Decision **PROPOSED DECISION OF ALJ BEMESDERFER** **(Mailed 4/3/2012)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Wilner & Associates, Complainant, vs. Pacific Gas and Electric Company (U39M), Defendant.	Case 11-10-028 (Filed October 26, 2011)

DECISION DISMISSING COMPLAINT

Summary

We dismiss the complaint of Wilner & Associates (Wilner) as moot. The thrust of Wilner's complaint is that Electro-Magnetic Field (EMF) radiation emitted by so-called "smart meters" is a health risk to customers at whose residences the smart meters are installed. In Decision (D.) 12-02-014, issued February 9, 2012, the Commission ordered Pacific Gas and Electric Company to provide an analog meter in place of a smart meter to any customer on request at a one-time cost of $75 plus a monthly fee of $10. D.12-02-014 effectively provides complete relief to any customer concerned about the effects of EMF radiation and renders further proceedings in this docket moot.

Background

On October 26, 2011, Wilner & Associates (Wilner) filed a complaint. The complaint purports to speak for the class of Pacific Gas and Electric Company

(PG&E) customers generally as well as for a sub-class of PG&E customers alleged to suffer from sensitivity to low levels of Electro-Magnetic Field (EMF) radiation. The complaint alleges, among other things, that smart meters produce twice as much EMF radiation per unit as stated by PG&E; that this amount is sufficient to cause illness in customers sensitive to EMF radiation; that PG&E has intentionally misrepresented the dangers of EMF radiation; and other allegations to similar effect. The complaint seeks assorted remedies including financial sanction against PG&E, Underwriters Laboratory certification of the smart meters, etc. Most relevant for this decision is this prayer for relief:

> 10 (a) An order by the Commission requiring PG&E to install an analog meter for any customer that is concerned about health issues, and does not want a smart meter installed on his or her property. This shall be done at no cost to the customer unless the Commission approves an opt-out fee for this option.

On December 15, 2011, PG&E filed its answer to the complaint together with a motion to dismiss. The answer denies the specific allegations of the complaint. The motion to dismiss points out, among other things, that the issues raised by the complaint overlap the issues in proceeding Application (A.) 11-03-014, the so-called "smarter meter opt-out" proceeding, and it characterizes this proceeding as a prohibited effort to re-litigate those issues in another forum.[1] On January 10, 2012, Wilner filed a response to the motion to

[1] *Pacific Gas and Electric Company's Motion to Dismiss Wilner & Associates Case 11-10-028* dated December 11, 2011.

dismiss contesting the factual allegations and legal arguments made by PG&E therein.[2]

On February 9, 2012, the Commission issued Decision (D.) 12-02-014 in proceeding A.11-03-014, which directed PG&E to offer all customers the option of exchanging their smart meters for analog meters upon payment of a one-time fee of $75 and a recurring monthly fee of $10.

Discussion

In ruling on a motion to dismiss, we construe the facts favorably to the party against whom the motion is directed. Thus, in this case, we assume for purposes of the motion that there is a sub-set of PG&E customers who are so sensitive to EMF radiation that operation of a smart meters at their places of residence makes them ill, and that Wilner's other allegations regarding the amount of energy emitted by smart meters and the potential for adverse health effects of EMF exposure are true. We also assume, as alleged by Wilner, that we made no findings of fact or conclusions of law regarding health impacts of EMF radiation in any decision in any other docket. On those assumptions, the question before us is whether D.12-02-014, permitting any customer to obtain an analog meter in place of a smart meter upon payment of the charges set out therein, moots this proceeding. We conclude that it does.

D.12-12-014 gives *all* PG&E customers, not just those who believe themselves to be adversely affected by the presence of a smart meter at their residences, the option of having the smart meter replaced by an analog meter. In that decision, we imposed charges on customers who exercise that option in

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[2] *Wilner & Associates Response to Pacific Gas and Electric Company's Motion to Dismiss Complaint* dated January 10, 2012.

recognition of the fact that PG&E incurs both an additional one-time expense in replacing a smart meter with an analog meter and an on-going expense of manually reading the analog meter. The charges compensate PG&E for these additional expenses and are appropriately levied on those customers who exercise the smart meter replacement option rather than on ratepayers generally. As a result of D.12-02-014, all persons whose interests Wilner claims to represent can avoid smart-meter produced EMF radiation by exercising the smart meter replacement option. Exercise of the smart meter replacement option renders any other relief unnecessary and therefore moots this proceeding.

Categorization and Need for Hearing

This proceeding was initially categorized as adjudicatory and it was initially determined that hearings are required. In view of the disposition of this case, we change the hearing determination to "not required."

Comments on Proposed Decision

The proposed decision of Administrative Law Judge (ALJ) Bemesderfer in this matter was mailed on April 3, 2012 to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.3. Comments were received from Wilner on April 23, 2012. We respond to his comments as follows:

1) Wilner is correct that the proposed decision erroneously states that he asked the Commission to require warning notices on smart meters. He did not and we revise the proposed decision to remove that erroneous statement.
2) Wilner is also correct that the proposed decision does not find it necessary to consider PG&E's argument that the complaint constitutes an impermissible collateral attack on prior Commission decisions authorizing the smart meter program (including the smart meter opt-out decision, D.12-02-014). On further reflection, we conclude the complaint is an impermissible collateral attack on prior Commission decisions in this area and that this decision

> should memorialize that fact. In particular, Wilner's complaint substantially reiterates arguments made in his pending *Application for Modification of D.06-07-027 and D.-09-03-026*. (A.11-01-002.) As Wilner's own filing demonstrates, he knows that the proper way to challenge a Commission decision is by seeking a rehearing. Accordingly, we amend the proposed decision to include a new Conclusion of Law that the complaint is an impermissible collateral attack on D.06-07-027, D.09-03-026, and D.12-02-014. We also delete the following sentence from the proposed decision: "In view of the conclusion we reach in this decision, we need not consider PG&E's characterization of this complaint as a collateral attack on the smart meter opt-out proceeding."

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

Findings of Fact

1. D.12-02-014 directs PG&E to offer all residential customers the option of having analog meters installed at their places of residence in place of smart meters.

2. To exercise the smart meter replacement option, a customer must pay a one-time fee of $75 and an additional monthly fee of $10.

3. A customer who exercises the smart meter replacement option can avoid exposure to smart-meter-generated EMF radiation.

Conclusions of Law

1. D.12-02-014 provides PG&E customers with a means of avoiding exposure to smart-meter-generated EMF radiation.

2. A one-time fee of $75 and an additional monthly fee of $10 is a reasonable charge to customers for exercising the smart meter replacement option.

3. The complaint is an impermissible collateral attack on decisions D.06-07-027, D.09-03-026, and D.12-02-014.
4. This complaint should be dismissed as moot.

O R D E R

IT IS ORDERED that:

1. The complaint of Wilner & Associates is dismissed as moot.
2. No hearings are necessary.
3. Case 11-10-028 is closed.

This order is effective today.

Dated _____, at Fresno, California.