

Decision 12-11-018

November 8, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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)

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

**ORDER DENYING REHEARING OF DECISION (D.) 12-02-014**

**I. INTRODUCTION**

In this Order we dispose of the applications for rehearing of Decision (D.) 12-02-014 (or “Decision”) filed by CALifornians for Renewable Energy (“CARE”) and Wilner & Associates (“Wilner”).<sup>1</sup>

In Application (A.)12-02-014, the Commission modified Pacific Gas and Electric Company’s (“PG&E’s”) SmartMeter Program to approve an option for residential customers who, for whatever reason, do not wish to have a wireless SmartMeter with radio frequency (“RF”) transmission capability (“opt-out option” or “opt-out service”). (D.12-02-014, at p. 2.) Any customer requesting the opt-out service will be provided with an analog electric and/or gas meter to replace an existing SmartMeter at their home. The Decision also adopted interim fees and charges to cover PG&E’s costs to provide the opt-out service.<sup>2</sup> (D.12-02-014, at pp. 1, 29-32.)

<sup>1</sup> Wilner & Associates is a consultant firm that conducts electromagnetic fields and radio frequency interference studies for people that are concerned about their health and sensitive electronic equipment. (See Wilner & Associates Protest, dated April 25, 2011, at p. 1.)

<sup>2</sup> D.12-02-014, at p. 29. See also PG&E Response to Administrative Law Judge’s October 12, 2011 Ruling Directing it to File Additional Cost Information (“PG&E Response to ALJ Oct. 12 Ruling”), dated October 28, 2011. In addition, the interim fees and charges are subject to adjustment once a decision on costs and cost allocation for the opt-out option is issued. (D.12-02-014, at p. 32.)

CARE and Wilner both filed separate and timely applications for rehearing of D.12-02-014. CARE challenges the Decision on the grounds that: (1) the Commission failed to comply with environmental review requirements under the California Environmental Quality Act (“CEQA”) and the National Environmental Policy Act (“NEPA”); (2) the authorized fees and charges violate Proposition 26 and Article XIII, Section 3 of the California Constitution; (3) the Decision provided false and misleading information regarding: who has regulatory authority over the frequency of SmartMeter transmissions; the potential harm from exposure to RF emissions; information pertaining to Part 47, Section 15 of the Code of Federal Regulations (“C.F.R.”); and local building inspector authority over SmartMeter deployment; and (4) the Commission failed to provide adequate due process by not acting on two CARE motions. A response was filed by PG&E.

Wilner challenges the Decision on the grounds that it: (1) contains certain miscellaneous errors; (2) failed to make findings on the health impacts of RF transmissions; (3) violated Public Utilities Code Section 453(b) by failing to address whether customers with medical conditions (i.e., RF sensitivity) should be exempt from opt-out service costs;<sup>3</sup> (4) failed to provide adequate due process by not holding evidentiary hearings; (5) failed to consider RF emissions associated with Home Area Networks (“HANs”); and (6) raised uncertainty regarding whether the analog meter option will be permanent. A response was filed by PG&E.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that good cause has not been established to grant rehearing. Accordingly, we deny the applications for rehearing of D.12-02-014 because no legal error has been shown.

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<sup>3</sup> All subsequent section references are to the Public Utilities Code unless otherwise stated.

## II. DISCUSSION

### CARE APPLICATION FOR REHEARING

#### A. Environmental Review

CARE contends there was legal error because no environmental review (and specifically, alternatives analysis) was conducted when the Commission first authorized deployment of PG&E's Advanced Metering Infrastructure ("AMI" and SmartMeters). (CARE Rhg. App., at pp. 6-9.)

PG&E's AMI deployment was first approved in D.06-07-027.<sup>4</sup> Thus, CARE's current contention is an impermissible challenge of a prior, and final, Commission decision. Such challenges are specifically precluded by Public Utilities Code Sections 1709 and 1731(b).<sup>5</sup>

Further, in that decision the Commission did address whether environmental review was warranted. It was not, because equipment deployment does not constitute a "project" as defined by CEQA.<sup>6</sup> Meter deployment was also exempt from environmental review pursuant to CEQA Guideline Sections 15301(b) and 15302(c).<sup>7</sup>

#### B. Interim Fees and Charges

CARE contends the Decision erred because the approved interim fees and charges violate Proposition 26 and Section 3, Article XIII of the California Constitution. (CARE Rhg. App., at pp. 9-10.)

