Decision 10-12-003 December 2, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code Section 1708.5, to Establish a Minimum Level of Competence for any and all Digital Information Systems and all components used in SmartGrid.	Petition 10-07-015 (Filed July 15, 2010)

DECISION DENYING PETITION

1. Summary

The Petition of Certichron, Inc., which requests that the Commission open a rulemaking to establish a minimum level of competence for any and all digital information systems and all components used in the SmartGrid, is denied. The filing fails to comply with Commission Rules of Practice and Procedure and fails to make a persuasive argument that opening a rulemaking on this issue could provide ratepayer benefits in excess of costs or could advance a statutory goal.

This proceeding is closed.

2. Section 1708.5 Petition by Certichron

As permitted by Pub. Util. Code § 1708.5,[1] Certichron, Inc. (Certichron) filed a petition requesting that the Commission open a rulemaking to "formally establish requirements for any Data Processing or SmartGrid AMR/AMI

[1] All statutory cites herein are to the Public Utilities Code.

[Automatic Meter Reading/Advanced Metering Infrastructure] systems to meet the 'Trustworthiness requirements' for the digital content records they produce and store which was set in the applicable Digital Evidence precedent established by the Superior Court in re Californian v Klahed [sic] …"[2]

Certichron states that:

> To facilitate this Certichron believes therefore that it is appropriate to specify in the petitioned ruling that "Any and all SmartGrid monitoring processes must also produce court admissible evidence of operations which meets the minimum legal standards for digital evidence both at the State of California's level and that of the Federal Government."[3]

More specifically, Certichron argues:

> The inclusion of a third party, to generate and officiate those evidentiary grade time stamps as part of every transaction is another potential key-step towards assuring compliance with the state and federal evidentiary standards and for designing transparency into the SmartGrid system. It is for that we also seek acknowledgement in the Petitions as well.[4]

The Petition also appears to request that the Commission adopt new evidence standards in its own proceedings:

> The question then is how to build digital trust into systems which are intended to produce information which must be admissible before the Administrative Law Judges of the California Public Utilities Commission (CPUC) and both the

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[2] Petition at 1. Certichron further identifies the cited case as California v Khaled, California Superior Court SA128676PE from Orange County, California Appellate 30-2009-00304893, May 21, 2010.

[3] *Id.* at 18.

[4] *Id.* at 8.

> California Court and Federal Court's as the next two layers of oversight therein.
>
> To address this matter both Federal and California Court's now have reference rulings providing precedent for the answers to those questions. What remains herein is for the Administrative Law Judges of the CPUC and the CPUC Executive and "Nexus Industry" Group Directors (Electric and Water Industry Segments) to take formal notice of these requirements in all approval actions moving forward.[5]

Unfortunately, the words "all approval actions" are not subsequently addressed in the Petition.

3. Response to the Petition

On August 16, 2010, San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas), filing jointly, provided the only response to the Petition.[6] The Response attacks the Petition, arguing that it is "a thinly-veiled attempt to rewrite the California Public Utilities Code, Section 1701(a)."[7]

The Response further argues that:

> … it is unclear that the relief sought by the petition is within the scope of this statute. The petition is not really asking the Commission to adopt, repeal, or amend a regulation. It is in fact asking the Commission to formally adopt the state and federal technical rules of evidence and to specifically defer to

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[5] *Id.* at 3-4.

[6] *Response of San Diego Gas & Electric Company (U 902 M) and Southern California Gas Company (U 904 G) to the Petition for Rulemaking of Certichron Inc.* (Response), August 16, 2010.

[7] *Id.* at 2.

> the Superior Court's jurisdiction under the doctrine of *stare decisis* in establishing requirements for electronic data processing.[8]

The Response also argues that since § 1701(a) states that the Commission need not apply the technical rules of evidence, "it would represent a waste of this Commission's scarce resources to conduct a proceeding to consider any issue that only the Legislature can change."[9]

The Response argues that the Petition is procedurally defective and violates Rule 6.3 of the Commission's Rules of Practice and Procedure (Rules) because although "Certichron proposes adoption or amendment of regulation," the Petition fails to "include specific proposed wording for that regulation."[10]

The Response further argues that "Certichron's Petition contains no factual assertions which support adoption or amendment of a regulation."[11] The Response concludes that "[t]his is a wholly inadequate basis on which to initiate a Rulemaking."[12]

4. Discussion

The principal issue before the Commission is whether to grant the Petition and thereby open a rulemaking.

The Petition, however, is written so unclearly that it is uncertain what the proposed rulemaking would consider. It appears that at a minimum, the

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[8] *Id.* at 4-5.

[9] *Id.* at 6.

[10] *Id.* at 7.

[11] *Id.*

[12] *Id.*

rulemaking would consider whether to adopt regulations pertaining to the SmartGrid in order to ensure that the information that it produces meets specific evidentiary standards. In addition, the Petition may also be requesting that the Commission change the evidentiary standards used in Commission proceedings.[13]

Specific statutes and rules guide the Commission in deciding whether to grant a petition. These statutes and rules seek to ensure that those requesting changes in Commission policy clearly state what they want and receive a timely answer from the Commission.

To guide the filing and the Commission's review of petitions for rulemaking, Rule 6.3(b) states:

> (b) Form and Content. A petition must concisely state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation. In addition, a petition must state whether the issues raised in the petition have, to the petitioner's knowledge, ever been litigated before the Commission, and if so, when and how the Commission resolved the issues, including the name and case number of the proceeding (if known). A petition that contains factual assertions must be verified. Unverified factual assertions will be given only the weight of argument. The caption of a petition must contain the following wording: "Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5."

[13] Specifically, it is unclear what "take formal notice of these requirements in all approval actions moving forward" (Petition at 4) would entail.

Section 1708.5 provides, in pertinent part, as follows:

> (a) The commission shall permit interested persons to petition the commission to adopt, amend, or repeal a regulation.
>
> (b)(1) The commission shall consider a petition and, within six months from the date of receipt of the petition, either deny the petition or institute a proceeding to adopt, amend, or repeal the regulation.

In addition, since the Petition asks that the Commission require that digital information systems and SmartGrid components meet a specific evidentiary standard, it is useful to review the evidentiary standards that currently apply to Commission proceedings. Specifically, we note that § 1701(a) provides the current statutory guidance on this particular matter.

Section 1701(a) states:

> 1701(a) All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

Our analysis of the Petition finds it procedurally and substantively defective. Procedurally, the Petition has at least two defects.

First, the Petition fails to include "specific proposed wording" for the regulations to implement the policy changes that it requests, that is, specific regulations that, if followed, would ensure that the data generated by the SmartGrid would meet the evidentiary standards that appear to prevail in California trial courts, with law enforcement agencies, and with municipalities employing automated enforcement systems. In addition, if the Petition had

"specific proposed wording," it would be clear whether a change in Commission evidentiary standards is also sought.

Second, the Petition fails "to concisely state the justification for the requested relief." At best, the Petition argues that it would be a good idea to adopt these new rules for information developed on the SmartGrid and used in Commission proceedings, but the Petition fails to state why this is a good idea.

Substantively, the Petition fails to make a case that it would serve the public interest to open a rulemaking to consider requiring that the information collected and used in the SmartGrid digital information systems and all components used in the SmartGrid meet evidentiary standards that appear to prevail in California trial courts, with law enforcement agencies, and with municipalities employing automated enforcement systems. More specifically, the Petition fails to contain any factual assertions that would show that ratepayers would benefit from the adoption of the proposed evidentiary standards for the SmartGrid and that these benefits would exceed the costs of implementing these standards.

Finally, we note that California utilities are implementing SmartGrid technologies pursuant to statutory guidance[14] and in order to advance goals and policies set in State and federal energy policy. The information developed and exchanged over the SmartGrid is and will be designed to serve these purposes. The Petition in no way demonstrates that requiring the SmartGrid's component systems and infrastructure to meet evidentiary standards that appear to prevail

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[14] See, for example, Decision 10-06-047, which adopts policies and findings pursuant to Senate Bill 17 (Padilla), signed into law on October 11, 2009 (Chapter 327, Statutes of 2009).

in California trial courts, with law enforcement agencies, and with municipalities employing automated enforcement systems is tied to any applicable statutory goal.

In summary, this Petition fails to meet the procedural and substantive requirements that would warrant its approval.

5. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge 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 of the Commission's Rules of Practice and Procedure. There were no comments filed on the proposed decision.

6. Assignment of Proceeding

Nancy E. Ryan is the assigned Commissioner and Timothy J. Sullivan is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Petition fails to include specific proposed wording for the regulations to implement the policy changes that it requests.
2. The Petition lacks clarity.
3. The Petition fails to concisely state the justification for the requested relief.
4. The Petition does not provide facts that demonstrate that ratepayers would benefit from the opening of a rulemaking to consider Commission adoption of new standards applicable to the data collected by the SmartGrid and used in Commission proceedings.
5. The Petition does not demonstrate that requiring the SmartGrid's component systems and the information generated to meet evidentiary

standards that appear to prevail in California trial courts, with law enforcement agencies, and with municipalities employing automated enforcement systems.

Conclusions of Law

1. The Petition fails to comply with the standards set forth in Rule 6.3(b).

2. Since the Petition fails to conform to Rule 6.3 and fails to demonstrate that the adoption of new standards for information in the SmartGrid and in Commission proceedings would produce customer benefits or meet a statutory goal or requirement, it is reasonable to deny the Petition.

O R D E R

IT IS ORDERED that:

1. The Certichron, Inc.'s Petition is denied.
2. Petition 10-07-015 is closed.

This order is effective today.

Dated December 2, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners