

Decision 14-09-016

September 11, 2014

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of CPUC
Resolution E-4533.

Application 12-11-026
(Filed November 29, 2012)

**ORDER MODIFYING RESOLUTION E-4533
AND DENYING REHEARING OF RESOLUTION, AS MODIFIED**

I. INTRODUCTION

This decision addresses the application for rehearing of Resolution E-4533, filed by Edward Hasbrouck. In Resolution E-4533 we affirmed Energy Division’s disposition and approval of Pacific Gas and Electric Company’s (“PG&E’s”) Advice Letter 3278-G/4006-E (or “Advice Letter”).

PG&E filed the Advice Letter to comply with Ordering Paragraph (“OP”) 2 of Decision (D.) 12-02-014 which required it to submit tariffs necessary to implement an opt-out option for customers who do not wish to have a wireless SmartMeter installed at their location.¹ D.12-02-014 required PG&E to establish procedures for residential customers to select the option to have an analog meter if they do not wish to have a wireless SmartMeter, to inform customers that a SmartMeter opt-out option is available, and to notify customers currently on the delay list that they will be schedule to receive a SmartMeter unless they elect to exercise the opt-out option. (D.12-02-014, OP 2.) PG&E’s proposed tariff included a provision that deems a customer as having elected service under the Opt-Out Program “[i]f PG&E makes a field visit to a customer’s residence for purposes of installing a SmartMeter™ and the customer does not provide

¹ All citations to Commission decisions are to the official pdf versions which are available on the
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reasonable access to PG&E to install a SmartMeter™ after being provided notice of eligibility for service under this opt-out program.” (Advice Letter, Attachment 1, Tariff Sheets 29535-G & 31331-E.)

Edward Hasbrouck filed a timely application for rehearing of Resolution E-4533. Mr. Hasbrouck contends: (1) Resolution E-4533 fails to address the basis of his protest, and thus, does not comply with due process; (2) the Commission fails to comply with its own Rules of Practice and Procedure, including Rule 7.4.2 and Rule 5.1; (3) the Commission anticipates ruling on issues which have not been adjudicated; (4) factual claims are not supported by any record; and (5) the protested portion of the tariff is outside the scope of any Commission decision or proceeding. Mr. Hasbrouck’s rehearing application also requests oral argument pursuant to Rule 16.3 of the Commission’s Rules of Practice and Procedure.²

We have reviewed each and every allegation set forth in Mr. Hasbrouck’s application for rehearing and are of the opinion that good cause has not been demonstrated to warrant a rehearing. However, we modify Resolution E-4533, as set forth below, to remove the discussion of service termination, to make a clarification to Finding and Conclusion (“FOF/COL” 7), and to replace FOF/COL 8. Rehearing of Resolution E-4533, as modified, is denied.

II. DISCUSSION

A. Resolution E-4533 addressed the issues raised in Mr. Hasbrouck’s protest.

Mr. Hasbrouck contends that the Commission failed to address the issues raised in his protest of the Advice Letter. (Rehrg. App., p. 5.) Mr. Hasbrouck states that while he protested the Advice Letter on the four different grounds provided for in

(footnote continued from previous page)

Commission’s website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>

² Unless noted otherwise, all rule references are to the Commission’s Rules of Practice and Procedure.

Rule 7.4.2.,³ the Energy Division's disposition and Resolution E-4533 only addressed his first ground for protest. Mr. Hasbrouck states that the other three grounds were only mentioned in Resolution E-4533 in a single conclusory statement. (Rehrg. App., pp. 5-6.) Mr. Hasbrouck contends that a conclusory dismissal of his objections amounts to a violation of due process and the specific requirements of Public Utilities Code section 1757⁴ for determinations to be based on the record. (Rehrg. App., p. 6.)

Mr. Hasbrouck's allegation of legal error has no merit. There is no legal requirement that Commission decisions discuss or make findings on each and every issue raised by a party. Section 1705 mandates that "the decision shall contain, separately stated, findings of fact and conclusion of law by the [C]ommission on all issues material to the order or decision." (Pub. Util. Code, § 1705.) We need only make findings of fact and conclusions of law to dispose of those issues necessary and relevant to our decision. (*Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 670.)

Resolution E-4533 made legally requisite FOF/COL on all material issues. (See Resolution E-4533, pp. 21-22 [FOF/COL 1-21].) Moreover, Mr. Hasbrouck's protest raised policy objections or issues beyond the scope of the proceeding which are not proper grounds for a protest, and which we are not required to discuss in the Resolution. Mr. Hasbrouck faults the Commission for not addressing or making FOF/COLs on these issues. However, this allegation has no merit, as we are not required to discuss such issues in Resolution E-4533, because they were beyond the scope of the proceeding and thus, not relevant or material to the Resolution. Accordingly, Mr. Hasbrouck has not raised legal error.

³ Mr. Hasbrouck identifies the rule only as CPUC Rule 7.4.2. It turns out to be General Rule 7.4.2 of General Order 96-B.

⁴ Unless noted otherwise, all statutory references are to the Public Utilities Code.

B. Resolution E-4533 did not misunderstand the basis of Mr. Hasbrouck's protest.

Mr. Hasbrouck contends that Resolution E-4533 misunderstands his protest, and thus, has not addressed the issues raised. Mr. Hasbrouck takes issue with FOF/COL 6 of Resolution E-4533, which states that his “protest challenging PG&E’s right of access to the customer premises to install a SmartMeter is outside the scope of the Advice Letter.” (Rehrg. App., p. 7.) Mr. Hasbrouck contends that he never argued that PG&E does not have a right of access to install a wireless SmartMeter. (Rehrg. App., p. 7.) Mr. Hasbrouck argues that the issue he raised was PG&E’s legal authority to access the customer’s premises. (Rehrg. App., p. 7.)

The purpose of a rehearing application is to alert the Commission to legal error. A rehearing application must set forth specifically the grounds on which the applicant considers the decision to be unlawful. (Pub. Util. Code, § 1732; see also, Code of Regs., tit. 20, § 16.1, subd. (c).) Mr. Hasbrouck’s rehearing application fails to specify what law the Commission violated or explain how disagreement with a FOF/COL in Resolution E-4533 constitutes legal error.

Moreover, Resolution E-4533 did not misunderstand the arguments in Mr. Hasbrouck’s protest. Mr. Hasbrouck essentially raises the issue of PG&E’s right to access a customer’s premise when he states that there may be many reasons why a customer might not grant PG&E access to install a SmartMeter. (Protest, p. 3). Mr. Hasbrouck’s protest also argues that the right of access to install a SmartMeter may not extend to wireless equipment. (Protest, p. 6.) In fact, the concluding paragraph of Mr. Hasbrouck’s protest specifically raises the issue of “access rights” for SmartMeters. (Protest p. 9.) Mr. Hasbrouck also raises the access right issue in his May 26, 2014, Second Request for Commission Review of the Energy Division’s Disposition Letter (“Second Request for Review”). Thus, Resolution E-4533 did not misunderstand the basis of Mr. Hasbrouck’s protest. Moreover, we note that the adopted procedures do not require access to the property, as customers that do not provide PG&E with reasonable access are enrolled in the Opt-Out Program.

C. The Commission did not violate its own Rules.

Mr. Hasbrouck contends that the Commission violated Rule 5.1⁵ regarding matters appropriate for advice letters and thus violated both the Commission's own Rules of Practice and Procedure and his due process rights. (Rehrg. App., p. 6.) Mr. Hasbrouck argues that there is no evidence in the record to suggest that the Advice Letter: (1) does not involve highly controversial issues; (2) does not raise important policy questions; and (3) does not require an evidentiary hearing. (Rehrg. App., p. 6.)

Mr. Hasbrouck is not correct. As provided for in General Order ("GO") 96-B, the primary use of the advice letter process is to review a utility's request to change its tariffs in a manner previously authorized by statute or the Commission. (GO 96-B, Rule 5.1.) This process provides a quick and simplified review for such requests that are expected neither to be controversial nor raise important policy questions. (GO 96-B, Rule 5.1.) PG&E filed the Advice Letter to request a change to its tariffs in a manner previously authorized by the Commission in compliance with GO 96-B, Rule 5.1. (See *infra*, Section F for further discussion of this issue.) Although Mr. Hasbrouck may believe that he has raised an issue that is controversial and involves an important policy question, he is wrong. PG&E's advice letter is no more than a compliance tariff filing for the utility's SmartMeter Program that the Commission previously authorized. Further, an item does not become controversial just because a party protests the advice letter. Moreover, many of the issues that Mr. Hasbrouck argues are controversial are outside of the scope of the Advice Letter. Thus, Mr. Hasbrouck has not alleged legal error.

D. Resolution E-4533 did not anticipate ruling on issues which have not been adjudicated.

Mr. Hasbrouck contends that Resolution E-4533 anticipates ruling on issues that have not been adjudicated. Specifically, Mr. Hasbrouck argues that Resolution E-4533 wrongfully claims that "PG&E would be entitled to terminate the electric service

⁵ Although Mr. Hasbrouck refers to this rule as a Rule of Practice and Procedure, it appears that Mr. Hasbrouck is actually citing General Rule 5.1 of General Order 96-B.

to a customer if it is prevented from accessing its metering equipment at the customer site.” (Rehrg. App., p. 8.) Mr. Hasbrouck argues that PG&E never proposed terminating service on that basis in any previous or ongoing proceeding or in its Advice Letter. (Rehrg. App., p. 8.)

Mr. Hasbrouck’s allegation has no merit. Resolution E-4533 does not rule on an issue when it makes this statement. Resolution E-4533 discusses this matter as part of its justification for determining the reasonableness of PG&E’s proposed default procedure for customers who failed to exercise the opt-out option after receiving notices of PG&E’s intent to install a SmartMeter and failing to provide PG&E with reasonable access to install the SmartMeter. In the Resolution, we considered what other options might have been available to handle unresponsive customers. We looked at existing Tariff Rules and noted that absent our ordered opt-out requirement, PG&E could terminate service to customers that prevent access to its metering equipment.

Upon reflection and in response to the rehearing application, we believe that this discussion, however, may have generate some confusion because PG&E did not propose terminating service to these customers and, in fact, could not have proposed this option in its Advice Letter. In D.06-07-027 and D.09-03-026, we authorized PG&E to deploy SmartMeters at all residential customer locations. (Resolution E-4533, p. 11.) In D.12-02-014 we modified PG&E’s Smart Meter Program and required it to establish an opt-out option for residential customers who did not want to have a wireless SmartMeter. (D.12-02-014, p. 39 [OP 1].) Accordingly, customers had two choices: the installation of a SmartMeter or enrollment in the utility’s opt-out program. Thus, to comply with these decisions, PG&E had two options: install a SmartMeter or enroll the customer into its Opt-Out Program. Service termination was not an option.

Thus, we modify Resolution E-4533 as set forth in the ordering paragraphs below to remove this discussion. We also modify the FOF/COL to state that our prior decisions provided PG&E’s residential customers with two options: the installation of a SmartMeter or enrollment in PG&E’s opt-out program.

E. With the modifications made to the Resolution, the factual determinations are supported by the record.

Mr. Hasbrouck contends that certain FOF/COLs in Resolution E-4533 are not supported by the evidence. First, Mr. Hasbrouck contends there is no factual record to support the assumption that customers who do not provide access to PG&E to install a SmartMeter actually do not “wish” to have a SmartMeter. (Rehrg. App., p. 9.) However, Resolution E-4533 does not make any FOF/COLs regarding the actual wishes of a customer.

Mr. Hasbrouck next contends that there is no record to support the statement in Resolution E-4533 that there are only two alternatives that PG&E could have proposed for customers that have been informed of their ability to opt-out but do not respond affirmatively with an opt-out selection but deny access to PG&E to prevent installation of a SmartMeter. (Rehrg. App., p. 9.) Mr. Hasbrouck contends there could be other alternatives such as negotiating access rights or installing SmartMeters at other locations. (Rehrg. App., p. 9.)

Mr. Hasbrouck is incorrect that other alternatives were available. As previously discussed, under our prior decisions, customers have two choices: the installation of a SmartMeter or enrollment in the utility’s opt-out program. As part of implementation of the opt-out program, an issue arose as to what to do with customers who do not provide access and who did not respond to the notice for opting out. To comply with our prior decisions, PG&E proposed enrolling these customers in the Opt-Out Program. We approved this procedure because it was reasonable and it was consistent with our prior decisions. No other options were available to PG&E to comply with our prior decisions.

Mr. Hasbrouck contends that there is no evidence to support FOF/COL 8 which states: “[e]nrolling the unresponsive customer into the opt-out program is a less severe and/or hazardous option for the customer than shutting off their electric service.” (Rehrg. App., p. 10.) Although this FOF/COL is a rational observation, it is not

necessary to support the adoption of PG&E's proposed procedures. Therefore, we modify the Resolution as set forth in the ordering paragraphs to remove this FOF/COL.

Next, Mr. Hasbrouck argues that there is no factual record to support FOF/COL 7 which states, "[t]he procedure proposed by PG&E to deem the actions for customers repeatedly preventing installation of a smart meter as effectively selecting the opt-out option is reasonable." Mr. Hasbrouck argues that PG&E's Advice Letter makes no reference to "repeatedly" or "preventing installation" which Mr. Hasbrouck contends implies a deliberate and intentional act. (Rehrg. App., p. 10.)

Mr. Hasbrouck is incorrect in his assertion that preventing installation requires some deliberate or intentional act by the customers. According to the American Heritage Dictionary, prevent means to keep from happening. By failing to provide PG&E reasonable access to install the SmartMeter, the customers are keeping PG&E from complying with our prior decisions authorizing the installation of SmartMeter to those customers who have not opted-out.

However, Mr. Hasbrouck's assertion that there is no record to support the statement in FOF/COL 7 that customers will be enrolled in the opt-out program after "repeatedly" preventing installation has some merit. The tariff language and the proposed procedure states a customer will be deemed to have elected service under the opt-out program if "PG&E makes *a field visit* to a customer's residence . . . and the customer does not provide reasonable access to PG&E to install a SmartMeter™ after being provided notice of eligibility for service under the Opt-Out Program and not electing to opt-out." (Advice Letter, Attachment 1, Tariff Sheets 29535-G, 31331-E; Attachment 2, p. 3, emphasis added.) Although the procedures for providing notice of the opt-out option indicate that customers will receive a certified letter on the opt-out option if PG&E makes multiple attempts to access a customer's property, multiple attempts are not required for customers that affirmatively refuse PG&E's attempts to install a SmartMeter as there would be no reason to make multiple attempts to access the property of such customers. (Advice Letter, Attachment 2, p. 2.) Thus, we modify

FOF/COL 7 to remove the word “repeatedly” as set forth in the ordering paragraphs below.

Finally, Mr. Hasbrouck alleges there is no factual record supporting the finding of “reasonableness” contained in FOF/COL 7. (Rehrg. App., p. 10.) Mr. Hasbrouck argues there was never any reasonableness review to develop a factual record on reasonableness. Mr. Hasbrouck contends that failure to conduct a reasonable review or to provide any procedural opportunity to contest or develop a factual record with respect to reasonableness of the proposal violates due process and Commission Rules.

Mr. Hasbrouck has not alleged legal error. Our past decisions do not require a reasonableness review of PG&E’s implementation of its SmartMeter Program. Rather, the Commission has ordered the filing of an Advice Letter that is consistent with our prior decisions. (See D.12-02-014, p. 39 [OP 2.a.].) The record⁶ before us supports our conclusion that it is reasonable to deem the action of customers not providing reasonable access for the installation of SmartMeter as effectively selecting the opt-out option.

Contrary to Mr. Hasbrouck’s contention, he had an opportunity to contest the adopted procedures. He had an opportunity to file a protest, and did file one. (See Mr. Hasbrouck’s March 7, 2012 Protest.) Further, Mr. Hasbrouck received actual service of the Draft Resolution E-4533. (Resolution E-4533, p. 23, [FOF/COL 13].) Under Rule 14.5, Mr. Hasbrouck had the opportunity to file comments on the draft Resolution E-4533,⁷ and he did provide “comments” to the draft Resolution prior to the Commission vote.⁸

⁶ The record includes, but is not limited to, the Advice Letter (with any accompanying documents), the Protest (with any accompanying documents), PG&E’s Reply to the Protest and other information provided by the various parties to the Advice Letter.

⁷ Instead of filing Comments on the Draft Resolution, Mr. Hasbrouck filed the following documents: (1) Motion to Strike Certificate of Service and Draft Resolution E-4533; (2) Declaration of Edward Hasbrouck in Support of Motion to Strike Certificate of Service and Draft Resolution E-4533; (3) Draft Resolution: Resolution to Strike Certificate of Service and Draft Resolution E-4533; and (4) Certificate of

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F. PG&E’s Advice Letter did not go beyond the scope authorized by D.12-02-014.

Mr. Hasbrouck contends that PG&E’s Advice Letter went beyond the scope authorized by D.12-02-014 when PG&E proposed procedures that deemed customers that have not provided reasonable access to PG&E to install a SmartMeter as having elected service under the Opt-Out Program. Mr. Hasbrouck argues that D.12-02-014 explicitly limited the SmartMeter opt-out fees to only those customers that “do not wish to have a wireless SmartMeter installed at their location,” and thus, limits enrollment and the associated fees to only those customers that affirmatively indicate that they do not want a SmartMeter installed. (Rehrg. App., pp. 2, 12.) Mr. Hasbrouck argues that D.12-02-014 did not authorized PG&E to determine the intent of customers that do not enroll in the opt-out program but do not provide access for SmartMeter installation. Mr. Hasbrouck argues that there is no record that these customers actually did not “wish” to have a SmartMeter. (Rehrg. App., p. 12.) Mr. Hasbrouck contends that evidentiary hearings are necessary to consider the actual wishes of the customers.

Mr. Hasbrouck’s argument has no merit. Resolution E-4533 does not attempt to determine the intent of unresponsive customers but rather adopts procedures for enrolling customers into the Opt-Out Program. As discussed above, implementation of PG&E’s SmartMeter Program involves only two choices: installation of the SmartMeter or enrollment in the opt-out program. Prior decisions authorize PG&E to install SmartMeters. (D.06-07-027 & D.09-03-026.) D.12-02-014 modified PG&E’s SmartMeter Program and ordered PG&E to file an advice letter with procedures for customers to select the opt-out option if they do not wish to have a wireless SmartMeter.

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Service. Because Mr. Hasbrouck included proposed alternative language in the Draft Resolution document, it was treated as if it were Comments on the Draft Resolution. (Resolution E-4533, p. 7.)

⁸ We did not adopt Resolution E-4533 until our November 8, 2012, meeting and thus complied with the requirement in section 311(g)(1) that more than 30 days pass from the time of service until Commission vote.

(D.12-02-014, p. 39 [OP 2.a].) The Advice Letter conformed to this directive to establish procedures. It was reasonable for PG&E to propose procedures that inferred from the customer's action of preventing access that the customer did not want a SmartMeter, and to enroll the customer into the Opt-Out Program. As Resolution E-4533 notes, this procedure will prevent unresponsive customers from unfairly benefitting from improperly preventing PG&E access to the utility equipment.² (Resolution E-4533, p. 13.) Further, should a customer believe he/she was enrolled in the Opt-Out Program in error, the customer can contact PG&E to have a SmartMeter installed and resolve any billing issues.

G. Request for Oral Argument should be denied.

Lastly, Mr. Hasbrouck requests oral argument pursuant to Rule 16.3. Mr. Hasbrouck argues that oral argument will materially assist us in resolving the application for rehearing because he contends that Commission staff has had great difficulty understanding his protest and request for review underling the application for rehearing. Mr. Hasbrouck further contends that his application for rehearing raises issues of major significance because the challenged Resolution adopted new Commission precedent of attempting to pre-judge an entire class of future termination of service disputes. Mr. Hasbrouck further argues that his rehearing application presents legal issues of exceptional controversy and public importance. (Rehrg. App., p. 13.)

We have complete discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a); Cal. Code of Regs., tit. § 20, 16.3, subd. (a).) The request for oral argument does not meet the requirements specified by our Rules. The issues raised by Mr. Hasbrouck are basic issues that are not of exceptional complexity. Resolution E-4533 does not present legal issues of exceptional controversy and public importance. Accordingly, there is no basis to conclude oral argument would

² As a condition of service, a customer agrees to give PG&E access to its meter. (PG&E Electric Rule No. 16. and Gas Rule No. 16.)

benefit disposition of the application for rehearing. Consequently, the request for oral argument is denied.

III. CONCLUSION

For the reasons stated above, Resolution E-4533 will be modified, as provided in the ordering paragraphs below, to remove the discussion of service termination, to clarify FOF/COL 7, and to replace FOF/COL 8. Rehearing of Resolution E-4533, as modified, on all remaining issues should be denied as no legal error has been shown.

THEREFORE, IT IS ORDERED that:

1. Resolution E-4533 is modified to remove the first full paragraph on page 12.
2. Finding and Conclusion 7 in Resolution E-4533 is modified to read:
“The procedure proposed by PG&E to deem the actions for customers preventing installation of a smart meter as effectively selecting the opt-out option is reasonable. PG&E’s enrolling those customers into the opt-out program is reasonable, and PG&E is authorized by the Decision and prior CPUC orders and rules to establish this procedure.”
3. Finding and Conclusion 8 in Resolution E-4533 is modified to read:
“Prior Commission decisions provide PG&E’s residential customers with two choices: the installation of a SmartMeter or enrollment in PG&E’s opt-out program.”
4. The request for oral argument is denied.
5. Rehearing of Resolution E-4533, as modified, is hereby denied.
6. This proceeding, Application (A) 12-11-026, is hereby closed.

This order is effective today.

Dated September 11, 2014, at San Francisco, California.

MICHAEL R. PEEVEY

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

MICHAEL PICKER

Commissioners