Proposition 26 expanded the definition of a tax to include state and local fees such as: user fees; regulatory fees; and property charges. Such fees require either

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<sup>4</sup> *Application of Pacific Gas and Electric Company for Authority to Increase Revenue Requirements to Recover the Costs to Deploy an Advanced Metering Infrastructure* [D.06-07-027] (2006) \_\_ Cal.P.U.C.3d \_\_, at pp. 1, 68 [Ordering Paragraph Number 1] (slip op.), as modified by *Application of Pacific Gas and Electric Company for Authority to Increase Revenue Requirements to Recover the Costs to Deploy an Advanced Metering Infrastructure* [D.07-09-037] (2007) \_\_ Cal.P.U.C.3d \_\_.

<sup>5</sup> Pub. Util. Code, §§ 1709, 1731, subd. (b).

<sup>6</sup> D.06-07-027, *supra*, at p. 65 [Finding of Fact Number 25].

<sup>7</sup> D.06-07-027, *supra*, at pp. 61, 68 [Conclusion of Law Number 19] (slip op.).

voter approval or approval by two-thirds of the Legislature.<sup>8</sup> Proposition 26 would apply here if the approved fees and charges were regulatory fees within the meaning of Proposition 26.<sup>2</sup> They are not.

Fees subject to Proposition 26 are those charged by a government entity to increase state/local revenues. The fees are then used to provide a broad public benefit.<sup>10</sup> The fees and charges approved here are not charged by a government entity (i.e., the Commission), nor will they increase state revenues or be used to provide a broad public benefit. They are merely fees PG&E was authorized to charge to recover its direct cost of implementing and providing the opt-out service to individual customers. (D.12-02-014, at pp. 21-33.)

### **C. Alleged False and Misleading Information**

CARE contends the Decision erred by providing false and misleading information regarding: (1) who has regulatory authority over SmartMeter transmissions; (2) the potential harm from exposure to RF transmissions; (3) 47 C.F.R. § 15; and (4) the authority of local building inspectors in connection with SmartMeter deployment. (CARE Rhg. App., at pp. 10-27.)

We reject CARE's allegations because none of these issues were material or within the scope of this proceeding. Here, the material issues did not involve SmartMeter deployment or operation. Rather, the scope involved issues material to providing a *different* and *non-SmartMeter* alternative. Specifically: (1) whether PG&E's proposed opt-out plan was a reasonable solution for customers who prefer not to have a SmartMeter; (2) consideration of other alternative options; (3) the reasonableness PG&E's cost and cost recovery proposal; and (4) the delay list for SmartMeter

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<sup>8</sup> Section 3, Article XIII of the California Constitution provides specific exemptions from property taxation requirements and is inapplicable to the fees and charges approved in D.12-02-014. (Cal. Const. art. XIII, § 3.)

<sup>2</sup> CARE also suggests the Decision approved an exit fee associated with the opt-out option. (CARE Rhg. App., at p. 9.) That is incorrect. The Decision specifically declined to adopt an exit fee and determined that that issue should be considered in the second phase of this proceeding. (D.12-02-014, at p. 31.)

<sup>10</sup> See e.g., *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866.

installation.<sup>11</sup> CARE's allegations are also without merit for the reasons briefly discussed below.

### **1. Regulatory Authority Over SmartMeter Transmissions**

CARE argues the Decision provided false and misleading information regarding jurisdiction over SmartMeter transmissions, by stating:

One of the more controversial disputes raised during the September 14 workshop was how many times in total (average and minimum) an electric SmartMeter transmits during a 24-hour period....PG&E also includes in its November 1 response the FCC's response to a request for the FCC to step in and ask for the removal of SmartMeters. The FCC said:

...the FCC's exposure limits are derived from recommendations from human exposure to RF fields by the Institute of Electrical and Electronics Engineers, Inc. (IEEE) and National Council on Radiation Protection and Measurements (NCRP), and by the U.S. Environmental Protection Agency (EPA), the Food and Drug Administration (FDA) and other federal health and safety agencies. These recommendations were developed by scientists and engineers with extensive experience and knowledge in the area of RF biological effects and related issues....

