



December 11, 2008

Gordon Schremp, Workshop Facilitator
Fuel and Transportation Division
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Re: Fuel Delivery Temperature Study – Committee Workshop

Dear Mr. Schremp:

As discussed during the December 9 Committee Workshop, the enclosed memorandum submitted on behalf of Valero Marketing and Supply Company and Chevron USA, Inc. addresses the question of whether the implementation of ATC at retail stations is permissible under applicable California law.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Scott N. Folwark'.

Scott N. Folwark
Executive Director Governmental Affairs
Valero Marketing and Supply Company, and

On behalf of:

Chevron USA, Inc.

CC: James D. Boyd, Commissioner and Vice Chair
Karen Douglas, Commissioner

Enclosure

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December 11, 2008

Re: California Energy Commission Staff's November 2008
Fuel Delivery Temperature Study

This memorandum addresses certain conclusions of law set forth in the California Energy Commission Staff's November 2008 Fuel Delivery Temperature Study ("Study") and is submitted for your consideration by the law firms of Latham & Watkins LLP and Akin Gump Strauss Hauer & Feld LLP. Specifically, this memorandum discusses the propriety of the subject legal opinions in light of the terms of California Business & Professions Code § 13630, the statute authorizing the Commission to prepare the instant Study, and provides legal authorities and arguments addressing the Study's erroneous statements that "[a]s of today, no law forbids any retailer from installing ATC devices," and "[p]ermissive (voluntary) use of automatic temperature compensation (ATC) devices at California retail stations is already permitted under California law as it is not specifically prohibited." Study at p.8; 89.

As demonstrated below, because Section 13630 does not authorize the Commission or its Staff to review the legality of selling temperature-compensated motor fuel in California, and the undersigned believe that expressing such views is not appropriate. Moreover, under the presently-existing regulatory scheme governing retail motor fuel sales, any California retailer who attempts to sell motor fuel on a temperature adjusted basis is exposed to substantial risk of liability under California law. Accordingly, we ask that the CEC Staff either delete references to the legality or illegality of selling temperature-compensated motor fuel in California or, alternatively, revise the Study to accurately reflect California law.

I. BUSINESS & PROFESSIONS CODE SECTION 13630 DOES NOT GIVE THE STAFF AUTHORITY TO OPINE ON THE LEGALITY OF TEMPERATURE COMPENSATION

Business & Professions Code § 13630 authorizes the California Energy Commission, along with the California Department of Food and Agriculture, to "conduct a comprehensive survey and cost-benefit analysis" including surveying the temperature of fuel "during routine dispenser inspections," and compare various options relative to temperature compensation, including "retaining the current reference temperature of 60 degrees Fahrenheit, establishing a different statewide reference temperature," "establishing different regional reference

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temperatures for the state” and “requiring the installation of temperature corrected or compensated equipment at the pump.”

Section 13630 does not authorize the Commission or its Staff to opine on the legality of temperature compensation under the current regulatory scheme. In doing so in the Study, the Staff is acting outside the grant of its authority. See 28-SUM Admin. & Reg. L. News 8, 10 (.2003)(“[a]n agency acting outside its statutory authority is acting *ultra vires*, and any regulations it issues in such capacity are void”); *Stark v. Wickard*, 321 U.S. 288, 309 (1944) (“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted”).

II. EXISTING CALIFORNIA LAW FORBIDS DISPENSING MOTOR FUEL AT THE RETAIL LEVEL ON THE BASIS OF ANYTHING OTHER THAN GALLONS DEFINED AS 231 CUBIC INCHES (EXACTLY).

