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CHARGEPOINT, INC.
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 In re VOLKSWAGEN “CLEAN DIESEL”
13 MARKETING, SALES PRACTICES, AND
PRODUCTS LIABILITY LITIGATION
14

MDL No. 2672

**AMICUS CURIAE BRIEF OF
CHARGEPOINT, INC. WITH RESPECT
TO APPENDIX C OF PROPOSED
PARTIAL CONSENT DECREE**

15 This document relates to:

16 *United States of America, et al. v Volkswagen*
17 *AG, et al.*, Case Number 3:16-cv-00295
18

Hon. Charles R. Breyer
Hearing (Preliminary): October 18, 2016
Time: 8:00 a.m.
Courtroom: 6 – 17th Floor
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CORPORATE DISCLOSURE STATEMENT

No publicly held corporations hold more than 10% of the stock of ChargePoint.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appendix C of the Partial Consent Decree orders the Settling Defendants (as defined in the Partial Consent Decree) to invest, over the next 30 months, \$500 million in the zero-emission vehicle (“ZEV”) infrastructure market—a market that, without this investment, is estimated to be, *at best*, only approximately \$800 million over that same time period. Appendix C requires the Settling Defendants to invest an additional \$1.5 billion over the subsequent seven and a half years. Appendix C provides that, with respect to these expenditures, the Settling Defendants will be “solely responsible for every aspect of selecting the National [ZEV] investments . . . including timing and locations.” Appendix C, at 4. That is, as a remedy for the Settling Defendants’ alleged use of defeat device software that increased automotive emissions, Appendix C empowers the Settling Defendants literally to drown out all other participants in the ZEV infrastructure market through enormous spending, made at its unfettered discretion, that is untethered to the normal constraints and financial metrics by which all other market participants must operate. As is evident from the brief of the United States in support of the Partial Consent Decree, which the United States filed after hours on Friday, September 30, 2016, the United States has not given this issue any material consideration. Rather, the United States has focused almost exclusively on the impact of the proposed Appendix C on the market for zero emission *vehicles*, not the market for ZEV *infrastructure*. The Settling Defendants, of course, are not concerned with either the impact of Appendix C on the other participants in the ZEV infrastructure market or the overall level of competition in that market.

This Court, however, must be concerned with both, as the Court is tasked with ensuring that the proposed Partial Consent Decree serves the public interest and protects the rights of non-parties. Appendix C, while laudable in its apparent goal of increasing ZEV infrastructure, does neither. To the contrary, as currently written, Appendix C threatens to destroy the competitive market for ZEV infrastructure and, as such, harm participants in the ZEV infrastructure market and disserve the public interest. Appendix C should not be approved in its current form. The Court should require

1 the parties to modify Appendix C to address the significant concerns raised herein before granting
2 its approval to this aspect of the Partial Consent Decree.

3 **INTEREST OF AMICUS CURIAE**

4 ChargePoint, Inc. (“ChargePoint”) operates the world’s largest electric vehicle charging
5 network. The company maintains more than 30,000 “Level 2” and “DC fast” charging spots. By
6 charging vehicle batteries more quickly than conventional household outlets, Level 2 and DC fast
7 charging stations allow drivers to reach longer distances without the need for overnight charging.
8 In addition to manufacturing and selling electric vehicle charging stations, ChargePoint also sells
9 various related services, including software as a service applications that permit owners of electric
10 vehicle charging stations to, among other things, decide who charges at those charging stations and
11 determine the price, if any, charged to the driver for a charge. ChargePoint provides services to
12 drivers of electric vehicles. Those services include a mobile application and a network that
13 facilitates access to charging stations wherever electric vehicle owners drive. The company works
14 in close partnership with automakers, including the Settling Defendants.

15 The ChargePoint business model is to engineer, manufacture, and sell the equipment and
16 network services necessary for electric vehicle charging station owners to effectively provide
17 charging services to drivers that visit their properties. In almost every case, ChargePoint sells
18 charging equipment to an independent site host, who becomes the owner and operator of that
19 charging station. ChargePoint also provides free services to drivers through a mobile app, in-
20 vehicle navigation, and online. These services allow drivers to easily find and access the electric
21 vehicle infrastructure provided by station owners, track their charging, and receive important
22 notifications, such as if their charging session is interrupted.

23 ChargePoint is part of a charging industry that is expecting to generate approximately \$800
24 million during 2017, 2018 and the first half of 2019 (30 months). The industry is highly
25 competitive and dynamic with participants competing fiercely to develop new technologies,
26 including faster charging solutions and wireless charging.

27 This brief was authored by counsel for ChargePoint at ChargePoint’s direction.
28

ARGUMENT

1
2 The Partial Consent Decree relates to claims that the Settling Defendants illegally
3 manipulated emissions information on their diesel vehicles. As a remedy, the Partial Consent
4 Decree proposes that the Settling Defendants provide \$2 billion in electric vehicle infrastructure to
5 the public. As a percentage of the market, that amount is so large that the performance by the
6 Settling Defendants of their obligations under Appendix C has the potential to drive out all
7 competition in the burgeoning market for electric vehicle infrastructure. The Settling Defendants'
8 performance will also stifle innovation because companies will be unable to afford to invest in new
9 charging products or services when the dominant player in that market gives away its product for
10 free or below cost.

11 This Court must protect the interests of non-parties to the Consent Decree, such as
12 ChargePoint, as well as the public interest. Accordingly, before any approval of Appendix C, the
13 Court should require changes to it that would address the substantial risk to the ZEV infrastructure
14 market from implementation of Appendix C as presently written.

15 **I. THE CONSENT DECREE, AS PRESENTLY WRITTEN, COULD LEAD THE**
16 **SETTLING DEFENDANTS TO DRIVE OUT COMPETITION AND OBTAIN A**
17 **MONOPOLY**

18 ChargePoint must make rational economic decisions regarding the investments it makes,
19 decisions that are driven by market considerations. Chief among them is the anticipated return on
20 these investments, *i.e.*, how the anticipated revenue associated with any particular investment
21 compares to the cost of that investment. This basic calculus forms an essential part of the business
22 decisions for all well-run businesses, including every participant in the growing ZEV infrastructure
23 market. This calculus also creates a highly competitive marketplace responsive to customer needs
24 and marked by innovation. Appendix C turns this calculus on its head. The Appendix C mandate
25 that the Settling Defendants spend, at their unfettered discretion, at least \$2 billion on ZEV
26 infrastructure essentially frees the Settling Defendants from having to make the same rational
27 economic decisions regarding investments that ChargePoint and every other market participant must
28 make. And, with expenditures as significant as those at issue here, the overall effect on the market
of that asymmetry will be devastating for the other market players and, thus, the market itself.

1 David Adams, the Vice President of Finance at ChargePoint, explains why this is so in the
2 attached declaration. The Settling Defendants, following standard accounting practices, likely will
3 record a loss reserve for the entire amount agreed to in the Partial Consent Decree—\$16 billion.
4 This means that, as the Settling Defendants deploy, operate, and maintain the mandated ZEV
5 infrastructure, the costs will be recorded *against the reserve* rather than *against current operations*.
6 Because the Settling Defendants’ profit and loss statements will reflect this loss only once, this
7 means that there will not be any on-going impact on the Settling Defendants’ profit and loss
8 statements from its expenditure of \$2 billion. That is, any revenue generated from the ZEV
9 infrastructure expenditures *would appear as having no concomitant costs*. See Ex. 1, Declaration
10 of David Adams ¶¶ 9-19.

11 Appendix C frees the Settling Defendants from the normal constraints associated with return
12 on investment. Faced with no other constraints under the terms of the Partial Consent Decree, and
13 faced with concrete funding obligations, the failure of which results in penalties, the Settling
14 Defendants necessarily would undercut current market participants, none of which, of course, can
15 make investments without incurring current costs and each of which rely on ordinary sales to make
16 a profit and stay in business. Indeed, facing no current costs, the Settling Defendants easily could
17 bring into the marketplace large quantities of ZEV infrastructure for free or at below cost. Placing
18 \$2 billion of such products into the current ZEV infrastructure market threatens the very viability of
19 the other participants in that market and of the market itself. If that happens, the Settling
20 Defendants will have monopolized the business of fueling America’s next generation vehicles.

21 ChargePoint’s concerns regarding anticompetitive behavior by the Settling Defendants are
22 not merely theoretical. The United States too had such concerns, for it included provisions in
23 Appendix C to prevent the Settling Defendants from using non-proprietary connectors in the
24 infrastructure it supplies. Appendix C, at 2 & 7. In prohibiting this, the Government recognized
25 that the Settling Defendants might try to engage in anticompetitive behavior by tying its car sales
26 business to the ZEV infrastructure. But “tying” is not the only anticompetitive harm potentially
27 raised by the Partial Consent Decree. Appendix C does nothing to prevent the Settling Defendants’
28 “investment”—really, a donation to potential customers—from crowding out the current market.

1 In other words, the United States took into account anticompetitive behavior as it relates to
2 care sales, but apparently gave no consideration to the market impact of requiring the Settling
3 Defendants to spend \$2 billion on ZEV charging infrastructure. As the United States notes,
4 Appendix C requires that the Settling Defendants consult with “municipalities, states, federally-
5 recognized Indian tribes, and other federal agencies.” What is not required, however, is any sort of
6 consultation with those who understand the operation of the ZEV charging market. Memorandum
7 in Support of Entry of Partial Consent Decree at page 19. Indeed, it seems that the impact of this \$2
8 billion on that competitive market was not even on EPA’s radar. In response to comments stating
9 that the Settling Defendants should be required to structure the \$2 billion in order to protect
10 consumer choice and competitiveness, the United States’ response is so general as to be
11 meaningless, simply asserting, without citation to any supporting information, that [a]lthough the
12 ZEV investment under Appendix C is expected to be a meaningful addition to the current ZEV
13 landscape, other entities are likely to increasingly engage in ZEV investments in the coming years,
14 allowing for continuing competition in these emerging markets.” United States Response to
15 Comments, Exhibit 5, at 12.

16 To the extent any thought was given to the impact on the market, it was given to the ZEV
17 *vehicle* market and not the ZEV *charging* market. “The required ZEV investments are intended to
18 support the burgeoning market in ZEV vehicles by making the necessary technology and
19 infrastructure more available. The Decree explicitly provides that the investments must be neutral
20 among manufacturers and not favor Volkswagen or Audi vehicles over other vehicles.” United
21 States Response to Comments, Exhibit 5, at 7. *See also*, Exhibit 5 at 10 (“Appendix C is intended
22 to credit investments that support the use of ZEVs from all manufacturers, not strictly ZEVs
23 manufactured or sold by Settling Defendant’s.”). That is, the United States clearly understood that
24 Appendix C could give the Settling Defendants a competitive advantage over other vehicle
25 manufacturers. It just gave no thought to the fact that Appendix C could *also* give the Settling
26 Defendants a competitive advantage over all other participants in the ZEV infrastructure market.

27 In fact, the industry players most impacted and undermined by the terms of this Partial
28 Consent Decree have had no real opportunity for input. At best, they have had the opportunity to

1 comment provided by the Clean Air Act, 42 U.S.C. § 7413(g). During notice and comment,
2 ChargePoint objected to the anticompetitive effects of Appendix C, but the Government has not
3 meaningfully responded to these concerns. ChargePoint even offered to meet with the United States
4 in order to explain the economics of the electric vehicle charging industry, and the basis for its
5 concerns, but its offer was declined.

6 It is important to emphasize how widespread the damage caused by Appendix C could be.
7 To analogize, consider the car-buying market and imagine if the Settling Defendants had been
8 required to provide U.S. consumers with free or reduced price automobiles. Other car
9 manufacturers would suffer; they would have no way to profit by producing cars. But the path of
10 destruction would be significantly wider. Independent car dealerships, which sell the cars at retail
11 to the consumer, would collapse. Relatedly, there would be no need for car-buying services that aid
12 consumers in finding the best price or brand of car that best meets their needs.

13 Appendix C, as presently written, creates similar hazards. Part of the danger is that the
14 Settling Defendants will supply the entire anticipated electric vehicle infrastructure market with free
15 or reduced-price goods, thereby crowding out other sources of infrastructure. But as with the car-
16 buying market example, this would create other downstream effects. If the Settling Defendants
17 become the sole source for electric vehicle infrastructure, it will stifle innovation in industries
18 designed to support electric vehicle recharging. ChargePoint, for example, does not just supply the
19 physical infrastructure; it also has a network of providers and designs mobile applications that aid
20 drivers in finding an appropriate charging facility for their car.

21 The twenty-first century may see a rapid shift from the old internal combustion engine to
22 electric vehicles that are more environmentally friendly and more reliable. Today, we would not
23 want a single company supplying gasoline to every station in the country. Likewise, it would not
24 serve the public interest to have a single company defining the products, location or cost of
25 tomorrow's refueling infrastructure.