In the case of SmartMeters, the FCC has no data or report to suggest that exposure is occurring at levels of RF energy that exceed our RF exposure guidelines. In contrast, the California Council on Science and Technology recently released a report that found that "[s]cientific studies have not identified or confirmed negative health effects from potential non-thermal impacts of RF emissions such as those produced by existing common household electronic devices and smart meters." With no indication that the SmartMeters in question might not comply with FCC exposure limits we have no

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<sup>11</sup> Scoping Memo, dated May 25, 2011, at pp. 3-4.

reason or authority to order them removed or their operation discontinued.

(D.12-02-014, at pp. 12-13.)

To support its assertion, CARE cites to a 2010 complaint it filed with the Federal Communications Commission (“FCC”) alleging that SmartMeters caused the 2010 San Bruno gas line explosion. (CARE Rhg. App., at pp 11.) There is no correlation between the subject of CARE's complaint and the FCC's response to the above quoted FCC statements concerning SmartMeters and its RF exposure limit rules. They are separate issues. Even if they were related, CARE's complaint was not accepted and thus is of no significance on the merits.<sup>12</sup>

In addition, the above passage was merely informational and reiterated portions of an FCC letter. (D.12-02-014, at pp. 11-15.)<sup>13</sup> And the C.F.R. speaks for itself regarding jurisdiction. Section 15 of the C.F.R. clearly vests the FCC with authority over the licensing of RF emitting devices and the setting of permissible exposure limits attendant to transmissions.<sup>14</sup> CARE offers no tangible and/or proven evidence to refute the FCC's rules or stated conclusions. Accordingly, it fails to show any legal error.

Finally, this Commission has made clear it does not defer its own authority and responsibility to ensure that PG&E provides safe, reliable service. We have merely recognized the FCC's expertise in this area, as well as its legitimate and comprehensive role in regulating RFs.<sup>15</sup> For example, in D.12-06-017, we stated:

The Commission did not defer to the FCC its responsibility to ensure PG&E provides safe, reliable service. The Commission exercised its authority over health and safety by considering the facts presented to it, including the FCC's regulation of RFs and PG&E's compliance with FCC regulations. We found Smart Meters are licensed or certified

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<sup>12</sup> See CARE Rhg. App., at p. 13.

<sup>13</sup> See also D.12-02-014, at pp. 15-16.

<sup>14</sup> See e.g., 47 C.F.R. § 51.1.

<sup>15</sup> See e.g., D.10-12-001, *supra*, at pp. 7-9 (slip op.); D.12-06-017, *supra*, at pp. 2-3 (slip op.).

by the FCC and are in compliance with FCC requirements (D.10-12-001, Finding of Fact 2.)....<sup>16</sup>

Nothing in the Decision misrepresented the FCC's legitimate jurisdiction under the C.F.R., nor did it misrepresent or defer this Commission's own jurisdictional responsibilities. CARE merely wants the Commission to either revisit issues not relevant here, or reach conclusions mirroring CARE's own negative view regarding SmartMeters. That is not a basis for legal error.

## **2. Alleged Harm From Exposure to RF Emissions**

CARE argues the Decision provided false and misleading information regarding the potential harm from exposure to RF emissions, by stating:

Another issue that was a topic of intense discussion during the workshop was whether the SmartMeter was a 1-watt powered meter...or actually two or more watts...PG&E's response indicates its electric SmartMeters are rated to transmit at one watt. However...the meter's instantaneous peak level in terms of "effective isotropic power" (EIRP) is 2.5 watts....This is similar to saying that a flashlight with a 1-watt bulb that focuses the light output in one direction appears as bright as a 2.5 watt bulb....

(D.12-02-014, at p. 14.)

However, the issue of whether RF emissions from SmartMeters have an effect on individuals is outside the scope of this proceeding. Further, we determined in Decision (D.) 10-12-001 that PG&E's SmartMeter technology complies with FCC requirements. More importantly, the alleged effect of RF emissions on health is not material to the resolution of this application. Eligibility to opt out of receiving a wireless SmartMeter is not predicated on whether the meter has affected the consumers' health....a customer shall be allowed to opt out...for any reason, or for no reason."

(D.12-02-014, at pp. 15-16.)

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<sup>16</sup> See also D.12-06-017, *supra*, at pp. 2-3, 7-8.

To support its assertion CARE references a 2003 article in the Journal of the National Institute of Environmental Health Studies and opines at some length regarding its implications for SmartMeters. The article discussed brain neuron damage to rats associated with RF emissions from cell phones. From that, CARE argues it can be “inferred” that 2.5 watts of EIRP from SmartMeters is harmful to humans. (CARE Rhg. App., at pp. 17-18.)

CARE’s inferences are speculative at best, and the relevance and validity of the referenced article was not vetted in this proceeding. CARE offers no direct factual proof to invalidate the Commission’s conclusions, and its disagreement does not establish legal error.<sup>17</sup>

### 3. 47 C.F.R. § 15

CARE contends the Decision provided false and misleading information regarding the CFR, by stating:

Therefore, while it is true that the EIRP [effective isotropic radiated power] from the SmartMeter is 2.5 watts, this level of emissions is below the FCC allowable RF emissions.

(D.12-02-014, citing 47 C.F.R. § 15.247(c)(3) & (4).)

CARE argues the above statement is an impermissible interpretation of the C.F.R. because the FCC's broad authority “to regulate radio frequency devices,” and the fact that SmartMeters must comply with the FCC’s technical labeling requirements act to preempt such “interpretations.” (CARE Rhg. App., at pp. 19-20.)

Contrary to CARE’s allegation, the above statement was not unlawful, false, or misleading. It was a statement of fact readily discernable from the plain language of the federal statutes, as well as the FCC’s own statements regarding SmartMeter RF emissions.<sup>18</sup> And CARE offers no legal authority that precludes the

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<sup>17</sup> *Southern California Edison v. Public Utilities Commission* (2005) 128 Cal.App.4<sup>th</sup> 1, 8.

<sup>18</sup> See PG&E Response to ALJ October 18, 2011 Ruling Directing it to File Clarifying Radio Frequency Information (“PG&E Response to ALJ Oct. 18 Ruling”), dated November 1, 2011, Attachment A [FCC letter dated August 6, 2010.] and Attachment B [FCC Letter dated April 21, 2011.].

Commission from reasonably citing relevant statutes based on the facts and information before it.

#### **4. Local Building Inspector Authority**

CARE contends the Decision provided false and misleading information regarding the authority of local building inspectors to tag SmartMeters without an Underwriters Laboratory ("UL") mark, by stating:

Finally, we do not make any determination on whether to allow the opt-out option to be exercised by local entities and communities at this time. ...Consequently, we find that further consideration of whether to allow a community opt-out option should be included in the second phase of this proceeding.

(D.12-02-014, at p. 21.)

CARE appears to misunderstand the above statement. It relates only to whether entire communities and cities (as opposed to individual customers) will be able to opt-out of having a SmartMeter. That issue has absolutely no bearing on any local building inspector authority to tag such meters. Local authority was not at issue in the opt-out determination and was therefore not considered here.

Nevertheless, CARE's argues that cities may regulate telecommunications carriers to protect public safety and welfare. Thus, the Commission is prohibited from interfering with any local building codes or local zoning regulations requiring meters to have UL tags. (CARE Rhg. App., at pp. 20-27, citing Cal. Const., art XII, § 8.)<sup>19</sup>

Even if that issue had been material here, which it was not, CARE's reliance on Article XII, Section 8 of the California Constitution is flawed. Case law establishes that local entities may not regulate the construction and installation of utility facilities if the Commission has exercised authority, and it involves a matter of statewide

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<sup>19</sup> CARE also cites to the 1996 Federal Telecommunications Act ("Act") and Section 7901. The cited authorities govern and apply exclusively to telecommunications carriers. PG&E is not a telecommunications carrier nor is it providing a telephone service. Thus, the statutes and related case law CARE relies on are not controlling.

concern.<sup>20</sup> In general, the construction, operation, and design of public utility facilities (such as SmartMeters) are considered of statewide concern.<sup>21</sup> Thus, had any state / local conflict arisen here, the law supports a conclusion that local building inspector authority would likely be barred by our exclusive jurisdiction in this area.<sup>22</sup>

#### **D. Due Process**

CARE contends we failed to provide adequate due process because no action was taken on two motions CARE filed during the proceeding.<sup>23</sup> (CARE Rhg. App., at pp. 27-29.)

