

**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. (U39M)

A.11-03-014
(Filed March 24, 2011)

**COMMENTS OF THE TOWN OF FAIRFAX, CALIFORNIA
THE ALLIANCE FOR HUMAN AND ENVIRONMENTAL HEALTH, COUNTY OF
MARIN, CONSUMERS POWER ALLIANCE, COALITION OF ENERGY USERS,
NEIGHBORHOOD DEFENSE LEAGUE, SANTA BARBARA TEA PARTY, EAGLE
FORUM OF CALIFORNIA, ROVE ENTERPRISES, AND BURBANK ACTION ON THE
PROPOSED DECISION OF COMMISSIONER PEEVEY**

James M. Tobin
Jose E. Guzman, Jr.
August O. Stofferahn
Tobin Law Group
1100 Mar West Street, Suite D
Tiburon, CA 94920
(415) 732-1700 (telephone)
(415) 704-8919 (facsimile)
jim@tobinlaw.us
joe@tobinlaw.us
august@tobinlaw.us

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Attorneys for Commenting Parties

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The Town Of Fairfax, California, the Alliance For Human And Environmental Health, County of Marin, Consumers Power Alliance, Coalition Of Energy Users, Neighborhood Defense League, Santa Barbara Tea Party, Eagle Forum of California, Rove Enterprises, and Burbank Action (jointly, the “Commenting Parties”) hereby submit their comments on the Proposed Decision of Commissioner Peevey (“Proposed Decision”), mailed November 22, 2011.¹

¹ Mothers Against SmartMeters concurs in these Comments but has not yet been granted Party status in this matter. Numerous other local government, industry and public interest groups, and concerned citizens groups have become parties to this proceeding and expressed support for the Protest filed by the Town of Fairfax et al. The inability of these parties to join in these Comments does not reflect their endorsement of the Proposed Decision or any disagreement with these comments. Rather, it is due to the presumably purposeful release of the Proposed Decision (and commencement of the twenty day period available for comment) at approximately 2:25 PM on November 22, 2011, leaving only hours more than one full business day before the Thanksgiving holiday. The Commission is well aware of the formal procedures which must be followed by governmental bodies in California in order to properly review and authorize an official position in proceedings such as this. The Commission’s timing of the release

I. SUMMARY

There is no adequate record in this proceeding that would support any form of final Decision at this time, and therefore Commenting Parties are precluded from proposing any specific revisions to the Proposed Decision by this fundamental and unlawful failure of record development. In order for any Proposed Decision to be properly before the Commission, the Proposed Decision's Conclusion of Law 23 and Ordering Paragraph 7 – which reverse the Scoping Memorandum's prior determination that hearings are required – must be legally correct.² It is undisputed that no hearings have been held. Therefore, if there are material disputed issues of fact relevant to the grant or denial of the Application no form of Alternate Decision or modifications to the Proposed Decision could resolve the fundamental denials of due process represented by and essential to the very existence of the Proposed Decision. While the Proposed Decision contains some statements of fact and legal conclusions with which Commenting Parties do not disagree, it also contains many disputed facts and conclusions that are clearly erroneous and generally unsupported by identified record evidence. There has been no schedule adopted in this proceeding for the testimony of any Commenting Party to be admitted into the record, and no Commenting Party has

of the Proposed Decision, combined with the known legal requirements binding on participating parties and practical realities of the Thanksgiving holiday, is one more example of the failure of the Commission to provide a meaningful ability to be heard in this proceeding. It is cumulative to the other such failures which in total, if the Proposed Decision is adopted, will result in reversible legal error as summarized in these Comments and demonstrated by the Commission's official records of the proceeding even if not set forth in detail here.

² Finding of Fact 23 states "No hearings were necessary as there were no disputed factual issues material to the resolution of this application." Ordering Paragraph 7 states, "No evidentiary hearings are necessary."

been permitted to confront any PG&E witness sponsoring the PG&E testimony that has been made part of the record.