1 **II. THIS COURT MUST SEEK MODIFICATIONS TO APPENDIX C BECAUSE,**
2 **AS PRESENTLY DRAFTED, APPENDIX C CREATES A REAL RISK OF**
3 **HARM TO THE PUBLIC INTEREST**

4 A district court may approve a consent decree only if it is “satisfied that [the consent decree]
5 is at least fundamentally fair, adequate and reasonable.” *United States v. Oregon*, 913 F.2d 576,
6 580 (9th Cir. 1990). In approving a consent decree, the Court has a special responsibility to protect
7 the public interest and ensure the protection of “those who did *not* participate in the proceedings.”
8 *Id.* at 581.

9 The major difficulty with Appendix C, as presently drafted, is its complete lack of detail.
10 Appendix C provides (at 4) that the Settling Defendants will be “solely responsible for every aspect
11 of selecting the National [ZEV] investments . . . including timing and locations.” This potentially
12 authorizes the Settling Defendants to engage in a wide-range of anticompetitive behavior. The
13 Settling Defendants could produce electric vehicle infrastructure on their own and provide it to
14 customers free or below cost, injuring competition. They could leverage the money spent in the
15 settlement to gain a monopoly on electric vehicle charging and on the provision of ancillary
16 services.

17 A consent decree “is a form of judgment” and thus “must conform to applicable laws.”
18 *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). The anticompetitive potential of the
19 agreement fails to do that. Appendix C requires the Settling Defendants to make about half of their
20 investment in California. Yet, California law seeks to promote competition, customer choice, and
21 innovation in the electric vehicle charging markets. *See* SB 350 (Ch. 547, 2015). The consent
22 decree creates serious tension with California policy by giving the Settling Defendants absolute
23 discretion in how to spend its \$2 billion “investment.”

24 The lack of detail in Appendix C makes it difficult to understand the full impact of the
25 United States requiring the Settling Defendants to enter the electric vehicle charging market.
26 Among the questions left open: Will the Settling Defendants own electric vehicle charging
27 stations? Will they own a charging network? How, if at all, will the Settling Defendants charge site
28 hosts for placing the Settling Defendants’ charging infrastructure in their stations? Appendix C
fails to provide any guidance on these and many similar questions.

1 Requiring the Settling Defendants to spend \$2 billion in electric vehicle infrastructure will
2 undoubtedly change this market significantly, and not necessarily for the better. In light of the
3 Court's responsibility to protect non-parties and the public interest, and ensure that the decree
4 conforms to applicable law, the Court should require the United States and the Settling Defendants
5 to modify the consent decree before approving it. The difficulties with Appendix C can be
6 remedied in several ways.

7 *First*, the Court could appoint a neutral third-party or trustee to determine how the \$2 billion
8 must be spent. The trustee could prevent self-dealing by the Settling Defendants and ensure that
9 ZEV infrastructure is not purchased in a manner that would threaten the current competitive
10 marketplace.

11 *Second*, the funds could be distributed as grants or rebates. A grant or rebate system would
12 facilitate the competitive marketplace because consumers will have the final choice in selecting
13 ZEV infrastructure among a range of providers.

14 *Third*, the Court could require that the Settling Defendants sell ZEV infrastructure at fair
15 market rates. This would prevent the Settling Defendants from unfairly undercutting competitors.
16 And, to the extent that it would be unseemly to permit the Settling Defendants to profit from their
17 previous wrongdoing, the Agreement could require the Settling Defendants to disgorge any profits
18 by ordering the Settling Defendants to reinvest them in other areas of the ZEV infrastructure
19 market.

20 Regardless of the precise method employed, the Court has a special obligation to protect the
21 public interest and, in addition, to protect nonparties from unfair competition. Although Appendix
22 C as presently written laudably attempts to increase ZEV infrastructure, it may inadvertently
23 authorize the Settling Defendants to monopolize this market. Appendix C should be amended to
24 avoid this possibility.¹

25 ¹ In addition to the reasons given in the text, there is a separate basis for additional scrutiny of
26 Appendix C. In its enthusiasm to have more ZEV infrastructure, the United States has improperly
27 used its Clean Air Act injunctive relief authority. *First*, the statute, as well as the Court's equitable
28 authority, requires a nexus between what is ordered and the harm that was done. Here, EPA admits
that it is *Appendix D* that "fully remediates" the excess NoX emissions that form the basis for EPA's
claim. Memorandum for Entry of Partial Consent Decree at 18. *Second*, the United States justifies
Appendix C on the grounds that it is the remedy for "Settling Defendants' deceptive marketing of

(Footnote Cont'd on Following Page)

1 **CONCLUSION**

2 The United States and the Settling Defendants have reached a settlement that potentially
 3 threatens the viability of the electric vehicle infrastructure market. To settle claims that it illegally
 4 altered emissions data on its diesel automobiles, the Settling Defendants are agreeing to provide \$2
 5 billion in electric vehicle infrastructure throughout the United States. But allowing the Settling
 6 Defendants to flood a competitive market with \$2 billion in goods threatens the survival of the
 7 current participants in that market, and thus the market itself. To survive and innovate, these
 8 companies depend on their ability to sell electric vehicle infrastructure at a profit. Nor can they
 9 afford to sustain \$2 billion in lost sales by the entry of a competitor that can make such investments
 10 untethered to normal market constrains. If the Settling Defendants are allowed to enter into the
 11 market in this way, within ten years it is very likely that the Settling Defendants will be the only
 12 entities in the electric vehicle charging marketplace. Accordingly, the Court should require the
 13 United States and the Settling Defendants to modify Appendix C of the proposed Partial Consent
 14 Decree as described above.

15 Dated: October 11, 2016

ARNOLD & PORTER LLP

16
 17 By: /s/ Douglas A. Winthrop
 Douglas A. Winthrop
 Kelly A. Welchans

18
 19 Attorneys for Amicus Curiae
 CHARGEPOINT, INC.

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 23 _____
 (Footnote Cont'd From Previous Page)

24 the subject vehicles as “green.” *Id.* at 20. While the United States casts Appendix C as remedying
 25 “a broader environmental injury,” the injury it points to is not environmental injury at all; it is
 26 consumer injury. That is, there is no nexus between the underlying violation and the Clean Air Act
 27 injury. . . .” *Id.* at 10, 22. *Third*, when EPA includes Supplemental Environmental Projects
 28 (“SEPS”) as part of the penalty, it must go through a process to ensure that the SEP is appropriate.
 See 2015 Update to the 1998 U.S. EPA Supplemental Environmental Projects Policy, March 2015.
 While this proposal is not technically an SEP, it is one in spirit, and that same scrutiny should be
 applied to the merits of Appendix C, including, in this case, an economic analysis by a qualified
 economist.

EXHIBIT 1

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8 UNITED STATES DISTRICT COURT
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12 In re VOLKSWAGEN “CLEAN DIESEL”
MARKETING, SALES PRACTICES, AND
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14

MDL No. 2672

DECLARATION OF DAVID ADAMS

15 This document relates to:

16 *United States of America, et al. v Volkswagen*
17 *AG, et al.*, Case Number 3:16-cv-00295
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1 I, David Adams, declare as follows:

2 1. I am over 18 years of age. I am the Vice President of Finance at ChargePoint Inc.
3 and have personal knowledge of the facts stated herein. If called upon, I could and would testify
4 competently to them. I started my career at the public accounting firm of PriceWaterhouseCoopers
5 and have worked in various finance roles for more than 20 years. I make this declaration on behalf
6 of ChargePoint in support of ChargePoints's Amicus Curiae Brief in the above-captioned matter.

7 2. I have reviewed Appendix C of the Partial Consent Decree, as well as the comments
8 made by EPA to the Court filed on September 30, 2016. I am knowledgeable about the EV charging
9 marketplace. I have very serious concerns about the impact of Appendix C on competition in the
10 EV marketplace. In spending the \$2 billion, VW will not be subject to the same constraints as every
11 other business that decides to invest in building out EV infrastructure. If that is the case, then VW
12 will be able to use these funds to undercut every other market competitor. If VW is allowed to enter
13 the EV charging market without being subject to the normal financial constraints of a company
14 seeking to enter into a new line of business, in 10 years they will control the EV infrastructure
15 network.

16 **ChargePoint**

17 3. Founded in 2007, ChargePoint designs, develops and deploys Level 2 and DC Fast
18 Charging electric vehicle charging stations, software applications and data analytics aimed at
19 creating successful, scalable, and grid-friendly EV service equipment (EVSE). Our innovative and
20 intelligent software platform, known as the ChargePoint network, forms the foundation of this
21 EVSE infrastructure.

22 4. The ChargePoint business model is to engineer, manufacture, and sell the equipment
23 and network services necessary for EV charging station owners to effectively provide charging
24 services to drivers that visit their properties. In almost every case, ChargePoint does not own the
25 hardware. ChargePoint sells charging equipment to a site host. The site host is free to set the price
26 for customers that use the charging station. ChargePoint also provides services to drivers, free of
27 charge, which allow them to easily find and access the EV infrastructure provided by station owners
28 through a mobile app, in-vehicle navigation and on our website.

1 5. ChargePoint is committed to the goal of providing customers with a choice of
2 charging station hardware from multiple manufacturers. Through the ChargePoint OnRamp
3 Program, ChargePoint provides engineering and technical resources to other manufacturers and
4 certifies their EVSE to be compatible with ChargePoint. To date, we have engaged over 12
5 manufacturers in this program.

6 6. ChargePoint has 244,000 EV drivers on the ChargePoint network, including more
7 than 125,000 registered users in California. Since our first station was deployed, more than 18.6
8 million charging sessions have occurred. ChargePoint has more than 6,000 station owners as
9 customers. Our customers are workplaces, governments, hotels, colleges and universities, hospitals,
10 utilities, parking garages, airports, multifamily housing, auto dealerships and other businesses.

11 **The EV Infrastructure Market**

12 7. The estimated total market for US charging hardware plus installation is
13 approximately \$800 million during 2017, 2018 and the first half of 2019 (30 months).

14 8. From ChargePoint’s perspective, Appendix C would allow VW to threaten and
15 disrupt competitive markets. From the perspective of a market participant that is working every day
16 to offer state-of-the-art equipment and services to meet customer needs and preferences, having VW
17 swamp the market with a \$2 billion spend on EV charging--without any of the discipline that
18 profitability dictates--would ultimately be extremely harmful to market growth, diversification, and
19 innovation, which is driven by customer choice.

20 **Appendix C**

21 9. ChargePoint welcomes more investment in the EV business. We also welcome new
22 competition if it is fair and on a level playing field. However, we are gravely concerned that
23 Appendix C jeopardizes the future of existing competitors and the competitive market; that it will
24 lead to less consumer choice; and that it will stifle innovation in the industry.

25 10. Appendix C is unclear about how VW will spend the \$2 billion, and therefore our
26 evaluation of the proposal necessarily requires some speculation on how VW will proceed. The
27 Partial Consent Decree states that how VW spends the money is “solely” in their discretion. Since
28 VW is required to spend the \$2 billion, it does not have to make a profit on selling EV infrastructure

1 and could give them away for free. The existing competitors cannot compete with free
2 infrastructure.

3 11. Appendix C allows VW to create a short-term business model that is not good for the
4 market or for EV customers. By flooding the market with cheap products, or by picking a single
5 existing competitor to supply a massive amount of equipment, VW could drive out all competition
6 and innovation over the ten-year period.

7 12. One reason VW could drive out other competitors relates to its accounting for the \$2
8 billion payout. While I cannot be certain how VW will do its accounting, typically a company
9 would record a loss reserve for the entire amount agreed to in the Partial Consent Decree -- \$16
10 billion -- with the result that the Company's Profit and Loss statements will reflect its loss only
11 once, before any infrastructure is deployed. Investors will recognize the amount, put it behind them
12 and focus on "normal" operations. As the EV infrastructure is deployed, operated and maintained,
13 costs will be recorded against the reserve rather than against current operations with the result that
14 no costs related to the EV charging investment would appear on the company's Profit and Loss
15 statements. Any revenue generated from the EV infrastructure would, however, appear as revenue.
16 This allows VW to have 10 years of revenue generation with no cost.

17 13. An entity not required by a Consent Decree to spend \$2 billion who wants to roll
18 out a similar investment could not compete with VW. In normal operations, the costs of the
19 infrastructure would be capitalized, and depreciated over the 10 years, and both the operating costs
20 and revenue would be recorded in the periods incurred.

21 14. As an example, assume that the cost of EV infrastructure hardware and installation
22 was \$1.5 billion, the cost of the operating the equipment for 10 years was \$500 million, and the
23 infrastructure generated \$700 million of revenue over the 10 years.

24 15. Over the 10 years of the program, VW would record the \$700 million of revenue
25 with no cost, so net income of \$700 million (because the cost was all recorded as a lump sum before
26 the program rolled out). The other entity would record \$700 million of revenue, but \$2 billion of
27 costs, resulting in a net loss over the same period of \$1.3 billion.

28 16. This means that VW can undercut the existing competition because it will not have

