

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

EMF SAFETY NETWORK

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,

Respondent,

PACIFIC GAS & ELECTRIC COMPANY,

Real Party In Interest.

Case No. A135927

Commission Decision Nos.
D.10-12-001 & D.12-06-017

**ANSWER OF THE RESPONDENT
TO PETITION FOR WRIT OF REVIEW**

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**ANSWER OF RESPONDENT
TO PETITION FOR WRIT OF REVIEW**

**TO THE HONORABLE PRESIDING JUSTICE J. ANTHONY KLINE &
ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION TWO:**

Respondent, the California Public Utilities Commission ("Commission"), respectfully submits its answer in opposition to the petition for writ of review ("Petition"), filed by EMF Safety Network. ("Petitioner"), and denies that said writ should be issued.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case is about Smart Meters and whether the Commission acted lawfully in denying a request by Petitioner for reconsideration and modification of two previous

Commission decisions: Decision (D.) 06-07-027 and D.09-03-026.¹ Petitioner challenges the lawfulness of D.10-12-001, as modified and affirmed by D.12-06-017 (“Rehearing Order”) (collectively, “Decisions”), which denied Petitioner’s request.²

Six years ago, on July 24, 2006, the Commission issued D.06-07-027, which authorized Pacific Gas and Electric Company (“PG&E”) to deploy its Advanced Metering Infrastructure project, otherwise known as the Smart Meter Program. (*Final Opinion Authorizing Pacific Gas and Electric Company to Deploy Advanced Metering Infrastructure* [D.06-07-027] (2006) ___ Cal.P.U.C.3d ___, 2006 Cal. PUC LEXIS 274.) On March 13, 2009, the Commission issued D.09-03-026, which authorized PG&E to upgrade certain aspects of its Smart Meter Program and to increase revenue requirements to recover the related costs of the upgrade. (*Decision on Pacific Gas and Electric Company’s Proposed Upgrade to the SmartMeter Program* [D.09-03-026] (2009) ___ Cal.P.U.C.3d ___, 2009 Cal. PUC LEXIS 136.). Neither of the foregoing decisions was challenged on rehearing or on judicial review.

On April 6, 2010, Petitioner filed an Application for Modification of these two earlier Commission decisions (D.06-07-027 and D.09-03-026). This application asked the Commission to reopen the review of PG&E’s Smart Meters Program to consider the

¹ The request was made in Application for Modification of D.06-07-027 and D.09-03-026. A copy is located at Petitioner’s Appendix (“Pet. Append.”), Tab 1.

Commission decisions signed after July 2000 can be found on the Commission’s website: <http://www.cpuc.ca.gov/PUC/documents/>

² Copies of these two decisions are located at Pet. Append., Tab 18 and Tab 21 respectively.

issue of health impacts allegedly attributable to radio frequency ("RF") emissions from Smart Meters.³

On May 17, 2010, PG&E filed a Protest to the Application for Modification and filed a Motion for Immediate Dismissal ("Motion"). PG&E asserted that the entire field of RF regulation was pre-empted by federal law, and that the Federal Communications Commission ("FCC") is the body solely responsible for RF regulation.⁴ PG&E's Motion included the Declaration of Daniel M. Partridge, Manager of Smart Meter Engineering at PG&E, which was signed under oath ("Partridge Declaration").⁵ This expert witness' declaration is part of the evidentiary record for the proceeding at the Commission. On May 27, 2010, Petitioner filed a response to PG&E's Motion, and on June 11, 2010, PG&E filed a reply.⁶

On December 2, 2010, the Commission issued D.10-12-001, dismissing Petitioner's Application for Modification. In D.10-12-001, the Commission found that PG&E Smart Meters are licensed or certified by the FCC with respect to their RF

³ In its Application for Modification, Petitioner asks the Commission to reopen 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. (Pet. Append., Tab 1, p. 2.)

⁴ PG&E's Motion is located at Pet. Append., Tab 4. PG&E's Protest refers to this motion. A copy of this protest is located at Pet. Append., Tab 5.

⁵ The Partridge Declaration is located at Pet. Append., Tab 4, pp. 46-51.