In essence, as evident throughout the Proposed Decision, PG&E's unilateral factual assertions, none submitted under oath, are simply accepted as accurate even on technical matters of network engineering and economic cost calculations, as well as operational safety and data privacy and security.³ The Commission is undoubtedly aware of the harm to the public interest that can result from such unquestioning acceptance of PG&E assertions concerning network safety and compliance with applicable federal and state regulatory safeguards. Under current circumstances, such unquestioning acceptance of PG&E statements in support of its business practices would be unreasonable and arbitrary. Even more unreasonable is the Proposed Decision's premature and unlawful order refusing to even allow parties desiring to contest these assertions to submit their own evidence and confront PG&E's spokespersons directly on the record, or to conduct discovery of data necessary for such participation.

Some of the facts and testimony that the Proposed Decision would exclude from the record are summarized in Section III below entitled "Offer of Proof Pursuant to Rule 13.6(e) and Section 534 of the California Evidence Code." In light of the absence of any record containing contested relevant facts, and the resulting unavoidable absence of specific analysis of any such disputed facts in the Proposed Decision, the Commission

³ For example, Findings of Fact 9 and 10 state that PG&E "provided cost estimates" and "provided cost information" and Finding of Fact 10 finds only that these estimates are "based on its best efforts and actual costs may be significantly different."

must reject the Proposed Decision in its entirety and proceed with hearings and an orderly disposition of this case consistent with due process requirements.

Instead of any final Decision ignoring not only due process but the actual useful record information that it seeks to preclude, the Commission should instead direct that the inherent discriminatory status quo created by the limited Delay Install List Ruling in this proceeding be eliminated.⁴ This Delay Install List Ruling, which Commenting Parties applaud for what it does accomplish, nevertheless only grants delay rights to consumers lucky enough to have not had their SmartMeters installed before the issuance of the Ruling in late September. This Ruling should be modified to treat all PG&E customers fairly and consistently with those having delay rights under the Ruling⁵ by allowing any PG&E customer to request replacement of a SmartMeter pending conclusion of this proceeding unless prior express consent has been given. PG&E should be required to remove any such meter and replace it with the type of meter previously serving the customer, as proposed in Section IV below. This will provide substantial relief to concerned customers and remove any pressure to short circuit the development of an adequate record to support a final decision.

II. COMPLIANCE WITH RULE 14.3

In compliance with Rule 14.3(b), Commenting Parties state:

A. Subject Index of Recommended Changes to the Proposed Decision

⁴ *Assigned Commissioner's Ruling Concerning Customer Requests to Delay Installation of a Smart Meter*, issued September 21, 2011 ("Delay Install List Ruling").

⁵ And also consistently with certain individuals who personally appeared before the Commission during its open business meetings and were informed by President Peevey that PG&E would restore their prior meters.

All subjects listed in the Proposed Decision, which should be rejected in its entirety.

B. Table of Authorities

See Attachment A hereto.

C. Proposed Findings of Fact and Conclusions of Law

No Findings of Fact or Conclusions of Law should be adopted because no Decision should be adopted. See Section IV below proposing an Interim Decision.

In compliance with Rule 14.3(c), Commenting Parties state:

The fundamental position of the Proposed Decision denying Commenting Parties and other parties the right to submit factual and expert testimony based on adequate discovery of PG&E makes a complete list of all factual, technical, or legal errors of the Proposed Decision impossible to produce, but see Section IV below setting forth Commenting Parties' initial Offer of Proof.

III. The Proposed Decision Denies Commenting Parties Their Fundamental Right to Due Process.

Due process is a fundamental requirement of both the federal and California Constitutions.⁶ The California Supreme Court has held that due process before the Commission requires "adequate notice to a party affected and an opportunity to be heard before a valid [Commission] order can be made." *People v. Western Airlines, Inc.* 42 Cal.2d 621, 632 (1954).⁷ The Proposed Decision would deny parties due process by summarily terminating their opportunity to be heard on the issues identified in the Scoping Memo and the details of the various opt-out options proposed by parties, in

⁶ See, U.S. Constitution, 5th and 14th Amendments; California Constitution, Article 1, Sec. 7(a).

