

Decision 12-06-017 June 7, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of EMF Safety Network
for Modification of D.06-07-027 and
D.09-03-026.

Application 10-04-018
(Filed April 6, 2010)

ORDER MODIFYING DECISION (D.) 10-12-001
AND DENYING REHEARING OF DECISION, AS MODIFIED

I. SUMMARY

This decision addresses the application for rehearing of Decision (D.) 10-12-001 filed by EMF Safety Network (“Network”). In D.10-12-001, we dismissed Network’s Application for Modification of D.06-07-027 and D.09-12-001,¹ two prior decisions in which we had approved installation of Smart Meters by Pacific Gas & Electric Company (“PG&E”). Network had sought to modify these decisions to reopen the review of Smart Meters and to consider the issue of health impacts produced by radio frequency (“RF”) emissions from Smart Meters.²

Network filed a timely application for rehearing of D.10-12-001. Network challenges our decision on numerous grounds. Network contends: (1) the Commission incorrectly deferred its utility regulation duties to the Federal Communications Commission (“FCC”); (2) the Commission failed to follow prior Commission mandate

¹ Application of EMF Safety Network for Modification of D.06-07-027 and D.09-12-001 (“Application for Modification,” A.10-04-018, filed April 6, 2010.)

² In its Application for Modification, Network asks the Commission to re-open review of PG&E’s Smart Meter program, require PG&E to submit an independently prepared RF Emissions Study; schedule public hearings on RF health, environmental, and safety impacts; review actual Smart Meter program performance; allow customers to opt out of Smart Meter installation; and impose an immediate moratorium on installation of PG&E Smart Meters. (Application for Modification, p. 2.)

by allowing PG&E to deploy RF emissions Smart Meters; (3) Smart Meters violate FCC safety regulations; (4) the Commission decision to mandate Smart Meters violates state and local laws; (5) if the Commission accepts PG&E's pre-emption argument, General Order 168 (Consumer Bill of Rights) should apply to Smart Meters; (6) by dismissing Network's application, General Order 159A rules for the construction of mobile radio services facilities are not met; and (7) the Commission has a civic obligation to investigate Smart Meter safety. PG&E filed a Response opposing Network's rehearing application.

We have reviewed each and every allegation set forth in Network's application for rehearing and do not find grounds for granting rehearing. For purposes of clarification, we modify D.10-12-001 as set forth below. Rehearing of D.10-12-001, as modified, is denied.

II. DISCUSSION

A. The Commission did not unlawfully defer to the FCC.

Network contends in D.10-12-001 the Commission unlawfully defers responsibility for deployment of Smart Meters to the FCC. (Rehrg. App., p. 5.) Network argues it is the Commission's responsibility to protect consumers and ensure the provision of safe, reliable utility service. (Rehrg. App., p. 5.) Network cites to a statement President Peevey made at the December 2, 2010, Commission meeting and to a statement in the decision that the Commission generally does not delve into technical matters which fall within the expertise of another agency. (Rehrg. App., p. 5.) Network's claim has no merit.

The Commission did not defer to the FCC its responsibility to ensure PG&E provides safe, reliable service. The Commission exercised its authority over health and safety by considering the facts presented to it, including the FCC's regulation of RFs and PG&E's compliance with FCC regulations. We found Smart Meters are licensed or certified by the FCC and are in compliance with FCC requirements. (D.10-12-001, Finding of Fact 2.) We recognized the FCC regulations are developed and updated with

input from independent professional sources such as the United States Environmental Protection Agency and World Health Organization. (D.10-12-001, p. 9.) We found Smart Meters produce RF emissions far below the levels of many commonly used devices. (D.10-12-001, Finding of Fact 3.) We based these findings and determinations on the Declaration of Daniel M. Partridge, Manager of Smart Meters™ Engineering at PG&E which was included with PG&E's May 17, 2010 Motion to Dismiss. Thus the findings were based on the evidence submitted in the proceeding.

While D.10-12-001 states we are deferring to the FCC which possesses extensive expertise for evaluating and licensing or certifying Smart Meters, we did not defer our authority and responsibility to ensure that PG&E provides safe, reliable service. The Commission is merely recognizing the expertise of another agency. By looking to the FCC's regulation of RF as guidance, we are not abdicating or abandoning our health and safety jurisdiction; rather, we are exercising our authority. We recognized the FCC's comprehensive regulation of RF and found uncontested evidence Smart Meters are in compliance with FCC regulations. Network and DRA did not allege new or changed facts supported by a declaration, affidavit or proposed testimony of an expert witness challenging such compliance. As set forth in the Order below, we clarify we are looking to the FCC's expertise for guidance and not deferring to them.

B. The Commission has no obligation to apply its low cost/no cost EMF policy to Smart Meters.

Network contends the Commission has a mandate to reduce electromagnetic fields ("EMF"). Specifically, Network argues in 1993 the Commission ordered electric utilities to implement low-cost/no-cost EMF mitigation measures, and the Commission affirmed this policy in D.06-01-042. (Rehrg. App., p. 8.) Network states the Commission failed to follow its own precautionary mandate by allowing PG&E and other utilities to deploy RF Smart Meters. (Rehrg. App., p. 1.)

We authorized PG&E to install Smart Meters in D.06-07-027 and D.09-03-026. Network is now challenging those decisions as not complying with an alleged Commission mandate. To the extent Network is using this application for

rehearing to challenge these decisions it is an impermissible collateral attack of our final and unappealable determinations in D.06-07-027 and D.09-03-026 authorizing installation of Smart Meters and is prohibited by Public Utilities Code sections 1709 and 1731(b).³ Moreover, Network does not allege any specific violation of law or fact but merely argues the Commission should follow this previously adopted policy. Section 1732 requires applicants for rehearing to specify the ground or grounds upon which they claim a decision is erroneous. (See also, Rule 16.1(c) of the Commission's Rules of Practice and Procedure.)⁴ Simply identifying a legal principle or argument, without explaining why it applies in the present circumstances or how there is legal error does not meet the requirements of section 1732.

Even if we were to address Network's challenge it has no merit. In D.06-01-042, we affirmed our low-cost/no cost policy adopted in D.93-11-013, to mitigate EMF exposure for new utility transmission and substation projects.⁵ PG&E's Smart Meters are not transmission or substation project to which our low-cost/no cost policy was directed.

C. There is no record evidence Smart Meters violate FCC safety regulations.

Network contends D.10-12-001 wrongly accepts without question PG&E's unproven claims of RF safety. Specifically, Network argues the Commission wrongly accepted PG&E's assessment of RF safety at ten feet from a single Smart Meter when

³ Section 1709 provides: "In all collateral actions or proceedings, the orders and decision of the [C]ommission which have become final shall be conclusive." Section 1731(b) provides that challenges to a Commission decision must be made in an application for rehearing within 30 days of the decision's issuance. Unless otherwise specified, subsequent section references are to the Public Utilities Code.

⁴ Unless otherwise specified, subsequent rule references are to the Commission's Rules of Practice and Procedure.

⁵ *Opinion on Commission Polices Addressing Electromagnetic Fields Emanating from Regulated Utility Facilities* (D.06-01-042) (2006) ___ Cal.P.U.C.3d___, at p. 1 (slip op.). In D.93-11-013, we adopted a low-cost/no cost policy to mitigate EMF exposure for new and upgraded facilities requiring certification under General Order 131. (*Re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities* (D.93-11-013) (1993) 52 Cal.P.U.C.2d. 1, 9.)

multiple factors affect RF exposure. (Rehrg. App., p. 8.) Network argues RF levels transmitted by Smart Meters can violate FCC guidelines under normal conditions of installation and operation. (Rehrg. App., p. 8.) To support its claims, Network cites a report that is not part of the record and to a declaration attached to its rehearing application.

Rule 16.1(c) requires an application for rehearing to set forth specifically the grounds on which the applicant considers the decision to be unlawful or erroneous and “must make specific references to the record or law.” In arguing PG&E’s Smart Meters violate FCC guidelines, Network cites to the Declaration of Cynthia Sage (“Declaration”) which it attached to its rehearing application and to a report issued by Sage Associates. This declaration and report are not part of the record in this proceeding and cannot be considered without reopening the record, and providing PG&E notice and opportunity to be heard on this new evidence. Network does not cite to any record evidence to support its contentions Smart Meters violate FCC safety regulations.

The findings in D.10-12-001 that PG&E’s Smart Meters are licensed or certified by the FCC and comply with all FCC requirements and produce RF emission far below the levels of many commonly used devices are based upon the record evidence. (Declaration of Daniel M. Partridge, pp. 2-5.)

D. Commission authorization of Smart Meters does not violate state and local laws.

Network contends the Commission decision to mandate installation of radiation-emitting Smart Meters violates basic rights granted by the State of California, overburdens utility easements and violates local laws. (Rehrg. App., p. 9.) Network’s claims have no merit.

We authorized PG&E to install Smart Meters in D.06-07-027 and D.09-03-026. Network is essentially arguing these decisions are unlawful because our prior authorization of Smart Meters violates various laws. To the extent that Network is using this application for rehearing to challenge these decisions it is untimely and prohibited by sections 1709 and 1731(b).

