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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of EMF Safety Network for Modification of D.06-07-027 and D.09-03-026	Application 10-04-018 (Filed April 6, 2010)

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 M) IN OPPOSITION TO APPLICATION OF EMF SAFETY NETWORK FOR REHEARING OF DECISION 10-12-001

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RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 M)
IN OPPOSITION TO APPLICATION OF EMF SAFETY NETWORK
FOR REHEARING OF DECISION 10-12-001

I. INTRODUCTION

Pursuant to Rule 16.1(d) of the Commission's Rules of Practice and Procedure, Pacific Gas and Electric Company responds to the "Application of EMF Safety Network for Rehearing of Decision 10-12-001" ("Rehearing Application" or "Reh'g App.") filed on January 5, 2011.

In its Rehearing Application, EMF Safety Network ("Network" or "Applicant") alleges that Decision 10-12-001 contains nine legal, technical and factual errors:

1. "The Commission Has a Responsibility to Ensure and Protect Public Safety" (Reh'g App., p. 4)
2. "The Commission Wrongly Defers to the FCC" (*id.*, p. 5)
3. "The Commission Has Previously Investigated EMF and RF Health Impacts" (*id.*, p. 6)
4. "The Commission Has a Mandate to Reduce EMF" (*id.,* p. 8)
5. "Smart Meters Violate FCC Safety Regulations" (*id.,* p. 8)
6. "The Commission Decision to Mandate Smart Meters Violates State and Local Laws" (*id.,* p. 9)
7. "[I]f the Commission accepts PG&E's position that Smart Meters are mobile services facilities, then…the Commission's General Order 168, which includes a Consumer Bill of Rights, should apply to Smart Meters" (*id.*, pp. 10-11)
8. "[S]everal of General Order 159A goals remain unaddressed by the Commission's decision to dismiss Network's application, including compliance with the California Environmental Quality Act (CEQA)" (*id.*, p. 12)
9. "Considering the serious and growing community concern over Smart Meter problems…Network believes the Commission has a civic obligation to investigate this issue in a public proceeding" (*id.*, p. 12).

As explained in detail below, PG&E agrees that the Commission has responsibility to ensure and protect public safety. In Decision 10-12-001, the Commission affirmatively met this responsibility by weighing the evidence – including an uncontroverted PG&E Declaration signed under penalty of perjury stating that all SmartMeter™ devices are regulated by the Federal Communications Commission (FCC) and that radio frequency (RF) exposure from such SmartMeter™ devices is 1/6000th of the safety limits set by the FCC – and determining that there was no evidence "that would warrant either modifying D.06-07-027 and D.09-03-026 or reopening this proceeding to investigate the health impacts of emissions from Smart Meters." (D.10-12-001, p. 7.) Contrary to Applicant's allegations, the Commission was not "deferring its utility regulation duties" (Reh'g App., p. 1); rather, the Commission was meeting its public health and safety responsibilities by recognizing the FCC's comprehensive regulation of RF and acknowledging the uncontested evidence that PG&E's SmartMeter™ devices are in compliance with such regulations. Applicant's other claims of error are similarly without merit and should be rejected.

II. THE COMMISSION PROPERLY EXERCISED ITS AUTHORITY OVER PUBLIC HEALTH AND SAFETY IN REJECTING APPLICANT'S REQUEST FOR MODIFICATION.

PG&E agrees with Applicant that the Commission has both the authority and responsibility to ensure the public health and safety associated with utility facilities. (Reh'g App., p. 4.) Applicant errs, however, in arguing that the "Commission commits legal error by deferring its responsibility for the deployment of SmartMeters to the FCC." (*Id.,* p. 5.) To the contrary, the Commission exercised its authority over public health and safety associated with PG&E's SmartMeter™ devices by considering the facts presented to it – including the FCC's

comprehensive regulation of RF energy and PG&E's compliance with such regulations – and determined that there was no evidence to support Applicant's request for modification.

A. The Commission's Decision Is Supported By The Findings And Substantial Evidence In Light Of The Whole Record.

In its Application for Modification leading up to Decision 10-12-001, Network asked the Commission to re-open its review of PG&E's SmartMeter™ program; require PG&E to submit an independently prepared RF Emissions Study; schedule evidentiary hearings on RF health, environmental, and safety impacts; and impose an immediate moratorium on PG&E installation of new SmartMeter™ devices, as well as other requested relief. (Network Application for Modification, p. 2.) In denying Applicant's requests, the Commission carefully considered the evidence presented to it. Specifically, the Commission considered the uncontroverted Declaration of PG&E's Manager of SmartMeter™ Engineering, Daniel Partridge, who stated the following facts, among others, under penalty of perjury:

1. "Smart Meters are 'regulated by the FCC and certified under CFR Title 47'" (D.10-12-001, p. 7);
2. "'[e]xposure to radio frequency energy from SmartMeters™ is considerably less than the exposure from other radio devices in widespread use'" (*id.*, citing PG&E Declaration at 2); and
3. "'exposure at 10 feet is 1/six thousandth of safety limits set by the FCC'" (*id.*, citing PG&E Declaration at 4).

As the Commission stated in rejecting the Application for Modification, Applicant "did not dispute these facts." (D.10-12-001, p. 7.)

As the Commission also stated, "it is…reasonable to expect that Network as the moving party provide support for reversing the Commission's prior decision by either offering new

evidentiary testimony or by providing evidence through a declaration or affidavit. Network did neither." (D.10-12-001, pp. 13-14, emphasis added.) Not only did Network fail to provide any evidence to support its contentions, it even failed to dispute the facts presented by PG&E, as noted above. In light of this overwhelming evidence, the Commission reasonably found:

> Neither DRA or EMF Safety Network have provided allegations of new or changed facts supported by an appropriate declaration, affidavit, or the proposed testimony of an expert witness that would warrant either modifying D.06-07-027 and D.09-03-026 or reopening this proceeding to investigate the health impacts of emissions from Smart Meters.

(D.10-12-001, p. 14, Finding of Fact 4, emphasis added.) Thus, the Commission's decision is supported by the findings and by substantial evidence in light of the whole record. (Pub. Util. Code §1757(a) (3) & (4).)

B. The Commission Reasonably Relied On The FCC's Comprehensive Regulation Of RF Energy And PG&E's Compliance Therewith.

Applicant argues that the Commission failed to meet its responsibility to ensure the public health and safety associated with utility facilities because it inappropriately deferred to the FCC's expertise. (Reh'g App., p. 5.) As explained in PG&E's Motion for Immediate Dismissal (at pp. 1, 9-13), because the FCC comprehensively regulates RF energy, the Commission is pre-empted from the field, as the Commission itself has previously acknowledged. (*See* D.06-04-070, quoted in PG&E's Motion for Immediate Dismissal, pp. 12-13.) Recognition of such pre-emption does not mean that the Commission has failed to meet its responsibility over public health and safety, however. To the contrary, the Commission thoroughly reviewed the evidence that the parties submitted and made a thoughtful determination concerning health and safety based on the facts and science before it. Specifically, in addition to PG&E's sworn statements that SmartMeter™ devices are in compliance with FCC regulations, PG&E also provided a letter from the FCC's Chief of Engineering and Technology affirming that the FCC

"has taken a very conservative approach to RF exposure" and that "conditions for compliance are required to be met before a Grant can be issued." (FCC Letter, appended to PG&E's Reply to Network's and DRA's Comments on PD.) In contrast, Network failed to provide any evidence to support its own arguments or to rebut PG&E's showing.

In addition, as the California Supreme Court stated in *San Diego Gas & Electric Co. v. Superior Court ex rel. Covalt*:

> The commission, however has never claimed either the sole authority or the sole expertise to decide whether electric and magnetic fields cause adverse "health effects." Its constitutional and statutory powers to ensure that the service and facilities of regulated utilities pose no unreasonable danger to the public…do not bar it from enlisting the assistance of other state agencies (or private contractors) in carrying out its responsibilities.

(*SDG&E v. Superior Court (Covalt),* 13 Cal. 4th 893 (1996) at 946.) Consistent with this precedent, in Decision 10-12-001, the Commission appropriately deferred to the FCC on the issue of permissible RF exposure levels and PG&E's compliance with the FCC's RF standards. The Commission's reliance on the FCC in this regard is proper and reasonable given that the FCC "possesses extensive expertise on its staff for evaluating and licensing or certifying Smart Meter devices…." (D.10-12-001, p. 9.) As the Commission noted: "The FCC's standards are developed and updated from time to time with independent professional sources, such as the United States Environmental Protection Agency and World Health Organization." (*Id.*) It was entirely appropriate for the Commission to elect not to "delve into technical matters which fall within the expertise of another agency, in this case, the FCC." (*Id.*)

Thus, the Commission acted fully within the scope of its powers and jurisdiction, and in the manner required by law, by denying Applicant's request for modification. (Pub. Util. Code §1757(a)(1)&(2).) The fact that Network does not agree with the Commission's decision and

could not provide evidence to support its position does not justify its request for rehearing or its legal attacks on the Commission's process.

III. WHILE IT HAS PREVIOUSLY CONSIDERED EMF AND RF HEALTH IMPACTS, THE COMMISSION IS UNDER NO OBLIGATION TO RE-OPEN THE SMARTMETER™ PROCEEDING TO INVESTIGATE POTENTIAL RF EXPOSURE.

PG&E agrees with Applicant that the Commission has previously considered EMF and RF health impacts (Reh'g App., p. 6). Contrary to Applicant's suggestion, however, the Commission is under no obligation to re-open the SmartMeter™ proceeding to investigate potential EMF or RF exposure.

First, it should be noted that Applicant's request for modification pertains solely to RF exposure. (*See* D.10-12-001, pp. 3-4, listing the "Issues before the Commission in this Application.") Network is therefore barred from arguing that the Commission erred in Decision 10-12-001 by refusing to consider EMF or by failing to reduce EMF – issues that were not even raised in Applicant's request for modification.

Second, a review of the decisions cited by Network makes clear that, while some members of the public have raised concerns about EMF, the Commission has consistently been "unable to determine whether there is a significant scientifically verifiable relationship between EMF exposure and negative health consequences" (D.06-01-042, 2006 Cal. PUC LEXIS 41, at *2). Similarly, the Commission Advisory and Compliance Division (CACD) recognized the "absence of scientific evidence" about RF exposure and recommended that "it would be prudent for the Commission not to adopt any standard until the FCC has determined its course of action" (D.95-11-017, 1995 Cal. PUC LEXIS 842, at *27-28). As explained in PG&E's Motion for Immediate Dismissal (at p. 6), one year after the CACD's recommendation, the FCC required all wireless communications devices in the United States to meet minimum guidelines for safe

human exposure to RF, thereby occupying the field of RF regulation. Thus, the cases cited by Applicant undermine, rather than support, its arguments in opposition to Decision 10-12-001, and confirm that the Commission acted in the manner required by law by denying Applicant's request for modification. (Pub. Util. Code §1757(a)(2).)

IV. APPLICANT HAS FAILED TO PROVIDE SUBSTANTIAL EVIDENCE THAT PG&E'S SMARTMETER™ DEVICES VIOLATE FCC SAFETY REGULATIONS.

As noted in Decision 10-12-001, Applicant utterly failed to provide "allegations of new or changed facts supported by an appropriate declaration, affidavit, or the proposed testimony of any expert witness that would warrant either modifying D.06-07-027 and D.09-03-026 or reopening this proceeding to investigate the health impacts of emissions from Smart Meters." (D.10-12-001, p. 14, Finding of Fact 4.) In its application for rehearing, however, Applicant presents for the first time two declarations to support its claims that SmartMeter™ technology violates FCC safety regulations. (Reh'g App., pp. 8-9.)

First, as a matter of Commission procedure and fundamental due process, it is inappropriate for Applicant to submit evidence for the first time in its application for rehearing. Pursuant to Commission Rule 16.1: "Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously." It would violate fundamental due process for a party to be able to buttress its evidentiary showing on rehearing and argue that the Commission committed legal error by failing to consider such evidence in the underlying decision – which is exactly what

Applicant seeks to do here.[1] The Commission should therefore disregard the two declarations appended to the application for rehearing.

Second, even if the Commission were to accept all of the statements in the two declarations as true, the Commission could – and should – reasonably determine that the evidence does not justify granting the relief requested. Specifically, the Declaration of Sandra Maurer is replete with statements about Ms. Maurer's "beliefs," "doubts," and "suggestions," but fails to contain any substantiated evidence to demonstrate that PG&E's SmartMeter™ devices violate the FCC's standards for RF emissions. In addition, aside from being "founder of the EMF Safety Network," Ms. Maurer provides no credentials to demonstrate why the Commission should place any credence in her beliefs, doubts, and suggestions.

Similarly, the Declaration of Cynthia Sage claims that "FCC compliance violations are likely to occur" and the "Smart Meters can produce excessively elevated RF exposures" (Sage Declaration, p. 2, emphases added), but fails to back up such claims with substantial evidence. More disturbingly, Ms. Sage argues that "no positive assertion of safety can be made by the FCC, nor relied upon by the CPUC, with respect to pulsed RF when exposures are chronic and occur in the general population." (Sage Declaration, p. 3.) Thus, Ms. Sage effectively asks the Commission to second-guess the FCC and assert jurisdiction over RF regulation – an outcome that is prohibited by federal pre-emption.

In contrast to these two procedurally deficient and substantively unreliable declarations, PG&E has produced both the Declaration of Daniel Partridge, which describes in detail the FCC regulations specifically applicable to SmartMeter™ technology and the manner in which the FCC ensures compliance with such regulations, as well as the letter from the FCC's Chief of

[1] Rule 16.4(b), cited by Applicant (Reh'g App., p. 13) to support its introduction of new facts through the two declarations, pertains to petitions for modification and not applications for rehearing.

Engineering and Technology dated August 6, 2010, which affirms the statements contained in Mr. Partridge's declaration. Notably, the FCC letter was addressed to Ms. Sage herself, who raised the same concerns about RF exposure associated with PG&E's SmartMeter™ technology that she is now re-raising in her Declaration. In light of this evidence as a whole, the Commission can, and should, conclusively determine that there is no reasonable basis to grant Applicant's request.[2]

V. THE COMMISSION'S DECISIONS DO NOT VIOLATE STATE OR LOCAL LAWS OR THE COMMISSION'S GENERAL ORDERS.

Applicant argues that "mandatory installation of radiation-emitting SmartMeters violates basic rights granted by the State of California, overburdens utility easements and violates local laws." (Reh'g App., p. 9.) Applicant specifically cites to Article 1, Declaration of Rights, Sections 1 and 4; a City of Sebastopol wireless facility ordinance; and CPUC General Orders 168 (Consumer Bill of Rights) and 159A (Mobile Service Facilities Rules) as support for its request for rehearing. (Reh'g App., pp. 9-12.) These arguments are without merit and should be dismissed as frivolous.

First, PG&E is aware of no decisional authority that supports Applicant's suggestion that the installation of equipment that emits RF constitutes either (1) a violation of the constitutional right to property, life, liberty, or (2) unlawful discrimination based on beliefs and rights to practice prudent avoidance of EMF. Under such a theory, citizens would have a cause of action

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[2] To the extent the Commission is inclined to consider new facts, PG&E asks the Commission to take official notice of the California Council on Science and Technology's (CCST) draft report, issued on January 11, 2011, and prepared at the request of Assembly Member Jared Huffman (Marin) and Assembly Member Bill Monning (Santa Cruz). The draft report confirms the statements in Mr. Partridge's Declaration and specifically finds: "Wireless smart meters, when installed and properly maintained, result in much smaller levels of radio frequency (RF) exposure than many existing common household electronic devices" and "The current FCC standard provides an adequate factor of safety against *known thermally* induced health impacts of existing common household electronic devices and smart meters." *See* Draft Report, "Health Impacts of Radio Frequency From Smart Meters" at http://www.ccst.us/publications/2011/2011smartA.pdf.

whenever an entity provides Wi-Fi service, installs microwave ovens or cordless telephones, operates cellular telephones or Bluetooth receivers, or engages in numerous other activities that emit RF energy. Applicant has provided no rational basis for the Commission to reach this unprecedented conclusion. Thus, the Commission did not abuse its discretion or violate any right of Applicant under the state or federal Constitutions by refusing to grant Applicant's requested relief. (Pub. Util. Code §1757(a)(5)&(6).)

Second, Applicant errs in asserting that the installation of SmartMeter™ devices and associated infrastructure exceeds the scope of the rights granted under franchise agreements to use public streets. (Reh'g App., p. 9.) Under PG&E's Tariff Rule 16, the normal meter location is on the customer's property, not within public streets. To the extent any SmartMeter™ devices or associated infrastructure are placed within public streets, the rights conferred under franchise agreements granted under the Franchise Act of 1937 (Pub. Util. Code §6200 *et seq*.) encompass a broad range of utility facilities that are used "for the purpose of transmitting and distributing" gas and electricity. (*See* Pub. Util. Code §6265.) The SmartMeter™ equipment is an integral part of PG&E's distribution system. There is therefore no merit to the unsupported claim that the use of SmartMeter™ equipment overburdens the rights granted under franchise agreements. Moreover, Applicant does not have standing to make the claim against PG&E. Rather, such claim would have to be raised by the aggrieved franchise grantor – an event that has not occurred in this instance.

Third, Applicant also errs in claiming that PG&E's SmartMeter™ system violates local ordinances governing the operation of wireless equipment. (Reh'g App., p. 9.) Such ordinances typically require discretionary use permits from local planning departments. However, all decisions relating to the technology, safety, environmental, construction and siting of the

SmartMeter™ equipment are matters that fall within the exclusive jurisdiction of the Commission. Any discretionary permit requirement for the operation of SmartMeter™ equipment would impermissibly intrude on the Commission's authority and is therefore preempted.

Fourth, PG&E did not "impl[y] that Smart Meters are personal wireless service facilities," such that they should be subject to the Commission's regulations for mobile service facilities. (Reh'g App., p. 10.) To the contrary, the Declaration of Daniel Partridge explicitly states: "All SmartMeter technology radios are regulated by the FCC and certified under CFR Title 47. Part 15 of this regulation applies to electric meters and Part 90 applies to gas meters." (Partridge Declaration, p. 4, emphases added.) Thus, PG&E made clear that its SmartMeter™ devices are electric and gas metering equipment, not mobile telecommunications service facilities. Even assuming, *arguendo,* that PG&E implied its SmartMeter™ devices are personal wireless service facilities, PG&E cannot create jurisdiction where there is none as a matter of law. Therefore, Applicant's suggestion that PG&E should be subject to the Commission's General Orders 168 and 159A, which are solely applicable to telecommunications providers, is unsupported and should be rejected.

VI. THE COMMISSION HAS NO OBLIGATION TO RE-OPEN THE SMARTMETER™ PROCEEDING TO CONSIDER THE ISSUES RAISED BY NETWORK.

Applicant claims that the Commission "has received complaints from thousands of individual ratepayers and tens of city and county jurisdictions" and therefore "has a civic obligation to investigate this issue [of RF emissions associated with SmartMeter™ technology] in a public proceeding." (Reh'g App., p. 12.) PG&E strongly disagrees.

As Applicant correctly notes, the Commission has a responsibility to ensure that public utilities "furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities…as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." (Pub. Util. Code §451, quoted in Reh'g App., p. 4.) In exercising this authority, the Commission determined that "Smart Meters will play an important role in implementing key energy policies adopted by California law, including those directed at using renewable technologies, promoting conservation, and reducing greenhouse gases." (D.10-12-001, p. 9.)

In the underlying SmartMeter™ proceeding, the Commission engaged in deliberate and oftentimes contentious litigation about the merits of SmartMeter™ technology. The Commission considered arguments raised by the intervenor parties about the costs and benefits of SmartMeter™ technology, and resolved those issues based on countless pages of written testimony and pleadings. Neither Applicant nor any other party raised concerns about RF emissions.

When Network filed its Application for Modification of the SmartMeter™ decisions, the Commission carefully considered the evidence provided by PG&E and Network. As described in Section II above, based on PG&E's evidence supporting the FCC's comprehensive regulation of RF emissions and its compliance with such regulations – evidence that was undisputed by Network – the Commission reasonably denied Applicant's request for modification. In light of this procedural history, Applicant has no basis to claim that the Commission has a "civic duty" to engage in further litigation and deliberation.

VII. CONCLUSION

Wherefore, for the above-stated reasons, PG&E respectfully requests that the Commission deny rehearing of Decision 10-12-001, which is supported by substantial evidence of the FCC's comprehensive regulation of RF emissions and PG&E's compliance with such regulations.

Respectfully Submitted,

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CERTIFICATE OF SERVICE BY U.S. MAIL OR ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department, PO Box 7442, San Francisco, CA 94120.

On the **20th day of January, 2011**, I caused to be served true copies of:

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 M) IN OPPOSITION TO APPLICATION OF EMF SAFETY NETWORK FOR REHEARING OF DECISION 10-12-001

on the official service list for **A.10-04-018** by electronic mail for those who have provided an e-mail address and by U.S. mail for those who have not.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the **20th day of January, 2011**.

/s/

Rene A. Thomas

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CPUC DOCKET NO. A1004018

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