

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



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Petition to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code Section 1708.5, to Establish a Minimum Level of Competence for any and all Digital Information Systems and all components used in SmartGrid

Petition 10-07-015
(Filed July 15, 2010)

**RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M) AND
SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) TO THE PETITION
FOR RULEMAKING OF CERTICHRON INC.**

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August 16, 2010

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**I.
INTRODUCTION**

In accordance with Rule 6.3 of the California Public Utility Commission’s (“Commission” or “CPUC”) Rules of Practice and Procedure, San Diego Gas & Electric Company (“SDG&E”) and Southern California Gas Company (“SoCalGas”) respond to the Certichron Inc. (“Certichron”) Petition for Rulemaking to adopt, amend, or repeal a regulation pursuant to California Public Utilities Code Section 1708.5 (Petition), filed on July 15, 2010. The Petition requests that the Commission initiate a rulemaking to examine whether certain evidence precedents established by the Superior Court of California, County of Orange, for their jurisdiction, should be applied to SmartGrid.

**II.
RESPONSE**

SDG&E and SoCalGas respond that the Petition should be denied. In its Petition, Certichron specifically requests that the Commission, “in its Rulemaking Operations, formally establish requirements for any Data Processing or SmartGrid AMR/AMI systems to meet the “Trustworthiness requirements” for the digital content records they

produce and store which was set in the applicable Digital Evidence precedent established by the Superior Court in re California v Klahed,¹ a ruling, a ruling [sic] fully affirmed by the California Appellate Court and published as California State Precedent therein”.² [emphasis added]. Certichron contends that the Commission’s compliance with “both State and Federal evidence standards are required”.³

The Petition is a thinly-veiled attempt to rewrite the California Public Utilities Code, Section 1701(a). In light of Certichron’s underlying request to impose state and federal standards for court admissibility of evidence,⁴ this matter raises a threshold issue that the Commission needs to resolve before it decides whether to grant the petition. If the Commission lacks the authority, under current law, to grant the relief requested, a rulemaking on this topic would serve no purpose.

SDG&E and SoCalGas submit that Certichron misconstrues *Khaled*,⁵ and a petitioner should not be able to do an end run around the statute by causing confusion at the Commission, the Petition should be seen for what it is – a self-serving attempt to delay and forestall the deployment of SmartGrid – and be dismissed out of hand. Certichron acknowledges that their primary intent is to force all SmartGrid systems offline until providers document compliance with the State's minimum evidence standard.⁶ Furthermore, the non-binding case *People v. Klahed*⁷ cited in the Petition is a

¹ Orange County Superior Court, Appellate Division in *People v. Khaled*, 30-2009-00304893 (Orange Super. Ct., Ap. Div., filed May 29, 2009).

² Certichron Petition p. 3.

³ Certichron Petition p. 7.

⁴ *Id.*

⁵ *People v. Khaled*, 30-2009-00304893 (Orange Super. Ct., Ap. Div., filed May 29, 2009).

⁶ Certichron e-mail entitled *FYI - courtesy notice on docketing of Petition for establishment of Evidence Standards for SmartGrid in concert with Appellate mandate*, dated July 15, 2010.

⁷ *People of the State of California v. Tarek Khaled*, Superior Court, County of Orange, Appellate Division, Case No. 30-2009-00304893.

distinguishable and unpersuasive case because the Court’s Decision fails to support the specific premise for which it is cited by Certichron, of establishing minimum digital evidence standards for “any and all devices producing evidence that may entered into a court...”.⁸ The *Klahed* Ruling merely “applies existing rules governing the admissibility of evidence to the specific context of citations issued through an automated enforcement system”.⁹ Moreover, the Appellate Division’s decision in *Klahed*¹⁰ suffers from various flaws, such as it fails to mention, much less address, key statutes and cases that most courts rely upon when adjudicating the admissibility of computer generated or electronic data and time/date stamped information.¹¹ Additionally, *Klahed*’s¹² interpretation of the confrontation clause contravenes the Fourth District Court of Appeal’s opinion in *People v. Chikosi*.¹³

Furthermore, in *Vos v. Pacific Gas*, D.97-01-043 (1997), the Commission previously considered the question of whether or not an action of a civil court is binding upon this Commission.¹⁴ In *Vos*¹⁵, the Commission held that “a superior court cannot circumvent or impede the Commission in the exercise of its constitutional jurisdiction over public utilities.”¹⁶ Applying *Vos*¹⁷ to the instant matter, the Commission clearly has

⁸ Certichron Commentary on Khaled Ruling and its Scope in re Regulated Utilities, p. 2.

