*, at ¶ 23

For these reasons, as Dr. Wazzan points out, it would obviously make no economic sense for a user of NRG's "Freedom Stations" to *not* become an NRG subscriber.⁴⁰ This will result in a considerable advantage to NRG, allowing it to solidify its already powerful market position, because once NRG captures consumers as contract subscribers, these individuals will not only develop a loyalty to NRG, there is nothing in the

⁴⁰ Wazzan Declaration, Exhibit 11, at ¶ 31.

Agreement to prevent NRG from imposing financial penalties for contract termination. According to Mr. Karner:

If NRG is allowed to proceed in this fashion, it will be exceedingly difficult, if not impossible, for ECOtality and other competitors to compete for the business of those consumers.

Exhibit 10, at ¶ 24.

D. Respondents' Actions in Promoting NRG's Monopolistic Practices Clearly Are Contrary to California's Public Policy

California's Cartwright Act (Business & Professions Code § 16700 *et seq.*) is the statutory embodiment of this State's "public policy against restraint of trade that has long been recognized at common law." *Speegle v. Board of Fire Underwriters of the Pacific* (1946) 29 Cal.2d 34, 44. The policies against restraint of trade, favoring free and open competition, have been described as applying even to those entities regulated by the PUC. "[T]he strong public policy of the Cartwright Act encouraging free and open competition and competitively established prices applies even to companies regulated by the PUC." *Cellular Plus, Inc. v. Superior Ct.* (1993) 14 Cal.App.4th 1224, 1243, *review denied* July 1, 1993.

Where, as in this case, the PUC's actions fail to properly consider California's policy against restraint of trade, the courts have overturned the PUC's orders. For example, in *Northern Cal. Power Agency v. PUC*

(1971) 5 Cal.3d 370, the Supreme Court annulled an order of the PUC for failing to adequately consider the respect in which the utility activities which it had approved – contracts under which PG&E proposed to purchase steam for a new generating facility – would in fact violate both state and federal anti-trust laws.

We conclude that the Commission erred in failing to give adequate consideration to, and to make appropriate findings on, the issues raised by the contention of NCPA [the complaining Petitioner] that the contracts under which PG&E plans to purchase steam for the new generating units violate both state and federal antitrust laws. We, therefore, annul the decision.

5 Cal.3d at 372.

The Supreme Court continued on to reason that it was a fundamental regulatory responsibility of public agencies to assure that their actions do not promote, as the Agreement does, anti-competitive conduct:

The principle that regulatory commissions should take antitrust considerations into account in determining whether a contemplated project will advance the public interest has been reiterated on numerous occasions by the federal courts.
[citations]

5 Cal.3d at 377.

Quoting extensively from an opinion of Judge J. Skelly Wright in a Federal Power Commission matter, the Supreme Court then articulated a further reason why agreements of the sort at issue here cannot be conducted in secret: a public hearing process, with specific findings, coupled with statements of reasons, on anti-trust issues is the only way that there can be any assurance that Respondents discharge their duty to carefully consider the public interest in free and open competition:

‘Although the Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy.’ (Fn. omitted.) (399 F.2d at p. 958.) The court explained: ‘This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of the antitrust laws. [Citations.] Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give ‘understandable content to the broad statutory concept of the ‘public interest.’ [Citation.] But

because competitive considerations are an important element of the ‘public interest,’ we believe that in a case such as this the Commission was obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations. [Citations.] (Fn. omitted.) (*Id.* at pp. 960—961.)

5 Cal.3d at 377-378.

In refusing to open the Agreement to any sort of public evaluation process, Respondents’ actions present exactly the same situation as in the *Northern Cal. Power Agency* case: a record absolutely devoid of any evidence as to how – *if at all* – the Respondents discharged their clear legal duty to carefully weigh the anti-trust implications of their actions. For example, it is impossible to determine what thought – if any –the Respondents gave to the price-fixing features of the Agreement that permit NRG to capture California consumers as their subscribers by pricing the non-subscription services outrageously high.

Did Respondents conclude this was all perfectly fine? Or, did they even realize this was what they were doing? Of course, we do not know because whatever their reasoning was, it was done behind closed doors, without a record of the evidence considered, findings made, or reasons adopted.

Under *Northern Cal. Power Agency*, since “the Commission was obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations,” this is reason enough to annul Respondents’ decision. *Northern Cal. Power Agency*, 5 Cal.3d at 378.

E. The Agreement Also Violates Respondents’ Duties Under Public Utilities Code § 453.5

California Public Utilities Code § 453.5 provides:

Whenever the commission orders rate refunds to be distributed, the commission shall require public utilities to pay refunds to all current utility customers, and, when practicable, to prior customers, on an equitable pro rata basis without regard as to whether or not the customer is classifiable as a residential or commercial tenant, landlord, homeowner, business, industrial, educational, governmental, nonprofit, agricultural, or any other type of entity.

In the litigation which the Agreement purports to settle, the PUC, pursuant to Section 206 of the Federal Power Act, had sought a refund for California ratepayers of the excessive charges paid in 2000-2001 to the Dynegy Parties, amounting to nearly a billion dollars as alleged by the PUC. To the extent Respondents enter into an agreement to settle those claims,

Public Utilities Code § 453.5 obligates them to refund that settlement to the California ratepayers, on a *pro rata* basis, on whose behalf the action was originally brought. Yet, Respondents chose to divert the bulk of this money to NRG, on the promise that NRG would invest the funds in its California EVCS business. Section 453.5 of the Public Utilities Code simply does not permit this result.

A nearly identical PUC effort to divert ratepayer refund monies to instead build infrastructure facilities that the PUC felt were necessary – a telecommunications infrastructure – was struck down by the Supreme Court in *Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal.4th 87.

That case involved \$7.9 million in principal, plus interest, that Pacific Telesis had been directed under a 1982 order of the Federal Communications Commission to be refunded to its ratepayers. 12 Cal.4th at 91. Years passed without the refund actually being made to ratepayers. During this period, the interest on the original sum grew to over \$40 million. *Id.* at 94. Then in 1993, when AT&T sought permission from the PUC to capitalize a cellular subsidiary (AT&T Cellular), the PUC issued its own order specifically finding that the \$7.9 million, “pocketed” by Pacific Bell, had been intended by both itself, and the FCC, to be refunded to ratepayers. However, the PUC declined to order such a refund. Rather, after conducting evidentiary hearings the PUC decided it had the “greater

discretion” to use the interest amount of \$40.3 million for other purposes, concluding that “funding telecommunications infrastructure for schools was an ‘appropriate use’ of the interest, because schools were uniquely positioned to facilitate public access to the ‘information superhighway,’ an action that would benefit directly all California telecommunications users.” *Id.*, at 94.

The Supreme Court agreed that “the development of an advanced telecommunications infrastructure in California” was a laudable objective, but nevertheless annulled the PUC’s decision, finding that the proposed diversion of ratepayer funds was simply not allowed by the clear terms of Section 453.5. *Id.*, at 104.

The very same conclusion should follow in this case. It should make no difference that the Respondents used a rate refund proceeding before FERC as a lever to divert money into yet another “infrastructure” program – however laudable the objective. The Supreme Court addressed the same principle in the *Assembly* decision. Whether the PUC attempts to justify the diversion by claiming “interest” is somehow different than “refund” (*Assembly*), or by using secret settlement negotiations in a rate refund proceeding to negotiate terms that are not a refund, the result is the same: Section 453.5 is subverted. Economic value which the ratepayers are entitled to has been diverted to subsidize NRG so that it can profit from the Agreement.

Indeed, the circumstances of this case are almost identical to the unlawful conduct of the PUC in *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, where the Supreme Court annulled another effort of the PUC to evade the clear terms of Section 453.5 by holding that the PUC could not avoid its obligations under that statute by simply declaring that a fund previously ordered to be distributed to ratepayers was not a “refund”.

Because Respondents here attempt to evade Section 453.5’s requirements in the same manner as the PUC attempted to in both *Assembly* and *California Mfrs. Assn.* – using refund litigation to negotiate a non-refund settlement – the result should be the same. The Agreement should be annulled.

V. CONCLUSION

For the reasons set forth above, Petitioner ECotality respectfully requests this Court to protect California consumers, the rights of ratepayers,

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and the competitiveness of the EVCS market, by issuing its writ of mandate annulling Respondents unlawful actions, declaring the Agreement null and void.

Dated: May 24, 2012____ Respectfully submitted,

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By:

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ECotality, Inc.

CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to California Rules of Court 8.204, subdivision (c)(1) and 8.486, subdivision (a)(6), in reliance upon the word counter feature of the software used, I certify that the attached contains 13,992 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

Dated: May 24, 2012____ Respectfully submitted,

**WARD L. BENSHOOF
SHIRAZ D. TANGRI
ALSTON & BIRD LLP**

By: _____
Ward L. Benshoof
Attorneys for Petitioner
ECotality, Inc.

PROOF OF SERVICE

I, Lorraine K. Lee, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Alston + Bird LLP, 333 South Hope Street, Sixteenth Floor, Los Angeles, CA 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On May 25, 2012, I served the following document(s): **VERIFIED PETITION FOR WRIT OF MANDATE AND OTHER APPROPRIATE RELIEF** on the following persons at the locations specified:

Paul Clanon
Executive Director
Public Utilities Commission
505 Van Ness Avenue, Rm. 5223
San Francisco, CA 94102-3298

Frank R. Lindh
General Counsel
Public Utilities Commission
505 Van Ness Avenue, Rm. 5138
San Francisco, CA 94102-3298

NRG Energy, Inc.
Agent for Service of Process:
CT Corporation System
818 W. Seventh Street
Los Angeles, CA 90017

in the manner indicated below:

BY PERSONAL SERVICE: I sealed true and correct copies of the above document(s) in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locatios by a professional messenger service. **A declaration from the messenger who made the delivery is attached or will be filed separately with the court.**

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

Executed on May 25, 2012, at Los Angeles, California.

Lorraine K. Lee