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March 10, 2009

Via US Mail, Facsimile and E-Mail

Commissioner James D. Boyd
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DOCKET	
07-HFS-1	
DATE	MAR 10 2009
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Commissioner Karen Douglas
California Energy Commission
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RE: Docket Number 07-HFS-1
Fuel Delivery Temperature Study

Dear Commissioners Boyd and Douglas,

Was there political influence on the staff report considering the costs and benefits of fixing the non-transparent sale of hot fuel in California? That question prompts us to request that you delay your March 11 vote on the commission's fuel temperature study until the public is able to examine newly obtained public records and acquire more information. The newly released documents, obtained under our Public Records Act request, show that changes essentially reversing the conclusions of the CEC professional staff and steeply favoring the oil industry, were requested by Commissioner James Boyd and to a lesser extent by Commissioner Karen Douglas. These changes apparently began even before the first "staff" version was published. In all, several months of revision appear to have shifted the fuel temperature study from modestly embracing consumer benefits, including fairness, to embracing the oil industry's rejection of any benefit from automatic temperature compensation of fuel sales. In light of Commissioner Boyd's clear conflicts of interest in this matter, these changes appear skewed and influenced by his ties to the oil industry, including his wife's employment as an oil lobbyist.

Documents requested by Consumer Watchdog and Public Citizen under the state public records act were forwarded to us last night, offering too little time to thoroughly examine 350 pages of e-mails and documents. However, our preliminary

examination shows that:

- E-mails show that Commissioners Boyd and Douglas and/or their appointed representatives met privately in August 2008 with an economist, Robert Topel, who was under the pay of the Western States Petroleum Association. WSPA's members strongly oppose fixing the hot fuel ripoff with gas pumps that compensate for temperature expansion of fuel.
- WSPA is the employer of Commissioner Boyd's spouse, Catherine Reheis-Boyd, who is the chief lobbyist for the WSPA. We stated in a previous letter that this relationship is a clear and financially substantive conflict of interest for Commissioner Boyd, who should have recused himself from this matter.
- (See the letter asking Boyd's recusal at <http://www.oilwatchdog.org/articles/?storyId=24766>)
- The commissioners and some staff accepted Mr. Topel's assertion that gasoline retailers would shift all costs for fixing the hot fuel ripoff to consumers, resulting in "no net benefit". Despite e-mailed queries by Commissioner Douglas and CEC communications director Susanne Garfield, asking whether an independent assessment of Mr. Topel's data and conclusions should be performed, no such assessment is recorded in CEC deliberations. The August 12 meeting and any subsequent contacts with Mr. Topel were not made public. Consumer advocates were not offered a timely opportunity to respond.
- Mr. Topel, though so prominent in the commissioners' early private discussion, is absent from the public record of the commission's meetings until January 12, when a paper sponsored by a different oil industry trade group and also signed by Topel's frequent coauthor, Kevin Murphy, presents the conclusions essentially adopted wholesale in the final draft report. No mention of Mr. Topel's connection to WSPA is in the report.

In addition, the newly released documents show that:

- The commissioners reversed the staff's conclusions on the high value of fairness and transparency in retail sales of fuel, and
- Reversed the staff's conclusion that temperature adjusted sales are already legal in California.

The Nov. 28 version of the staff report, the first one to be published, states what at that time was settled law, accepted by the state's Division of Measurement Standards:

"Permissive (voluntary) use of automatic temperature compensation (ATC) devices at California retail stations is already permitted under California law as it is not specifically prohibited." (Executive summary, page 2)

Yet the Jan. 9, 2008 version of the staff report, the last one published in full previous to the March 11 final meeting of the commission, sows exactly the doubts demanded by fuel marketers, who had hired law firms to argue that ATC is against the law:

That draft states: [I]t is unclear whether the voluntary use of ATC devices is permitted under California law,” (Executive summary, page 2), and

“If the Legislature chooses not to mandate the use of [automatic temperature compensation] at retail, they should clarify if the current intent of existing statutes is to permit or prohibit voluntary ATC at retail outlets for gasoline and diesel fuel.” Primary recommendations, Page3 3- 4, Bullet point 4)

On the matter of fairness and transparency, the commissioners inserted the phrase “the public perception of the value of increased fairness, accuracy and consistency of fuel measurement...”, thus degrading fairness, etc., to a perception, not an actual value. (Primary recommendations, page 3-4, bullet point 2.

An unseen original staff draft from mid-October, as well as the published draft of Nov. 28, stated that there could be monetary as well as fairness and transparency values in requiring automatic temperature compensation at the pump. Yet in the draft report of Jan. 9, the conclusion that there would be “no net benefits”, and some costs to consumers (the argument of Mr. Topel and Mr. Murphy) is accepted as an inevitable result of allowing fairly conducted retail sales of fuel.

Fairness, transparency and consistency are downgraded from key values to “public perception[s]”, that are “highly variable” and of unknown worth.

A staff draft of the key “Primary Recommendations” section, as reflected in an e-mail on changes demanded by the commissioners, discusses the tiny monetary cost to consumers, and the absolute value of fairness and accuracy, even if the oil industry economic arguments are fully accepted:

“Since the annual net costs to society are so low, less than two-tenths of a cent per gallon at most, it is recommended that the State’s Legislature consider the value of increased fairness, accuracy and consistency of fuel measurements when making a final determination regarding mandated use of ATC at California retail stations.” (unpublished draft, Primary Recommendations, page 4)

Changes inserted by the commissioners at an unclear date remove all reference to low costs and insert the “public perception” phrase in describing the value of fairness and transparency..

In an e-mail dated Nov. 26, Commissioner Boyd says of a staff version of the Executive Summary:

“Bad news, the Executive Summary is totally slanted to one conclusion” [i.e. that ATC is desirable and legal] and says “the last bullet question on Page 3 and the response thereto on Page 4 HAVE GOT TO GO. You cannot speak for the consuming public in a way that leaves no other conclusion than go with ATC....”

In response, a CEC staff member Jim Page sends this e-mail back to Commissioner Boyd:

"Edited report attached. Changes discussed this morning are highlighted in yellow on pp. 3,4 and 88-90. We have also eliminated the final conclusion (including similar language in the Abstract), and all references that we could find that characterize costs as 'insignificant', 'extremely small', etc."

The language that was removed has not been released.

Minor changes have been made to the final report to remove the most offensive diminutions of the value of fairness and transparency, for which we thank the staff. However, the conclusions of "no net benefit" from ATC and the invitation to the Legislature to make even voluntary ATC sales illegal remain.

This letter constitutes only the most preliminary examination of the e-mails and other public records provided. We wish to request other documents referenced in e-mails, as well as information on who recommended economist Robert Topel to the commissioners, and why, given his obvious tie to Commissioner Boyd's spouse.

There are many other unanswered questions, including a lack of response from Commissioner Boyd on our request that he recuse himself from deliberations on this report.

We ask that, in addition to delaying the vote, the documents already produced under the public records act request be made available to all stakeholders for examination.

Therefore, despite the late date, we believe the vote must once again be postponed.

Sincerely,

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