⁷ See also, *Pac-West Telecomm, Inc. v. Pacific Centrex Services, Inc.*, Order Granting Motion For Stay Of Decision (D.) 08-01-031, Denying Rehearing, and Ordering Defendant To Answer The Complaint, D. 08-04-044, 2008 WL 1841051 (Apr. 10, 2008).

contradiction to prior Rulings in this proceeding and the most recent related Commission decision requiring Southern California Edison to file a SmartMeter Opt-Out Plan with the Commission.⁸

The Assigned Commissioner Ruling and Scoping Memo was issued on May 25, 2011.⁹ The Scoping Memo defined the issues to be considered in this proceeding and determined that hearings would be required.¹⁰

A Workshop was held on September 14, 2011 consisting of informal discussions addressing the various alternatives being proposed and to assist in identification of which of those merited further review and data production by PG&E. None of the Workshop representations of PG&E or its vendors were made on the record. Subsequently, the Administrative Law Judge issued two Rulings directing PG&E to provide additional cost and network specification information on specified proposed alternative network configurations.¹¹ There has been no Ruling identifying the record basis for the exclusion of proposals not included in these Rulings, for excluding other proposed terms and conditions of the Opt-Out Plan, such as how it should be applied to

⁸ Decision 11-11-006, *Application of Consumers Power Alliance, Public Citizen, Coalition of Energy Users, Eagle Forum of California, Neighborhood Defense League of California, Santa Barbara Tea Party, Concerned Citizens of La Quinta, Citizens Review Association, Palm Springs Patriots Coalition Desert Valley Tea Party, Menifee Tea Party - Hemet Tea Party – Temecula Tea Party, Rove Enterprises, Inc., Schooner Enterprises, Inc., Eagle Forum of San Diego, Southern Californians For Wired Solutions To Smart Meters, and Burbank Action For Modification of D.08-09-039 and A Commission Order Requiring Southern California Edison Company (U338E) To File An Application For Approval of A Smart Meter Opt-Out Plan*, released November 17, 2011.

⁹ *Assigned Commissioner Ruling and Scoping Memo*, issued May 25, 2011 (“Scoping Memo”).

¹⁰ *Id.* at 3-4.

¹¹ *Administrative Law Judge’s Ruling Directing Pacific Gas and Electric Company to File Additional Cost Information*, issued October 12, 2011, and *Administrative Law Judge’s Ruling Seeking Clarification*, issued October 18, 2011.

Multiple Dwelling Units or implemented on a basis broader than an individual customer in light of the pervasive wireless mesh network emissions. Nor did any of these Rulings specify any procedure, requirement, or deadline for responses challenging the accuracy or completeness of PG&E's written responses, which were not submitted under oath.

In light of the nature of the ALJ Rulings seeking additional information from PG&E, and the Scoping Memo determination that hearings would be required, it was reasonable for parties to assume that they would next propound discovery to PG&E, and then proceed to prepare their testimony for the hearing that the Scoping Memo determined to be necessary. No Ruling of the ALJ or Assigned Commissioner provided any notice to Commenting Parties that this commonplace procedural track would not be followed in this case. Instead the Proposed Decision was issued out of the blue, days before a holiday making most participants predictably absent from their offices and unavailable to begin evaluation until the following week. The Proposed Decision deals with over 100 filings in this case *en masse*, by simply generically denying all motions or other requests for procedural or substantive relief that was inconsistent with its proposed outcome. This denial is without any reference to the factual or legal basis for the denial of any specific motion. It is therefore not possible for Commenting Parties to evaluate the factual or legal basis for the denial of any such motion, or to argue for reversal in these Comments. The Proposed Decision constitutes non-transparent, non-precise, and non-record based decision making at its most extreme. This is particularly appalling when the amount of money being expended on this program by PG&E, the

magnitude of ratepayer compensation PG&E will continue to seek,¹² and the apparent failure to date of the fundamental asserted rationale of the program.¹³

