PROPOSED DECISION

Agenda ID #15180 (Rev. 1)
Ratesetting
10/27/2016 Item 7

Decision **PROPOSED DECISION OF ALJ ALLEN** (Mailed 9/23/2016)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Alameda County Residents Concerned About Smart Meters for Modification of Decision 06-07-027.	Application 11-07-009 (Filed July 18, 2011)

DECISION DENYING APPLICATION FOR MODIFICATION

Summary

This decision denies an Application for Modification of Decision (D.) 06-07-027 filed by Alameda County Residents Concerned About Smart Meters (ACRCASM) on July 18, 2011, and closes this proceeding. D.06-07-027 authorized Pacific Gas and Electric Company (PG&E) to deploy advanced metering infrastructure.[1] PG&E protested the Application of ACRCASM, and requested that it be dismissed. ACRCASM replied to PG&E's protest, and requested that PG&E's protest be dismissed.

1. Background: Positions of Alameda County Residents Concerned About Smart Meters (ACRCASM) and Pacific Gas and Electric Company (PG&E)

According to ACRCASM, the authorization granted to PG&E to deploy advanced metering infrastructure (AMI) was reasonable at the time it was

[1] Advanced metering infrastructure is also referred to as "SmartMeters."

granted in 2006 and extended in 2009, but by 2011 new factual developments had arisen that require those original authorizations to be revisited.[2] (ACRCASM Application at 6.)[3] ACRCASM asks for the Commission to conduct "fact finding hearings" to address three primary issues: adverse health effects caused by AMI (*Id.* at 8-12), violations of property rights protected by the California Constitution stemming from those adverse health effects and the installation of AMI (*Id.* at 13-15), and that this Commission lacks authority to authorize the deployment of AMI (*Id.* at 16-17, 20-21).[4]

PG&E's protest to ACRCASM's Application argues that it is not appropriate or necessary to re-examine and re-litigate AMI issues already addressed and decided by the Commission. (PG&E Protest at 3-5.) PG&E characterizes ACRCASM's Application as procedurally and substantively deficient, and "comprised primarily of erroneous legal conclusions and unsupported factual allegations." (*Id.* at 1.) PG&E disputes ACRCASM's arguments based on property rights and lack of Commission authority, arguing that the Commission does have authority over AMI deployment, and that Commission-approved tariffs govern the installation and maintenance of meters, not easement law as argued by ACRCASM. (*Id.* at 6-7.)

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[2] ACRCASM refers to Decisions D.06-07-027 and D.09-03-026 collectively as the "original authorization." (ACRCASM Application at 2.)

[3] The electronic version of the ACRCASM Application lacks page numbers; accordingly, for citation purposes this decision will use the page numbers generated by the pdf reader software.

[4] ACRCASM also alleges "malfeasance" on the part of PG&E. (*Id.* at 17-20.)

ACRCASM filed a reply to PG&E's protest, in which it largely dismisses PG&E's arguments as irrelevant. (ACRCASM Reply at 5-8 and 11-12.)[5] The majority of the remainder of ACRCASM's reply is devoted to sections addressing: "The Difference Between the Past and the Future of a Decision" (*Id.* at 2-3), "The Separation Between the Legislative and the Regulatory" (*Id.* at 3-4, and 8), and "The Difference Between a Right and a Given Authority" (*Id.* at 4, and 8-10).

2. Discussion

ACRCASM's claim that the Commission lacks authority over AMI is incorrect, and ACRCASM's legal arguments lack merit. ACRCASM has not provided an adequate basis for this Commission to revisit its prior decisions relating to AMI; accordingly we do not address here any potential health effects of AMI, nor do we make any findings regarding specific property rights. The Commission's prior decisions remain in effect.

2.1. Legal Authority: Koponen v. PG&E

ACRCASM relies almost exclusively on one case as the legal authority supporting its position: *Koponen v. PG&E*, 165 Cal. App. 4th 345 (2008). (*See*, ACRCASM Application at 16, 19-20 and ACRCASM Reply at 4, 8-10.) ACRCASM cites *Koponen* for the proposition that the Commission, in its prior decisions authorizing installation of AMI, acted "…beyond the PUC's legitimate authority to regulate the public utility, as per the court's ruling in *Koponen*." (ACRCASM Reply at 8.)

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[5] The electronic version of the ACRCASM Reply also lacks page numbers; again, for citation purposes this decision will use the page numbers generated by the pdf reader software.

Koponen is central to ACRCASM's argument that prior Commission decisions authorizing AMI exceed the scope of the Commission's authority:

> The PUC has assumed that it has the power to grant PG&E the right to install Smartmeters universally in its region of operation in California. But according to *Koponen vs. PG&E* (Cal. App. 1st, July 28, 2008, A116728), it does not. This case, decided in the First Circuit Court of Appeals in California, while recognizing the PUC's authority to determine what uses PG&E can make of its facilities, denied the Commission regulatory authority over the property rights that exist for private owners with respect to PG&E. (ACRCASM Application at 16.)

The *Koponen* case addressed the question of what types of actions could be brought against a utility in state court, as some actions against a utility are barred by Public Utilities Code section 1759; *Koponen* follows other cases that addressed this issue, including *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal. 4th 893 ("*Covalt*") and *Hartwell Corp. v. Superior Court* (2002) 27 Cal. 4th 256. In *Koponen*, plaintiffs sought to sue PG&E in superior court, arguing that PG&E's leasing the use of its rights of ways to telecommunications companies exceeded the scope of the easements held by PG&E. (*Koponen*, supra at 348-349.)

Ultimately, the *Koponen* court concluded:

> That the commission has made no determination of the extent of PG&E's easements means only that plaintiffs are not barred from seeking a court determination of that issue. It does not, however, follow that plaintiffs are entitled to obtain all the relief they seek by their complaint. To the contrary, some of the relief plaintiffs seek invades the commission's ratemaking authority, and is barred by section 1759. (*Id.* at 356-357.)

In short, *Koponen* held that some controversies are properly brought before the courts, while others that would hinder or interfere with the Commission's exercise of its regulatory authority are barred. (*Id.* at 351, citing *Hartwell*, supra.)

Here, however, ACRCASM is not trying to bring an action in superior court, but is expressly asking the Commission to take action. ACRCASM specifically asks that the Commission hold fact finding and evidentiary hearings. (ACRCASM Application at 21-22), and that the Commission take specific actions, including ordering a moratorium on AMI installations. (*Id.* at 22-23.) ACRCASM cannot simultaneously argue that the Commission has no authority to address AMI while asking the Commission to address AMI. The primary holding of *Koponen* does not apply here, and accordingly does not support ACRCASM's position.

ACRCASM also relies on *Koponen* to argue that the installation of AMI by PG&E falls outside the permissible use of the easement that PG&E has over its customers' property. ACRCASM argues that:

> Under its easement, PG&E has the right to maintain the equipment it has installed on private property, as well as to read its meters. PG&E itself affirms, on its webpage under the heading of Public Responsibility, that it has an easement to maintain its facilities in order to furnish and supply electricity. But that is all. Its easement does not extend to equipment upgrades, or the addition of technological devices that go beyond the furnishing and supplying of electiricity [sic], such as communications technology. (*Id*. at 16.)

We do not reach the issue of the precise scope of PG&E's easement, but observe that the situation here is different than in *Koponen*. The *Koponen* court described the situation it was addressing:

> Plaintiffs, however, contend their claims have nothing to do with the commission's authority to regulate PG&E's use of PG&E property, including PG&E's property interest in the rights-of-way over plaintiffs' land. Rather, plaintiffs seek to establish PG&E is invading *plaintiffs*' property rights by attempting to sell to the telecommunications providers a use of the rights-of-way that PG&E does not own. (*Koponen*, supra at 353.)

In *Koponen*, PG&E was selling the use of its easements to telecommunications companies, resulting in the easement being used by a different company, providing a different service, and potentially serving different customers. Here, PG&E is installing its own equipment to serve its own customers. And metering, whether digital or analog, whether read remotely or by a human meter reader, is an integral part of providing electric service. As PG&E puts it:

> PG&E's provision of electric service is governed by PG&E's Electric Tariff Rule 16. Rule 16 applies to PG&E's Service Facilities, including the meter. Rule 16 represents PG&E's terms of service, and provides the basis by which PG&E may lawfully install and maintain the SmartMeter™ equipment on the property. (PG&E Protest at 6, footnotes omitted.)
>
> The term "Service Facilities," is defined in Rule 16.A.2: "SERVICE FACILITIES. PG&E's Service Facilities shall consist of (a) primary or secondary underground or overhead service conductors, (b) poles to support overhead service conductors, (c) service transformers, (d) <u>PG&E owned metering equipment</u>, and (e) other PG&E-owned service related equipment." (*Id.* at 6, footnote 3, emphasis in PG&E Protest.)

Accordingly, *Koponen* does not appear to be factually on point.

2.2. Collateral Attack

PG&E argues that ACRCASM's Application is a collateral attack on the Commission's prior AMI decisions, and that ACRCASM has failed to meet the requirements of the Commission's Rule of Practice and Procedure (Rule) 16.4. (PG&E Protest at 4-5.) ACRCASM takes strong exception to this argument, but seems to misconstrue what "collateral attack" means, and its response does not directly address PG&E's argument.[6]

In law, a "collateral attack" generally means an attempt to alter the outcome of one case by bringing (or making arguments in) another case. Here, PG&E is incorrect that ACRCASM is engaged in a collateral attack on D.06-07-027; ACRCASM is directly attacking D.06-07-027. More problematic is that ACRCASM does appear to be engaged in a collateral attack on another proceeding: Application (A.) 11-03-014.

In fact, ACRCASM expressly admits that this is their intent:

> This group, ACRCASM, was not a party to the original authorization of the AMI project, but became a party to PG&E's application for modification of that project (A.11-03-014), in protest against that application. It therefore has an interest in the validity of the original authorization of that AMI project, through its interest in opposition to the proposed modification, in the knowledge

[6] ACRCASM's response reads: "It behooves us to point out, unfortunately, that the last sentence in paragraph 2 of sec. III A is unintelligible, which is inexcusable for a corporation that can hire the best lawyers available. It refers to a "procedurally impermissible collateral attack". What kind of Orwellian statement is this? We, who are defending the people against a serious and intentional incursion on their welfare are being accused of "attacking"? It is "impermissible" for citizens to hold their government and its assigned agents accountable to the law and the constitution? Since when? Only in a tyranny would such a thought be intelligible. It is a disgrace that PG&E would stoop to such derogation and calumny against the citizens of this state." (ACRCASM Reply at 11.)

> that the validity of PG&E's latter proposed modification depends on the validity of that original authorization. If the proceedings in A.11-03-014 (herein referred to as "PG&E's modification application") are to decide whether PG&E's request is reasonable or not, the validity and reasonableness of the program PG&E wishes to modify must enter into consideration. (ACRCASM Application at 2; *see* also at 7-8.)

ACRCASM does not describe why its participation in A.11-03-014 (a forward-looking proceeding addressing AMI) would be inadequate to meet its purposes, but presumably it believes it could gain an advantage in that proceeding by undercutting the earlier AMI decision. This Commission does not wish to encourage parties in Commission proceedings to simultaneously seek to reverse related prior Commission decisions in order to gain a litigation advantage.

2.3. D.10-12-001

PG&E points out that the Commission has previously been asked to revisit D.06-07-027, and declined to do so. (PG&E Protest at 3.) In a 2010 application (A.10-04-018), the EMF Safety Network filed an application for modification of D.06-07-027 and D.09-03-026, on the grounds that "[t]he Commission and other interested parties did not adequately address health, environmental, and safety impacts related to widespread deployment of [Radio frequency] RF Smart Meter technologies…" (D.10-12-001 at 2, as modified by D.12-06-017.) This is essentially the same claim made by ACRCASM in 2011.

In that case, the Commission found that it was not reasonable to reopen its prior AMI decisions to address the alleged health impacts produced by RF emissions from AMI, and it deferred to the expertise of the Federal

Communications Commission on that issue. (*Id.* at 1, 9-11.) ACRCASM has not provided an adequate basis for this Commission to reach a different result here.

3. Categorization and Need for Hearing

In Resolution ALJ 176-3278 issued on July 28, 2011, the Commission preliminarily determined that the category of this proceeding is ratesetting and that hearings would be needed. Due to this being an application for modification of a prior Commission decision raising legal issues, evidentiary hearings were not necessary.

4. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3. Comments were filed by ACRCASM on October 10, 2016. No changes were made to the proposed decision.

5. Assignment of Proceeding

The assigned Commissioner is Liane M. Randolph and the assigned ALJ is Peter V. Allen. ALJ Allen is the Presiding Officer. This proceeding is categorized as ratesetting.

Findings of Fact

1. ACRCASM presents a number of arguments in support of its request to modify Commission D.06-07-027 and D.09-03-026.
2. ACRCASM relies upon *Koponen v. PG&E* as the primary legal authority supporting its arguments.
3. ACRCASM's Application here is a collateral attack on A.11-03-014.

Conclusions of Law

1. ACRCASM's arguments do not provide an adequate basis for modifying Commission D.06-07-027 and D.09-03-026.
2. *Koponen v. PG&E* does not support ACRCASM's legal arguments.
3. Collateral attacks on other proceedings are discouraged.
4. Evidentiary hearings were not necessary.
5. A.11-07-009 should be closed.

O R D E R

IT IS ORDERED that:

1. Alameda County Residents Concerned About Smart Meters's Application for Modification of Decision 06-07-027 is denied.
2. Application 11-07-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.