Although California law contains no express prohibition regarding the installation of ATC-equipped motor fuel dispensers, statutes and regulations cited elsewhere in the Study make plain that dispensing motor fuel in any unit other than in gallons of 231 cubic inches (exactly) is forbidden. See Study at 8 (“California law specifies the following: Requires retailers to sell motor fuel by the gallon; requires retailers to advertise prices on a per gallon basis on its dispensers; defines the unit gallon as “231 cubic inches (exactly)””). As the Study observes, among those provisions adopted from Handbook 44 into California law is the following definitions of *gallon* as a measure of liquid volume: “4 quarts = 1 gallon = 231 cubic inches;” and “gallon = 231 cubic inches (exactly).” See Bus. & Prof. Code § 12107; Title 4 C.C.R. §§ 4000:4001 (incorporating Handbook 44, App. C at pp. C-3, C-9 and C-16). Accordingly, California has expressly adopted a definition of *gallon* as a measure of liquid volume *without reference to temperature*.¹ See Cal. Bus. & Prof. Code §§ 12107, 12313; Title 4 C.C.R. § 4001. As the Study further acknowledges, “[i]f there was temperature compensation at retail stations in California, distribution of fuel under warmer temperature conditions *would be adjusted by dispensing*, compared to the volume indicated by the device, *slightly more gasoline or diesel fuel in cubic inches* provided to motorists. Conversely, if the fuel is colder than 60 degrees Fahrenheit (15.6 degrees Celsius), *fewer cubic inches* would be dispensed to motorists.” Report at 8 (emphasis added). Thus, selling motor fuel in units other than in 231 cubic inch gallons would constitute a *per se* violation of existing California law in that consumers would receive more or less than 231 cubic inches (exactly) per gallon depending on the temperature of the fuel.²

¹ Handbook 44 clarifies that “[a] unit is a special quantity in terms of which other quantities are expressed. In general, a unit is fixed by definition and is *independent of such physical conditions as temperature*. Examples: the meter, the liter, the gram, the yard, the pound, the gallon.” Handbook 44, Appendix B (2) (“Units of Systems and Measurement”) (emphasis added).

² Unlike sales at the wholesale level, where existing California law specifically contemplates sales on the basis of temperature adjusted gallons, existing California law requires retail sales to be “indicated and recorded” on the basis of purely volumetric

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By the same token, motor fuel dispensers that dispensed motor fuel in units other than in 231 cubic inch gallons would necessarily be considered "incorrect" under present California law, subjecting retailers who deployed them to misdemeanor criminal liability. Specifically, California Business & Professions Code § 12107 provides, in pertinent part, that the tolerances and specifications and other technical requirements for commercial weighing and measuring instruments shall be as "published in the National Institute of Standards and Technology Handbook 44, except as specifically modified, amended, or rejected by regulation adopted by the director." Furthermore, Business & Professions Code § 12500(d) defines an "incorrect" instrument as one that "fails to meet all of the requirements of [Business & Professions Code] Section 12107." Because a dispenser that dispenses motor fuel in units other than 231 cubic inch gallons fails to dispense "gallons" as defined by § 12107, the dispenser is necessarily deemed "incorrect." Business & Professions Code § 12020 expressly makes it a misdemeanor to use an "incorrect weighing or measuring device" in California.

Further, sales of motor fuel in units other than 231 cubic inch gallons would run afoul of an additional provision of California law: the requirement that a retailer not charge more than the "true extension of a price per unit." When motor fuel is sold in California at temperatures below

gallons. See Handbook 44 § 3.30, S.1.2.1. Automatic temperature adjustment is addressed exclusively in provisions of § 3.30 related to devices used exclusively at the wholesale level. See Handbook 44 §§ 3.3.0; S.2.7; S.2.7.1-4.; S.4.3.2; N.5. These provisions (1) include specifications for wholesale devices equipped with a means of adjusting the volume of motor fuel on a temperature adjusted basis (HB 44 §3.30 S.2.7.1); (2) specify the proper means of determining the temperature of fuel in the dispenser (HB 44 §3.30 S.2.6); (3) dictate the proper standards for sealing a device equipped with a temperature compensating mechanism (HB 44 §3.30 S.2.7.3); (4) set forth the requirement that the primary indicating element, recording elements, and recorded representations clearly are marked to show that the volume delivered has been adjusted to the volume at 15°C (60°F) (HB 44 § 3.30 S.4.3.2); and (5) require adequate disclosures on the invoice (receipt) indicating that the volume delivered has been adjusted to the volume at 15°C (60°F) (HB 44, § 3.30 U.R.3.6).

In direct contrast to these provisions governing wholesale motor fuel dispensers, and in particular contrast to Section 3.30 S.4.3.2 referenced above, Handbook 44, Section 3.30, S.1.2.1, the section pertaining to liquid measuring devices, requires that for retail motor-fuel devices, "[d]eliveries shall be indicated and recorded, if the device is equipped to record in liters or gallons and decimal subdivisions and fractional equivalents thereof." Because Appendix C to Handbook 44 defines a gallon as "231 Cubic inches (exactly)," present California law permits the sealing only of those retail motor fuel dispensers that dispense equal-sized, volumetric gallons, within permitted tolerances.

