



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

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

A.11-03-014
(Filed March 24, 2011)

**REPLY COMMENTS OF THE TOWN OF FAIRFAX, CALIFORNIA
THE ALLIANCE FOR HUMAN AND ENVIRONMENTAL HEALTH, COUNTY OF
MARIN, CONSUMERS POWER ALLIANCE, COALITION OF ENERGY USERS,
NEIGHBORHOOD DEFENSE LEAGUE, SANTA BARBARA TEA PARTY, EAGLE
FORUM OF CALIFORNIA, ROVE ENTERPRISES, AND BURBANK ACTION ON THE
PROPOSED DECISION OF COMMISSIONER PEEVEY**

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Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure, the Town Of Fairfax, California, the Alliance For Human And Environmental Health, County of Marin, Consumers Power Alliance, Coalition Of Energy Users, Neighborhood Defense League, Santa Barbara Tea Party, Eagle Forum of California, Rove Enterprises, and Burbank Action (jointly, the “Commenting Parties”) hereby submit their reply comments on the Proposed Decision of Commissioner Peevey (“Proposed Decision” or “PD”), mailed November 22, 2011.¹

I. SUMMARY

With the exception of PG&E and SCE, the parties filing opening comments on Commissioner Peevey’s Proposed Decision join the Commenting Parties in assailing

¹ Commenting Parties received opening comments on the Proposed Decision from Aglet Consumer Alliance (“Aglet”), Alameda County Residents Concerned About SmartMeters (“ACRCASM”), City and County of San Francisco (“San Francisco”), the Division of Ratepayer Advocates (“DRA”), EMF Safety Network (“Network”), Ecological Options Network (“EON”), County of Lake (“Lake County”), PG&E, Smart Meter Choice, Southern California Edison Company (“SCE”), The Utility Reform Network (“TURN”), and Wilner and Associates (“Wilner”).

the PD for its erroneous finding that there are no disputed factual issues that necessitate evidentiary hearings, for its denial of the parties' due process right to be heard, for its failure to develop any evidentiary record (except for unproven and untested PG&E-proffered testimony) on which its conclusions can be based, and for its complete disregard of the plethora of significant issues related to establishing a meaningful and effective SmartMeter opt-out program for PG&E's customers.

As discussed below, the PD violates express constitutional rights of California citizens and fails to carry out express responsibilities of the Commission under our State Constitution. The Proposed Decision also ignores the viability of a community-wide opt out option that may be the only effective means of addressing RF radiation-related health concerns, given the ubiquitous nature of PG&E's wireless mesh network configuration. Perhaps most disturbing is that PG&E activities in the real world, outside the realm of the Commission, are beginning to mirror the hasty, ill-considered attempts to railroad this proceeding to a premature and untimely conclusion, as PG&E has already taken the draconian action of cutting off electricity to the homes of those who, seeking to resolve their physical illnesses, would dare to interfere with the installation of a SmartMeter.

The Commission must step back from this rush to judgment on a PG&E SmartMeter opt-out program. As they recommended in their opening comments, and as concurred in by San Francisco, the Commenting Parties urge the Commission to reject the Proposed Decision in its entirety and proceed with hearings and an orderly disposition of this case consistent with due process requirements, and to adopt the Interim Order described below.

II. NEARLY ALL OF THE OPENING COMMENTS AGREE THAT THE PROPOSED DECISION DENIES PARTIES' THEIR FUNDAMENTAL RIGHT TO DUE PROCESS.

Nearly all of the opening comments address the PD's failure to allow any of the parties to present evidence, except for evidence presented by PG&E in support of its proposed opt-out program.² This lack of an opportunity to present evidence constitutes a denial of the parties' due process right of an opportunity to be heard, which is required in Commission proceedings. *People v. Western Airlines*, 42 Cal.2d 621, 632 (1954). Adding insult to injury, the Proposed Decision justifies this denial of the parties' due process right of an opportunity to be heard by concluding that there are "no disputed factual issues material to the resolution of this application" that would necessitate evidentiary hearings. PD, Conclusion of Law 23, at 42.

In their opening comments, virtually all of the parties identify critical issues that the PD fails to address and on which they will be prevented from offering evidence. As Commenting Parties pointed out in their opening comments, any legitimate comparative analysis of the details of PG&E's opt-out proposal and the proposals of other parties are inherently fact-based. But the Proposed Decision reaches its conclusion on an opt-out plan without any established record facts to compare its costs and benefits to other alternatives render the PD arbitrary and unlawful in that its findings, conclusions and ultimate order are not based on any credible evidentiary record.

