



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

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Application of Pacific Gas and Electric Company  
(U 39 M) for Approval of Modifications to its  
Smart Meter Program and Increased Revenue  
Requirements to Recover the Costs of the  
Modifications.

Application 11-03-014  
(Filed March 24, 2011)

**MOTION BY Alameda County Residents Concerned About Smart Meters  
TO DISMISS PG&E'S PROPOSAL FOR AN OPT-OUT OPTION (A.11-03-014)  
AND HALT THE SMARTMETER PROGRAM PENDING RENOVATED LEGITIMACY**

This motion submitted by

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ACRCASM consents to e-mail service of documents.

Dated September 20, 2011

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**1. Introduction**

Pursuant to Rule 11.1 and 11.2 of the California Public Utilities Commission's Rules of Practice and Procedure, Alameda County Residents Concerned About Smart Meters (ACRCASM) respectfully move that the Commission dismiss Pacific Gas and Electricity's application (A1103014) for an opt-out option to its Smartmeter and Automated Metering Infrastructure (AMI) program as having no legitimacy or credibility because the underlying project for installing AMI technology throughout California has lost its legitimacy. The original authorization (D.06-07-027 (2006), and (D.09-03-026 (2009)) has lost legitimacy because it has shown itself to constitute an overstepping of authority on the part of the Public Utilities Commission (PUC), and because, under it, the PUC has shown itself unable to hold Pacific Gas and Electricity (PG&E) and the other electric utilities within the bounds of California law. We therefore move that the original authorization for the AMI program be withdrawn until it can be re-established in a way that will conform both with law and with the well-being of the people of this state.

In making this motion, we address both issues through PG&E's proposal for an opt out option (A1103014), but since the legitimacy of that opt out proposal hinges on the continued legitimacy of the underlying authorization for the AMI project, we must call for the dismissal of both. In addressing PG&E's proposal, we shall be addressing all three utilities, namely Pacific Gas and Electric (PG&E), San Diego Gas and Electric (SDGE, and Southern California Edison (SCE), the latter two following suit behind PG&E's lead.

In particular, all three electric utilities, in advancing a concept of opting out of the AMI and Smartmeter program as it is at present constituted, have shown themselves to have falsely

assumed that they have a mandate to install AMI technology universally, which they do not. To the extent the PUC participated in created this false assumption, the PUC overstepped its authority. Insofar as the PUC has allowed this Smartmeter program to continue even in the face of complaints and evidence of injuries and harms to some utility customers at the program's hands, and growing evidence of adverse effects on some people's health and well-being, it has been derelict in its duty, and has thus permitted the entire Smartmeter program to devolve to an unconstitutional violation of essential property protections in this state.

## **2. Discussion**

PG&E proposed an opt-out option to its Smartmeter program (A1103014) in March, 2011. To address this proposal, two Pre-Hearing Conferences and a workshop have been called by the PUC. The workshop, which occurred on Sept. 14, 2011 ("9/14 workshop"), was to consider the feasibility and reasonableness of the opt-out proposal. Given certain egregious inconsistencies in the statements of the utility representatives, to the point of hypocrisy and a propensity toward criminality, a motion to put an stop to the AMI project as soon as possible is wholly in order.

At the 9/14 workshop, the representatives of each utility claimed that they supported choice on the part of the customer to opt-out of the Smartmeter program. Two aspects of both the workshop and the utilities' behavior would suggest that this expression in support of choice on the part of these representatives of the utilities was quite hypocritical. The first is that these utilities (at least PG&E and SCE) have established "delay" lists, which are lists of customers who wish to delay the installation of a Smartmeter until the last possible moment. These delay lists have dedicated phone numbers (for PG&E, that number is 877-743-7378; for SCE, it is 800-810-2369), implying that certain resources have been committed to handle the traffic expected, and suggesting that these delay lists represent policy decisions on the part of each utility. The second is the policy logic of the proposal for an opt-out option in the first place.

### **3.1 The "delay" list**

Contained in the concept of a "delay" list is the intention to eventually install. If customers enter their names on this list, it does not constitute a choice not to receive a Smartmeter. It simply means that the Smartmeter will be installed later. In other words, the implication of the utility having a "delay" list for the installation of a Smartmeter is that installation is inevitable, as a matter of policy. This is furthermore the import of PG&E's desire to charge

money for any or all opt-out possibilities (whether that be "radio-off," or reinstallation of an analog meter, or just leaving the original meter in place). All customers who might choose to opt out will be subject, through additional charges, to a fiduciary pressure to accept a Smartmeter. This does not spank of choice. For the utilities to claim that they favor customer "choice" is simply bad faith. Their respective "delay" lists imply that they consider eventual installation to be universal.

### **3.2 The meaning of an "opt-out" option**

An "opt-out" option, which for PG&E means "radio-off," was the fundamental issue of the 9/14 workshop. But the logic of the concept of opting out is that there is something to which each customer is being enlisted as a matter of course, for which a special dispensation for refusal is to be developed. The central concept of the issue of opting out is that refusal is to be considered a special case. To consider refusal of the program a special case within the program means unequivocally that universal implementation is the basic assumption of the program. But for the utilities to make such an assumption is tantamount to their considering the program to be mandatory. Indeed, it is only within that assumption of mandatory installation that an opt-out option, whose character is to be an exception to the general rule, has any meaning.

But if the assumption is that installation will eventually be universal, because it is mandatory, then customers really do not have a choice. And the fact that the PUC had originally asked PG&E to present a proposal for an opt out option signifies that up until that time (March 2011), the utilities had considered their Smartmeter and AMI project to be absolutely mandatory.

### **3.3 The illegitimacy of any AMI mandate**

But this points to the real problem concerning Smartmeter installation. The utilities have no authority to proclaim, to imply, or to assume that Smartmeter installation is or can be mandatory. The installation of Smartmeters cannot be mandatory because there has been no legislation, either at the federal or the state level, providing for it. And there is nothing in the PUC's enabling legislation that gives it the authority to render AMI installation mandatory..

The PUC bases its decision to "authorize" the AMI program, as well as to supersede all individual and community rejection of that program, on the Public Utility Code. In particular, the PUC turns to section 701 of that code to ground its assumption that it can make the program mandatory. Section 701 of the Public Utility Code states that "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." That "exercise of such power and jurisdiction" for which the Commission may "do all things," however, refers only to the supervision and regulation of the utilities. That is, it pertains only to the relation between the PUC and the utilities. It does not extend to the relation between the utilities and the people, except insofar as the PUC can regulate the rates the utility can charge its customers. Beyond that, the relation between the utilities and the people can only be regulated by legislation enacted within the context of rights and protections granted the people by the state constitution.

The two salient facts concerning this are, to review, that there has been no legislation making the AMI project mandatory in California, and the PUC does not have the power or authority to legislate for the people. This latter juridical fact is the force of the case of *Koponen vs. PG&E*, decided in the 1<sup>st</sup> Circuit Court, in 2008. Thus, the PUC does not have the power or authority to make AMI installation mandatory for the people of California, because that be an incursion into the legislative domain from which the PUC is barred (by *Koponen*).

Even SB 17 (2009), which amended the Public Utilities Code, only provides for a "smart grid deployment plan" whose focus would be to "improve overall efficiency, reliability, and cost-effectiveness of electrical system." But that law only authorizes the formation of a "plan." Referring throughout to the utilities only, while authorizing them to formulate a plan for offering the new technology, it says nothing about the imposition of new technologies on people who do not want it. Indeed, the bill is careful to assure that any practical application of such a plan will always be "in a manner that does not compromise customer or worker safety."

In sum, if the PUC does not have the authority to make the Smartmeter program mandatory, but only to authorize the PUC to install Smartmeters within the purview of the law and property protections established by the state constitution, then the utilities cannot legitimately suggest that the program is mandatory. If that is the case, then there is no basis for an opt out option. In that sense, PG&E's proposal, as well as the conferences and workshop that have addressed it, have been wholly without foundation. The people of California already have the ability to refuse a Smartmeter as a right, since its installation cannot be mandatory.

PG&E's proposal for an opt-out option, on the very face of it, because it is based upon a false assumption, and is promulgated illegitimately under false authority, with which the PUC is complicit, therefore constitutes a gross malfeasance. The utilities' glib proclamation affirming customer "choice" actually adds insult to the social injury of this malfeasance.

This implies that the underlying AMI project, having been promulgated in practice with malfeasance and under false assumption, must be seen as illegitimate insofar as it overstepped the original authorization given it in 2006. But in addition, under the false assumptions of that original authorization, the AMI project has also stepped beyond the bounds of the law. If it is without legitimacy altogether, it must be stopped immediately. We so move.

### **3.4 The project's unconstitutionality, and PG&E's easement**

There are two aspects to the AMI project's transgression of the law. The first is the fact that PG&E has overstepped its easement. And the second is that its claim to be mandatory has led it to violate property protections granted by the state constitution. (We are still following the logic of what it means that the utilities and the PUC think that an opt out option is a valid concept.)

The PUC's initial request that PG&E propose an opt out option hinges on the fact that there have been thousands of cases of people made ill by the microwave radiation of these Smartmeters, and by the Smartmeter's production of low frequency magnetic pulses resulting from disruption of the line current in the installed residence. The PUC has allowed this Smartmeter program to continue even in the face of complaints and the evidence thus presented of injuries and harms to utility customers. The spread of general knowledge throughout the population of adverse effects on some people's health and well-being means that all are potentially threatened in some fashion by the Smartmeter program. It is for this reason that the state constitution's guarantee of protection of property against such threats to health and safety (contained in Article 1, Section 1) has become relevant and exigent. In the face of these complaints, and this knowledge, the Smartmeter program becomes unconstitutional to the extent that any installation occurs without the express consent and permission of the property owner.

In other words, all Smartmeters installed without the express permission of the residents and property owners are illegitimately imposed.

On the question of the utilities' easement, there has been a wholesale violation of property rights because installation without customer consent represents an illegitimate extension of that easement. PG&E's easement is limited to reading and maintaining its equipment. PG&E's Electric Tariff Rule 16.A.11 enumerates PG&E's rights under its easement, which include "meter reading, inspection, testing, routine repairs, replacement, maintenance, emergency work, etc." It does not include installing communications technology, which is not

involved in "furnishing electric service." That this technology is not part of the process of furnishing electric service is evinced by the fact that electric service can proceed quite well without it.

Though the PUC claims that the installation of communications technology in AMI meters is simply an upgrade, this is fallacious both on the face of it, since communications technology is more than an upgrade of existing technology, and on the fact that it has had adverse effects on people's health, safety, and well-being. For the PUC to think that it can change the utilities' easement to include communications technology is to move into the legislative realm, from which it is barred. Thus, in authorizing the installation of communications technology as if it were simply an upgrade of existing metering, the PUC has overstepped its authority. It does not have the power or the right to revise the utilities' easement.

In sum, because of constitutional protections that become germane as soon as the Smartmeter becomes implicated in a threat to health and safety, every Smartmeter installed without the express consent of the customer is in violation of the law. And because the PUC has no authority to extend the utilities' easement beyond what is covered by maintenance, every Smartmeter installed without the express consent of the customer is prima facie evidence of trespass.

Insofar as the AMI program stands in violation of the constitution and of California law, it has no legitimacy, and must be stopped. And all this is implied directly in the fact that the PUC and the utilities have proposed an opt-out option.

### **3.5 The criminal tendencies of PG&E**

These malfeasances do not, of course, exhaust the criminal tendencies to which the utilities have shown themselves attracted.

The very terms of the utilities' opt-out proposals contain criminal intent. They are extortionary on the face of it. The concrete reason we are discussing an opt-out proposal is the fact that thousands of people have been made ill, have had their lives and style of life disrupted by these Smartmeters. Now, the utilities are offering to not install or not activate the microwave emission function if they can charge the customer more money for that privilege. In other words, they are saying to customers, "we will install something on your house that is potentially injurious to your health and safety, and if you don't want us to do that, you must pay us money." This is a form of "protection racket." In its very terms, it is a procedure that fits the legal definition of extortion.

In the hypocrisy disclosed by the representatives of the utilities, and in their flaunting of the law and of constitutional property protections, these utility corporations have revealed themselves to be unworthy to function in a public capacity with any high level of responsibility. In them, the public trust has been seriously misplaced. And nothing indicates the irresponsibility of such a corporation as PG&E's response to the San Bruno explosion in 2010, in which 8 people were killed and a whole neighborhood wrecked. PG&E spent \$50 million that same year to try to pass Proposition 16 in the 2010 June election, a proposition that would only have fed their greed by tacitly granting them monopoly status (by making it more difficult for communities to opt for public power). This is money that should have been put into maintenance, to correct weaknesses in the gas delivery structure that, it has been revealed in federal hearings, were weaknesses that PG&E knew about. Hence, the deaths in San Bruno amount to negligent manslaughter, which is a felony. Yet, in the face of federal investigations, PG&E tries to claim that the explosion was not its fault.

### **3.6 A note on costs**

Finally, we should say a word about costs. Part of the proposal for an opt out option that PG&E has offered is that the customer bear the costs of the Smartmeters, their installation, and then of subsequent opting out. And the utilities have described costs that they have already born in implementing the project that the PUC authorized in 2006 and 2009. However, in beginning the implementation of the AMI program within their own corporate infrastructure, they did so without any consultation or discussion with their eventual customers. This is important.

It is a mark of the utter corruption of these corporations, as already evinced in their hypocrisy and their malfeasance, that they wish to charge their customers for opting out, and even for leaving the original analog meter in place (as they have stated in the 9/14 workshop). When the parties in protest against PG&E's proposal submitted, in the 9/14 workshop, that those who opt out, and keep their original meter, should pay nothing for that privilege, the utilities then suggested that they would have to spread the cost of that opting out among all the customers who did not opt out. That is, if they did not charge the customer who opted out for that "privilege," they would have to charge all the other customers their increase in costs. In other words, the customers who did not opt out would pay the additional costs incurred by those who do.

This is so unreasonable as to fly in the face of the most fundamental principles of commerce and trade, namely, that no purchasers be required to pay for something they do not

receive, and that no purchasers be required to buy something they do not want (this principle is even recognized in the "implied consent" concept that requires auto insurance for drivers). The fact that the utilities could shamelessly propose such a thing in the workshop is astounding.

But the PUC did not expressly authorize the utilities to act as if legislatively mandated, when they weren't, nor did it instruct the utilities to violate the constitution, nor did it overtly declare that the utilities could overstep their easement and their public responsibility. The abrogation of responsibility that can be laid at the door of the PUC is that it did not stop the project when any of these malfeasances became evident. Therefore, the injuries and harms done to the people of this state, the violation of constitutional protections, and the overstepping of legality by the utilities rests on the management of those corporations.

For this reason, it is wholly unreasonable that any costs be levied on the customers for the AMI program. Instead, it should be the shareholders of the corporations that bear those costs, since it is the management that they have invested in that is responsible for whatever losses the corporation might incur in promulgating an illegitimate project, or in promulgating an ostensibly legitimate project illegitimately. When an enterprise produces a product that is faulty or illegal, it is not the customers of that business who must pay the cost for its faultiness, but the company producing it. It is the investors who have gambled on the management of the corporations in which they have invested. It is they who have taken the risks. And there is nothing in the ethic of investing in enterprise that has ever claimed to guarantee any return on investment (except in the verbiage of confidence men).

In sum, because the onus of any losses due to the crimes, malfeasances, and usurpations of authority by the corporations lie wholly on the shoulders of their management, the costs of all this, rather than be born by the people who have been victimized by these malfeasances, should be born by the shareholders of the corporations.

#### **4. Conclusion**

Given their behavior over the last two years, leading up to their egregious behavior in the 9/14 workshop, the utilities have shown themselves guilty of violation of the constitution, trespass, usurpation of authority, violation of the Public Utility Code of California, a threat of extortion, hypocrisy, and violation of the fundamental principles of commerce and trade. Thus, they have betrayed the trust of the people and the state of California, of their investors and of their regulators.

To the extent that the utilities have shown themselves to be hypocritical, to engage in criminal endeavor, and to exceed legitimate legislated bounds, they cannot be allowed to continue in this harmful and injurious project.

We therefore move that PG&E's opt out proposal, A1103014, be dismissed as illegitimate, and that the PUC immediately order a cessation of the entire AMI project until regulations and protections of the people and of property can be defined and enacted that will not produce the injuries and harms attendant upon the present Smartmeter program. If any program is promulgated according to the desires of the legislature (as expressed in SB 17 (2009)) to offer a more efficient and energy saving system of electricity delivery to the people, it must be combined with sufficient oversight by the state to guarantee that this situation of malfeasance and betrayal of the public trust not happen again.

In accord with this sentiment, we therefore also move that the PUC schedule hearings on the health effects of these Smartmeters, to get it on the record – not what is predicted by science and regulations but what have been the real affects to people on the ground. These should also be combined with hearings on the nature and extent of the utilities' many malfeasances and usurpations of authority in order to legislate to protect the people against any recurrence, and hearings on the extent of the damage that has been done to people in this state by this program, with respect to the costs and compensations that are due the people as a result of the utilities' malfeasances.

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Dated September 20, 2011, at Berkeley, California.

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## VERIFICATION

I, Steve Martinot, represent Alameda County Residents Concerned About Smartmeters, and am authorized as its Recording Secretary to make this verification on the organization's behalf. I declare under penalty of perjury that the statements in the foregoing document are true and correct to the best of my knowledge and belief.

Dated September 20, 2011, at Berkeley, California.

/s/ Steve Martinot  
Steve Martinot