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60 degrees Fahrenheit, the consumer would be "short-changed."³ Bus. & Prof. Code § 12024.2 provides, in pertinent part, that:

- (a) It is unlawful for any person, at the time of sale of a commodity, to do any of the following:
- (1) Charge an amount greater than the price, or to compute an amount greater than a true extension of a price per unit, that is then advertised, posted, marked, displayed, or quoted for that commodity.
 - (2) Charge an amount greater than the lowest price posted on the commodity itself or on a shelf tag that corresponds to the commodity, notwithstanding any limitation of the time period for which the posted price is in effect.

A retailer who advertises on a price-per-gallon basis, but sells fuel in units other than 231 cubic inch gallons when the temperature is below 60 degrees Fahrenheit, delivers less than 231 cubic inches per unit price, in effect charging more than the advertised price for 231 cubic inches of fuel. Such an action is illegal under Section 12024.2 of the California Business & Professions Code.

III. THE ISSUANCE OF A CTEP CERTIFICATE TO A MOTOR FUEL DISPENSER MANUFACTURER, GILBARCO VEEDER-ROOT COMPANY, IN MAY 2007 DOES NOT LEGALIZE THE INSTALLATION OF A TEMPERATURE COMPENSATING DISPENSERS

In May 2007, the State of California Department of Weights and Measures issued a certificate of approval ("CTEP") to motor fuel dispenser manufacturer, Gilbarco Veeder-Root Company ("Gilbarco"), approving an Encore series retail dispenser having temperature-compensation capability. This recent regulatory action does not alter the fact that dispensing motor fuel in units other than 231 cubic inch gallons remains unlawful in California, barring further statutory changes, as explained in Section II above.

Moreover, the issuance of a CTEP to Gilbarco, standing alone, is also insufficient to render use of ATC functionality on such dispensers permissible under California law for two additional independent reasons.

First, the mere issuance of CTEP is insufficient, standing alone, to effect a change in California law.⁴ California's Administrative Procedures Act, Government Code §11340 *et seq.*,

³ The CEC staff analysis of the Division of Measurement Standards' Temperature Survey clearly shows that fuel is dispensed in California at temperatures below 60 degrees Fahrenheit. See Study, p. 31.

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requires that a regulation be filed with the Secretary of State in order for a change in existing law to become effective. Cal. Gov't Code § 11340.5(a). As of the date of this memorandum, California has not completed this requirement.

Second, as the Study itself observes and as discussed in greater detail below in Section IV of this memorandum, a multitude of regulatory changes will be necessary before temperature compensation functionality can be used in California without causing undue harm to consumers. See Study, Chapter 7 "Related Issues." Specifically, the Study notes that temperature compensation, if recommended for application at retail, should include "regulations that help to ensure that consumers will be provided with information sufficient to alert a motorist to the presence of ATC at the service station." Study at 91. Further, the Study also finds that introducing ATC will require development of "amended regulatory language for labeling fuel dispensers that includes guidance for –Wording of the ATC message – Font Size – Location of the –timing of the requirement (when ATC equipment is activated and Authority to affix the decal." Study at 95. In short, additional regulatory guidance beyond the mere issuance of a CTEP is absolutely necessary before use of ATC functionality on the Gilbarco dispenser can be permitted in California.

IV. EVEN IF NOT EXPRESSLY FORBIDDEN, SELLING MOTOR FUEL ON A TEMPERATURE COMPENSATED BASIS WITHOUT SUFFICIENT REGULATORY OVERSIGHT WOULD CONSTITUTE AN UNFAIR PRACTICE WITHIN THE MEANING OF BUSINESS & PROFESSIONS CODE § 17200 AND IS THUS ILLEGAL

The sale of motor fuel on a temperature compensated basis is forbidden in California on the second independent basis in that many of such sales would likely violate California's consumer protection laws. Specifically, California's Business & Professions Code § 17200, California's Unfair Competition Law, clearly applies to conduct that is not expressly forbidden, but still unfair or fraudulent within the meaning of this statute. See e.g., *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 182-3 (1999)("[a]cts may, if otherwise unfair, be challenged under the unfair competition law even if the Legislature failed to proscribe them in some other provision")(emphasis added). Had retailers engaged in sales on a temperature compensated basis, and in some cases dispensed to consumers less than the 231 cubic inches per gallon advertised, contracted, and paid for, the retailer likely would have violated Section 17200 on the basis that the retailer supplied less motor fuel (measured in volume) than advertised on its price signs.

Moreover, the consumer confusion resulting from the unregulated use of ATC would likely also give rise to an unfairness claim under § 17200, as implicitly acknowledged in the Chapter 6 of Study concerning the permissive use option. As the Study acknowledges, "[t]he

⁴ If the issuance of the CTEP to Gilbarco is the event that made use of ATC dispensers lawful in California, it necessarily follows that use of such dispensers was unlawful at all time prior to May 2007, the date of issuance of the CTEP.

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fact that there are no regulatory guidance standards for labeling of fuel dispensers or large signs could lead to consumer confusion at the initial stages of permissive ATC use at retail stations." Study at 90. Further, "[a]dequate labeling requirements would be necessary to empower consumers with sufficient information so as to make a better informed decision. Permissive ATC without adequate regulatory structure does not ensure that sufficient labeling standards would be adhered to by an ATC fuel retailer." Consumer confusion is the hallmark of a deception claim under Section 17200 of the Business & Professions Code as well as under the California Consumer Legal Remedies Act. *See, e.g., Department of Agriculture v. Tide Oil Co.*, 269 Cal. App. 2d 145 (1969).

Dept of Agriculture v. Tide Oil Co. is especially pertinent on this subject. There, a station operator was enjoined from advertising certain cash discounts that were found to be misleading.⁵ Finding defendant's signs advertising "We give 2 cents Per Gallon Discount Coupons" misleading, the court explained that: "[t]he practices of these defendants in honoring discounts pursuant to these signs are singularly misleading in that they induce a passing motorist to stop, expecting to save 2 cents per gallon of gas purchased. In fact, the evidence adduced at trial showed that a purchaser can save 2 cents per gallon per coupon held but only if they upon subsequent purchases from the same station." 269 Cal. App. 2d 145, 155 (1969). The unregulated advertisement of sales on an ATC basis could be subject to the same criticism insofar as the customers may be induced to stop at the station advertising ATC expecting a discount relative to a station not offering ATC, and either not receiving one at all (because the ATC station might be charging a higher price than the other station if the temperature of the fuel at both stations is considered) or a different discount than he/she expected relative to a station not employing ATC (because the price differential between the two stations might be smaller than the consumer thinks depending on the difference in temperature of the fuel at the two stations). Again, as the Staff acknowledges, the "lack of adequate regulatory structure, consumer protection and potential marketing inequities" leads to the conclusion that unregulated, voluntary use ATC should not be permitted until "DMS develops standards sufficient to address equipment approval, certification testing, compliance enforcement, consumer labeling, and timing provisions for automatic temperature compensation fuel dispensers for retail stations." Study at 90. Concluding that the unregulated use of ATC is legal in California ignores the reality that any attempted use of this technology, in the current legal environment, would expose retailers to legal penalties under California's consumer protection laws — a result the Study implicitly acknowledges would be certain.

V. CONCLUSION

In sum, until California law is changed to allow retailers to dispense fuel in units other than 231 cubic inch gallons, sales of motor fuel on an ATC basis are manifestly prohibited in California. Further, any attempted sale of motor fuel on an ATC basis would almost certainly subject retailers to liability under California's consumer protection laws until regulations

⁵ While the specific statutes at issue in *Tide Oil Co.* have since been repealed, existing Bus. & Prof. Code § 13413 is materially similar.

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regarding labeling and signage absent standards sufficient to address equipment approval, certification testing, compliance enforcement, consumer labeling, and timing provisions for automatic temperature compensation fuel dispensers for retail stations. To conclude that use of ATC-equipped dispensers is "lawful because not prohibited" is both erroneous as a matter of law and fails to acknowledge the significant risk of liability faced by retailers who attempted to deploy this technology in the current regulatory environment. We ask that the Staff revise the Study to accurately reflect California law.

EG/HT: