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**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 (U-39-M).

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

**WILNER & ASSOCIATES' COMMENTS TO PROPOSED DECISION OF
ASSIGNED COMMISSIONER MICHAEL R. PEEVEY**

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Dated: December 12, 2011

INDEX OF RECOMMENDED CHANGES TO PROPOSED DECISION

1. The proposed decision to modify Pacific Gas and Electric Company's ("PG&E") SmartMeter program ("PD") shall include an option for residential customers who do not wish to have a SmartMeter to have an analog meter instead.
2. A customer selecting the analog meter option shall be assessed an initial fee of \$90.00, and a monthly charge of \$15.00. California Alternate Rates (CARE) and Family Electric Rate Assistance (FERA) program customers making this election shall not be assessed an initial fee, but will pay a monthly charge of \$5.00.
3. Customers that have a medical condition shall not be assessed any costs for opting out of the SmartMeter program pursuant to § 453(b) of the Public Utilities Code ("PU") Code.
4. PG&E shall track revenues and costs associated with providing an analog meter in the same manner as set forth in the PD on Page 2.
5. PG&E shall file a Tier 1 Advice Letter implementing the analog meter opt-out option, and to establish a SmartMeter Opt-Out Tariff within 15 days of the effective date of this decision. PG&E shall also file a companion volumetric usage tariff for this option in lieu of demand, peak pricing, and Time-Of-Use rates that have been or will be established in the future. The tariff shall be filed pursuant to § 454 of the PU Code.
6. Customers on the delay list shall be allowed to participate in the opt-out program, and retain their analog meter, if they have one. Customers on the delay list that have a SmartMeter, shall be allowed to have the analog meter option subject to the terms and conditions set forth in the final decision in this matter. Customers with a medical condition shall not be subject to any charges.

7. Notice of the opt-out options adopted in the final decision in this matter shall be given to all PG&E customers. Such notice shall be by bill insert, advertisements in general circulation publications, written notice by mail to each customer, and information on PG&E's Web site.

8. Customers shall not be required to participate in demand, peak pricing, or TOU billing if they have chosen an analog meter instead of a SmartMeter. Instead, they will be subject to existing electric service tariffs or a volumetric tariff alternative.

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**WILNER & ASSOCIATES' COMMENTS TO PROPOSED DECISION OF
ASSIGNED COMMISSIONER MICHAEL R. PEEVEY**

Pursuant to Rule 14.3 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, Wilner & Associates ("Wilner") respectfully submits its comments on the proposed decision ("PD") issued by assigned Commissioner Peevey in this proceeding:

I. INTRODUCTION

Although the majority of parties in this matter that filed a protest to Pacific Gas and Electric Company's ("PG&E") opt-out application were in favor of offering customers an analog meter as an alternative to a SmartMeter¹, the PD rejects this option, and finds that the analog meter is obsolete as well as inconsistent with the State's energy policy. One of the reasons Wilner and other parties wanted the analog meter option was concern that PG&E's proposal to disable the radio in the SmartMeter or to offer a digital meter without a radio would not solve the health concerns raised by many of PG&E's customers. Wilner has alleged throughout this proceeding that the switching-mode power supply and other components in the SmartMeter (and digital meter) conduct radio frequency ("RF") interference onto the customers' electrical wiring and also radiates this interference through the air.² Wilner also alleges that these factors present a health hazard to PG&E's customers, and there is no assurance that the alternatives set forth in

¹See 5/6/11 Prehearing Conference ("PHC") transcript for analog meter opt-out recommendations (pp 12-13 for Wilner; p 20 for Alameda County Residents Concerned About SmartMeters; p 25 Eagle Forum of California; and p 56 for EMF Safety Network). See also 7/27/11 PHC transcript (p 140 for The Utility Reform Network; and p 152 for County of Lake).