² See, Aglet Opening Comments, at 2-3, ACRCASM Opening Comments, at 3-4, DRA Opening Comments, at 10, San Francisco Opening Comments, at 1-2, Network Opening Comments, at 1, TURN Opening Comments, at 24, Wilner Opening Comments, at 3-4.

PG&E's opening comments support this position. The PD accepts PG&E's entire proposal with the exception of minor and temporary reductions in the rates PG&E proposed for an opt-out. PG&E congratulates the Commission for its "conditional acceptance" of its proposal, but then argues that proper rate making procedures have not been followed (including hearings and testimony) and that its cost recovery proposal "is not based on any evidence or conclusion that PG&E's costs are unreasonable" and therefore the PD cannot reduce its proposed rates.³

Discovery, the presentation of testimony at evidentiary hearings, the right to cross examine other parties witnesses, and the submission of legal briefs are, in this case, absolutely essential to the right of due process. Due process will not be satisfied by allowing parties to file another round of comments and reply comments on the PG&E's proposals and submissions of information.

III. THE PROPOSED DECISION ERRS IN REJECTING AN ANALOG METER OPTION AND A WIRED SMARTMETER OPTION.

Several parties assert that the Proposed Decision errs in rejecting the use of analog meters for those PG&E customers who opt-out of having a wireless SmartMeter installed.⁴

³ PG&E Opening Comments, at 6. As PG&E is aware, the Commission's prior decisions authorizing (but not mandating its wireless mesh network architecture or any related rates) have expressly not included a "reasonableness" finding that any or all of the moneys it is expending on these mandatory SmartMeter installations are to be included in its rate base, or the "socialization" of any such portion of these expenditures that is eventually found reasonable. Any such finding will require a factual investigation of PG&E's forced installation practices and lack of compliance with valid local government ordinances and franchise agreements.

⁴ Network Opening Comments, at 1-2, TURN Opening Comments, at 5, Wilner Opening Comments, at 1, 5.

However, Aglet, EON and Network all point out that time-variant pricing is not mandatory. The PD attempts to assert that the ability to track interval energy consumption is mandatory by citing P.U. Code §745(b)(2) which provides that “an electrical corporation *may* employ mandatory or default time-variant pricing . . . for residential customers after January 1, 2014.” PD, at 21, Footnote 47, emphasis added. The PD’s omission of other provisions in Section 745 does not provide an accurate representation of the law. The PD fails to note that P.U. Code §745(d)(1) provides that:

“(d) On and after January 1, 2014, the commission shall only approve an electrical corporation’s use of default time-variant pricing in a manner consistent with the other provisions of this part, if all of the following conditions have been met:

(1) Residential customer have the option to not receive service pursuant to time-variant pricing and incur no additional charges as a result of the exercise of that option. . . .”

Aglet further points out that energy consumption data are not needed for every customer and that the small percentage of customers who opt-out of a wireless SmartMeter should not be critical to meeting the state’s smart grid and energy goals and objectives. Aglet Opening Comments, at 5.

If it is true that time-variant pricing is not mandatory for every electric customer in the state, then the whole rationale for forcing every customer to have a SmartMeter capable of tracking interval consumption data goes out the window. Commenting Parties have been denied the opportunity to brief the legal issue of what the law requires before the Commission authorizes PG&E to undertake an expensive, and perhaps unnecessary, opt-out program that prohibits the use of analog meters.

Similar problems exist with the PD's rejection of a wired SmartMeter alternative. The PD rejects wired Smart Meters based on unproven and untested PG&E cost information that purportedly shows wired SmartMeters to be more expensive than other options discussed. Those costs have not been subjected to critical analysis or cross-examination and, if the Proposed Decision is adopted, parties who support the wired SmartMeter alternative will be prevented from doing so and also from presenting evidence in support of this alternative.⁵

IV. THE PROPOSED DECISION ERRS IN NOT ADDRESSING A COMMUNITY-WIDE OPT-OUT OPTION OR THE JURISDICTION OF LOCAL GOVERNMENTS TO REGULATE THE INSTALLATION OF ELECTRIC FACILITIES IN THEIR COMMUNITIES.