⁶ Petitioner's response and PG&E's reply are located at Pet. Append., Tab 6 and Tab 7 respectively.

emissions, that they comply with all pertinent FCC requirements, and that the devices produce RF emissions far below the levels approved by the FCC for many commonly used devices. (D.10-12-001, p. 14 [Findings of Fact 2 and 3] in Pet. Append., Tab 18, p. 223.) The Commission also found that Petitioner had not provided allegations of new or changed facts supported by an appropriate declaration, affidavit, or proposed testimony of an expert witness that would warrant either modifying D.06-07-027 and D.09-03-026 or reopening the proceeding to further investigate the alleged health impacts of emissions from Smart Meters. (D.10-12-001, p. 14 [Finding of Fact 4] in Pet. Append., Tab 18, p. 223.)

On January 5, 2011, Petitioner filed an application for rehearing of D.10-12-001. Among the many issues it raised included: (1) the Commission failed to follow prior Commission mandate by allowing PG&E to deploy RF emissions Smart Meters, and (2) Smart Meters violate FCC safety regulations.⁷ On January 20, 2011, PG&E filed a response opposing Petitioner's rehearing application.

On June 11, 2012, after considering Petitioner's various challenges, the Commission issued the Rehearing Order (D.12-06-017), which modified D.10-12-001 and denied rehearing of D.10-12-001, as modified. In D.12-06-017, the Commission specifically rejected Petitioner's evidentiary arguments on Smart Meters compliance with FCC safety regulations and Petitioner's assertion the Commission was obligated to apply its EMF mitigation policy to Smart Meters.

⁷ A copy of Petitioner's Application for Rehearing is located at Pet. Append., Tab 19.

On July 11, 2012, Petitioner filed the instant Petition, which challenges the lawfulness of D.10-12-001, as modified and affirmed by D.12-06-017.⁸

II. ISSUES PRESENTED

The Petition raises the following issues:

- 1. Did the record support the Commission's finding that Smart Meters comply with FCC safety requirements?**
- 2. Did the Commission correctly exclude non-record evidence from its consideration?**
- 3. Did the Commission act lawfully when it declined to reconsider D.06-07-027 and D.09-03-026 for purposes of applying the electromagnetic fields ("EMF") mitigation policy to Smart Meters?**

The Commission respectfully submits the answer to each of these questions is in the affirmative.

III. STANDARD OF REVIEW

The Court of Appeal has jurisdiction to review the Commission decisions at issue pursuant to Public Utilities Code section 1756. Section 1756(a) provides that "any aggrieved party may petition for a writ of review in the court of appeal" (Pub. Util. Code, § 1756.) However, the grant of a writ of review of Commission decisions under section 1756 is discretionary rather than mandatory. (*Pacific Bell Wireless, LLC v. Public Utilities Comm.* (2006) 140 Cal.App.4th 718, 729; *Pacific Bell v. Public Utilities Comm.* (2000) 79 Cal.App.4th 269, 272.) The plain language of

⁸ The Petition involves only decisions, D.10-12-001 and D.12-06-017. The Commission notes the Court's online case information system includes reference to two earlier decisions (D.06-07-027 and D.09-03-026). In fact, however, the Petition does not (nor could it) challenge the lawfulness of these decisions.

the statute provides: “If the writ issues, it shall be made returnable at a time and place specified by court order” (Pub. Util. Code, § 1756, subd. (a) (emphasis added).)

Thus, the Court is “not compelled to issue the writ if the [Commission] did not err” (*Pacific Bell v. Public Utilities Comm.*, *supra*, 79 Cal.App.4th at p. 279; see also, *Southern California Edison Company v. Public Utilities Comm.* (2005) 128 Cal.App.4th 1, 13-14, reh'g. den. 2005 Cal.App. Lexis 745 [“the court need not grant a writ if the petitioning party fails to present a convincing argument that the decision should be annulled”].)

The Court’s review of the challenged Commission decisions is governed by section 1757. The statute provides the Court’s review shall not extend further than to determine, on the basis of the entire record, whether any of the following occurred:

- (1) The Commission acted without, or in excess of, its powers or jurisdiction.
- (2) The Commission has not proceeded in the manner required by law.
- (3) The decision of the Commission is not supported by the findings.
- (4) The findings in the decision of the Commission are not supported by substantial evidence in light of the whole record.
- (5) The order or decision of the Commission was procured by fraud or was an abuse of discretion.
- (6) The order or decision of the Commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

(Pub. Util. Code, § 1757, subd. (a).)

