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03-09-12

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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' APPLICATION FOR
REHEARING OF DECISION 12-02-014**

Dated: March 9, 2012

David L. Wilner
Wilner & Associates
P.O. Box 2340
Novato, CA 94948-2340
415-898-1200
DavidLWilner@aol.com

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**WILNER & ASSOCIATES' APPLICATION FOR
REHEARING OF DECISION 12-02-014**

Pursuant to Rule 16.1 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, Wilner & Associates ("Wilner") hereby files this Application for Rehearing of Decision ("D.") 12-02-014 ("Decision") in the above-entitled matter:

I. BACKGROUND

Pacific Gas and Electric Company ("PG&E") has installed approximately 8.8 million Smart Meters as of December 15, 2011 (see PG&E Web site, SmartMeter installation schedule), along with a mesh network that connects the electric SmartMeters to various collection points strategically located throughout its service territory. The customers' usage information is then transmitted from the collection points to PG&E's computer center over a cellular telephone network for billing and management purposes. As part of the mesh network, the electric SmartMeters act as a relay for each other so that when one meter is unable to communicate with the collection point, the data transmission is relayed by one or more of the other meters. Each collection point provides two-way data communications to as many as 5,000 electric SmartMeters located in the same geographic area. The gas SmartMeters communicate directly with PG&E's computer center over a separate cellular telephone network. Upon completion of the deployment, there will be approximately 10 million SmartMeters in operation.

Unfortunately, there has been an ongoing controversy concerning alleged health problems and other issues relating to the installation of SmartMeters in PG&E's service territory. As a result, there have been protests, customers have been arrested, moratoriums declared by a number of counties and cities, customers' power disconnected in some instances, and extensive media coverage. In addition, a large number of PG&E's customers have appeared before the Commission during its Business Meetings asking for relief. This is what has led to the instant

proceeding and Decision allowing customers to opt-out of the SmartMeter program.

II. INTRODUCTION

To the extent the Decision allows PG&E's customers to choose conventional analog electric and gas meters instead of SmartMeters, Wilner believes that this is a step in the right direction that will alleviate many of the concerns that have surfaced. Another positive aspect of the decision is the fact that PG&E's customers can opt out (choose analog meters instead of SmartMeters) for any reason. Whether it is a matter of health, privacy, safety, or security, PG&E's customers now have a choice -- which was one of Wilner's main objectives in this proceeding.

In addition, the Commission has decided to continue this matter by holding a second phase to consider what the costs will be for customers that choose to opt out of PG&E's SmartMeter program. Consideration will also be given to a community opt-out option.

However, there are Findings of Fact and Conclusions of Law in the Decision that are not supported by substantial evidence as required by law. Furthermore, there were issues raised in this proceeding by Wilner that were not addressed in the Decision which also constitutes legal error.

III. SPECIFIC LEGAL ERRORS

1. **The Decision is in error with respect to Conclusion of Law #2 which states that "D.10-12-001 determined that PG&E's SmartMeter technology complies with FCC requirements"** (see Decision, p. 37) for the following reasons:

a. The Commission cannot rely on D.10-12-001 to make Conclusion of Law #2 because that decision is subject to a pending Application for Rehearing involving dismissal of EMF Safety Network's application (A.10-04-018) to modify the decisions authorizing the

SmartMeter deployment. It must also be noted that there was no hearing in that proceeding, and there was insufficient evidence in the record to conclude that PG&E's SmartMeter technology complies with FCC requirements.

b. In addition, the issue of FCC compliance was beyond the scope of the instant proceeding. See Commissioner Ruling and Scoping Memo dated May 25, 2011 ("Scoping Memo"), p 6. Nonetheless, the assigned Administrative Law Judge requested information concerning this issue from PG&E after a workshop was held on September 14, 2011.¹ However, she failed to schedule an evidentiary hearing to give Wilner and the other parties an opportunity to cross-examine the sponsor of the technical information that was submitted. This amounts to a violation of Wilner's and the other parties' procedural due process rights.²

c. A further legal error is acceptance of the technical information referred to above (see Decision, pp. 15-16) without verification as required by Public Utilities Code ("PU Code") §1710 which in pertinent part 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.

Wilner pointed this out in its comments to the proposed decision in this matter (p. 3). However, the technical information was considered as part of the Decision anyway.

¹ See assigned Administrative Law Judge's Ruling Seeking Clarification dated October 18, 2011.

² Wilner 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 its 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.

d. Another error is the fact that the technical information provided by PG&E concerning FCC compliance was incomplete. That information only represented SmartMeter radio frequency ("RF") emissions in the 902 to 928 megahertz ("MHz") portion of the radio spectrum, and RF emissions that would be present when the radio transmitter in the SmartMeter was disabled. However, there was no information provided by PG&E showing the amount of RF interference conducted onto customers' electrical wiring and/or radiated into the air from the SmartMeters which is subject to FCC Part 15 (B) guidelines. This is an FCC compliance requirement for digital devices such as SmartMeters (see FCC Part 15 47 C.F.R. § 15.107 Conducted limits).

2. **The Decision is also in error because it lacks Findings of Fact and Conclusions of Law concerning people that suffer from electromagnetic sensitivity.** This is another example where Wilner was not allowed to introduce evidence concerning this issue because it was beyond the scope of the proceeding (see Decision, p. 15).³ This issue was raised in Wilner's protest to PG&E's opt-out application (see p. 1) and throughout the matter. Therefore, the Commission erred when it failed to consider the electromagnetic sensitivity issue, and sidestepped it by stating: "eligibility to opt out of receiving a wireless SmartMeter is not predicated on whether the meter has affected the customer's health" (see Decision, p. 16).⁴ This is not sufficient for those that suffer from electromagnetic sensitivity because a SmartMeter installed on a neighbor's house (or multiple meters installed in a building complex) can trigger a

³ People that suffer from electromagnetic sensitivity are susceptible to adverse health effects from levels of RF radiation (and conduction) from SmartMeters that are far below guidelines established by the FCC.

⁴ Wilner did appeal the Scoping Memo (see Wilner's Appeal of Categorization of Scoping Memo dated June 3, 2011). However, the assigned Commissioner did not revise it as requested (see p. 4).

negative health reaction due to proximity. The issue here is that a person with the sensitivity problem cannot force a neighbor (or neighbors) to opt-out of the SmartMeter program in order to obtain relief.

3. **The Decision is also in error because it fails to address the issue of whether customers with a medical condition (such as electromagnetic sensitivity) should be exempt from paying any costs for opting out of the SmartMeter program.** Wilner raised this issue a number of times during the proceeding and in its comments to the proposed decision (see Wilner's Comments to Proposed Decision of Assigned Commissioner Michael R. Peevey, pp. 2 & 4). The Commission has a statutory duty to ensure that people with a medical condition are not discriminated against by being required to pay to opt out of a service that causes harm to them. See PU Code § 453(b).

4. **The Decision is also in error because hearings were supposed to be held in this proceeding** (see Scoping Memo, p. 6). However, there were none. This means Wilner and the other parties were not given an opportunity to offer evidence to support their various positions or to challenge the technical information that was submitted by PG&E. This amounts to a denial of procedural due process rights for Wilner and the other parties.

5. **The Decision is also in error because of the Commission's failure to consider RF emissions generated by the Home Area Network ("HAN") feature of the SmartMeter which has a separate transmitter operating in the 2.4 gigahertz portion of the radio spectrum.** PG&E claims that the HAN is an optional feature which is not currently being offered, and therefore did not provide any technical data (see PG&E's response to ALJ's request for clarification, p. 3, Footnote 3 & p. 10, Footnote 6). That representation is not correct. PG&E has received permission from the Commission to provide this service to 5,000 customers initially

(see D.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.

6. The Decision is also in error to the extent that there is uncertainty concerning how long the analog meter opt-out option will be available to PG&E's customers that do not want a SmartMeter. The Decision states: "At a minimum, this opt-out option should be re-evaluated once default TOU pricing is employed for all residential customers" (see Decision, p. 20). In addition, Finding of Fact #8 states:

Further review of the feasibility of continuing to offer an analog meter opt-out option may be warranted in the future to ensure that this opt-out option does not impede the full implementation of net metering, demand response and smart grid. (See Decision, p. 37.)

This language raises a serious question as to whether the analog meter solution will be permanent. Requiring PG&E's customers to pay a fee to opt out and a monthly charge for that option would be unjust, unreasonable, and therefore unlawful if the alternative is withdrawn at a later time (see PU Code § 451).

7. The Decision is also in error to the extent that it has determined that the question of whether RF emissions from SmartMeters have a negative effect on PG&E's customers is beyond the scope of this proceeding (see Decision, p. 15). In the Concurrence of Commissioner Timothy Alan Simon on Item 28 [Decision 12-02-014] Decision Modifying PG&E's SmartMeter Program to include an Opt-out at Page 4, Commissioner Simon states:

In closing, I believe the FCC's jurisdiction in the regulation of radio-frequency supersedes that of the States,³ but I am a huge advocate of due process and I believe States have an obligation to

protect the health and welfare of their citizens. Hence I encourage those opposing wireless smart meter technology to utilize this Commission's rules and procedures to support opening a proceeding which will formally examine the health impacts of this emerging technology. . . . [Footnote omitted.]

Commissioner Simon is correct. In fact, the California Supreme Court has held that the Commission should not necessarily defer a matter like this to the FCC on the basis of legal preemption. *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.

The Commission definitely has a duty to protect the health and safety of the public pursuant to PU Code § 451. Furthermore, the Commission has broad authority to go beyond its statutory duty. *See, San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893.

The California Supreme Court has also 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].

Therefore, the Decision in this matter should be amended to include an evaluation of the health effects created by SmartMeters in the second phase of this proceeding; or the Commission should issue an Order Instituting Investigation (OII) on its own motion to ensure that this issue is properly addressed and resolved once and for all.

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IV. CONCLUSION

Although the Commission has approved the analog meter option, that alternative does not make existing and potential health issues go away. The Commission must be mindful of the history that led up to the Decision in this matter (see Background herein, p. 2).

It may be necessary to make modifications to the SmartMeters to reduce or possibly eliminate spurious emissions that give rise to health problems to PG&E's ratepayers and the public at large. This is especially true because there will be approximately 10 million SmartMeters installed and operating in PG&E's service area by the end of this year.

WHEREFORE, for the reasons set forth herein, Wilner's Application for Rehearing of D.12-02-014 should be granted.

Respectfully submitted,

/s/

David L. Wilner
Wilner & Associates
P.O. Box 2340
Novato, CA 94948-2340
415-898-1200
DavidLWilner@aol.com

Dated: March 9, 2012