



BEFORE THE PUBLIC UTILITIES COMMISSION OF

STATE OF CALIFORNIA

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Application of PACIFIC GAS AND ELECTRIC COMPANY (U-39-E) for Approval of Modifications to its SmartMeter™ Program and Increased Revenue Requirements to Recover Costs of Modifications.

Application No. 11-03-014
(Filed March 24, 2011)

**THE CITY AND COUNTY OF SAN FRANCISCO'S OPENING COMMENTS
ON THE PROPOSED DECISION MODIFYING PACIFIC GAS AND
ELECTRIC COMPANY'S SMARTMETER PROGRAM TO INCLUDE AN
OPT-OUT OPTION**

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
Facsimile: (415) 554-4763
E-Mail: william.sanders@sfgov.org

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I. INTRODUCTION

This proceeding concerns the application of Pacific Gas & Electric Co. (“PG&E”) to modify the prior decisions of the California Public Utilities Commission (“Commission”) approving PG&E’s installation of SmartMeters throughout its territory to allow customers to opt-out of PG&E’s SmartMeter program and to establish both the reasonable cost of the opt-out program and an appropriate cost-recovery mechanism.

On November 22, 2011, President Peevey issued a Proposed Decision in this matter (“PD”). The City and County of San Francisco (“City”) submits these comments on the PD, pursuant to Rule 14.3 of the California Public Utilities Commission’s Rules of Practice and Procedure.

The PD would grant PG&E’s application by modifying PG&E’s SmartMeter program to allow residential customers who do not wish to have a wireless SmartMeter installed at their location to have a non-communicating meter. The PD would split the cost of the opt-out program between customers opting-out and all residential ratepayers. The PD would impose an initial fee of \$90 and a monthly fee of \$15 for most customers, but would leave to another day a determination of the total cost of the program by requiring a subsequent reasonableness review. At that time, the Commission would determine the total costs to be apportioned to residential ratepayers.

II. SUMMARY OF CITY’S COMMENTS AND AND CITY’S RECOMMENDATION THAT THE COMMISSION REJECT THE PROPOSED DECISION

The City recommends that the Commission reject the PD in its entirety for two reasons. First, the PD makes these findings without a hearing and without allowing the parties to this

proceeding – other than PG&E – to submit any evidence. The Commission cannot make such a finding when it prevented the parties other than PG&E from making a record. Second, the fees imposed on customers are arbitrary and appear to be intended to dissuade customers from opting-out. While purporting to split the cost between opting-out customers and all residential ratepayers, the PD proposes an allocation of those costs based on insufficient data concerning the total cost of the program. In addition, the proposed fees will likely be cost-prohibitive for many PG&E customers.

The deficiencies in the PD cannot be remedied. For this reason, the City does not propose any specific changes to the findings of fact or conclusions of law. The City instead asks the Commission to reject the PD.

III. THE CITY’S COMMENTS ON THE PROPOSED DECISION

A. THE PROPOSED DECISION IMPROPERLY FINDS THAT THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT

In Resolution ALJ 176-3272 dated April 4, 2011, the Commission characterized this proceeding as a ratesetting proceeding and determined a hearing would be necessary. In the Assigned Commissioner’s Ruling and Scoping Memo dated May 25, 2011, the Commission identified the issues to be addressed in this proceeding, without setting a schedule. The Commission also determined that a second pre-hearing conference would be necessary to establish a schedule. The Commission subsequently held a second prehearing conference, during which time the parties discussed the schedule for further proceedings among other things.

Based on this record, the parties to this proceeding reasonably expected the Commission to issue an order establishing deadlines for filing their testimony and set dates for a hearing. Yet, no further scheduling order was issued. The parties were never given an opportunity to submit written testimony.

Despite this procedural posture, the PD would dispose of this case without a hearing. The PD determines that a hearing is not necessary because “there were no disputed factual issues material to the resolution of this application.” The PD, however, makes this determination based solely on the uncontested evidence submitted by PG&E in support of its application. The PD errs by ignoring the

many protests and motions filed in this proceeding, as well as the statements from many parties in the prehearing conferences, attempting to raise issues of fact concerning PG&E's radio-off proposal, the costs to implement PG&E's proposal, and PG&E's proposed cost-recovery mechanism.¹ For this reason, the PD must be rejected.

The PD in effect has granted PG&E summary judgment by making a decision in this disputed matter based solely on the written record created by PG&E. In determining whether summary judgment is appropriate, the Commission will generally look to the requirements of California Code of Civil Procedure § 437c. (*See* Decision ("D.")11-01-017, *Order Instituting Investigation on the Commission's Own Motion into the Operations, Practices, and conduct of Contractors Strategies Group, Inc., et al.*, 2011 Cal. PUC LEXIS 14 (Jan. 13, 2011). Section 437c(c) requires this Commission to review *all* of the evidence presented by the parties before making this determination:

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(Code of Civ. Proc., § 437c(c); *see* D.11-01-017, at pp. **27-28; *Aguilar v. Atlantic Richfield Co.* (2001) 125 Cal.4th 826.)

The evidence submitted by only one side in any proceeding will inevitably be undisputed. The Commission cannot create this inevitability by prohibiting the parties to this proceeding from submitting evidence, which it has done by issuing the PD at this time. Without the benefit of all of the evidence the parties might present, along with the inferences that can be drawn from that evidence, the Commission cannot decide this matter. It seems obvious from the proceedings in this case that a complete record would show that there are disputed factual issues that require a hearing.

¹ The City also questions the PD's finding that all pending motions in this proceeding are "rendered moot." At the very least, the PD should have identified those motions and stated how the PD moots them.

In issuing the PD without allowing the other parties to this proceeding to submit evidence the PD has denied these parties their legal right to be heard in this ratesetting proceeding. For this reason, the Commission should reject the PD.

B, THE PROPOSED DECISION ERRS BY IMPOSING OPT-OUT FEES THAT ARE ARBITRARY AND SEEMINGLY INTENDED TO DISSUADE CUSTOMERS FROM CHOOSING TO OPT-OUT

The PD establishes opt-out fees that are in some respects less than those that PG&E had proposed and provides that all residential ratepayers will be allocated the remainder of the costs of opt-outs. Regardless of whether this is a reasonable approach to allocating the costs of the opt-out option, which the City believes it is, the initial fee of \$90 and the monthly fee of \$15 that the PD would impose on most customers choosing to opt-out are arbitrary for four reasons.²

First, the Commission would impose fees on ratepayers before knowing the cost of the opt-out program. If the PD is adopted, the Commission will decide the reasonableness of the cost of the program at a later date. So there is no way of knowing how much of those costs will be covered by these fees. PG&E claims that the cost to manually read an opting-out customer's meter would be \$10.69, but the PD would impose a charge of \$15. On its face, this is unreasonable.

Second, the PD, while requiring all residential ratepayers to assume some of the costs, would require opting-out customers to pay these fees without knowing what percentage of the total costs of PG&E's opting-out proposal those fees represent. If the total cost of the opt-out program are to be shared, as the PD would order, the Commission should make a determination as to the proper allocation of the costs first, rather than assessing costs on opting-opt customers first and requiring residential ratepayers to make up some yet to be determined amount. In light of the high fees the PD would impose on opting-out customers, it is likely that the costs to be paid by residential ratepayers could be relatively small, whether or not this is the PD's intended result.

Third, the PD would impose costs on PG&E's customers that will impact many customers' decisions whether to opt-out. These proposed fees could be cost-prohibitive for many customers that

² The City agrees with the PD that PG&E should not be allowed to also impose an exit fee of \$130.

might want to opt-out. Customers that want to opt-out should be able to make that choice without having to consider the cost.

The solution to this problem is simple. The cost to install SmartMeters has been borne by all ratepayers – including those who now may choose to opt-out. It seems unfair for those customers to pay both the full cost of the SmartMeter program and the high opt-out cost proposed by the PD. For this reason, allocating more of the cost to all of PG&E’s ratepayers would be a reasonable result. Considering that PG&E’s SmartMeter program will cost ratepayers in excess of \$2 billion, the additional costs of the opt-out program will have little impact on customer rates if all customers are required to bear those costs.

Fourth, the PD rejects the request from a number of protesters that shareholders be responsible for opt-out costs. Given that shareholders have continued to earn profits on the SmartMeter program, it is only fair that they shoulder at least some of the opt-out costs.

IV. CONCLUSION

For the reasons stated above, the Commission should reject the Proposed Decision. The Commission should instead order that a prehearing conference be schedule so that the Commission can establish a schedule for a hearing in this matter.

Dated: December 12, 2011

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

By: _____ /S/
WILLIAM K. SANDERS

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone:(415) 554-6771
Facsimile: (415) 554-4763
E-Mail: william.sanders@sfgov.org