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07-30-12
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**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)

And Related Matters.

Application 11-03-015
Application 11-07-020

REPLY BRIEF OF EMF SAFETY NETWORK

Pursuant to Rule 13.11 of the Commission’s Rules of Practice and Procedure, the EMF Safety Network (Network) submits this reply brief in response to “Assigned Commissioner’s Ruling Amending Scope of Proceeding to Add a Second Phase” dated June 8, 2012.¹ In its Opening Brief, Network answered affirmatively Questions 1 and 2 on the legal effect of the proposed opt-out fees under federal and California law on customers with disabilities and or medical conditions. Network believes the fees, as imposed on such persons, violate the Americans with Disabilities Act (ADA), Section 453(b) of the California Public Utilities Code and other laws, and that the Commission accordingly is limited in its ability to adopt such fees.

In this Reply Brief, Network comments on the record assembled in response to Questions 1 and 2 and on the answers of others to Question 4 on “community” opt-out.

1. Opt-Out Fees under ADA and California Law

Only the briefs of the four responding investor-owned utilities (IOUs) differ with Network’s conclusions. The rest of the briefs addressing Questions 1 and 2 agree with Network. The contrary views of the IOUs rest on three assertions: (1) the cited statutes do not apply to the IOUs; (2) sensitivity to RF radiation is not a recognized disability or medical condition under these laws; and (3) opt-out fees would not discriminate because they would apply to all

¹ ALJ’s Ruling Revising Briefing Schedule, July 3, 2012.

customers opting out, not just those having medical reasons for doing so.

We believe the record in the opening briefs refutes each of these positions. First, leaving aside the differences of opinion about the applicability of the ADA to IOUs as such, the opt-out fees, if accepted by the CPUC, would qualify as a program, service or activity engaged in by a public entity under Title II, and thus be amenable to judicial review for lawfulness.²

Second, the statutory language is not confined to particular types of disability, but speaks broadly to interference with major life activities.³ Notably, by reference to Section 11135 of the Government Code, Section 453(b) extends its protection against discrimination to “any program or activity that is conducted, operated, or administered by the state or by any state agency.”

Third, the opt-out fee requirement will have a “disparate impact” on those whose medical conditions or disabilities oblige them to decline Smart Meters, as opposed to members of the general population.⁴ This disparate impact was illustrated dramatically by the Declarations of many California utility customers excerpted at pages 5-7 of Network’s Opening Brief.⁵

Network supports Marin County’s Opening Brief comments, “*In any event, Friedman v. PUC illustrates that the core issue here is whether the Commission can lawfully require a customer to pay a fee to avoid having Utility equipment installed on their property that has not been found safe by the Commission...*”⁶ In A. 10-04-018 the CPUC accepted the declaration of one PG&E employee as proof of Smart Meter safety. There was no testimony allowed, no cross examination, and no expert witnesses. The Commission has not ensured Smart Meters are safe.

2. Opt-Out by Communities

² See, Opening Brief of Marin County, 11-12.

³ Moreover, California prides itself for going beyond the ADA in its concern for persons with disabilities. (Government Code Section 12926.1)

⁴ See, e.g., the discussion at Section IV of the Opening Brief of SCWSSM; see also, Opening Brief of Marin County, 17 (“A fee that is on the surface ‘optional’ for any Utility customer nevertheless disproportionately affects, and is de facto ‘mandatory’ to, disabled persons who, because of their disability, will be forced to accept limits of a major life activity if the fee is not paid.”)

⁵ The full Declarations were ordered to be stripped from the brief as “out-of-record material.” Network has appealed the exclusionary order.

⁶ See, Opening Brief of Marin County, 10

Question 4 of the Scoping Memo of June 8th asks first how communities would be defined and what effects the definitions might have on existing tariffs, contractual relationships and property rights. The Memo then asks how to implement community opt-out if adopted by the CPUC.

2 A. Definition of Community

The answers to defining community range from “can’t be done”⁷ to “flexibly and broadly.”⁸ Network believes that community should be defined as broadly as the area, district, locality, neighborhood or vicinity where a group of people live.

2 B. Implementing Opt-Out

Whatever suffices as legal evidence of final action in the opt-out community should serve this question of meter choice as well. That could be a resolution or ordinance of a city council or county board. It could be a formal resolution of a homeowners association or condominium board, or a petition from a neighborhood group. It could even extend to one person’s need for a safe area around a home.

The Scoping Memo’s question about whether and how to permit appeal of such a final action might depend on the public or private nature of the decisional body. For a public body, the question could turn on whether a challenger would retain the individual right to ask for a Smart Meter. That is, may a resident of an opt-out community keep his Smart Meter, if already installed, or “opt in” at the appropriate time? The choice might obviate any need for appeal. For a private body, the answer might lie within its charter or rules. Utility companies have provided, and can continue to provide, analog time of use meters, to residential and commercial customers in communities that opt-out.

2 C. Further Considerations

At least 56 local jurisdictions in the State of California have taken some stand against the Smart Meter deployment and a dozen or more have banned Smart Meters. Most have done so by written letter or resolution sent to the Commission. Communities could be notified that a

⁷ Opening Brief of SDG&E/SoCalGas, 14.

⁸ Section V, Opening Brief of Marin County.

community wide opt-out choice is under consideration and allowed to submit their intention to opt out by notifying the Commission. Furthermore, all areas in California should be notified and provided the opportunity to return to the safer and more reliable analog utility meters.

The city of Sebastopol is relatively free of Smart Meters and could be a candidate for the community opt-out program. PG&E has recently threatened to install Smart Meters in Sebastopol even though the decision on whether a community can opt-out of Smart Meters is still undecided. Sebastopol's response to PG&E's stated intention to install Smart Meters, was to adopt a resolution on July 19th, asking PG&E to, "*Delay all Smart Meter installations and deployment in the city of Sebastopol until the CPUC has formally concluded phase 2 Smart Meter opt-out proceedings.*" PG&E's response to this resolution included, "*we believe such a blanket delay would disadvantage most of our customers in Sebastopol and cannot agree to your proposal.*" Since a community wide opt-out is under consideration at the CPUC, PG&E should at least offer the courtesy of delaying deployment until the issue is resolved.

3. Conclusion

The Commission must ensure Californians safe, and reliable utility service at reasonable rates. Adopting Network's proposals will help to fulfill that statutory command.

Dated: July 30, 2012 at Sebastopol California.

Respectfully submitted,

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