Due process requires the Commission to provide parties notice and an opportunity to be heard.<sup>24</sup> However, no rule or statute requires that we act on all motions that may be filed in any given proceeding. That said, the ALJ did eventually rule on and deny CARE's motions after D.12-02-014 was issued.<sup>25</sup> Thus, the issue is now moot, and by this Order we adopt and ratify the ALJ's ruling.

### **WILNER APPLICATION FOR REHEARING**

#### **A. Alleged Miscellaneous Errors**

Wilner contends the Decision erred because: it wrongly relied on D.10-12-001 to render Conclusion of Law Number 2; it accepted technical information that failed to comply with Section 1710; and the technical information was incomplete. (Wilner Rhg. App., at pp. 3-4.)

The disputed Conclusion of Law stated:

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<sup>20</sup> *Orange County Air Pollution Control District v. Public Utilities Commission* (1971) 4 Cal.3d 945, 950.

<sup>21</sup> See e.g., *Pacific Telephone & Telegraph Company v. City and County of San Francisco* (1959) 51 Cal.2d 766, 768. See also Pub. Util. Code, § 768.

<sup>22</sup> See also D.12-06-017, *supra*, at pp. 5-8 (slip op.).

<sup>23</sup> CARE Motion for Acceptance for Filing, dated May 8, 2011; and CARE Motion for Procedural Relief, dated November 2, 2011.

<sup>24</sup> See e.g., *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal.3d 240, 244-245; *Railroad Commission of California v. Pacific Gas & Electric Co.* (1937) 302 U.S. 388, 393-394.

<sup>25</sup> Administrative Law Judge's Ruling Addressing Various Motions, dated March 29, 2012, at pp. 3-4, 12-13.

2. D.10-12-001 determined that PG&E's SmartMeter technology complies with FCC requirements.

(D.12-02-014, at p. 37 [Conclusion of Law Number 2].)

Wilner argues reliance on D.10-12-001 was improper on the ground that D.10-12-001 was not "final" pending action on application for rehearing. Contrary to Wilner's suggestion, a Commission decision is valid as of the date it is issued, and remains as such unless or until it is amended or modified, etc. Thus, it was reasonable and lawful to rely on D.10-12-001.

Moreover, the issue is now moot. We have acted on the referenced application for rehearing, without any change to the merits of the statement contained in Conclusion of Law Number 2.<sup>26</sup> Decision 10-12-001 and the rehearing order are now final and any further challenge is barred by Sections 1709 and 1731(b).

Section 1710 provides in relevant part:

No document or records of a public utility or person or corporation which purport to be statements of fact shall be admitted into evidence or shall serve as any basis for the testimony of any witness, unless the documents or records have been certified under penalty of perjury....

(Pub. Util. Code, § 1710.)

Wilner argues Section 1710 was violated because the technical information submitted by PG&E was not certified under penalty of perjury.<sup>27</sup> However, Section 1710 did not apply to this information. The submission was made only to enable a better understanding of certain questions parties raised during the workshop.<sup>28</sup> It was relevant only as general background data to show the relative RF emission numbers as between the available alternatives (radio-out meter, radio-off meter, and analog meter).

(D.12-02-014, at pp. 15-16.) The information did not serve as the basis of any witness

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<sup>26</sup> *Application of the EMF Safety Network for Modification of D.06-07-027 and D.09-03-026 ("Order Modifying Decision (D.) 10-12-001 and Denying Rehearing, as Modified")* [D.12-06-017] (2012) \_\_ Cal.P.U.C.3d \_\_.

<sup>27</sup> PG&E Response to ALJ Oct. 18 Ruling.