Under this standard, the burden rests upon the Petitioner to demonstrate the Commission acted contrary to a statute, to the state or federal constitutions, in excess of its jurisdiction, as a result of fraud, or in abuse of its discretion. In addition, the Court must determine whether the Commission's decision is supported by findings, and whether those findings in turn are supported by "substantial evidence in light of the whole record."²

Courts have opined that the Commission "is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers." (See e.g., *Wise v. Pacific Gas & Electric Company* (1999) 77 Cal.App.4th 287, 300; *Southern California Edison Company v. Public Utilities Comm.* (2000) 85 Cal.App.4th 1086, 1096.)

In *Greyhound Lines, Inc. v. Public Utilities Comm.* (1968) 68 Cal.2d 406, the California Supreme Court noted there is a "strong presumption of validity of the commission's decisions." (*Id.* at pp. 410-411 [citations omitted]; see also, *Southern California Edison Company v. Public Utilities Comm.*, *supra*, at p. 1096.) The Supreme Court similarly has cautioned that the scope of review of Commission decisions shall not extend further than to determine whether the Commission has regularly pursued its authority. (See, e.g., *Goldin v. Public Utilities Comm.* (1979) 23 Cal.3d 638, 652-653; *Toward Utility Rate Normalization v. Public Utilities Comm.* (1988) 44 Cal.3d 870, 880.)

² Factual findings by the Commission "are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence." (*Toward Utility Rate Normalization v. Public Utilities Comm.* ("TURN v. CPUC") (1978) 22 Cal.3d 529, 537-538 (citation omitted).)

there. With respect to factual findings made by the Commission, the appellate courts do not exercise independent judgment on the evidence. (Pub. Util. Code, § 1757, subd. (b).) Case law establishes that an agency's findings will be upheld so long as they are reasonable and sufficiently supported by record of evidence. (See e.g., *Molina v. Munro* (1956) 145 Cal.App.2d 601, 604; *Strumsky v. San Diego County Employees Retirement Association* (1974) 11 Cal.3d 28, 35 [in reviewing decisions of state agencies, courts do not exercise independent judgment on the evidence, but look to whether there was substantial evidence in light of the whole record to support the agency's findings].) This is true even where there may be conflicting evidence. (See e.g., *TURN v. CPUC, supra*, 22 Cal.3d at p. 538 ["When conflicting evidence is presented from which conflicting inferences can be drawn, the commission's findings are final."].) Courts must consider all relevant evidence, but it is for the agency to weigh conflicting evidence, and a court may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the same conclusion. (*Eden Hospital District v. Belshe* (1998) 65 Cal.App.4th 908, 916.)

Further, the fact that evidence may be contradicted does not have a bearing on whether there was substantial evidence in light of the whole record. (See *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187 [If findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed].) There is a presumption that the record contains evidence to sustain every finding of fact, and to overcome this presumption a challenger must demonstrate that

there is no substantial evidence to support the challenged findings, and may not cite selectively to that party's own evidence, but must set forth all material *record evidence*. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782, emphasis added.)

In determining whether there is substantial evidence in light of the whole record, the cases instruct: "[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination. . . . If such substantial evidence be found, it is of no consequence that the [the decision-maker] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874. [citations omitted]; see also 9 Witkin, Cal Procedure (5th ed. 2010) Appeal § 368, p. 426.)

In the present case, the Commission proceeded entirely in the manner required by law. Petitioner has not presented the Court with any persuasive argument to alter or annul the challenged Commission decisions. Therefore, the Commission respectfully submits the writ petition should be denied as being without merit.

IV. ARGUMENT

A. Record evidence supports the finding that PG&E Smart Meters comply with FCC requirements.

Petitioner contends that the Commission's finding that Smart Meters are in compliance with FCC requirements is not supported by substantial evidence in light of the whole record. (Petition, p. 17.) Petitioner's contention has no merit.

The finding is supported by the following: The Commission recognized the FCC's expertise for evaluating and licensing or certifying Smart Meters. (See D.12-06-017, pp. 2-3 in Pet. Append. Tab 21, pp. 274-275.) In 1996, the FCC adopted new RF exposure guidelines for all wireless communications devices sold in the United States. (Report and Order, ET Docket 93-62, FCC 96-326, (adopted August 1, 1996), 61 Fed. Reg. 41006.)¹⁰ In its 1996 order, the FCC adopted Maximum Permissible Exposure limits for field strength and power density for transmitters operating at frequencies from 300 KHz to 100 GHz.¹¹ In adopting guidelines for RF exposure, the FCC considered comments from the U.S. Environmental Protection Agency and other federal health and safety agencies, and the adopted guidelines were based substantially on the recommendations from those agencies. (Report and Order, ET Docket 93-62, FCC 96-326, *supra*, 61 Fed. Reg. at p. 41006.)

The evidence shows that the RF emissions from PG&E's Smart Meters are closely regulated by the FCC and certified under C.F.R. Title 47.¹² (Partridge Declaration, p. 4 in Pet. Append., p. 50.) Certification is an authorization issued by the FCC for equipment based on representations and test data from a sample unit submitted by the applicant. (*Ibid.*) An FCC identification number is issued to show compliance. (*Ibid.*)

¹⁰ See PG&E's Motion to Dismiss, p. 6. in Pet. Append., Tab 4, p. 37.

¹¹ The FCC requirements are detailed in Parts 1 and 2 of the FCC's Rules and Regulations (47 C.F.R. 1.1307(b), 1.1310, 2.1091, 2.1093).

¹² Part 15 of the regulation applies to electric meters and Part 90 applies to gas meters. (Partridge Declaration, p. 4 in Pet. Append., p. 50.)

The evidence further shows that RF exposure levels from Smart Meters are considerably less than exposure from other devices in widespread use, such as cellular phones. (Partridge Declaration, pp. 2-3 in Pet. Append., Tab 4, pp. 48-49.) Moreover, many of these other wireless devices involve more frequent radio transmission, emit radio frequency energy for longer periods of time, and operate in much closer proximity to humans than Smart Meters. (Partridge Declaration, p. 3 in Pet. Append., Tab 4, pp. 49.) In addition, RF emissions from Smart Meters result in exposure that is tiny compared to existing exposure regulations. (Partridge Declaration, p. 4 in Pet. Append., Tab 4, pp. 50.)

The Commission's decision not to reopen its earlier decisions authorizing installation of Smart Meters was a reasonable decision based upon record evidence that Smart Meters are licensed or certified by the FCC, comply with all FCC requirements, and produce RF emission far below the levels of many other commonly used devices.

Petitioner argues that the Partridge Declaration in the record does not constitute sufficient evidence. Specifically, Petitioner cites to what is characterized as contradictory evidence that is outside the record, including evidence of non-compliance with FCC regulations.¹³ (Petition, pp. 17-18.)

By this argument, Petitioner essentially is asking this Court to reweigh the evidence and second-guess the Commission. Public Utilities Code section 1757(b)

¹³ This includes evidence regarding compliance with the FCC's Grants of Equipment Authorization.

prohibits this Court from exercise its independent judgment on the evidence. (Pub. Util. Code, §1757, subd. (b).) Under the law, it is the Commission, not the appellate court, which has the responsibility to weigh the evidence and to reach a determination based on the evidence in the record. (*Eden Hospital District v. Belshe*, (1998) 65 Cal.App.4th 908, 915.)

Moreover, the Petitioner improperly asks the Court to consider evidence that is not in the record. (See discussion in Section IV.B., *infra*.) Not only does the Petitioner cite to a new declaration attached to its application for rehearing and new evidence included in its Comments on the Proposed Decision,¹⁴ but Petitioner also cites to yet additional new evidence included in its Petition.¹⁵ (Petition, pp. 18-19.) None of this evidence was in the record, and the Petitioner never asked the Commission to reopen the record to include this evidence prior to the issuance of D.10-12-001. Petitioner's attempt to go outside the record is improper, and the Commission respectfully submits that section 1757 prohibits the Court from considering such new and additional evidence that was not

¹⁴ In fact, when the Petitioner raised the issue of compliance with FCC conditions in its Comments on the Proposed Decision, it stated that when filed its Application for Modification, it "was unaware of the details of the FCC licensing process and compliance requirements" and has just "begun to research the factors that govern FCC compliance and the 'Grants of Equipment Authorization' upon which FCC compliance is based." (Pet. Append., Tab 16, p. 190.)

¹⁵ See Pet. Append., Tab 22, p. 285 is not in the record. The Petitioner also cited new evidence on a different issue in footnote 13 which is not in the record. Moreover, the Petitioner has included in its exhibits two notices of ex parte communications with Commission advisors and other individuals which are not in the record. Under Rule 8.3 of the Commission's Rules of Practice and Procedure, ex parte communications and any required notices filed of those communications are not part of the record of the proceeding and cannot be considered by the Commission. (Cal. Code of Regs., tit. 20, § 8.3, subd. (k).)

part of the record below. (See Pub. Util. Code, §1757, subd. (a) [“No new or additional evidence shall be introduced upon review by the court.”]; see also, Pub. Util. Code, §1757 subd. (b) [The Court is not permitted to hold a trial de novo.])