On September 21, 2011, the Assigned Commissioner issued a Ruling requiring that PG&E to establish specified Delay Install List requirements applicable to subsequent customer requests to delay the installation of a wireless SmartMeter.¹⁴

The details of PG&E's opt-out proposal and the proposals of other parties are inherently fact-based, as evidenced by the ALJ Rulings requiring PG&E to file more detailed opt-out proposals addressing who can opt-out, how data transmission will be handled, and other information, and cost information on field deployment, information technology, and customer communications and operations support costs. The issue of

¹² In a cart before the horse decision that few California citizens will accept if explained to them, the Proposed Decision admits that the cost of this program is currently unknown, but then purports to establish rates in some instances (but not all) lower than those proposed by PG&E, and then permits PG&E to seek unlimited rate increases annually if it does not recover its self-determined full costs. It appears to Commenting Parties that the cost and cost recovery issues explicitly designated as Issues 2 and 3 in the Scoping Memo are being simply "kicked down the road" for some months, such that PG&E is fully authorized to seek its originally-proposed opt-out rates later. Instead, Commenting Parties believe that only a cost-justified rate, determined by lawful Commission proceedings, should be the basis of any consumer charge for opting out. In fact, P.U. Code Section 745 explicitly establishes the requirement of non-mandatory time of use consumer billing at this time, and would appear to prohibit charges for opting out of equipment related to that rate structure as well. However, the Proposed Decision precludes even the ability to brief this legal issue based upon relevant facts that would be present in a full record. This determination will need to include not only the "reasonableness" of including any money spent by PG&E in its rate base, but also the appropriate ratepayer body and rate structure that is found reasonable by the Commission. The denial of Commenting Parties' right to contest PG&E's assertions is made even more egregious by the Proposed Decision's adoption of rates without adequate findings of fact or specific references to any record.

¹³ Recent PG&E information provided at a presentation to the Commission on December 9, 2011, at a workshop providing updates on PG&E's SmartMeter program, indicates that less than 1% of PG&E's customers with SmartMeters have accessed their SmartMeter data.

¹⁴ Delay Install List Ruling, *supra*, note 4.

whether any of these proposals and their associated costs is reasonable can only be determined in light of the facts of each proposal. Yet, despite that fact that PG&E has made a proposal, which it supports with testimony and detailed cost information, and the fact that numerous parties have proffered alternative opt-out proposals, none of which have been subjected to analysis or detailed examination, the Proposed Decision concludes that there are no disputed factual issues that would make hearings necessary.

IV. OFFER OF PROOF PURSUANT TO RULE 13.6(e) AND SECTION 354 OF THE CALIFORNIA EVIDENCE CODE

Rule 13.6 sets forth the process for objections to the exclusion or admission of evidence. It is framed generally on the assumption that a hearing is occurring where evidence is offered into the record and objections are made and ruled upon by the presiding officer. Rule 13.6(a) provides:

(a) Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.

Rule 13.6(e) states:

(e) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

Similarly, Section 354 of the Code of Civil Procedure provides as follows regarding offers of proof:

§ 354. Erroneous exclusion of evidence; effect a verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

- (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
- (b) The rulings of the court made compliance with subdivision (a) futile; or
- (c) The evidence was sought by questions asked during cross-examination or recross-examination.

Here, the Proposed Decision has made it impossible for Commenting Parties to present their offers of proof in a hearing context where such evidence was excluded by a specific ruling because no hearing process was scheduled or held, and no notice was given that the Scoping Memo hearing determination would be reversed. Therefore, these Comments are the first occasion where Commenting Parties can explicitly state on the record their offers of proof with respect to the issues designated in the Scoping Memo of this proceeding.¹⁵

A. Offers of Proof Concerning Issue 1

Issue 1 identified in the Scoping Memo states:

1. Whether PG&E's proposed Opt-Out program is a reasonable solution as an alternative to those customers who choose not to have a SmartMeter capable of RF transmission.

¹⁵ The Law Revision Commission Comments to this section state: "an offer of proof is unnecessary where the judge has limited the issues so that an offer to prove matters related to excluded issues would be futile. *Lawless v. Calaway*, 24 Cal.2d 81, 91, 147 P.2d 604, 609 (1944)." Rutter describes the general procedure for an offer of proof as follows: When evidence is permanently excluded by an order *in limine*, opposing counsel are thereby prohibited from introducing the evidence or referring to it at trial. However, a verdict or judgment will not be set aside for erroneous exclusion of evidence unless the "substance, purpose and relevance of the excluded evidence was made known to the court by ... offer of proof or by any other means." [Ev.C. § 354(a)] Thus, opposing counsel should make a formal offer of proof on the record outside the presence of the jury. For example: "Your Honor, I would like to make an offer of proof. If permitted to testify, Mr. Jones will state: "This is directly relevant to the issue of: "It is admissible because: (not hearsay, under hearsay exception, etc.)." Weil & Brown, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2011) ¶4:306.

If permitted to present factual and expert testimony and documentary evidence, Commenting Parties would produce record evidence that PG&E's Opt-Out Program is not a reasonable solution because:

- The wireless mesh network used by PG&E apparently does not encrypt individual customer information collected by a SmartMeter on the wireless transmission path of that customer data from the SmartMeter to the PG&E distant Access Point, which is a radio transmitter and receiver which only at that location apparently encrypts individual customer data for further transmission to PG&E. This enables anyone to receive, record, and use such individual customer data while in the coverage area of the wireless mesh network. Such data can be sorted by individual meter and made available to anyone desiring it.¹⁶ This network design is unreasonable because it violates the privacy rights of individual subscribers as established by federal and state law, as well as the Commission's Rules. It is further unreasonable because it enables the "hacking" of the SmartMeter wireless web with possible consequences of grid security breaches as well as alteration of SmartMeter data.¹⁷ These are complex issues

¹⁶ See, e.g., PG&E's web site where PG&E admits that encryption occurs at the Access Point, not at the meter:

"The electric network access point collects meter data from nearby electric meters and periodically transfers this data to PG&E via a secure cellular network. Each RF mesh-enabled device (meters, relays) is connected to several other mesh-enabled devices, which function as signal repeaters, relaying the data to an access point. *The access point device aggregates, encrypts, and sends the data back to PG&E* over a secure commercial third-party network. The resulting RF mesh network can span large distances and reliably transmit data over rough or difficult terrain. If a meter or other transmitter drops out of the network, its neighbors find another route. The mesh continually optimizes routing to ensure information is passed from its source to its destination as quickly and efficiently as possible." (Emphasis added.) See, <http://www.pge.com/myhome/customerservice/smartmeter/howitworks>,

¹⁷ See, e.g., Hacking potential proven at 2009 and 2011 BlackHat conferences: <http://gigaom.com/cleantech/smart-meter-worm-could-spread-like-a-virus>; <http://www.informationweek.com/news/government/security/218700250> <http://www.crn.com/news/security/231300172/black-hat-water-smart-meters-vulnerable->

requiring expert testimony to fully identify factual problems with the PG&E network configuration. If PG&E disputes these facts, this is a material set of disputed facts obviously relevant to the issue of whether PG&E's proposed plan is a reasonable proposal for removing concerns of customers regarding privacy of their personal information and security of their service provider's network.

- PG&E's Plan does not include allowing any customer that does not already have and does not desire a SmartMeter until the terms and conditions of the final Opt-Out Plan are approved by the Commission to continue to use their previously-installed meter. This right is being made available only to those customers whose SmartMeters had not yet been installed when the Commission issued its Delay Install List Ruling. The dates of installations were not proposed to, reviewed by, or approved by the Commission. Thus, today a customer not desiring a wireless SmartMeter for any of several reasons is forced to retain it only because of PG&E's internally developed installation schedules and policies of refusing to replace such installations pending resolution of this proceeding. This significant factual reality of the PG&E Plan is unreasonably discriminatory to affected customers (such as different delay rights being provided to residents of the same town) and is further unreasonable because it is causing harm to affected citizens.¹⁸

to-attack.htm;jsessionid=Woa+2KwRZQGcXLTTTh3ZHsQ**.ecappj01; MIT says no entity in charge of grid security (12/8/11): <http://www.scmagazineus.com/mit-researchers-suggest-power-grid-security-oversight/article/218277/>; Illinois Water Dept. Hacked by Russians, Customer user names and passwords stolen (11/18/11): <http://www.scmagazineus.com/water-utilities-in-illinois-houston-reportedly-hacked/article/217173/>; Vulnerable to Stuxnet and similar worms (4/26/11) <http://www.crn.com/news/security/229402303/iran-says-stars-virus-intended-for-cyber-espionage.htm>; <http://www.triplepundit.com/2010/11/getting-trendy-about-smart-grid/>; recently revealed Operation Shady RAT – 2011 Chinese based cyber warfare: <http://www.informationweek.com/news/security/attacks/231300108>.

¹⁸ See, e.g., Daniel Hirsch, Founder and First Director of the Stevenson Program on Nuclear Policy, UC Santa Cruz, who has identified material flaws in the CCSD study, finding that cumulative RF radiation from Smart Meters to be 100-150 times the cumulative exposure of a cell phone: http://www.youtube.com/watch?v=a6-hcOr-sxA&feature=player_embedded#at=19; the World Health Organization on May 31, 2011

- The PG&E proposal is unreasonable because it does not consider the existing findings and decisions of other jurisdictions which have considered opt-out issues, as well as positions being advocated in these other states. Testimony upon which these other state commissions have determined opt-out program terms would provide a record basis for arguments that similar determinations are reasonable here. For example, and without necessarily advocating specific testimony concerning implementation by PG&E at this time, following are a few descriptions of issues that testimony would review and compare to the PG&E proposal based upon the record: Under the State of Maine Opt Out plan, restoration of electromechanical analog meters is allowed as an option that can be selected on the utility's website; see: <https://www.cmpco.com/smartmeter/smartmeteroptions.html>. In Vermont, the Vermont ACLU is advocating for an opt-in program and no-cost opt out due to privacy concerns. See, http://www.acluvt.org/issues/smart_meters_aclu_position.pdf. At the same time, utilities in Vermont are offering electromechanical smart meters as an opt out, and a \$10 monthly fee. New Mexico Gas Company: Has a Medical Waiver program in place: see, http://whyfry.org/download/EMAIL_MEDICAL_WAIVER_FORM.doc

Continuing with a second part of Issue 1, parties may recommend other reasonable cost alternative methods which allow a customer to Opt-Out of a SmartMeter Installation. Parties recommending an alternative Opt-Out program shall also provide the estimated costs of any recommended alternatives Opt-Out program, and a proposed cost recovery mechanism.

declared non-ionizing radiation from smart meters a Class 2B possible carcinogen: http://www.iarc.fr/en/media-centre/pr/2011/pdfs/pr208_E.pdf ; the National Institutes of Health has published a study of the effect of cell phone radiation on the human brain showing non-thermal biological effects on brain function: <http://well.blogs.nytimes.com/2011/02/22/cellphone-use-tied-to-changes-in-brain-activity/> ; a Sage Report found that RF radiation exposure from a smart meter is equivalent to living within 500 feet of a major cell tower: <http://sagereports.com> .

As recognized in reaction to Comments on the proposed draft of D.11-11-006, additional data from the utility (there SCE, here PG&E) was the best source of information needed by parties to evaluate the proposed alternatives to the PG&E proposal. Responding to a request for modification of Finding of Fact 5 by DRA, the Commission found that “5. SCE is the party in the best position to provide information *in the first instance* on the technological feasibility and costs to offer an alternative to the wireless smart meter.”¹⁹ The “first instance” language clearly envisions further evaluation and response to such data, a process also commenced by the ALJ Ruling in this case but truncated by the Proposed Decision.