However, even if we were to address Network's challenges they have no merit. Network claims mandatory installation of Smart Meters infringes on people's rights to protect their property, life and liberty under Article 1, Section 1 of the California Constitution. Specifically, Network argues radiation emitted by Smart Meters is an environmental toxin which infringes on people's rights to obtain safety. (Rehrg. App., p. 9.) Network also contends the forced installation of RF devices in homes and cities violates Article 1, Section 4 of the California Constitution which provides free exercise and enjoyment of religion without discrimination. (Rehrg. App., p. 10.) Network argues the forced installation of RF devices is discrimination based on beliefs and rights to practice prudent avoidance of EMF. (Rehrg. App., p. 10.) Network cites no legal authority to support its contention.

We need not address Network's legal claims of violations of the California Constitution as there is no evidence in the record that Smart Meters are not safe or RF avoidance is the belief or practice of any religion. The evidence demonstrates all radio devices in PG&E's Smart Meters are licensed or certified by the FCC and comply with all FCC requirements and produce RF emissions far below the levels of many commonly used devices. (Declaration of Daniel M. Partridge, pp. 2-5.)

Next Network contends existing utility franchise agreements generally lack specific provisions regarding RF emissions. (Rehrg. App., p. 9.) Network contends PG&E's installation of Smart Meters and the associated infrastructure goes far beyond the intentions of utility easements incorporated into most if not all franchise agreements. (Rehrg. App., p. 9.) Network further contends that homeowner insurance policies exclude RF damage from coverage, putting ratepayers at risk for hazards not contemplate in utility franchise agreements. (Rehrg. App., p. 9.)

Again, we need not address this legal challenge as there is no evidence in the record to support Networks contentions.⁶ There are no franchise agreements, utility easements, or insurance policies in the record to consider. Even if we were to address the Network's claims they have no merit. First, most Smart Meters are placed on the customer's property and thus do not involve franchise agreements.⁷ To the extent a Smart Meter may be placed on public property covered by a franchise agreement, the record contains no franchise agreements to consider. Moreover, rights granted by franchise agreements pursuant to section 6265 confer broad rights. Specifically, gas franchise confer upon the grantee the right to use, or to lay and use, gas pipes, and appurtenances for the purpose of transmitting and distributing gas and electric franchise confers the right to use, or to construct and use, poles, wires, or conduits and appurtenances for the purpose of transmitting and distributing electricity. (Pub. Util. Code, § 6265.) Smart Meters are utility facilities used for the purpose of transmitting and distributing gas and electricity.

Lastly, Network contends PG&E has violated a City of Sebastopol's wireless facility ordinance which prohibits installation of minor antennas within 10 feet of power lines and on wood structure and limits six antennas in a single location. (Rehrg. App., p. 9.) Network cites City of Sebastopol zoning ordinance Chapter 17, sec. 17.200.020 (A) though (C).⁸

Local agencies are pre-empted from regulating the construction or installation of utility facilities where the Commission has exercised its regulatory authority and its authority is pitted against that of a local government involving a matter

⁶ In addition, Network presents this argument broadly and fails to provide any specificity or analysis or cite to facts in the record to support any of its allegations. Thus, Network's claim of franchise violation does not comply with section 1732 and rule 16.1(c).

⁷ PG&E tariff rule 16 covering electric service states "[a]ll meters and associated metering equipment shall be located at some protected location on Applicant's Premises as approved by PG&E."

⁸ Again, Network presents this argument broadly and fails to provide any specificity or analysis or cite to facts in the record to support any of its allegations and thus does not comply with section 1732 and rule 16.1(c).

of statewide concern. (*Orange County Air Pollution Control District v. Public Utilities Commission* (1971) 4 Cal 3d 945, 950.) Intrastate electric and gas distribution are matters of statewide concern and within the exclusive jurisdiction of the Commission. (*City of Woodside v. PG&E* [D.88462] (1978) 83 Cal.P.U.C. 418, 422; *Redevelopment Agency of the City and County of S.F. v. P.G.&E. Co.*, [D.82168] (1973) 76 Cal. P.U.C. 77.)⁹ The Commission has comprehensive jurisdiction over questions of safety arising from utility operations. (Pub. Util. Code, § 768.) Any local zoning ordinance regulating the location or safety of Smart Meters would be generally pre-empted by Commission regulation.

E. General Order 168 does not apply to PG&E or to Smart Meters.

Network argues if the Commission accepts PG&E's position Smart Meters are personal wireless facilities, then they must comply with General Order 168 and the requirements of the Consumer Bill or Rights. (Rehrg. App., p. 11.) Network's argument has no merit.

General Order 168 governs telecommunication services and applies to telecommunications service providers. PG&E is not a telecommunications service provider providing telecommunication service. Moreover, Smart Meters are not personal wireless facilities and are not used to provide personal wireless service.

F. General Order 159A does not apply to PG&E or to Smart Meters.

Network contends the installation of Smart Meters should have complied with the rules for construction of mobile radio services facilities found in Commission General Order 159A. (Rehrg. App., p. 12.) Network argues several of General Order 159A goals remain unaddressed by the Commission's decision to dismiss Network's

⁹ California courts have found that the construction, design, and operation of public utility facilities are of statewide concern and that local regulatory efforts are thus pre-empted by Commission regulation. (See *Pac. Tel. & Tel. Co. v. City and County of S.F.* (1959) 51 Cal. 2d 766, 768, 744, *California Water and Telephone Co. v. County of Los Angeles* (1967) 253 Cal. App. 2d 16, 28-29.)

application, including compliance with California Environmental Quality Act. (Rehrg. App., p 12.) Network's argument has no merit.

General Order 159A provides rules relating to the construction of commercial mobile radio service facilities by cellular service providers. PG&E is not a cellular service provider subject to General Order 159 and is not offering cellular service.

G. Network's argument the Commission has a civic obligation to investigate Smart Meters does not allege error.

Network contends the Commission has a civic obligation to investigate the health, safety and environmental impacts from RF Smart Meters given the growing community concern. (Rehrg. App., p. 12.)

The purpose of a rehearing application is to alert the Commission to legal error. Network does not comply with section 1732 which requires an applicant to set forth specifically the grounds on which an applicant considers a Commission decision to be unlawful or erroneous.¹⁰ Network argues only that the Commission has an obligation to investigate issues related to Smart Meters but does not allege legal or factual error.

H. Modification of D.10-12-001

Although we did not dismiss Network's application on federal pre-emption grounds, Ordering Paragraph 1 states we are granting PG&E's Motion for Immediate Dismissal of Application 10-04-018, which had sought dismissal on pre-emption grounds. We modify D.10-12-001 to clarify that we are not dismissing Network's application but rather denying the application because the evidence does not support re-opening review of Smart Meters.

We also modify the decision to clarify Smart Meters are in compliance with FCC guidelines or emission limits.

¹⁰ See also Rule 16.1 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, § 16.1.

III. CONCLUSION

For the purpose of clarification, we modify D.10-12-001 for the reasons discussed above. Good cause does not exist for the granting of Network's application for rehearing. Therefore, we deny rehearing of D.10-12-001, as modified.

THEREFORE, IT IS ORDERED that:

1. D.10-12-001 is modified as follows:

a. The title is modified to read:

**DECISION DENYING EMF SAFETY
NETWORK'S APPLICATION FOR
MODIFICATION OF DECISIONS
(D.) 06-07-027 AND D.09-03-026**

b. The first sentence of the first paragraph on page 1 is modified to read:

This decision denies the application of the EMF Safety Network for modification of Decision (D.) 06-07-027 and D.09-03-026 as the evidence does not support re-opening review of Smart Meters.

c. The second sentence of the first paragraph on page 1 is modified to read:

The radio frequency (RF) emissions from Smart Meters that the EMF Safety Network wishes the Commission to investigate are one /six thousandth of the Federal exposure limits at a distance of 10 feet from the Smart Meter and far below the RF emissions of many commonly used devices.

d. The first sentence of the first paragraph of the Discussion section on page 9 is modified to read:

We find that it is reasonable to deny Network's application concerning all matters relating to the use of RF transmission by Smart Meters.

- e. The first sentence of the third paragraph of the Discussion section on page 9 is modified to read:

The FCC's RF exposure limits are developed and updated from time to time with input from independent professional sources, such as the United States Environmental Protection Agency and World Health Organization.

- f. The last sentence starting on page 10 and continuing to page 11 is modified to read:

The Commission generally does not delve into technical matters which fall within the expertise of another agency. In this case we look to the FCC for guidance since the FCC possesses extensive expertise on its staff for evaluating and licensing or certifying Smart Meter devices that operate via the use of wireless technology.

- g. The first full sentence on page 11 is modified to read:

We therefore deny Network's application as the evidence does not support re-opening review for the purposes of modifying D.06-07-027 and D.09-12-001.

- h. The second and third sentences of the second full paragraph on page 12 are modified to read:

The Smart Meters meet guidelines adopted to control EMF emissions, not health standards. The emissions limits, however, are adopted by the FCC based on a consideration of many factors, including health concerns [footnote omitted]. Despite this minor revision, the basic findings remain incontrovertible – PG&E's Smart Meters comply with relevant FCC guidelines and that emissions are far below those from other devices in common use, such as baby monitors, cell phones, garage door openers, wi-fi access points, and laptop computers with wi-fi transmitters [footnote omitted].

- i. Conclusion of Law 2 is modified to read:

It is reasonable to deny Network's Application 10-04-018.

j. Ordering Paragraph 1 is modified to read:

Application 10-04-018 is denied as the evidence does not support re-opening review for purposes of modifying D.06-07-027 and D.09-12-001.

2. Rehearing of D.10-12-001, as modified, is hereby denied.
3. This proceeding, Application (A.) 10-04-018, is closed.

This order is effective today.

Dated June 7, 2012, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners