

**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)	Application 11-03-014 (Filed March 24, 2011)
Application of Utility Consumers' Action Network for Modification of Decision 07-04-043 so as to Not Force Residential Customers to Use Smart Meters.	Application 11-03-015 (Filed March 24, 2011)
Application of the Consumers Power Alliance, et al 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.	Application 11-07-020 (Filed July 26, 2011)

**MOTION OF COUNTY OF MARIN, TOWN OF FAIRFAX, CA, AND THE ALLIANCE
FOR HUMAN AND ENVIRONMENTAL HEALTH TO REQUIRE DELAY OF FURTHER
SMARTMETER INSTALLATIONS UNTIL DETERMINATION OF COMMUNITY
OPT-OUT RIGHTS IN PHASE 2**

Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, County of Marin, Town of Fairfax, California, and The Alliance For Human And Environmental Health ("Joint Movants") request an immediate Commission ruling directing Pacific Gas and Electric Company ("PG&E") to temporarily suspend further deployments of SmartMeters in the jurisdictions identified herein until resolution of the community opt-out issues designated for Phase 2 of this proceeding.

I. PROCEDURAL BACKGROUND

In D. 12-02-014¹ the Commission required PG&E's SmartMeter program to include an option for residential customers who do not wish to have a wireless mesh network-based SmartMeter installed at their location to instead receive an analog electric and/or gas meter."² The Joint Movants support this result, and in their Protest and subsequent pleadings also requested that the Commission allow communities as a whole to opt out of the wireless SmartMeter program, due to its reliance on a community-wide wireless mesh radio network, which is not necessary to implement functional SmartMeter data transfer. The Decision addressed this issue as follows:

"[W]e do not make any determination on whether to allow the opt-out option to be exercised by local entities and communities at this time. Parties advocating for a community opt-out option have not sufficiently addressed issues regarding implementation of such an option, including whether such an option is consistent with existing statutes and rules. Further, as discussed below, we have determined that any residential customer electing the opt-out option will be assessed an initial fee and monthly charges. It is unknown at this time whether customers who are part of a community opt-out option should be assessed the same, or different, opt-out fees and charges. Consequently, we find that further consideration of whether to allow a community opt-out option should be included in the second phase of this proceeding."³

The Commission recognized that the analog opt-out option would "require PG&E to incur costs such as purchasing a new meter, going back to the customer location to install and service the meter," and has designated the cost issues involved, explicitly

¹ Decision 12-02-014, "Decision Modifying Pacific Gas And Electric Company's SmartMeter Program To Include An Opt-Out Option, *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)*," issued February 9, 2012 ("Decision").

² *Decision at 2.*

³ *Id.* at 21 (footnote omitted).

including whether the costs differ in a community opt-out, for investigation in Phase 2.⁴ Of course, if no SmartMeter had been installed at the time of the customer opt-out, it would not be necessary for PG&E to incur the cost to “go back to” the customer’s premise to install an analog meter. This fundamental fact is at the heart of this Motion.

The Decision further stated that “a prehearing conference to discuss the scope and schedule of this second phase will be scheduled within 45 days of the date this decision is issued. The assigned Commissioner will issue an amended scoping memo to reflect the new issues and schedule.”⁵

The Decision also required PG&E to file an implementing Tier 1 advice letter:

Within 15 days of the effective date of this order, Pacific Gas and Electric Company shall file a Tier 1 advice letter in compliance with General Order 96-B. The advice letter shall be served on the service list in Application 11-03-014. The advice letter shall include tariff sheets to modify PG&E’s SmartMeter Program to include an opt-out option for customers who do not wish to have a wireless SmartMeter installed at their location and to implement a SmartMeter Opt-Out Tariff. The Advice Letter filing shall:

- a. Establish procedures for residential customers to select the option to have an analog meter if they do not wish to have a wireless SmartMeter.
- b. Establish procedures to inform customers that a SmartMeter opt-out option is available. A customer currently on the delay list shall be informed that the customer will be scheduled to receive a wireless SmartMeter unless the customer elects to exercise the opt-out option.⁶

⁴ *Id.*

⁵ *Id.* at 35. On April 24, 2012, the assigned ALJ issued a Ruling scheduling a Prehearing Conference for May 14, 2012, and consolidating Phase 2 of the PG&E proceeding with the similar proceedings involving Southern California Edison and San Diego Gas and Electric. See, “Administrative Law Judge’s Ruling Consolidating Proceedings And Notice Of Prehearing Conference Ruling,” issued April 24, 2012.

⁶ *Id.* at 39, Ordering Paragraph 2 (“OP 2”).

On February 16, 2012, citing OP-2 of the Decision, PG&E filed its Advice Letter 3278-G/4006-E as a Tier 1 advice letter, meaning that it was intended to be effective on the date filed.⁷ However, this advice letter was protested.⁸ Active parties to the A.11-03-014 proceeding were served with the Protest, but have not been served with any disposition of that Protest by the Commission. Based on available information, due to one or more procedural errors or other substantive issues, this Advice Letter was apparently suspended at some point on or before April 20, 2012.⁹ Until further disposition of this suspension by the Commission and appropriate notice to the parties in this proceeding and the public generally, and subject to any subsequent requests for review thereof, the rates, terms and conditions contained in this Advice Letter are not in effect. These terms and conditions of service include not only the interim rates set forth in the Decision, but also PG&E's proposed tariff provisions defining the procedures set forth in OP 2 (a) and (b) of the Decision. If, for example, a Smart Meter is installed while there is no effective tariff provision governing the service provided, legal uncertainty -- at a minimum -- results regarding what, if any, rates would apply and what right, if any, PG&E had to install the meter if the customer did not affirmatively agree. If

⁷ See, General Order 96-B, Energy Industry Rule 5.1.

⁸ See, Protest by Pacific Gas and Electric Company customer Edward Hasbrouck and request for evidentiary hearing regarding Advice Letter 3278-G/4006-E (Pacific Gas and Electric Company ID U 39 M), "Approval of Electric Rate Schedule E-SOP, Residential Electric SmartMeter™ Opt-Out Program, and Gas Rate Schedule G-SOP, Residential Gas SmartMeter™ Opt-Out Program, in Compliance with D.12-02-014 " filed March 7, 2012.

⁹ See, email from Commission counsel Elizabeth Dorman to Edward Hasbrouck et al dated April 20, 2012, stating in part: "Legal Division has instructed Energy Division that the Advice Letter filing is suspended, and requested that they include such label on our website. Energy Division is now at liberty to issue a disposition regarding the above-referenced Advice Letter." In an earlier letter to Mr. Hasbrouck dated April 5, 2012, Ms. Dorman indicated that because the Commission was withdrawing the March 19, 2012 Staff disposition in this matter, there is no longer an effective disposition.

the Commission's disposition of this Advice Letter rejects or requires modification of its proposed tariff provisions, a subsequent Advice Letter may be required.

II. STATEMENT OF FACTS

Beginning with their Protest to the original Application of PG&E in A.11-03-014, the County of Marin, the Town of Fairfax, and the Alliance for Human and Environmental Health have urged that the Commission give appropriate recognition and deference to the desires of these and other governmental jurisdictions to take lawful action to review the installation by PG&E of the wireless mesh network facilities it has elected to employ to allow SmartMeters to communicate with PG&E's data bases. Specifically, because of the community-wide implications of this mesh network, these parties have sought community-wide opt-out rights.¹⁰ While the Commission has not acknowledged the validity of numerous county and municipal ordinances calling for moratoriums on installation of additional wireless mesh facilities, a position the Joint Movants continue to assert is erroneous, the Commission has directly addressed this issue by designating the issue of community opt-out rights in Phase 2 of this proceeding.¹¹ Joint Movants will demonstrate in Phase 2 that such rights are reasonable, feasible, do not conflict with legal requirements or Commission policy, and will provide for the ability of a resident of an opting-out community to obtain time of day rate structures based on SmartMeter data without use of a wireless mesh radio network.

¹⁰ See, Protest of Town of Fairfax, Alliance for Human and environmental Health, and County of Marin filed April 25, 2011 in A.11-03-014. An opt-out by an individual subscriber may not remove the causes of concern of that individual subscriber, whether they are EMF-related, privacy-related, or security-related.

¹¹ These actions by local government bodies represent the action of local officials representing in total over 2 million California citizens.

The governmental entities joining in this Motion have expressed their interest in pursuing such rights on repeated occasions. The County of Marin first passed its SmartMeter Ordinance 3552 on January 4, 2011, and renewed its effectiveness on January 12, 2012 as Ordinance 3576. The Town of Fairfax first passed a wireless permitting Ordinance in 1999, passed its SmartMeter Ordinance 3552 on August 4, 2010, and renewed its effectiveness on June 1, 2011, until July 1, 2012. As indicated in the Declaration of Lawrence Bragman, former Mayor and current member of the Town Council of Fairfax, attached hereto as Attachment 1, it is highly likely that the residents of Marin County and Fairfax will continue to actively pursue any community opt-out rights established in Phase 2. There is no reason to believe that many of the other jurisdictions which have adopted similar statements of public policy will not also pursue possible community opt-out programs.¹²

It should be noted that the definition of “community” for purposes of such rights is not precisely defined in the Decision and should not be limited only to governmental bodies. It should also include other appropriate communities with legally established communal decision making procedures, such as condominium associations and MDUs under common ownership and control. For example, in its recent decision establishing the requirements of SDG&E’s opt-out plan, the Commission indicated that rates might differ when multiple meters are installed at one location.¹³ While the Commission has rightly required that an opt-out can be done for any (or no) reason, it is undeniable that the physical implications of multiple wireless transmitters being installed close together

¹² See, e.g., Notice of Ex Parte filed January 27, 2012, attached hereto as Attachment 4, which included a Petition signed by 25 government officials urging the Commission to defer deployment of SmartMeters in their jurisdictions pending further hearing.

¹³ See, Decision 12-04-019 at 20.

can create a reasonable basis for the those impacted to have a right to elect to opt-out according to their applicable property rights.

Meanwhile, PG&E, even in the absence of an effective tariff for the service, has aggressively begun to escalate its SmartMeter installation program. As set forth in the Declaration of Larry Bragman attached hereto as Attachment 1, PG&E is informing many people that expedited installations will commence on May 1, 2012, resulting in numerous expressions of confusion by members of the public concerning the implications of a choice to opt out at this time. This is confirmed by the recent newspaper articles in the San Francisco Chronicle and San Jose Mercury News attached hereto as Attachment 2. While PG&E states this is not a deadline for opting out, particularly members of the public who have been on the “Delay List” are concerned that PG&E will immediately install Smart Meters at their premises, despite their desire that this not occur.

This confusion is based on uncertainty about the implications of the Phase 2 continuing investigation of the scope of opt out rights available (“I thought our town already voted to opt out”) and costs of opting out (“What if Phase 2 eliminates individual fees if the community opts out? Am I stuck because I agreed?”). This confusion is increased by the uncertain nature of the Commission’s possible disposition of the Protest filed against the implementing Advice Letter, which challenges fundamental premises of PG&E’s interpretation of the Decision.

The Declaration of Steve Kinsey, President of the Marin County Board of Supervisors, is attached hereto as Attachment 3 and also supports the existence of

confusion amongst members of the public concerning the implications of their opting out pending the outcome of Phase 2.

III. GRANT OF THIS MOTION WOULD REMOVE THE RISK OF EXPENDITURE BY PG&E OF MILLIONS OF DOLLARS UPON COMMUNITY OPT-OUT.

PG&E's cost information provided in this proceeding asserts that the cost of installing an analog replacement for an installed SmartMeter is \$416.00.¹⁴ Using the Town of Fairfax as an example, if there are 3,000 resident locations not presently served by SmartMeters, and PG&E aggressively moves to install as many wireless SmartMeters as possible prior to the resolution of the community opt-out issue in Phase 2, it will expend installation costs of installing and making the SmartMeters functional of between \$474,000.00 and \$1,248,000.00.¹⁵ If Fairfax later implements a community opt-out for its jurisdiction, PG&E would be required according to its own figures to expend a further \$1,248,000.00 to remove the wireless SmartMeters and install analog replacements. If this same estimate is applied to the residents of the unincorporated portions of Marin County, the resulting expenditures would be even greater. Of course, as it has already done, PG&E will seek to recover these expenditures from the communities opting out.

These potential costs are small to PG&E but will present significant negative implications for the financial feasibility of possible community opt-outs by adding

¹⁴ See, Decision at 25, Table 2.

¹⁵ Joint Movants are not precisely quantifying the costs asserted by PG&E for installation of wireless SmartMeters, but an estimate would logically approximate the costs to install an analog replacement, and thus approximate \$1,248,000.00. At a minimum these would include PG&E's labor cost per visit of \$128.00 and a per meter cost of between \$30 and \$50, for an approximate total of at least \$474,000.00. *Id.* These cost examples, and customer figures, are presented for illustrative purposes only. The actual costs involved in these activities are an issue designated for Phase 2.

between \$574 and \$832 per resident to the costs which PG&E will seek to recover. When this is balanced against the minor costs and other consequences of deferring these expenditures for the short period until determination of the community opt-out issue in Phase 2, it would be imprudent and unreasonable to permit PG&E to incur them when the alternative of avoiding them is so clear and feasible, and the potential for undermining the feasibility of community opt-out rights while they are under active investigation in Phase 2 is clear.

IV. APPLICABLE LEGAL STANDARDS SUPPORT GRANT OF THIS MOTION.

This Motion is properly viewed as a straightforward request for an interim order that would allow Phase 2 to proceed without PG&E incurring unnecessary costs or changing the facts on the ground by deploying SmartMeters in specific areas where there exists the reasonable possibility, if not probability, of a community opt-out if authorized by the Commission. This Motion is within the scope of Rule 11.1 (a) of the Commission's Rules of Practice and Procedure.¹⁶ As shown below, failure of the Commission to grant this Motion will permit PG&E to materially affect the potential outcome of Phase 2's community opt-out rights within the very jurisdictions that have sought this right for over a year. Such installations by PG&E would have the practical consequence of undermining one of the two fundamental issues designated for Phase 2 by materially altering the status quo of the specific community circumstances being investigating. The status quo would be changed to the detriment of residents of governmental Joint Movants' jurisdictions. This Motion should be granted to ensure the

¹⁶ Rule 11.1 (a) states: A motion is a request for the Commission or the Administrative Law Judge to take a specific action related to an open proceeding before the Commission.

possibility of a fair proceeding not being undermined by one party seeking to ensure its desired outcome.

But even if the relief sought by this Motion is viewed as a request for injunctive relief, it should be granted. The Commission has the authority to grant injunctive relief when warranted.¹⁷ The Commission confirmed its authority to issue injunctive relief in *Re San Diego Gas and Electric*, where the Commission stated:

The Commission's authority to provide injunctive relief is firmly rooted in the California Constitution and PU Code, and is recognized in case law. The Commission is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers. . . . [T]he California Supreme Court [has] recognized that the Commission has equitable jurisdiction, which permits it to issue injunctions. . . . For example, the commission may issue injunctions in aid of jurisdiction specifically conferred upon it.¹⁸

When deciding whether to issue injunctive relief the Commission uses the same four-part test as California courts. The party seeking the relief must show: (1) a reasonable likelihood of prevailing on the merits; (2) imminent irreparable harm to the moving party; (3) no substantial harm to other interested parties; and (4) the relief requested is not contrary to the public interest.¹⁹ The overriding requirement, however, is that the Commission balance the equities of both parties.²⁰ If the moving party makes a greater showing with respect to any one factor, the less must be shown on the other to support an injunction.²¹

¹⁷ *MCI Telecommunications Corporation v. Pacific Bell*, D.95-05-020, 59 CPUC 2d 665, 1995 Cal. PUC LEXIS 458 *19.

¹⁸ *Re San Diego Gas and Electric*, D.09-08-030, Aug. 20, 2009, (mimeo) at p. 3 (citing D.01-01-046, pp. 12-13).

¹⁹ D.09-08-030, at p.3; See also *Korean Philadelphia Presbyterian Church v. California Presbytery*, 77 Cal App. 4th 1069, 1084 (2000).

²⁰ *Robbins, infra.*, 38 Cal.3d 199, 205, 211.

²¹ See, e.g., *Butt v. State of Calif.*, 4 Cal. 4th 668, 678 (1992).

The purpose of interim or preliminary injunctive relief is to preserve the status quo until the Commission can evaluate the substantive issues raised by the moving party.²² The Commission must exercise its discretion in favor of the party most likely to be injured. If denial of injunctive relief would result in greater harm to the moving party than the respondent would suffer if relief is granted, then it is an abuse of discretion to fail to grant injunctive relief.²³ In D.01-01-046, for example, the Commission issued an interim injunctive relief order preventing PG&E and Southern California Edison from discontinuing electrical service due to financial difficulties in purchasing power based on a strong public interest and likelihood of harm, without addressing the likelihood that a party would prevail on the merits.

Pursuant to Rule 14.6 (c) (1), the Commission may forego notice or a hearing in issuing an interim injunctive ruling that maintains the status quo until consideration of a permanent injunction or other relief can be heard.²⁴ Here, Joint Movants do not seek any form of permanent injunctive relief; this Motion is limited to relief until resolution of the community opt-out right designated for Phase 2.

V. JOINT MOVANTS MEET ALL OF THE REQUIREMENTS FOR INTERIM INJUNCTIVE RELIEF IF APPLICABLE.

As indicated above, this Motion is properly viewed not as a motion for injunctive relief, but as a Motion requesting appropriate interim procedures during Phase 2 of this

²² *Continental Baking Co. v. Katz*, 68 C2d 512, 528; D.01-01-046, at p. 1, 3 (1968).

²³ *Robbins v. Sup. Ct. (County of Sacramento)*, (1985) 38 C3d 199, 205, 211 (“*Robbins*”); *Shoemaker v. County of Los Angeles*, 37 Cal. App. 4th 618, 633 (1995).

²⁴ Rule 14.6 (c)(1) states: In the following circumstances, the Commission may reduce or waive the period for public review and comment on draft resolutions and proposed decisions, and may reduce but not waive the period for public review and comment on alternates to them: (1) in a matter where temporary injunctive relief is under consideration.

proceeding. This is particularly true in light of lack of public knowledge concerning the status of the tariff advice letter proposing terms and conditions of the service, most importantly the procedures to be used to notify the affected public of their rights, only a matter of days before PG&E has stated its intent to escalate installations. But even if it is viewed as subject to the more stringent standards applicable for grant of interim injunctive relief, this Motion should still be granted as shown below.

A. Joint Movants Are Reasonably Likely to Prevail on the Merits.

The proposal of the Joint Movants that community opt-out rights be made a part of the PG&E opt-out program has already passed a very significant hurdle supporting its likelihood of further success. Despite strong opposition by PG&E, and despite its absence from the initial Proposed Decision, the Decision determines that community opt-out will be further explored in Phase 2, and identified certain specific showings that would be required of proponents. The large number of governmental bodies that have expressed support for this position, the collective experience and expertise of their officials, and the continuing strong interest of the public all support the likelihood that significant forms of community opt-out rights will result from the Phase 2 proceedings.

There is no basis to believe that a community opt-out plan designed primarily to remove the unwanted presence of a wireless mesh radio network, and its essential risks of security, privacy, and health impacts cannot be structured in accordance with all applicable law and policy. There is no law or policy mandating the form of wireless mesh network unilaterally chosen by PG&E. Nor does a community opt-out need to result in the lack of availability of time of day usage data if mandated by law, only choice of alternative communications means.

B. Joint Movants and their Residents Will Suffer Irreparable Harm Absent Grant of This Motion.

As set forth in the Declarations of Steve Kinsey and Lawrence Bragman attached hereto, the residents of Marin County and Fairfax will suffer irreparable injury if this Motion is not granted. In addition to the risks described above resulting from activation of the wireless mesh network, they will also be faced with the substantially increased risk that PG&E will have expended so much additional money with its accelerated deployment that the additional cost burden these expenditures create will materially increase the possibility that a feasible and reasonable community opt-out plan can be developed. This will create the risk that these expenditures will deprive these members of the public of a valuable right they could have otherwise proven reasonable and feasible. Grant of the Motion would eliminate this risk. If the risk in fact materializes, the harm to the Joint Movants and the residents they represent could not be compensated with money.

C. PG&E's Interests Will Not Be Harmed by Grant of This Motion.

The third prong of the standard for injunctive relief is the absence of substantial harm to PG&E. Joint Movants seek to maintain the status quo, pending Commission resolution of the community opt-out right issue in Phase 2 in jurisdictions that have repeatedly expressed, through public ordinances and resolutions of their elected governmental officials, a clear interest in assisting their residents in protecting their health, safety, privacy, and security as they perceive it. An interim order requiring that PG&E maintain the status quo by not installing a few thousand SmartMeters for a few months while this issue is determined by the Commission will not only fail to harm PG&E, it will avoid the risk that PG&E expends millions of dollars that will prove to have

been wasted, and which it will still seek to recover from ratepayers. It will defer expenditures even if no community opt-out plan is established in Phase 2, with no impact on reduction of revenues.

D. The Public Interest Will Not Be Harmed by Grant of This Motion.

For all of the reasons described above, there is no harm to the public interest if this Motion is granted. The timing of installations of wireless mesh network SmartMeters never been mandated by the Commission, already differs between PG&E, SCE, and SDG&E, and is not required in the short term to satisfy any mandatory time of day pricing requirement.

To the contrary, the public interest will be affirmatively served by grant of this Motion. The concept of community opt-out, strongly supported by over 50 county and municipal bodies, deserves a fair hearing. The Commission has made a positive move forward by establishing Phase 2 to explore this issue, and should not undercut its own progress by allowing unnecessary expenditures and other risks to occur for no necessary reason. Grant of this Motion would represent a pro-consumer interim requirement designed to minimize the potential cost of a community opt-out program and to help ensure a fair and undistorted opportunity to construct a community opt-out program that would not impose duplicative costs on the public.

VI. CONCLUSION

For the reasons set forth above, the Commission should promptly issue an order requiring PG&E to defer installation of SmartMeters in the jurisdictions named herein

until such time as the terms and conditions of the community opt-out alternative are determined in Phase 2 of this proceeding.

Dated: April 30, 2012, at Tiburon, California.

Respectfully submitted,

By: _____ /s/ _____

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

Attorneys for Joint Movants