B. Offers of Proof Concerning Issue 2

Issue 2 identified in the Scoping Memo states:

2. Whether the estimated costs of PG&E’s Opt-Out program are reasonable.

If permitted to present factual and expert testimony and documentation, Commenting Parties would produce record evidence that PG&E’s estimated costs of its Opt-Out Program are not reasonable because:

- The relative cost of the wired SmartMeter option rejected by the Proposed Decision is vastly overstated in the materials provided by PG&E. While discovery will be eliminated if the Proposed Decision is adopted, preliminary review of PG&E’s cost information by an expert regulatory economist included in the Protest of the Town of Fairfax et al states that various erroneous assumptions appear to have been used. If more reasonable cost and telecommunications network design assumptions are used, the relative differential of cost between a wired alternative and other alternatives would be

¹⁹ D.11-11-006 at 10; emphasis added.

minimized. When such evidence would be considered together with the privacy violations of the proposed network system, this alternative may be far more reasonable than the wireless mesh, particularly in more densely populated areas where alternative communications networks are available and greater concentrations of EMF emissions will occur under PG&E's plan.

- The costs alleged by PG&E are unreasonable because PG&E failed to conduct due diligence about alternative communications networks and services available to transport SmartMeter data, particularly to explore in any reasonable detail whether different data transport systems would be more economical in some areas.

C. Offers of Proof Concerning Issue 3

Issue 3 identified in the Scoping Memo states:

“3. Whether PG&E's proposed cost recovery of the costs for the Opt-Out Program is reasonable.” Scoping Memo, at 3-5.

If permitted to present factual and expert testimony and documentation, Commenting Parties would produce record evidence that PG&E's cost recovery proposal for its Opt-Out Program is not reasonable because:

- As recognized even by the Proposed Decision (but without required specificity or reliance on identified record evidence) PG&E's proposal that customers choosing to opt-out should bear the entirety of PG&E's costs is unreasonable.²⁰ PG&E has proceeded at great speed to install the wireless network design it has selected, despite actual notice of potential problems. It has chosen to proceed when alternative courses of action have been available to it and not prohibited by the Commission. Under such circumstances, expert regulatory economics testimony would propose that most, if not all, of the funds expended by PG&E on the wireless mesh network not be recovered from either opting out ratepayers or

²⁰ The Commission has explicitly disclaimed any “reasonableness” finding of any of PG&E's asserted costs as of this time.

ratepayers generally. Further establishing the unreasonableness of PG&E's proposed cost recovery, applicable statutes require a "reliable and safe" advanced metering system, and also a system that does not violate the privacy rights of customers and personal, state and national security.

- PG&E's proposed cost recoveries are unreasonable because they ignore material cost savings from potential opt-out alternatives, ignore cost savings from never removing existing meters from opting-out customers, and improperly inflate the necessary and efficient cost of collection of metering data.²¹
- PG&E's cost recovery proposal is unreasonable because it violates California Public Utility Code section 453 (b).²² By imposing a fee to opt out and regular monthly charges to maintain that status, PG&E would impose a different rate on the many utility customers who are EMF sensitive in contradiction to the terms of this statute.

Finally, there can be little reasonable argument that the above-described offers of proof are not relevant to grant or denial of this Application. They also demonstrate that a myriad of disputed facts exists in this proceeding. To so conclude would be reversible legal error. There has been a constant attempt by PG&E to read these three designated issues so narrowly as to preclude relevance of most of the real-life, sometimes even undisputed, consequences of its wireless mesh network implementation. At some point the narrowing of issues to the degree that facts that are related to the "reasonableness" of PG&E's technical plan, cost evidence, and cost

²¹ See, e.g., Attachment C to the Protest Of The Town Of Fairfax, California, The Alliance For Human And Environmental Health And County Of Marin, California, Memorandum of preliminary review of PG&E's cost and cost recovery material by Dr. Lee Selwyn.

²² Section 453(b) states: No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of ancestry, medical condition, marital status or change in marital status, occupation, or any characteristic listed or defined in Section 11135 of the Government Code.

recovery, as would appear to an ordinarily intelligent person, are declared “outside the scope” of the designated issues equates to denial of due process by indirection and sleight of hand. The issues designated by the Scoping Memo seek to determine if PG&E’s proposals are “reasonable.” To exclude the impact of these proposals on citizens rights of safety and privacy, the impact on the environment, the impact on citizens with disabilities, and the preclusion of involvement by concerned local governments is both arbitrary and a great disservice to the public interest, both as a matter of process and substance.

V. INTERIM RELIEF IS WARRANTED WHILE REQUIRED DUE PROCESS IS AFFORDED PARTIES TO THIS AND RELATED PROCEEDINGS

As stated above, Commenting Parties urge the Commission to reject in its entirety the Proposed Decision, and as a result allow this proceeding to continue with the required creation of a complete record upon which the Commission can rely without making an arbitrary decision. This process will take time, as all Commission proceedings do. But the ability of the Commission to address the Proposed Decision’s recognized need for a quick resolution of the opt-out issue can be accomplished without tossing aside important relevant testimony and the rights of participants and customers.

The Commission has recently taken an important and effective step in this direction by requiring PG&E, as well as Sothern California Edison and San Diego Gas & Electric, to establish Delay Install Lists.²³ This Ruling establishes procedures for citizens who have not yet had a SmartMeter installed on their property to delay that event until the conclusion of this proceeding. To the extent that the public has become

²³ Delay Install List Ruling, *supra*, note 5. This Ruling applied as well to SCE and SDG&E.

aware of this possibility, it has afforded a basis for retention of their current meter (whatever type it may be). This has proven valuable to these eligible subscribers.

However, the Delay Install List as currently implemented does not help members of the public who did not have sufficient information to knowingly seek delayed installation until after it had already occurred or experienced SmartMeter installations before the effective date of the Delay Install List Ruling. Neither SCE nor SDG&E had a Delay Install List process until ordered to implement one, and PG&E's delay process predating the Delay Install List Order was inconsistently communicated and did not meet the minimum requirements of the Delay Install List Order.

To address public concerns about SmartMeters pending the outcome of this case based on allowing parties a meaningful opportunity to compile a record, the Commission should direct that the Delay Install List Ruling be modified by permitting any PG&E, SCE and SDG&E customer that has not already affirmatively agreed to the installation of a SmartMeter to request and obtain its removal and replacement with the type of meter previously serving that customer's premise. Should the Commission feel that a further record is required concerning this action, an expedited hearing could be held to permit introduction of evidence by parties concerning the availability of such meters, estimated cost, and to arrive at an interim "remove and replace" installation cost for PG&E staff to make the replacement. This would provide meaningful relief to numerous members of the public and would not violate the privacy and due process rights of anyone.

VI. CONCLUSION

As discussed herein, the Proposed Decision would deny due process to Commenting Parties and the other parties by cutting off any opportunity they have to be heard on the pros and cons of PG&E's SmartMeter Opt-Out proposal and its associated costs as well as the pros and cons of other parties' opt-out proposals and costs. Moreover, in the absence of any evidentiary record, the Proposed Decision would adopt an opt-out program (and reject all other opt-out proposals) and adopt costs for that program that have no record basis that will survive judicial appeal.

The Commission must reject the fatally-flawed Proposed Decision and instead conduct this proceeding in accord with Commenting Parties' due process rights in order to establish the record necessary to support the final decision. In the meantime, the Commission or the Assigned Commissioner should promptly adopt an Interim Ruling modifying the Delay Install List Ruling as set forth above.

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Respectfully submitted,

By: /s/ James M. Tobin

James M. Tobin
Jose E. Guzman, Jr.
August O. Stofferahn
Tobin Law Group
1100 Mar West Street, Suite D
Tiburon, CA 94920
(415) 732-1700 (telephone)
(415) 789-0276 (facsimile)
jim@tobinlaw.us
joe@tobinlaw.us
august@tobinlaw.us

Attorneys for Commenting Parties

ATTACHMENT A

Table of Authorities

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Miscellaneous

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