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

**Application for Rehearing
of CPUC Resolution E-4533**

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APPLICATION FOR REHEARING OF CPUC RESOLUTION E-4533

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30 November 2012

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APPLICATION FOR REHEARING OF CPUC RESOLUTION E-4533

Pursuant to Rules 16.1, 16.2, and 16.3 and the other applicable Rules of Practice and Procedure of the California Public Utilities Commission (CPUC or "Commission") and Sections 1731 and 1732 of the California Public Utilities Code (PUC), I hereby apply for rehearing by the Commission of its decision to approve Resolution E-4533, "Mr. Edward Hasbrouck's Request for Commission Review of Energy Division's disposition approving Pacific Gas and Electric Company (PG&E) Advice Letter 3278-G/4006-E (Electric Rate Schedule E-SOP for Residential Electric SmartMeter Opt-Out Program, and Gas Rate Schedule G-SOP for Residential Gas SmartMeter Opt-Out Program)".

1. Introduction and Background

In its Decision D.12-02-014, issued 1 February 2012, the CPUC directed Pacific Gas & Electric (PG&E) to file an Advice Letter which "shall include tariff sheets to modify PG&E's SmartMeter Program to include an opt-out option for customers who do not wish to have a wireless SmartMeter installed at their location and to implement a SmartMeter Opt-Out Tariff. The Advice Letter filing shall: a. Establish procedures for residential customers to select the option to have an analog meter if they do not wish to have a wireless SmartMeter. b. Establish procedures to inform customers that a SmartMeter opt-out option is available. A customer currently on the delay list shall be informed that the customer will be scheduled to receive a wireless SmartMeter unless the customer elects to exercise the opt-out option."

Decision D.12-02-014 thus explicitly limited the SmartMeter opt-out tariff to "customers who do not wish to have a wireless SmartMeter installed at their location", and was silent on what, if anything, would happen after the customer was "scheduled to receive a wireless SmartMeter" if they did not "elect[] to exercise the opt-out option".

PG&E, however, filed Advice Letter 3278-G/4006-E on 16 February 2012, which included tariff sheets which went beyond the scope of the CPUC Decision to propose that, "If PG&E makes a field visit to a customer's residence for purposes of installing a SmartMeter™ and the customer does not provide reasonable access to PG&E to install a SmartMeter™ after being provided notice of eligibility for service under this Opt-Out Program and not electing to opt-out, the customer shall be deemed to have elected service under this Opt-Out Program."

On 7 March 2012, I filed with the CPUC Energy Division a timely protest of, and request for an evidentiary hearing with respect to, this provision of the Advice Letter.

On 19 March 2012, the CPUC Energy Division sent PG&E (but not me) what purported to be a disposition of my protest. On 28 March 2012, I filed a timely request for Commission review of that or any other purported "disposition" of my protest of the Advice Letter.¹

Once that request for review was made, the duty of the Energy Division was, as it remains, to prepare a proposed resolution for the Commission with respect my request for Commission review of its first purported "disposition" of my protest. Instead, the Energy Division tried to give itself a "do-over". First the Energy Division claimed to have "withdrawn" its first purported disposition "without prejudice" – an action not provided for by any CPUC rule. Then, on 15 May 2012, the Energy Division issued a second purported "disposition" of my protest. On 26 May 2012, I timely filed a second request for Commission review of the Energy Division's second purported "disposition" of my protest.

On 8 November 2012, as part of its consolidated "consent agenda", without discussion or individualized vote, the commission approved Resolution E-4533 affirming the Energy Division's (second) "disposition" approving the Advice Letter, denying my second request for Commission review, and denying my motion with respect thereto.

This Application for Rehearing is filed to call the Commission's attention to its failure to comply with due process, its own rules of practice and procedure, and the Public Utilities Code, in its decision to approve Resolution E-4533.

¹ Resolution E-4533 is explicitly limited to the Energy Division's second purported "disposition" of my protest on 15 May 2012, and my second request for review of that second purported disposition of 26 May 2012. My first 28 March 2012 request for review of the first 19 March 2012 "disposition" remains pending with the Commission, and is not at issue in this application for rehearing, except to the extent that it establishes the lack of jurisdiction of the Energy Division over the Advice Letter and my protest thereof, which were properly before the Commission for review at the time the Energy Division issued the second purported "disposition" which is at issue in my second request for commission review, Resolution E-4533, and this application for rehearing.

2. Standing of applicant for rehearing

Rule 16.2(b) of the CPUC Rules of Practice and Procedure ("CPUC Rules") provides that, "(b) For purposes of filing an application for rehearing of a resolution, 'parties' include any person described in paragraphs (1) through (4) of Rule 14.2(c) and any person who has served written comments on a draft or alternate resolution pursuant to Rule 14.5."

The reference to "14.2(c)" appears to be a typographical error in the Commission's rules, since Rule 14.2(c) has only one, unnumbered paragraph. It appears likely that the reference to "paragraphs (1) through (4) of Rule 14.2(c)" is intended to refer to "paragraphs (1) through (4) of Rule 14.2(d)". If this is the intent of the rule, I have standing to file this Application for Rehearing pursuant to Rule 14.2(d)(1), which includes among eligible parties "any person who served a protest or response to the Advice Letter." As is acknowledged in Resolution E-4533, I served a timely protest to PG&E Advice Letter 3278-G/4006-E on 7 March 2012.

I also have standing as a "person who has served written comments on a draft or alternate resolution pursuant to Rule 14.5." According to the Resolution, "Mr. Hasbrouck's Draft Resolution, submitted on September 5, 2012, was treated as Comments."

3. Date of issuance of decision and effect of this application for rehearing

I have received no service or delivery by any means of Resolution E-4533 since the Commission meeting on 8 November 2012 at which it was considered, and no indication that any attempt has been made to serve it on me or deliver it to me by mail, e-mail, courier, or any other means. I do not know whether it was mailed to anyone, or if so when.

However, PUC Section 1731(b)(3) provides that, "For the purposes of this article, 'date of issuance' means the mailing or electronic transmission date that is stamped on the official version

of the order or decision." In the absence of any evidence to the contrary, I presume that the "official version" of Resolution E-4533 is the version posted on the CPUC Web site at <<http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M033/K783/33783029.PDF>>, which is headed, "Date of Issuance – November 13, 2012".

This application was thus timely filed within 10 days of the "date of issuance" of the Resolution, and requires that the Resolution be suspended pursuant to PUC Section 1733.

4. Standard of rehearing

PUC Section 1732 provides that an application for rehearing, "shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." CPUC Rule 16.1 provides that, "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."

5. Specific legal errors in CPUC resolution and Energy Division "disposition"

(a) The Commission failed to address the basis for my protest.

As stated in my original protest of the Advice Letter, my protest was based "on the following grounds, as provided for by CPUC Rule 7.4.2 and as discussed further below:

"(2) The relief requested in the advice letter ... is not authorized by ... Commission order on which the utility relies;

"(3) The analysis, calculations, or data in the advice letter contain material errors or omissions;...

"(5) The relief requested in the advice letter requires consideration in a formal hearing, or is otherwise inappropriate for the advice letter process; or

"(6) The relief requested in the advice letter is unjust, unreasonable, or discriminatory[.]"

Despite the detailed factual and legal discussion in my protest of each of these items, only the first of these (whether the relief requested in the advice letter is authorized by Commission order on which the utility relies) is mentioned in either the disposition or the Resolution.

The other three of four grounds for my protest are entirely unmentioned in the disposition, and mentioned in the Resolution only in the single conclusionary statement, "The protest also fails to satisfy any of the other grounds allowed by GO 96-B for protesting an Advice Letter." It's impossible to know what, if any, support the Energy Division or the Commission believed might have existed in the record for this decision, but such a conclusionary dismissal of *prima facie* objections fails to satisfy the requirements of due process or law, including the specific requirement of PUC 1757 for "substantial evidence" in the record.

(b) The Energy Division and the Commission violated their own rules regarding which matters are appropriate for the Advice Letter process.

As discussed in detail in my protest, CPUC Rule 5.1, "Matters Appropriate to Advice Letters", provides that, "The Advice Letter process provides a quick and simplified review of the types of utility requests that are expected neither to be controversial nor to raise important policy questions. The Advice Letter process does not provide for an evidentiary hearing; a matter that requires an evidentiary hearing may be considered only in a formal proceeding."

Neither the disposition nor the Resolution makes any reference whatsoever, advances any argument, or points to any evidence in the record related to this grounds for my protest.

There is, in fact, no evidence in the record suggesting any reason to expect that this is not a highly controversial issue, that it does not raise important policy questions, or that it does not require an evidentiary hearing. Allowing these tariff provisions to be implemented by Advice Letter in these circumstances, where they had been duly protested as not within the matters defined by the CPUC's own rules as suitable for such simplified procedures, is in direct and uncontested violation both of the CPUC's own Rules of Practice and Procedure and of the substantive and due process rights which those rules were adopted to safeguard.

(c) The Resolution misstates the basis for my protest and request for review

Rather than deal with the issues actually raised in my protest, the Resolution misstates the basis for my protest and request for review, and engages in lengthy and irrelevant discussion of several arguments which I did not make.

Clause 6 of the Resolution says that "Mr. Hasbrouck's protest challenging PG&E's right of access to the customer premises to install a SmartMeter is outside the scope of the Advice Letter. Mr. Hasbrouck did not request Commission review of D.06-07-027 and D.09-03-026 within the appropriate period." I made no such protest, but this clause suggests a profound mistake of law on the part of the Commission with respect to its authority. Neither the referenced decisions nor any other Commission decisions could possibly create any right of access.

The Resolution claims inaccurately that one of the arguments in my request for review is that, "PG&E does not have the right of access to the customer premises to install a wireless smart meter." The resolution also refers inaccurately to "Mr. Hasbrouck's contention that PG&E is not authorized to install smart meters for these customers."

I have made no such argument or contention. As discussed further below, whether PG&E has a right of access to any particular premises to install a wireless SmartMeter is not at issue in this proceeding. There is nothing in the record before the CPUC that would provide a basis for any finding on this question, and it would be premature and improper to make any assumptions about what might be found in any future proceeding in which this might be an issue.

The confusion evident in the Resolution appears to stem from a failure to distinguish between regulatory "authorization" and legal "authority" for access to premises. Authorization from the CPUC may be, in some cases, a necessary component of legal authority for access to premises, but is never a sufficient basis to constitute such authority. The CPUC does not have power of eminent domain, and it is well established that no decision of the CPUC can create or alter any rights to real property including easements or access rights.

The Resolution also confuses an obligation which the CPUC can impose on a utility, and an obligation binding on a utility customer or third-party property owner. If a utility requests permission from the CPUC for the construction of a power line, neither authorization nor a mandate from the CPUC for that construction creates any obligation on property owners to allow the power line to be built across their property, or on contractors to build it without

compensation. Rather, it creates an obligation on the utility to acquire, by legal means, the necessary resources to fulfill the obligations it has undertaken to comply with CPUC orders.

(d) The Resolution anticipates rulings on issues which have not been adjudicated.

The Resolution claims that, "PG&E would be entitled to terminate the electric service to a customer if it is prevented from accessing its metering equipment at the customer site."

However, PG&E has not proposed any provisions for termination of service on this basis, either in any previous or ongoing proceeding or in this Advice Letter. And both CPUC rules and PG&E's tariff require that if PG&E were to seek to terminate service to a customer for any reason, that customer would be entitled to administrative review including an evidentiary hearing before the CPUC, and judicial review of any CPUC decision.

So far as I know, and so far as the record before the CPUC shows, PG&E has not yet sought to terminate the service of any customer on the basis of failure to obtain access to install a SmartMeter, and the CPUC has not yet reviewed any such proposed termination of service.

If PG&E were to seek such termination of service to a customer, I expect that the customer would argue that installation of a SmartMeter does not constitute "replacement" of the prior meter, as that term is used in PG&E's tariff and in the clauses requiring access, since each SmartMeter includes not only (a) components to serve the customer by transmitting readings of the customer's usage but also (b) components to serve other customers by relaying readings of their usage and (c) wireless mesh data network components capable of serving third parties.

A decision on the termination of service to a specific customer might also require the development of an evidentiary record as to the layout and ownership of the premises, and the status of easements, rights, and encumbrances to the property or properties at issue.

But neither my expectations as to what arguments customers might raise, nor the CPUC's expectations as to what arguments PG&E might raise, provide sufficient factual or legal basis to pre-judge the outcome of any such proceedings, or to base any decision in this proceeding on such speculation about other, hypothetical, future CPUC adjudicatory proceedings. Any such decision would deprive customers and property owners of substantive and due process rights to

full, individualized adjudication of these questions by the CPUC, and review of the CPUC's decisions by the courts, prior to any termination of PG&E service to any customer.

(e) Factual claims in the Resolution are not supported by any factual record.

PUC Section 1757 provides that, when a court reviews the validity of a Commission decision, it may review, among other things, whether “(2) The commission has not proceeded in the manner required by law. (3) The decision of the commission is not supported by the findings. (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.”

In addition to all of the points mentioned above on which claims in the Resolution are not supported by any factual record, much less by "substantial" evidence, including the lack of any factual record as to the actual "wishes" of utility customers with respect to SmartMeters in cases where access is not granted, the Resolution refers to "the two alternatives that PG&E could have proposed in this Advice Letter to address the fourth scenario of customers", that is, those customers who have not indicated that they do not want a SmartMeter at their location but at whose location PG&E is not granted access when it makes a site visit for the purpose of installing a SmartMeter.

There is no basis whatsoever in the record for this false assumption that these are the only two possible alternatives that PG&E could have proposed, or that PG&E was required to propose anything in this or any other Advice Letter with respect to this particular class of customers.

Nor could any factual record have been developed as to what possibilities were available, since PG&E had not previously made any proposal with respect to such customers.

If evidentiary hearings on this question were held, I expect that other possible courses of action for PG&E which would be explored, and with respect to which a record would be developed, would include without limitation the possibility of (1) PG&E negotiating with, and obtaining from (perhaps for compensation at fair market value) access rights to customer premises, or (2) PG&E installing SmartMeters at customer "locations" but at specific places where access was available (such as on customer "feed" lines or "drops", or in utility vaults or on utility poles under or above sidewalks or streets) rather than inside customers' homes.

Clause 8 of the Resolution finds that, "Enrolling the unresponsive customer into the opt-out program is a less severe and/or hazardous option for the customer than shutting off their electric service." This finding is entirely unsupported by any evidence in the record. Equally or more importantly, it is not and cannot be determinative of the Commission's decision where no proceeding or evidentiary hearing was ever held at which anyone could have introduced any evidence tending to support or contradict this finding, or suggesting other options.

(f) "Reasonableness" findings in the Resolution are not supported by any factual record and were never subjected to review, argument, or adjudication.

Clause 7 of the Resolution finds that, "The procedure proposed by PG&E to deem the actions for customers repeatedly preventing installation of a smart meter as effectively selecting the opt-out option is reasonable."

This clause of the Resolution grossly misstates the terms of the Advice Letter, in that (1) the Advice Letter makes no reference to "repeatedly", (2) the Advice Letter makes no reference to "preventing installation", which implies a deliberate and intentional act (the Advice Letter refers merely to access not being granted), and (c) nothing in the Advice Letter suggests that the non-access must be attributable to, or even known to, the customer (who may not even be home).

But even if the Resolution had correctly described the provisions of the Advice Letter, this finding of "reasonableness" is not supported by any factual record. There is no evidence that this proposal was ever subjected to any reasonableness review, even within the CPUC, much less that it was the subject of any proceeding in which the reasonableness of this proposal could be disputed or argued or any factual record related to its reasonableness could be developed.

The failure to conduct any reasonableness review or to provide any procedural opportunity to contest or develop a factual record with respect to the reasonableness of the proposal violates due process, the law, and the CPUC's rules.

(g) The protested portions of the tariffs in the Advice Letter are outside the scope of any Commission decision or proceeding.

The Resolution includes a lengthy, but entirely irrelevant, discussion of whether PG&E had obtained regulatory authorization from the CPUC, through various prior decisions not at issue in this Advice Letter, to install SmartMeters at the "locations" (although not necessarily on the real property of, a question outside the CPUC's jurisdiction) PG&E customers who did not indicate that they "do not wish to have a SmartMeter at their location".

But the portion of the Advice Letter and the included tariff sheets which I protested, and with respect to which I requested Commission review, pertains not to whether or not installation of a SmartMeter was authorized or required by Commission decision, but whether the imposition of certain fees was authorized or required by any Commission decision.

The sole decision cited in the Advice Letter as its basis was Decision D.12-02-014. Nothing in this decision purports to authorize any "opt-out" fees except for "customers who do not wish to have a wireless SmartMeter installed at their location".

Decision D.12-02-014 was issued in proceeding A.11-03-014, which is continuing. Although I believe that the issues raised in the Advice Letter are outside the scope of this proceeding, in an abundance of caution, I made an oral motion for party status by e-mail on 14 May 2012 to the Administrative Law Judge conducting this proceeding, for consideration at the Prehearing Conference on 16 May 2012, in accordance with CPUC Rules 1.4(a) (3) and 1.4(b).²

In accordance with Rule 1.4 (b)(2), which requires that a motion for party status "state the factual and legal contentions that the person intends to make and show that the contentions will be reasonably pertinent to the issues already presented, " I moved that:

"If, however, the CPUC or the Administrative Law Judge intends to consider or adopt the opinion below [from the CPUC Legal Division], expand the scope of the existing proceeding to include the issues newly raised by PG&E Advice Letter 3278-G/4006-E and my protest and request for review, or consider consolidating the proceeding required to address those new issues with the existing proceeding on other 'SmartMeter' opt-out issues, I request that:

(1) I be added as a party to this proceeding;

² The ALJ had previously ruled that she would accept "oral" motions for party status by e-mail, if received prior to the Prehearing Conference and accompanied by an "appearance" by e-mail. The ALJ did accept and grant some such "oral" motions for party status, and responded to my motion and acknowledged receipt of my appearance.

- (2) I be afforded a reasonable opportunity to respond to today's new opinion by the CPUC legal division regarding the scope of the proceeding;
- (3) The issues raised by PG&E Advice Letter 3278-G/4006-E, my protest of that Advice Letter, and my request for CPUC review, as attached, be included in the scope of this proceeding (in addition, of course, to being considered by the CPUC in its consideration of my pending request for review, which I have not withdrawn or abandoned)".

On 5 November 2012, at the next in-person rehearing before the ALJ at which an oral motion for party status could be made or considered, I orally renewed this motion and it was considered and denied by the ALJ on the grounds that the issues raised in the Advice Letter and in my protest thereof were outside the scope of this proceeding and could not be raised therein.

The Resolution characterizes the provisions of the Advice Letter as a "procedure... for determining customers' intent with respect to their participation in the opt-out program." Nothing in the Advice Letter indicates that it is intended to be a mechanism for determining customers' actual intent. This appears to be pure speculation on the part of the Commission. This provision of the Advice Letter could equally or more plausibly be interpreted as an attempt by PG&E to punish customers who do not donate, or do not persuade property owners to donate, rights to PG&E to install PG&E's for-profit wireless mesh data network infrastructure.

In the absence of any more detailed record of evidence or argument with respect to this proposal, it's impossible to say for sure. But the only evidence in the record concerning the source of, or reasons for, this provision of the Advice Letter is the e-mail message from CPUC staff member Marzia Zafar to PG&E on 14 February 2012, "In your advice letter, you may want to add language about those customers who do not choose. Either they are automatically opting in or opting out or you may want to add penalty language or disconnection language. Just a thought after looking at the meter that was under lockdown." This e-mail message, and the statement in the Resolution, "PG&E's procedure prevents an unresponsive customer from unfairly benefiting from improperly preventing PG&E access to the utility's equipment," suggest that the protested provision of the Advice Letter was not, in fact, intended to actually determine the wishes of customers, as the Resolution tries to claim, but to punish or coerce certain

customers – an outcome never discussed in any prior proceeding or authorized by any Commission decision.

But even if PG&E actually intends these provisions to be a means of determining customers' wishes, it is, as such, (a) unsupported by any factual record whatsoever, (b) unsupported by any reasonableness review or opportunity for argument, (c) facially unreasonable, since it is self-evident that there are many other reasons why access might not be granted, many of them entirely unrelated to any "wish" or intent of the customer (who may not even be home), and (d) requires an evidentiary hearing to consider the actual wishes of such customers, and whether this "procedure" is a reasonable way of determining those wishes.

Adjudication of this factual question regarding the wishes of such customers, and the reasonableness or lack thereof of the "procedure" proposed in the Advice Letter to "deem" certain customers to have certain wishes, on the basis of other actions, without any evidentiary hearing, argument, or reasonableness review, clearly violates the CPUC's rules regarding the use of Advice Letters, as well as the due process and other legal rights of these customers.

6. Request for oral argument

In accordance with CPUC Rule 16.3, I request oral argument before the Commission.

I believe that oral argument will materially assist the Commission in resolving this application for rehearing. It's clear to me, from the Resolution itself and the record of my communication with CPUC staff, that CPUC staff have had great difficulty understanding the protest and request for review which underlie this application for rehearing. Oral argument is likely to reduce the likelihood of further misunderstandings, arguments at cross purposes, and time wasted on analysis of, and argument with, straw men and other issues not actually raised.

This application raises issues of major significance for the Commission because the challenged decision adopts new Commission precedent (as noted above, it attempts to pre-judge an entire class of future termination-of-service disputes between PG&E and customers), and presents legal issues of exceptional controversy and public importance. It is evident from the record in this and related proceedings before the Commission, and is well known to the Commission, that this issue has been more controversial and has drawn greater public interest than almost any other issue that has ever come before the Commission.

For the reasons detailed above, I request that the Commission grant oral argument, grant rehearing, reverse its decision to approve Resolution E-4533, and order a full proceeding including evidentiary hearings on the issues raised in PG&E Advice Letter 3278-G/4006-E.

Respectfully submitted,

/s/

Edward Hasbrouck

30 November 2012

San Francisco, CA

VERIFICATION

I am the maker of the foregoing "Application For Rehearing of CPUC Resolution E-4533"; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

/s/

Edward Hasbrouck

Executed on 30 November 2012

in the City and County of San Francisco, California