The Proposed Decision errs in not addressing the legal issue of the authority of local jurisdictions to regulate public utility installations in their communities. If adopted, the PD also would prohibit the Commenting Parties, and perhaps other parties, from presenting evidence on the viability of a community-wide opt-out plan or some other opt-out plan – such as a multiple dwelling unit (“MDU”) opt-out plan – that is broader than individual customer opt-out. Indeed, given the ubiquitous nature of PG&E's wireless mesh network that supports its wireless SmartMeters, a community-wide opt-out option may be the best solution to the RF radiation-related health issues that plague so many people. In addition, in refusing to allow a record to be developed concerning the cost implications of such a community opt-out, the PD never permits Commenting Parties to produce record testimony establishing the realistic possibility that an opting-out community, such as a town, might itself undertake to hire meter readers to provide

⁵ See, Offer of Proof, Opening Comments of Commenting Parties, at 15-16.

data to PG&E, as well as evidence concerning the need of such data on a monthly basis in light of current PG&E invoice estimating practices.

The Commenting Parties urge the Commission to reject the PD and hold hearings on these, and all of the other issues identified by the non-utility parties to this proceeding. As they did in their opening comments Commenting Parties make the following offers of proof pursuant to Rule 13.6(a) with respect to a community-wide opt-out option:

- Commenting Parties will present factual and expert testimony on the legal authority of local governments to regulate installation of utility facilities in their local jurisdictions. Commenting Parties will show that it is possible for affected citizens, community organizations and local governments to have input and for local governments to protect the public health, safety, welfare and zoning concerns of their citizens without impeding or interfering with statewide goals and objectives.⁶
- Commenting Parties will present factual and expert testimony that will define the parameters of a community-wide opt-out option, including a definition of “community-wide,” which may include legally established cities and towns, the unincorporated areas of a county, a gated community, or an MDU. Testimony will also be presented on the means of exercising the opt-out option, whether it be by the vote of a city council or a county board of supervisors after an opportunity for citizens to be heard, or by a vote of the electorate of the city, town or county.
- Commenting Parties will present testimony on how a customer residing in an opting-out community would opt-in to a SmartMeter for purposes of receiving interval consumption information and paying pursuant to time-variant pricing. This likely would involve the use of a wired SmartMeter, but also could involve the use of meter readers employed by the local jurisdiction.

⁶ For example, the San Francisco city charter was adopted 1896, and the City of San Luis Obispo was chartered in 1876. Both adopted community Opt-Out ordinances ignored by PG&E. See, Article 12, Section 8 of the California Constitution. See *also*, Protest of Fairfax, et al, at 6-7, and Attachment B.

A community-wide opt-out option is not only viable, but it may be the only effective solution to the privacy and health problems stemming from PG&E's wireless mesh network configuration for SmartMeters. Commenting Parties urge the Commission to schedule the required discovery and permit them and other parties to present testimony on a community-wide opt-out alternative.

V. THE COMMISSION'S AGGRESSIVE RUSH TO JUDGMENT APPROACH TO THIS PROCEEDING IS ADVERSELY INFLUENCING PG&E'S UNFAIR AND AGGRESSIVE TREATMENT OF CUSTOMERS OPPOSED TO THE INSTALLATION OF WIRELESS SMARTMETERS.

Finally, Commenting Parties must note that the Commission's aggressive approach to bringing this proceeding to an unreasonably swift and untimely conclusion appears to be influencing PG&E's unfair and aggressive treatment of customers who oppose the installation of wireless SmartMeters in their homes. PG&E already has begun to shut off power to those opposed to the installation of wireless SmartMeters.⁷ Rules or not, it is a dangerous and irresponsible act to shut off power to a home under these circumstances.

The Commission should immediately adopt an Interim Order that puts a halt to PG&E's anti-consumer and inhumane course of conduct seemingly designed to inflict "shock and awe" on ordinary members of the public concerned about the violation of their privacy or risk to the health and safety of their children and families. This Interim Order should, at a minimum, broaden the current Delay List Ruling to allow any PG&E

⁷ See, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2011/12/16/BULC1MD1MA.DTL>, http://www.youtube.com/watch?v=yIGqz_2uGTs&context=C24422ADOEgsToPDskLlzlOo61BNWf8ppxW_tIEG, and stopsmartmeters.org

customer to retain or have re-installed at no cost the type of meter serving the customer's premise prior to any SmartMeter installation to which the customer did not expressly and knowingly consent, pending the final outcome of this proceeding.

VI. CONCLUSION

Commenting Parties urge the Commission to reject the PD in its entirety and to adopt an interim order providing the relief described herein and in our Opening Comments. The Commission should direct the Assigned ALJ to adopt a schedule that provides parties with a meaningful opportunity to conduct necessary discovery, and present factual and expert testimony, and legal argument based on a complete record, before a final decision is issued.

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Respectfully submitted,

By: /s/ James M. Tobin

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