²See Wilner's Protest, pp 4-5 & Exhibit A filed 4/25/11; Wilner's Motion to Require PG&E to Include an Analog Meter Option as Part of its SmartMeter Opt-Out Proposal, p 2 & Exhibit B filed 6/9/11; Wilner's Detailed Analog Meter Opt-Out Proposal, p 1 (attached to Motion to Take Judicial Notice of Workshop Document and Make It Part of the Record filed 8/23/11); and 5/6/11 PHC transcript, p 9.

PG&E's application will actually bring them relief. However, this critical issue was not considered in the proceeding or the PD.

Aside from the question of whether PG&E's proposed opt-out alternatives are reasonable, there is also a matter of the costs to PG&E's customers for those options. Wilner does not believe that there should be any costs for a customer that has a medical condition that is adversely affected by a SmartMeter. See § 453(b) of the Public Utilities ("PU") Code. This issue was not addressed in the proceeding or the PD. Wilner does not object to the costs that would otherwise be charged to PG&E's customers that choose to opt out for other reasons.³

II. ARGUMENT

The PD fails to recognize the possibility of health problems caused by the SmartMeters by stating: *health is not material to the resolution of this application (PD, p 17)*. How can this be? PG&E has a responsibility to provide facilities that promote the health and safety of its customers. See PU Code § 451. In addition, the California Supreme Court has held, [that] *the commission has broad authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public, and if so, to prescribe corrective measures and order them into effect*. See *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893.

Furthermore, PU Code § 8360 referring to the Smart Grid provides in part, [that it is] *the policy of the state to modernize the state's electrical transmission and distribution system to maintain safe, reliable, efficient and secure electrical service* It is clear from this

³An initial fee of \$90.00, and monthly charge of \$15.00 for residential customers, and no initial fee with a \$5.00 per month fee for California Alternate Rates (CARE) and Family Electric Rate Assistance (FERA) program customers (PD, p 33).

established law that the State's energy policies are not more important than the Commission's duty to protect the health and safety of PG&E's customers. The best way to ensure that this is accomplished is to require PG&E to offer an analog meter option to its customers.

III. LEGAL ERRORS

One legal error is acceptance of the technical information submitted by PG&E in response to the assigned Administrative Law Judge's Ruling Seeking Clarification dated October 18, 2011 (PD, pp 15-16). Wilner pointed out in its Motion to Strike and Request for Hearing dated November 18, 2011 at Page 1 that the Commission must not consider PG&E's submission because it is not verified, and therefore does not comply with PU Code §1710, which states:

No documents 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 by the person preparing or in charge of preparing them as being true and correct.

Another legal error is the fact that the Commission failed to hold an evidentiary hearing as required by the Assigned Commissioner Ruling and Scoping Memo ("Scoping Memo") dated May 25, 2011 (p 6). However, in the PD, it is stated that there are no disputed factual issues material to the resolution of the application, and therefore evidentiary hearings will not be necessary (PD, p 39). This is incorrect. The factual issues concerning conduction onto customers' electrical wiring as well as emissions into the air from the switching-mode power supply and other components in the SmartMeter are good examples. As stated in the introduction to these comments, Wilner claims that conduction and emissions cause a health problem for PG&E's customers, and disconnecting the radio in the SmartMeter or installing a digital meter without a radio will not solve this problem. PG&E claims in the technical

information it provided that the meters meet Federal Communications Commission ("FCC") guidelines (PD, pp 15-16). However, this information only represents RF emissions in the 902 to 928 megahertz ("MHz") portion of the radio spectrum, and emissions that would be present when the radio is disabled in the SmartMeter or a digital meter without a radio is installed. There are no conduction measurements as required in FCC Part 15 (B) guidelines concerning verification of compliance for digital devices – such as SmartMeters.

Inasmuch as the assigned Administrative Law Judge ("ALJ") considered PG&E's representation on this matter (PD, p 12), Wilner and the other parties should have been given an opportunity to cross-examine PG&E's witness sponsoring the technical information. There would have been at least four challenges: (1) admissibility; (2) whether the technical information provided applies to the conduction/radiation issues identified by Wilner; (3) whether the information is correct; and (4) whether it is representative of what would actually take place in a typical installation.

The concern that turning off the radio in the SmartMeter would not solve customers' health problems was raised in Wilner's protest and acknowledged in the PD (see Footnote 12, p 10). However, without fact finding on this issue, PG&E's customers might end up paying for an opt-out option that fails to solve their health concerns. As such, any charges for opting out would be unjust, unreasonable, and therefore considered unlawful (see PU Code § 451).

Another legal error is the fact that the Commission failed to address the problem of SmartMeters in multi-tenant environments in the PD. The assigned ALJ requested the parties to provide detailed opt-out proposals including consideration for this very issue (see ALJ Ruling Requesting Further Detail on Opt-Out Proposals and Setting Joint Workshop issued 8/3/11, p 7).

In response, Wilner did submit a recommendation for creating SmartMeter-safe zones in multi-resident complexes for groups of people that have health issues, and cannot be in proximity of SmartMeters. This would also accommodate individuals that are having a difficult time finding housing where SmartMeters are not installed (see Wilner's Detailed Analog Meter Opt-Out Proposal, p 6). However, because there was no evidentiary hearing, there was no opportunity for fact finding on this important issue.

Another legal error is the fact that the Commission failed to consider the Maine Public Utilities Commission ("Maine PUC") decision requiring electric utilities to provide an analog meter opt-out option in the PD. See Maine PUC Orders (Parts I and II) in Docket No. 2010-345, dated May 19, 2011 and June 22, 2011, respectively. Wilner raised this legal precedent several times in the proceeding: Once by a motion asking the assigned ALJ to take judicial notice of that decision, and make it part of the record as well as in its Detailed Analog Meter Opt-Out Proposal suggesting that the Commission adopt some of the opt-out guidelines established in the Maine PUC decision. This is a landmark decision that should have been considered in this proceeding.

Another legal error is the fact that the assigned ALJ failed to consider and rule on motions filed by Wilner during the opt-out proceeding.⁴ This is a violation of Wilner's

⁴The ALJ did not consider and rule on the following motions filed by Wilner: Motion to Require PG&E to Conduct SmartMeter Health Study; Motion to Require DRA to Oversee the SmartMeter Health Study; Motion to Amend Protest; Motion to Take Judicial Notice and Make Certain Documents Part of the Record; Motion to Require PG&E to Include an Analog Meter Option as Part of its SmartMeter Opt-Out Proposal; Motion for Rulings on Outstanding Motions; Motion to Take Judicial Notice of Workshop Document and Make It Part of the Record; Emergency Motion to Require PG&E to Retain Analog Meters; and Motion to Strike and Request for Hearing.

procedural due process rights.⁵ In the PD, all of Wilner's motions were either declared moot or denied (PD, p 38). This is a significant point because Wilner's motion for PG&E to conduct a SmartMeter health study would have provided him with an opportunity to show that the opt-out alternatives proposed by PG&E might not eliminate the health concerns associated with SmartMeters. In addition, the motion to require the Division of Ratepayer Advocates ("DRA") to oversee the study would have ensured impartiality. In the motion to take judicial notice and make certain documents part of the record, Wilner would have shown that: (1) the Maine PUC decision sets a legal precedent for the Commission to follow; (2) the World Health Organization study identifying non-ionizing radiation as a possible carcinogen applies to SmartMeters; and (3) PG&E customer letters addressed to ALJs DeBerry and Yip-Kikugawa placed in the proceeding correspondence file would have substantiated Wilner's claim that the switching-mode power supply and other components in the SmartMeter create a health problem for the utility's customers, and they prefer an analog meter alternative (currently, there are 277 such letters in that file). Wilner pointed out to the assigned ALJ on two occasions that the motions had not been acted upon: Once during the second prehearing conference on July 27, 2011 where she promised to rule on outstanding motions after PG&E had filed a response to one of DRA's motions (see 7/27/11 PHC transcript, p 97); and then in a letter dated August 15, 2011 to which she failed to respond.