<sup>28</sup> ALJ Ruling Seeking Clarification, dated October 18, 2011, at p. 2.

testimony and the Commission did not make any material findings of fact concerning the substance of the technical information. Thus, compliance with Section 1710 was not required.

Finally, Wilner contends we should not have accepted the technical information because it failed to contain information concerning RF interference related to unintentional radiators under Part B of 47 C.F.R. § 15. (Wilner Rhg. App., at p. 5.)

Wilner ignores that we did not request information related to unintentional radiators. Nor does Wilner establish how that information was necessary to select a non-RF emitting opt-out alternative. Thus, we reject its challenge.

### **B. Consideration of RF Health Effect Issues**

Wilner contends the Decision erred because it failed to make findings and conclusions regarding the health effects of SmartMeters. (Rhg. App., at pp. 5-6, 7-8.)

Our rationale for rejecting this challenge is contained in part I.C.2. above, and we will not repeat it here. However, Wilner also raises an issue based on a concurrence by Commissioner Simon, which stated in part:

...I encourage those opposing wireless smart meter technology to utilize this Commission's rules and procedures to support opening a proceeding which will formally examine the health impacts of this emerging technology....

Wilner argues the Commission should not defer to the FCC on this issue by claiming federal preemption. (Rhg. App., at pp. 7-8, citing Cal. Const., art. 3.5.)<sup>29</sup>

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<sup>29</sup> Also citing *Burlington Northern and Santa Fe Railway Company v. Public Utilities Commission* (“*Burlington Northern*”) (2003) 112 Cal.App.4<sup>th</sup> 881, 888; and *Northern California Power Agency v. Public Utilities Commission* (“*N. Cal. Power Agency*”) (1971) 5 Cal.3d 370. In *Burlington Northern*, the Commission chose to enforce an earlier of two relevant statutes. The Court held that when there are two conflicting statutes, the Commission should have enforced the later statute because it effectively superseded the earlier law. (*Burlington Northern, supra*, 112 Cal.App.4<sup>th</sup> at pp. 888-890.) This proceeding is not analogous because there are not two statutes pertaining to RF emissions or exposure limits. There is only 47 C.F.R. § 15. In *N. Cal. Power Agency*, the Commission granted a certificate of public convenience and necessity to a public utility despite contentions that the relevant purchase contracts violated federal and state antitrust laws. The Court annulled the Decision, finding the Commission had failed to properly consider the antitrust laws and issues. (*N. Cal. Power Agency, supra*, 5 Cal.3d at pp. 377, 380.) We did not fail to consider relevant law or issues here since potential RF health issues were not material to the determination.

Article 3.5 states in relevant part:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power to:

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement....

(Cal. Const., art 3.5.)

Wilner's constitutional claim could have merit if the Decision refused to enforce some relevant statute. However, the only statutes pertaining to RF emissions are contained in 47 C.F.R. § 15, and we have recognized and applied those provisions in light of the FCC's expertise and authority to establish RF emission exposure limits under the C.F.R.<sup>30</sup> And nothing in the Decision contradicts those statements or defers this Commission's authority to ensure safe and reliable utility service.

Finally, Wilner suggests that the Commission examine the health impacts of SmartMeters in a formal investigation or another phase of this proceeding. The instant application for rehearing is not the proper vehicle for making such a request. Should Wilner want to formally make such a request, it should file a petition under Section 1708.5, and request that the Commission adopt applicable rules or regulations.<sup>31</sup> In that event, meaningful consideration would require more than just the broad and speculative allegations of harm from RF emissions we have received thus far. Data, studies, and/or other tangible and verifiable information are required to support any Commission conclusion that additional rules and regulations are necessary.

### C. Section 453(b)

Wilner contends the Decision failed to comply with section 453(b) because it did not consider whether customers with medical conditions (specifically RF

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<sup>30</sup> D.12-06-017, *supra*, at pp. 2-3, 7-8.

<sup>31</sup> See Pub. Util. Code, § 1708.5, subd. (a).

sensitivity) should be exempt from paying costs for the opt-out service. (Wilner Rhg. App., at p. 6, relying on Section 453(b).)

Section 453 provides in relevant part:

- (b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of ancestry, medical condition, marital status or change in marital status, occupation, or any characteristic listed or defined in Section 11135 of the Government Code....

(Pub. Util. Code, § 453, subd. (b).)

Wilner fails to show any prejudicial, different, or discriminatory treatment here. All customers may select the opt-out service for any reason, without question.

(D.12-02-014, at p. 30.) And we treated all customers equally by setting the same fees for all customers who select the service.<sup>32</sup> (D.12-02-014, at pp. 29-32.)

The only exception, or different treatment, was approved for customers qualifying for the California Alternate Rates for Energy (“CARE”), and Family Electric Rate Assistance (“FERA”) programs.<sup>33</sup> (D.12-02-014, at pp. 26-27, 29-32.) Those customers will pay a lower fee based on economic hardship. That is not unlawful. It is consistent with established Commission precedent.<sup>34</sup> And Wilner fails to show any legal or factual basis why a customer claiming RF sensitivity should receive different treatment (no fee) relative to other utility customers. Section 453(b) explicitly prohibits any different treatment for customers based on medical conditions.

#### **D. Due Process**

Wilner contends it was denied adequate due process because following a preliminary determination that hearings were required, none were ever held. Therefore,

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<sup>32</sup> See D.12-02-014, at pp. 32, 39-40 [Ordering Paragraph Number 2(c) [\$75 initial fee and \$10 monthly charge.].

<sup>33</sup> D.12-02-014, at pp. 32, 39-40 [Ordering Paragraph Number 2(c) [CARE / FERA customers charged a \$10 initial fee and \$ 5 monthly charge.].

<sup>34</sup> See e.g., *Application of Pacific Gas and Electric Company for Approval of the 2009-2011 Low Income Energy Efficiency and California Alternate Rates for Energy Programs and Budget* [D.08-11-031] (2008) \_\_ Cal.P.U.C.3d \_\_.

Wilner argues it had no opportunity to offer evidence to support its position or to challenge PG&E's technical information. (Wilner Rhg. App., at pp. 4, 6.)

No rule or statute requires that we conduct evidentiary hearings. And although Wilner is correct that a preliminary determination was made indication hearings would be held (Resolution ALJ-176-3272), that determination was made only in the initial bi-monthly resolution to identify new proceedings for our public meeting business agenda. Those determinations are not binding and often change based on the facts and circumstances which develop in a particular case.

Further, our Rules of Practice and Procedure provide that hearings are not required if there are no disputed material facts. Specifically, Rule 12.3 states:

If there are no material contested issues of fact, or if the contested issue is one of law, the Commission may decline to set hearing.

(Cal. Code of Regs., tit. 20, § 12.3.)

Wilner identifies no disputed material facts here. Its sole substantive issue is the allegation that SmartMeters cause negative health effects.<sup>35</sup> As previously discussed, that issue was not within the scope of this proceeding, and hearings would have served no useful purpose.<sup>36</sup>

Moreover, in assuring adequate due process, what is paramount is that parties be given the opportunity to participate and comment in the decisionmaking process. Wilner had that opportunity here. Parties had the opportunity to provide any information they deemed necessary either in the two prehearing conferences,<sup>37</sup> in response to an ALJ request for alternative proposals,<sup>38</sup> and/or during workshops.<sup>39</sup> That

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<sup>35</sup> See e.g., Wilner & Associates Protest, dated April 25, 2011, at p. 1.

<sup>36</sup> See e.g. *City of Los Angeles v. Public Utilities Commission* (1975) 15 Cal.3d 680, 673.

<sup>37</sup> See D.12-02-014, at pp. 4-5 [Discussing prehearing conferences on May 6 and July 27, 2011].

<sup>38</sup> See Scoping Memo, dated May 25, 2011, at pp. 4-5.

<sup>39</sup> See D.12-02-014, at p. 5 [Workshop held September 14, 2011].

Wilner failed to provide the evidence it now claims was relevant does not establish there was not an adequate opportunity to do so.

**E. RF Emissions Associated with Home Area Network Devices**

Wilner asserts the Decision erred because it failed to consider RF emissions associated Home Area Network (“HAN”) devices that receive customer energy usage data from SmartMeters.<sup>40</sup> (Wilner Rhg. App., at pp. 6-7.)

Wilner argues that in D.11-07-056, PG&E was directed to provide HAN service to 5,000 customers, thus in this proceeding PG&E should have provided technical data related to HAN equipment (2.4 gigahertz (“GHz”) transmitters). Further, Wilner argues PG&E wrongly claimed no HAN devices were operational at the time of this proceeding. (Rhg. App., at p 6, citing D.11-07-056.)<sup>41</sup>

This proceeding did not involve approval of HAN devices. Thus, it was not material or necessary for PG&E to submit such information. Any consideration of the issue, if relevant at all, should occur in the Commission proceedings considering HAN integration with utility SmartMeters.

In addition, Wilner is wrong that D.11-07-056 authorized HAN activation. In that decision we merely directed the utilities to develop and submit HAN rollout plans which we could consider for customers who choose that service.<sup>42</sup> To date, no HAN devices are operational. As evidenced by Resolution E-4527, the earliest HAN devices will be activated is January 15, 2013.<sup>43</sup> Thus, PG&E’s representation was correct.

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<sup>40</sup> HAN devices are developed and marketed by independent third party vendors. (Resolution E-4527, issued October 3, 2012, at pp. 7-8; D.09-03-026, *supra*, at pp. 85-86.) HAN devices are in-home display devices capable of receiving energy usage data from SmartMeters so that customers can monitor and adjust their energy usage if desired, to achieve energy cost savings. (Resolution E-4527, at pp. 3-8.)

<sup>41</sup> Also citing PG&E Response to ALJ Oct. 18 Ruling, at p. 3, fn. 3 & p. 10, fn. 6. [Stating PG&E’s 2.4 GHz radio is not currently in use in PG&E’s SmartMeter system.].

<sup>42</sup> *Order Instituting Rulemaking to Consider Smart Grid Technologies Pursuant to Federal Legislation and on the Commission’s Own Motion to Actively Guide Policy in California’s Development of a Smart Grid System* [D.11-07-056] (2011) \_\_ Cal.P.U.C. \_\_, at pp. 4, 106-120, 166-167 [Ordering Paragraph Number 11].

<sup>43</sup> Resolution E-4527, at p. 2, Number 1, & p. 28, Ordering Paragraph 1(a).

**F. Status of the Analog Meter Option**

Wilner contends that Finding of Fact Number 8 created uncertainty concerning how long the analog meter opt-out option will be available. Finding Number 8 states:

8. Further review of the feasibility of continuing to offer an analog meter opt-out option may be warranted in the future to ensure that this opt-out option does not impede the full implementation of net metering, demand response and smart grid.

(D.12-02-014, at p. 37 [Finding of Fact Number 8].)

Wilner does not take issue with this particular statement, except to argue it would be unjust, unreasonable, and unlawful to charge customers for an opt-out option if that option is withdrawn at a later time. (Wilner Rhg. App., at p. 7, citing Section 451.)

However, such worry and speculation is not grounds for legal error. Our Decision directed PG&E to offer the opt-out service immediately, with costs to be paid by customers who select it. (D.12-02-014, at p. 39 [Ordering Paragraph Numbers 1 & 2], & pp. 39-40 [Ordering Paragraph Number 2(c)].) Nothing in the Decision indicated the Commission intends to discontinue the opt-out service or allow customers to be charged if the service is no longer provided in the future.

Further, should we determine it is necessary to review whether the service should continue in the future, such review is lawful pursuant to Section 1708.<sup>44</sup> Consistent with that statute, if and when the Commission reviews the feasibility of the opt-out service, parties will be afforded an opportunity to participate.

**III. CONCLUSION**

For the reasons stated above, the applications for rehearing of D.12-02-014 filed by CARE and Wilner & Associates are denied because no legal error has been shown.

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<sup>44</sup> Pub. Util. Code, § 1708.

Therefore **IT IS ORDERED** that:

1. The applications for rehearing of D.12-02-014 are denied.
2. This proceeding, Application (A.) 11-03-014 remains open to address outstanding issues.

This order is effective today.

Dated November 8, 2012, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners