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Application of Pacific Gas and Electric Company for approval of Modifications to its SmartMeter™ Program and Increased Revenue Requirements to Recover the Costs of the Modifications (U39M).
And Related Matters.

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

Application 11-03-015
Application 11-07-020

RESPONSE OF SOUTHERN CALIFORNIANS FOR WIRED SOLUTIONS TO SMART METERS (“SCWSSM”) SUPPORTING EMF SAFETY NETWORK’S (“NETWORK”) MOTION TO ACCEPT DECLARATIONS.

**I.
INTRODUCTION**

Pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure, SCWSSM submits this response supporting the “Motion to Accept the Declarations attached to NETWORK’S Opening brief submitted on July 24, 2012.

NETWORK submitted an Opening brief in response to the June 8th 2012 “Assigned Commissioner’s Ruling Amending Scope of Proceeding to Add a Second Phase”. The ALJ requested that the Declarations be removed as not part of the record. NETWORK brought a Motion to have the Declarations of customers’ disabilities and medical conditions included in the record.

SCWSSM mistakenly sent an e-mail response, to support this motion on July 25, 2012, to all parties, when it should have been a formal written filed response. The content of that July 25th, 2012 e-mail is set forth below in footnote 1.

¹NETWORK'S declarations are relevant to questions 1 & 2 at pages 5&6 of the Commissioner's Amended Ruling. In the Amended Ruling, the Commission inquired as to whether its authority to authorize opt out fees was limited by the ADA and/or California Public Utilities Code (CPUC) Section 453(b). To answer this question it is necessary to determine whether customers' disabilities and medical conditions come under the ADA definition of qualified person with disability ('qualified disabled customer') or the California definition of medical condition. ('Medical conditions customers'). It also requires whether "modifications to practice, policies and procedures

¹ Dear ALJ Yip-Kikugawa,

SCWSSM would like to go on record as supporting EMF Safety Network's Motion To Accept the Declarations as Part of its Opening Brief. It appears that The Commission's Rule of Procedure 13.8 may apply here.* Thank you for your consideration.

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*13.8. (Rule 13.8) Prepared Testimony.

(a) Prepared testimony may be identified and accepted in evidence as an exhibit in lieu of oral testimony under direct examination, provided that copies shall have been served upon all parties prior to hearing and pursuant to the schedule adopted in the proceeding. Prepared testimony shall constitute the entirety of the witness's direct testimony, and shall include any exhibits to be offered in support of the testimony and, in the case of an expert witness, a statement of the witness's qualifications.

(d) Prepared testimony may be offered into evidence by written motion in a proceeding in which it is preliminarily determined that a hearing is not needed and (1) the proceeding was initiated by application, complaint, or order instituting investigation, and no timely protest, answer, or response is filed, or (2) the proceeding was initiated by Commission order, and no timely request for hearing is filed. The prepared testimony shall not be filed with the motion, but shall be concurrently served on all parties. The serving party shall serve two copies of the exhibits on the Administrative Law Judge or, if none is yet assigned, on the Chief Administrative Law Judge. The motion shall include a declaration under penalty of perjury by the person preparing or in charge of preparing the prepared testimony as being true and correct, unless the person preparing them is dead or has been declared incompetent,

should be made to accommodate ‘qualified disabled customers ‘and ‘customers with medical conditions’

**II.
RULE OF PROCEDURE 13.8 ALLOWS SUBMISSION OF EVIDENCE BY
DECLARATION IN THIS INSTANCE.**

NETWORK offered into evidence by written motion, declarations of customers with disabilities and medical conditions who come under the ADA definition or California definition found at Government code section 12926. The question is whether these customers are discriminated against because of the fees levied by the Commission. The Commission determined no hearing was needed, and that this, and other issue would be determined solely by briefing. This briefing was initiated by Commission order and no timely request for hearings has been filed.

Rule 13.8 states at part (d)

“Prepared testimony may be offered into evidence by written motion in a proceeding in which it is preliminarily determined that a hearing is not needed and (1) the proceeding was initiated by application, complaint, or order instituting investigation, and no timely protest, answer, or response is filed, or (2) the proceeding was initiated by Commission order, and no timely request for hearing is filed.”

The declarations offered in the present case are directly allowable under Rule of Procedure 13.8 and therefore these declarations offered by NETWORK should be accepted into evidence.

**III.
IT IS ABUSE OF DISCRETION FOR THE COMMISSION TO MAKE A
RULING WITHOUT TAKING KEY EVIDENCE REGARDING
CUSTOMERS’ DISABILITIES AND MEDICAL CONDITIONS**

Whether the Commission’s authority is limited, turns on whether the customers’ disabilities and medical conditions are covered under the ADA and CPUC 453(b). Therefore without the Commission taking evidence as to what disabilities and medical conditions are alleged, the Commission has no evidence on which to make a ruling.

The term judicial discretion implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decisions." ' (*In re Cortez* (1971) [6 Cal.3d 78](#), 85-86 [98 Cal.Rptr. 307, 490 P.2d 819]; see also *In re Marriage of Martin* (1991) [229 Cal.App.3d 1196](#), 1200 [280 Cal.Rptr. 565].) 'The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason.' (*Shamblin v. Brattain* (1988) 44 Cal.3d474, 478 [243 Cal.Rptr. 902, 749 P.2d 339]; *In re Stephanie M.* (1994) [7 Cal.4th 295](#), 318-319 [27 Cal.Rptr.2d 595, 867 P.2d 706].) " (*Estate of Gilkison* (1998) [65 Cal.App.4th 1443](#), 1448-1449.)

To make a decision regarding basic rights of the disabled without taking evidence as to the disabilities and medical conditions that are the subject of that ruling is abuse of discretion. Directly relevant to the issues in front of the Commission, are the declarations submitted by NETWORK, addressing the disabilities and medical conditions experienced by utility customers in relationship to the smart meter and its mesh network emissions.

The Commission CANNOT make a ruling regarding whether its powers are limited in levying fees on utility customers' with disabilities and covered medical conditions pursuant to the ADA and CPUC section 453(b)², without evidence of what disabilities and medical conditions are being alleged to be the subject of discrimination. To do so is arbitrary capricious and not within the bounds of reason.

The declarations, submitted by NETWORK with its Opening Brief, are the only direct evidence submitted as to what disabilities and medical conditions the Commission is being asked to consider, as discriminated against, thus limiting its authority, pursuant to the ADA and CPUC section 453(b).

² Govt. Code sections 11135 and 12926 delineating disability and medical conditions are incorporated into CPUC 453(b)

It would be an abuse of discretion to make a ruling with no evidence regarding the key elements of evidence required to make the ruling, in this case medical conditions and disabilities suffered by customers.

For this Commission to fail to hold evidentiary hearings or to allow declarations as to customers disabilities, and medical conditions, when the issue is limited to written briefing, would be an abuse of discretion and reversible error because the Commission would be making life and death determinations about a class of customers lives, without any competent evidence on which to base such decision.

IV.

CONCLUSION

SCWSSM submits that making a decision that is determinative of a group of disabled customers' rights without any evidence taken on key issues relating to the underlying issue of disability and medical conditions is arbitrary, capricious and whimsical thinking outside the bounds of reason. There is no other conclusion but, to allow these declarations or hold evidentiary hearings. .

There is no direct evidence in the record without NETWORK'S DECLARATIONS being admitted into evidence. California Public Utilities Commission Rule of Procedure 13.8 authorizes acceptance of these declarations under these conditions. The Commission is bound by the ADA and numerous California statutes to respect disabled persons rights. SCWSSM suggests making a decision that affects life and death issues regarding thousands of Californians without any competent evidence in the record under which to make such a decision is an abuse of discretion and reversible error. Failing to have an evidentiary hearing and the opportunity for experts to address the medical issues is also nothing less than an abuse of discretion.

SCWSSM strongly urges the Commission to rethink its summary treatment of important disabled persons' rights. SCWSSM urges the Commission to:

1. Admit NETWORKS' declarations into the record.

2. Have full and complete hearing taking evidence and testimony on medical conditions and disabilities adversely affected by the smart meter and its mesh network.
3. This includes testimony of those whose disabilities and medical conditions have been worsened by this technology.
4. This includes medical expert testimony regarding the effects of this technology on those qualified individuals with disabilities and those with ‘covered medical conditions’.

Respectfully submitted,

Date: July 30, 2012

/s/

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