Another legal error is the Commission's failure to consider RF emissions generated by the Home Area Network ("HAN") feature of the SmartMeter which has a separate transmitter

⁵Wilner has a statutorily conferred right (along with other PG&E customers) to receive electrical service that promotes "safety, health, comfort, and convenience" pursuant to PU Code § 451, and has been deprived of his procedural due process rights guaranteed by the California Constitution. See *Ryan v. California Interscholastic Federation-San Diego* (2001) 94 Cal. App. 4th 1048, 1070-1073.

operating in the 2.4 gigahertz portion of the radio spectrum. According to the technical information PG&E provided concerning such emissions, it claims that the HAN is an optional feature which is not currently being offered (see PG&E's response to ALJ's request for clarification, p 3, Footnote 3 & p 10, Footnote 6). That statement is incorrect. PG&E has received permission from the Commission to provide this service to 5,000 customers initially (see Decision 11-07-056, p 116) which means there will be RF emissions from those SmartMeters (and presumably a much larger number in the future). In addition, the RF emissions between Smart appliances and the SmartMeters with the HAN feature will be quite substantial, and have the potential of creating adverse health effects for PG&E's customers.

IV. FACTUAL ERRORS

There is a factual error concerning **Finding of Fact 6** which states that: *The FCC has authority over technical aspects of radio communications and regulates human exposure to RF emissions in order to protect public health and safety* (PD, p 40). Although the FCC has authority to set and enforce RF emissions standards, the Commission has an obligation under the PU Code to ensure that PG&E's SmartMeters do not pose a threat to public health or safety (see § 451). The Commission cannot refuse to enforce this statute because it believes such enforcement is preempted by federal law, unless an appellate court has ruled that the statute is preempted. See Cal.Const. Art. 3.5; and also *Burlington Northern Railway Co. v. CPUC* (2003) 112 Cal.App. 4th 881, 888.

Another example of this doctrine can be found in *Northern California Power Agency v. Public Utilities Commission* (1971) 5 Cal.3d 370 where the Supreme Court held that while the Commission cannot enforce antitrust laws per se, it has an obligation to consider the implication of possible violations of those laws in the decision-making process.

In addition, the Commission has broad authority to go beyond its statutory duty to protect public health and safety. The California Supreme Court has stated, [that] *the commission's powers are not limited to those expressly conferred on it: The Legislature further authorizes the commission 'to do all things whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient' in the exercise of its jurisdiction over public utilities See Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal.3d891, 905 [160 Cal.Rptr. 124, 603 p.2d 41].*

Another factual error involves **Finding of Fact 8** which states: *Interval energy consumption data is critical to the Commission's policies to implement a demand response program and TOU rates (PD, p 40).* This may be critical to the Commission's objectives, but it is not more important than the utility customers' health and safety. That must come first (see PU Code § 451).

Conclusion of Law 2 states: *D.10-12-001 determined that PG&E's SmartMeter technology complies with FCC requirements (PD, p 40).* This was a determination made by the Commission without the benefit of a fully developed record to support its conclusion. This is another instance where an evidentiary hearing should have been held, and the parties in the proceeding given an opportunity to cross-examine PG&E's witness who sponsored the technical information provided to the Commission. It should be noted that Decision ("D.") 10-12-001 is subject to a pending application for rehearing, and should not be the basis for a Conclusion of Law at this time.

Conclusion of Law 5 states: *Allowing residential customers an opportunity to opt out of receiving a wireless SmartMeter does not mean that customers electing this option would not be subject to ongoing state energy objectives (PD, p 40).* PG&E's customers cannot be required to

participate in the State's ongoing energy objectives if it means putting their health at risk. This would be a violation of § 451 of the PU Code which is intended to avoid such a possibility.

The same is true with **Conclusion of Law 6** which states: *It is important that the selected opt-out option has the capability to take advantage of smart grid benefits in the future* (PD, 41). The benefits of a Smart Grid in the future do not outweigh the rights of PG&E's customers to receive safe and reliable service pursuant to PU Code §§ 451 and 8360.

With respect to **Conclusion of Law 8** which states: *It is appropriate to adopt a non-communicating meter as the opt-out option* (PD, p 41), this would only be true if the alternative does not conduct an unlawful level of RF interference onto the electrical wiring of the customer, and radiate such emissions through the air (see Technical Errors herein, p 12). This is an outstanding issue in this proceeding that has not been resolved, and will require an evidentiary hearing for fact finding by the Commission.

Conclusion of Law 10 states: *PG&E's proposed radio-off opt-out option is reasonable only if it will allow PG&E to collect interval data and use this data for billing purpose[s] as of January 1, 2014* (PD, p 41). No opt-out option can be considered reasonable if it places PG&E's customers' health and safety at risk (see PU Code § 451). Furthermore, PG&E could develop a companion tariff for analog meters that would include volumetric rates in lieu of demand and TOU billing.

Conclusion of Law 11 states: *It would not be reasonable to allow the opt-out option to be exercised by local entities and communities* (PD, p 40). The Commission cannot reach this Conclusion of Law because it is not supported by the record in this proceeding. This is another issue that must be determined by an evidentiary hearing.

Conclusion of Law 14 states: *A residential customer selecting the opt-out option should be assessed an initial charge to install the non-communicating meter and a monthly charge* (PD, p 41). This must not apply to customers with a medical condition that are adversely affected by the installation of a SmartMeter installed on their property in accordance with PU Code § 453(b).

Conclusion of Law 20 states: *The modifications to the SmartMeter Program should be implemented as quickly as possible* (PD, p 42). Implementation must include notice to all PG&E customers (not just those on the delay list) that they are eligible to opt out pursuant to the terms and conditions established in the final decision in this matter. Notice shall include a bill insert, advertisements in general circulation publications, written notice by mail to each customer, and information on PG&E's Web site.

Conclusion of Law 22 states: *All outstanding motions should be denied* (PD, p 42). All outstanding motions must be considered and a ruling made as to their merits. Failure to do so would constitute a violation of the parties' procedural due process rights. Furthermore, such rulings should have been made during pendency of this matter.

Conclusion of Law 23 states: *No hearings were necessary as there were no disputed factual issues material to the resolution of this application* (PD, p 42). As previously stated in these comments, evidentiary hearings are required to ensure certain fact finding and conclusions of law are made part of the record in this proceeding.

Conclusion of Law 24 states: *A.11-03-014 should be closed* (PD, p 42). This matter cannot be closed until such time as all factual, legal, and technical issues have been properly resolved by the Commission during evidentiary hearings.

Americans with Disabilities Act and Electromagnetic Sensitivity

The Commission has failed to properly consider the Americans with Disabilities Act

("ADA") in the PD, and ignored the issue of electromagnetic sensitivity.⁶ The PD addresses the ADA by stating: *While we appreciate important policy and practical values protected by the ADA, it is not clear how the referenced findings impact the Commission's activities* (PD, p 17). Just as the Commission does not have authority to enforce FCC rules or federal and state antitrust laws, it does have a duty to consider such issues in the decision-making process as discussed earlier in these comments. The same is true of the ADA. There are approximately 9.8 million men, women, and children in the United States that suffer from electromagnetic sensitivity. In fact, in many instances, they are entitled to receive disability benefits as a result of the medical symptoms that arise as a result of this condition. The number of people that suffer from this debilitating ailment is expected to grow exponentially as the number of wireless devices (like SmartMeters) increases in the future. Several states acknowledge that electromagnetic sensitivity is recognized by the ADA (see Exhibit 1 attached hereto). Investor-owned utilities ("IOUs") have an obligation under ADA guidelines to locate and maintain their facilities in a manner that protects their customers and the public at large. This must include SmartMeters and other apparatus associated with the Smart Grid deployment. This

⁶Wilner raised the issue of electromagnetic sensitivity in his protest where he explained that: *some people through no fault of their own suffer from [electromagnetic hypersensitivity ("EHS")] or some other medical condition, and are adversely affected by a SmartMeter installed on their property.* Wilner also explained that the *Institute of Electronic and Electrical Engineers ("IEEE") describes some of the symptoms associated with EHS as follows:*

- *Nervous system symptoms (e.g. fatigue, stress, sleep disturbances)*
- *Skin symptoms (e.g. facial prickling, burning sensations, rashes)*
- *Various body symptoms (e.g. pain and ache in muscles)*
- *Eye symptoms (e.g. burning sensations)*
- *Various less common symptoms, including ear, nose and throat symptoms, digestive disorders.*

It should be noted that the IEEE established an engineering protocol for the wireless devices utilized in the SmartMeters to transmit and receive radio signals. (See Protest, pp 1 & 4.)

is extremely important because people that suffer from electromagnetic sensitivity are susceptible to adverse health effects from levels of RF radiation (and conduction) that are far below guidelines established by the FCC.

One accommodation PG&E should provide to customers that suffer from electromagnetic sensitivity is analog meters because: *PG&E acknowledges that the analog meters emit no RF [emissions]* (PD, p 15).

V. TECHNICAL ERRORS

Table 1 on Page 15 of the PD purports to show RF emissions from a SmartMeter with the radio off and a digital meter without a radio. However, in order to meet FCC Class B digital device verification requirements, it is also necessary to show conduction measurements (see FCC Part 15 47 C.F.R. § 15.107 Conducted limits). Wilner requested this information from PG&E in a data request on September 2, 2011. PG&E objected to the request on the basis that the information was beyond the scope of the proceeding. PG&E also stated: *All radio devices in PG&E's Smart Meters are licensed or certified by the FCC and comply with all FCC requirements. (Finding of Fact 2)* in D.10-12-001. As previously stated in these comments, this Finding of Fact is not supported by a fully developed record, and D.10-12-001 is not final because it is subject to an application for rehearing. More importantly, the decision does not address emission and conduction measurements for a SmartMeter with the radio off or a digital meter without a radio.

The PD is technically incomplete to the extent that conduction measurements have not been considered, and are alleged to cause a health problem for PG&E's customers (see Wilner's Protest, pp 4 & 5). The technical information provided by PG&E showing emissions from the two devices (PD, p 15) only tells half the story. The conduction in this instance involves RF

interference from the switching-mode power supply and other components in a SmartMeter with the radio turned off (or a digital meter without a radio) that is conducted onto the customer's electrical wiring as well as the electrical wiring of the other customers (neighbors) that are served by the same secondary of a PG&E distribution transformer normally located on a nearby telephone pole. If there are ten customers served by that same distribution transformer, the total conduction could be ten times the limit allowed by the FCC. This would present a serious health hazard to PG&E's customers and Findings of Fact as well as Conclusions of Law are necessary on this technical issue before the Commission can determine that PG&E's proposed opt-out alternatives do not exceed FCC emission and conduction limits.

Table 1 below shows FCC § 15.107 conducted limits (56 to 46 microvolts) that are applicable to a single SmartMeter. Therefore, in the example above, that number would be multiplied by ten which equals 560 to 460 microvolts which would exceed the allowable limit. This measurement is made between each power line and ground at the customers' service entry point. This is another matter that should have been decided by fact finding at an evidentiary hearing.

Table 1

Frequency of emission (MHz)	Conducted limit (dB μ V)	
	Quasi-peak	Average
0.15-0.5.....	66 to 56*.....	56 to 46*
0.5-5	56	46
5-30	60.....	50

*Decreases with the logarithm of the frequency.

Another technical error in the PD is the explanation: *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 without the help of the flashlight's focusing capability* (PD, p 14). This is not the correct analogy to explain the difference between a SmartMeter that transmits 1 watt of power with an isotropic radiator (omnidirectional) and one that transmits with a dipole (directional) antenna. The directional antenna which is used in the SmartMeter will allow the radiated signal to travel in this example more than twice the distance. This means that all of PG&E's SmartMeters are radiating a signal at least twice the distance as originally represented. It is not a matter of a bulb looking brighter, but a matter of harmful RF emissions traveling farther.

IV. CONCLUSION

If the Commission fails to deal with the health issues that have been raised by PG&E's customers and the parties in this proceeding, this issue will keep coming back like a boomerang with new complaints and applications for modifications to the Smart Grid decisions. All of this will consume more Commission time and resources, and most importantly, many of PG&E's customers will continue to suffer ill effects from the SmartMeters.

By requesting technical information concerning SmartMeter emissions and frequency of data transmissions, the Commission expanded the scope of this proceeding beyond issues that were identified in the Scoping Memo:

1. *Whether PG&E's proposed Opt-Out program is a reasonable solution as an alternative to those customers who choose not to have a SmartMeter capable of RF transmission.*
2. *Whether the estimated costs of PG&E's Opt-Out program are reasonable.*

3. *Whether PG&E's proposed cost recovery of the costs for the Opt-Out Program is reasonable.*

(See Scoping Memo, pp 3 & 4.)

However, the Commission failed to give Wilner and the other parties an opportunity to submit any technical information that they believe should be considered by the Commission to rebut the information offered by PG&E. Wilner fully expected an opportunity to present prepared testimony on these issues during the evidentiary hearing that was supposed to be held pursuant to the Scoping Memo. Without that hearing, the Commission is accepting PG&E's evidence without legal challenge. This amounts to a denial of procedural due process and judicial error by the Commission.

Respectfully submitted,

/s/

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APPENDIX -- PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Proposed Findings of Fact

1. **Finding of Fact 6** states: *The FCC has authority over technical aspects of radio communications and regulates human exposure to RF emissions in order to protect public health and safety.* To be added: **However, the Commission is not preempted by such federal authority from enforcing Public Utilities Code ("PU Code") § 451 to ensure that PG&E's SmartMeters do not pose a threat to public health and safety.**

2. **Finding of Fact 8** states: *Interval energy consumption data is critical to the Commission's policies to implement a demand response program and TOU rates.* To be added: **However, implementation of demand response and TOU rates is not more important than the Commission's statutory duty to protect public health and safety.**

3. **Finding of Fact 12:** **The Main Public Utilities Commission has issued a decision requiring electric utilities to provide an analog meter as an opt-out option to customers.**

4. **Finding of Fact 13:** **The Americans with Disabilities Act and the Institute of Electronic and Electrical Engineers (IEEE) recognize electromagnetic sensitivity as a medical disability.**

5. **Finding of Fact 14:** **The technical information submitted by PG&E pertaining to RF emissions and transmission frequency from SmartMeters does not include conduction and radiation measurements which are required by the FCC for verification purposes.**

6. **Finding of Fact 15:** The technical information provided in this proceeding by PG&E concerning SmartMeter RF emissions and frequency of transmissions was not verified as required in PU Code § 1710.

7. **Finding of Fact 16:** The assigned Administrative Law Judge ("ALJ") failed to consider and rule on outstanding motions filed by Wilner & Associates ("Wilner") which should have been done during pendency of this matter.

Proposed Conclusions of Law

1. **Conclusion of Law 2** should state: *D.10-12-001 mistakenly determined that PG&E's SmartMeter technology complies with FCC requirements. This decision is not supported by a fully developed record, and is subject to a pending Application for Rehearing.*

2. **Conclusion of Law 4** states: *The best opt-out option to be adopted must balance the concerns expressed by customers against California's overall energy policy.* To be added: **However, when customer concerns involve health and safety, that consideration must come first.**

3. **Conclusion of Law 5** states: *Allowing residential customers an opportunity to opt out of receiving a wireless SmartMeter does not mean that customers electing this option would not be subject to ongoing state energy objectives.* To be added: **However, an exception must be made for customers that suffer from a medical condition including those requiring life-support equipment as defined in PU Code § 739(2) to protect their health and well-being. In such instances, alternate rates and charges must be made available to them.**

4. **Conclusion of Law 6** states: *It is important that the selected opt-out option has the capability to take advantage of smart grid benefits in the future.* To be added: **However, an exception must be made when an analog meter is the selected option, and in such cases a companion tariff with alternate rates and charges shall be made available.**

5. **Conclusion of Law 8** should be changed to read: *It is appropriate to adopt a non-communicating meter as one of the opt-out options.* To be added: **However, an analog meter shall be available as an opt-out option as well.**

6. **Conclusion of Law 11** should be changed to state: *It would ~~not~~ be reasonable to allow the opt-out option to be exercised by local entities and communities.*

7. **Conclusion of Law 14** should be changed to state: *A residential customer selecting the opt-out option should be assessed an initial charge to install either a non-communicating meter or an analog meter along with a monthly charge.* To be added: **However, customers with a medical condition and/or reliant on life-support equipment shall not be subject to any installation or monthly fees for an opt-out option.**

8. **Conclusion of Law 20** states: *The modifications to the SmartMeter Program should be implemented as quickly as possible.* To be added: **However, implementation shall include notice to all PG&E customers by bill insert, advertisements in general circulation publications, written notice by mail, and information on PG&E's Web site.**

9. **Conclusion of Law 21** states: *The September 21, 2011 Assigned Commissioner's Ruling directing the utilities to allow residential customers to be placed on a delay list should no longer be applicable for PG&E.* To be added: **However, new customers subscribing to PG&E's service shall be advised that they are eligible for the opt-out program, subject to the terms and conditions set forth in the final decision in this matter.**

10. **Conclusion of Law 22** should be changed to state: *All outstanding motions shall be considered, and a ruling made on them to ensure that Wilner is not denied procedural due process.*

11. **Conclusion of Law 23** should be changed to state: **Hearings should have been held because there were disputed facts that were material to resolution of PG&E's opt-out application that were not adjudicated.**

12. **Conclusion of Law 24** should be changed to state: *A.11-03-014 should remain open until such time as an analog meter option is adopted by the Commission.*

13. **Conclusion of Law 25:** **The decision by the Maine Public Utilities Commission approving an analog meter as an opt-out option is a legal precedent that should be followed by this Commission.**

14. **Conclusion of Law 26:** **The Americans with Disabilities Act and the Institute of Electronic and Electrical Engineers (IEEE) recognize electromagnetic sensitivity as a medical condition. Therefore, PG&E shall provide an accommodation, such as an analog meter, to those customers that suffer from electromagnetic sensitivity at no cost.**

15. **Conclusion of Law 27:** **The technical information submitted by PG&E concerning SmartMeter emissions and transmission frequency did not include measurements for RF conduction onto customers' electrical wiring and radiation into the air. Therefore, the Commission cannot determine that PG&E's SmartMeters meet FCC guidelines pursuant to Part 15 (B) digital devices.**

16. **Conclusion of Law 28:** **The technical information provided by PG&E concerning SmartMeter emissions and transmission frequency is inadmissible, and therefore cannot be made part of the record in this proceeding.**

17. **Conclusion of Law 29: The assigned ALJ's failure to rule on Wilner's outstanding motions constitutes a violation of Wilner's procedural due process rights.**