⁹ Superior Court of California, County of Orange, *People v. Khaled*, Appeal Case No. 30-2009-00304893, Trial Court Case Number SA128676PE, Minute Order, dated May 25, 2010.

¹⁰ *People of the State of California v. Tarek Khaled*, Superior Court, County of Orange, Appellate Division, Case No. 30-2009-00304893.

¹¹ See California Evidence Code Sections 1552 and 1553; see also *People v. Lugashi* (1988) 205 CalApp3d 632, 641-644; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746; and *People v. Bowley* (1963) 59 Cal2d 855, 860.

¹² *Id.*

¹³ G041014 (Cal.App.4th, May 6, 2010), [2010 WL 1804679].

¹⁴ See Decision No. 97-01-043, Case No. 95-09-030 (Filed September 5, 1995), p.2 at *4; see also *Hickey v. Roby*, 273 Cal. App.2d 752, 764 (1969); and *Perotta v. Jones*, 6 CPUC 2d 701 (1981).

¹⁵ Decision No. 97-01-043.

¹⁶ *Id.* at *5; see also *Ventura County Waterworks Dist. No. 12 v. Susana Knolls Mut. Water Co.*, 7 Cal. App. 3d 672 (1970).

¹⁷ Decision No. 97-01-043.

jurisdiction over both SmartGrid and the application of Section 1701(a) to evidentiary questions.¹⁸ Likewise, Certichron’s assertions raise no legitimate issue or reasonable challenge to the subject matter jurisdiction of the Commission over SmartGrid systems. Accordingly, SDG&E and SoCalGas oppose Certichron’ petition to the extent it seeks an impermissible rulemaking.

In addition, Certichron’s Petition does not comply with Rule 6.3(b) because it does not include “specific proposed wording for that regulation”, or provide objectively verifiable factual assertions to set forth specific facts which, if proven, would warrant a Rulemaking.¹⁹ Furthermore, the Commission should not entertain a petition for rulemaking where, as here, the issue raised in the Petition pertains directly to an active, open and pending matter before the Commission.²⁰ Thus, SDG&E and SoCalGas further recommend that the Commission deny Certichron’s Petition with prejudice.

III. STATUTORY SCOPE AND PROCEDURE APPLICABLE TO A PETITION TO OPEN A RULEMAKING UNDER SECTION 1708.5

Public Utilities Code section 1708.5 permits “interested persons to petition the Commission to adopt, amend, or repeal a regulation.”²¹ As a preliminary matter, it is unclear that the relief sought by the petition is within the scope of this statute. The petition is not really asking the Commission to adopt, repeal, or amend a regulation. It is in fact asking the Commission to formally adopt the state and federal technical rules of evidence and to specifically defer to the Superior Court’s jurisdiction under the doctrine

¹⁸ See e.g., D.86-12-101, 23 CPUC 2d 352 (1986), in which the Commission engages in a long discussion about how the CPUC has the statutory right under CPUC 1701 to follow the rules of evidence informally, so long as it preserves the substantial rights of parties, and the Commission’s refusal to adopt a special evidentiary rule concerning hearsay, specially the rule of reliability.

¹⁹ Unless stated otherwise, citations are to the Commission’s Rules of Practice and Procedure.

²⁰ Rule 6.2(f).

²¹ California Public Utilities Code Section 1708.5(a).

of *stare decisis* in establishing requirements for electronic data processing.²²

Furthermore, like any case, *Khaled* only applies to the limited facts, testimony and violation at issue in that specific trial.²³ In addition there is some question whether rulings from the Superior Court Appellate Division can create legal precedent.²⁴

Wherever practicable, the Commission may review evidentiary rulings in determining the matter on its merits, but if the Commission concludes that it is precluded by law from issuing a ruling that this precedent creates binding evidence standards, the petition must be denied, with a statement of reasons for the denial, with citation to the relevant provisions of law.²⁵

IV. THRESHOLD ISSUE OF WHETHER THE COMMISSION HAS THE AUTHORITY TO GRANT THE REQUESTED RELIEF

The Commission should first address the threshold question of whether it has the authority to grant or deny the specific relief requested. It is not necessary or appropriate to open a rulemaking in order to answer the preliminary question of the Commission's jurisdictional limits or regulatory authority. The issue is one of statutory interpretation that can be analyzed independent of any SmartGrid digital information requirements and policy issues.

The petition identifies a number of complex digital information, records and documentation issues from a technology sense that the Commission would need to address if a rulemaking is opened. But there is also another important threshold statutory

²² Certichron Petition p. 3.

²³ See *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 962 (“the language of an opinion must be construed with reference to the facts of the case, and the positive authority of a decision goes no further than those facts”).

²⁴ See *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 744, 779 (“although decisions of the appellate department have persuasive value, they are of debatable strength as precedents”).

²⁵ California Public Utilities Code, Section 1708.5(d).

issue that is not specifically identified by the petition that the Commission would need to consider. Certichron argues that it is appropriate that the state and federal evidence requirements “transit into the California PUC everyday operations and Operating Utility Code’s as well”.²⁶ As provided in California Public Utilities Code, Section 1701(a), the Legislature has stated that the Commission need not apply the technical rules of evidence, nor will any informality over matters within its jurisdiction invalidate any order, decision or rule made, approved, or confirmed by the Commission. Accordingly, SDG&E and SoCalGas note it would represent a waste of this Commission’s scarce resources to conduct a proceeding to consider any issue that only the Legislature can change. However these important threshold issues are factual questions that the Commission can readily resolve without assistance from parties.

**V.
THE PETITION IS PROCEDURALLY AND SUBSTANTIVELY DEFICIENT**

Certichron’s filing is procedurally and substantively deficient. Rule 6.3 requires the following:

(Rule 6.3) Petition for Rulemaking

(b) Form and Content. A petition must concisely state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation. ... [emphasis added].

The Petition requests a Rulemaking pursuant to Rule 6.3 to formally establish requirements for digital records created or collected by SmartGrid systems.²⁷ Specifically, Certichron “formally petitions the CPUC to issue specific guidance that “All

²⁶ Certichron Petition p. 5.

²⁷ Certichron Petition p. 3.

SmartGrid” component systems and infrastructure components (as well as existing operating SCADA systems) must meet the California State Evidence Standards... , and operators must produce ongoing evidence of their operation which meets the California State and Federal Rules of evidence and precedents...”.²⁸ Since Certichron proposes adoption or amendment of a regulation, the Petition must include specific proposed wording for that regulation. All that is provided in the Petition amounts to nothing more than a vague suggestion that the Commission add requirements to Rules 3.1 and 3.3 to adopt the “basic California Evidence Standards for Digital Content Capture and Management”, and that any SmartGrid system “is compliant to all existing California Evidence Requirements”.²⁹ Because of this deficiency, the Petition must be rejected.

Additionally, Rule 6.3 requires the following:

(Rule 6.3) Petition for Rulemaking

(b) ... “A petition that contains factual assertions must be verified. Unverified factual assertions will be given only the weight of argument.” ... [emphasis added].

Certichron’s Petition contains no factual assertions which support adoption or amendment of a regulation. The only real verifiable assertion in the Petition is that the *Khaled* ruling provides the minimal requirements for generating “Trustworthy Evidence”.³⁰ Otherwise, SDG&E and SoCalGas view the vast majority of assertions in the Petition as speculative and lacking or containing false, misleading and deceptive information. This is a wholly inadequate basis on which to initiate a Rulemaking.

²⁸ *Id.*, at p. 18.

²⁹ Certichron Petition p. 16.

³⁰ *Id.*, SDG&E and SoCalGas adamantly disagree with Certichron’s misinterpretation of the *Khaled* ruling and assertions made pertaining to the application of evidence standards.

**VI.
CONCLUSION**

For the reasons set forth herein, the Commission should decline to open the rulemaking requested and dismiss the Petition with prejudice.

Dated in San Diego, California, this 16th day of August, 2010.

Respectfully submitted,

By: /s/ Allen K. Trial
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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of the foregoing **RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M) AND SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) TO THE PETITION FOR RULEMAKING OF CERTICHRON INC.** on each party named in the official service list for proceeding **P.10-07-015** by electronic service, and by U.S. Mail to those parties who have not provided an electronic address.

Executed this 16th day of August 2010 at San Diego, California.

/s/ Jenny Norin
Jenny Norin



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