The Commission’s finding that PG&E Smart meters are licensed or certified by the FCC and comply with all FCC requirements is based on the record evidence.

B. The Commission acted lawfully in not considering evidence that was not part of the record for the proceeding.

Petitioner contends the Commission improperly excluded and ignored evidence of Smart Meter compliance with FCC safety regulations.¹⁶ (Petition, p. 14.) Petitioner’s contention lacks merit, as it relies on evidence that was not part of the record. Petitioner cites to the Declaration of Cynthia Sage (“Saga Declaration”) that was attached to its rehearing application¹⁷ and other new evidence offered by Petitioner in its Comments on the Proposed Decision. (Petition, pp. 14-15.) Neither the Saga Declaration nor the new evidence included in Petitioner’s comments on the administrative law judge’s proposed decision was record evidence.

During the proceedings below and prior to the issuance of the proposed decision and the Decisions at no point did Petitioner ask the Commission to reopen the record to

¹⁶ In D.12-06-017, the Commission noted that Petitioner did not cite any record evidence to support its claims on this issue. (D.12-06-017, p. 5 in Pet. Append., Tab 21, p. 277.)

¹⁷ Petitioner’s Rehearing Application included both the Saga Declaration and the Declaration of Sandi Maurer, neither of which is part of the record.

accept additional information into the record for the proceeding. Instead, Petitioner attempted to introduce new evidence during the rehearing stage. This was improper.

The purpose of a rehearing application is to alert the Commission to legal errors in its decisions. Rule 16.1(c) of the Commission's Rules of Practice and Procedure 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." (Cal. Code of Regs., tit. 20, § 16.1 subd. (c).) Petitioner failed to do this. Instead, it attached a new declaration which was not in the record, and then cited to this document to support its argument. For due process reasons, it would be improper to permit a party to add new evidence in a rehearing application, and presume this new evidence in the record. Further, Petitioner's argument that the Commission committed legal error by failing to consider this non-record evidence is simply unreasonable.

Moreover, new evidence included in Petitioner's comments on the administrative law judge's proposed decision does not constitute record evidence. Under Rule 14.3 (b) of the Commission's Rules of Practice and Procedure, Comments on a Proposed Decision must focus on factual, legal or technical errors and must make specific references to the record or applicable law. (Cal. Code of Regs., tit. 20, § 14.3, subd. (c).) Thus, new evidence provided in Comments on a Proposed Decision is not record evidence, and need not be considered by the Commission.

Petitioner contends the Commission's refusal to accept the Saga Declaration amounts to a "Catch 22," as the Commission first faulted Petitioner for not having any

evidence, and then refused to accept the declaration later when Petitioner attached it to its application for rehearing. (Petition, p. 15.) This contention has no merit.

If Petitioner wanted the Commission to consider the Saga Declaration or the new evidence it included in its Comments on the Proposed Decision as part of the record, it could have included it as a declaration, affidavit or testimony as supporting documentation with its Application for Modification, or under Commission Rules, it could have asked the Commission to reopen the record to make this information a part of the record.¹⁸ Petitioner did neither.

To the extent Petitioner cites to record evidence, it was not ignored by the Commission. The evidence simply was not found to be persuasive.¹⁹ What Petitioner appears to be seeking is for this Court to reweigh the evidence, something the Court cannot do. As previously discussed, it is the Commission, not the appellate court, that has the responsibility to weigh the evidence in the record, and to reach a determination based on the evidence. (*Eden Hospital District v. Belshe*, *supra*, 65 Cal.App.4th at p. 915.) The Commission here duly considered the record evidence, and found Petitioner's arguments not to be persuasive. Based upon the record evidence, the Commission properly

¹⁸ Rule 13.14 (b) of the Commission's Rules of Practice and Procedure allows parties to file a motion to set aside submission and reopen the record for the taking of additional evidence. (Cal. Code of Regs., tit. 20, § 13.14, subd. (b).)

¹⁹ Some evidence Petitioner cites does not concern the issue framed by the Petitioner of Smart Meter's lack of compliance with FCC regulations. Rather the evidence appears to address concerns with the adequacy of the FCC regulations. (Petition, pp. 15-16.)

exercised its discretion in deciding not to reopen its review of Smart Meter issues previously decided by D.06-07-027 and D.09-03-026.

C. The Commission acted lawfully when it declined to reopen D.06-07-027 and D.09-03-026 to apply its EMF mitigation policy to Smart Meters.

Petitioner asserts the Commission unlawfully departed from a past policy regarding electro-magnetic fields (“EMF”) set forth in D.93-11-013 and D.06-01-042. (Petition, pp. 11-14.) This assertion has no merit.

D.93-11-013 and D.06-01-042 involved a low cost/no cost EMF mitigation policy for new and upgraded utility transmission and substation projects, and did not involve Smart Meters.²⁰ Thus, there was no “past policy” for the Commission to depart from with respect to Smart Meters.

The Commission notes Petitioner’s assertion before this Court is different from the one raised in Petitioner’s application for rehearing. In contrast to its argument before this Court, on rehearing Petitioner asserted the Commission had a mandate to reduce EMF

²⁰ *Re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities* [D.93-11-013] (1993) 52 Cal.P.U.C.2d 1, 6; *Opinion on Commission Policies Addressing Electromagnetic Fields Emanating from Regulated Utility Facilities* [D.06-01-042] (2006) ___ Cal.P.U.C.3rd ___, p. 2 (slip op.), 2006 Cal. PUC LEXIS 41. In both D.93-11-013 and D.06-01-042, the Commission found there were no EMF studies that have concluded there was a direct link between exposure to EMF and human health effects. (*Re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities* (D.93-11-013) (1993) 52 Cal.P.U.C.2d 1, 27 [Finding of Fact 7].) *Opinion on Commission Policies Addressing Electromagnetic Fields Emanating from Regulated Utility Facilities* (D.06-01-042) (2006) ___ Cal.P.U.C.3d ___, at p.19 [Finding of Fact 5] (slip op.), 2006 Cal. PUC LEXIS 41, *28-*29.)

and should have followed its previously adopted precautionary approach for Smart Meters.²¹

Petitioner now appears to recast its dispute as a policy argument, arguing that the Commission should have extended its low cost/no cost EMF policy to Smart Meters. Petitioner contends the Commission abused its discretion or acted in a manner not in accordance with the law by departing from an EMF mitigation policy of twenty years without legally sufficient explanation. (Petition, p. 11.) Petitioner contends the Commission must provide an explanation for the alleged departure from this policy. (Petition, p. 14.) Such policy argument is not for the Court to decide, because any policy determination is for the Commission to make in exercise of its exclusive jurisdiction over public utilities.

Furthermore, Petitioner's contention was not raised below in its application for rehearing, and the Court may not consider issues not so raised. (See Pub. Util. Code, § 1732; *Consumer Lobby Against Monopolies v. Public Utilities Comm.* (1979) 25 Cal.3d 891, 903 ["the code prohibits the petitioner from relying on any ground that he did not set forth in his petition for rehearing before the commission."]))

In addressing the issue Petitioner did raise, the Commission concluded in its Rehearing Order that there was no legal mandate for it to apply its low-cost/no-cost EMF mitigation policy adopted in D.93-11-013 and affirmed in D.06-01-042 to Smart Meters. As the Commission noted: "PG&E's Smart Meters are not transmission or substation

²¹ Application for Rehearing, pp. 1, 6, 8, in Pet. Append., Tab 19, pp. 229, 234, 236.

project to which our low-cost/no-cost policy was directed.” (D.12-06-017, p. 4 in Pet. Append., Tab 21, p. 276.)

V. CONCLUSION

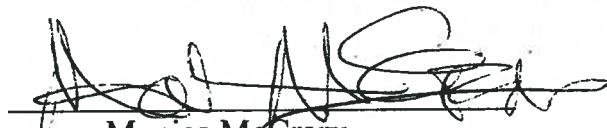
For the reasons stated above, the Commission respectfully submits that the Petitioner’s challenges to D.10-12-001, as affirmed by D.12-06-017, have no merit, and thus, the Petition should be denied.

Dated: August 15, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am a citizen of the United States, over the age of 18 years, with business address at 505 Van Ness Avenue, San Francisco, California and am neither a party to nor interested in **Case No. A135927, *EMF Safety Network v. Public Utilities Commission of the State of California***, before the Court of Appeal of the State of California, First Appellate District, Division Two.

On August 15, 2012 San Francisco, California, I caused to be deposited in overnight mail copies of **ANSWER OF RESPONDENT TO PETITION FOR WRIT OF REVIEW** in **Case No. A135927** on all parties listed on the attached service list.

Each copy was enclosed in a sealed envelope and all postage thereon fully prepaid.

I certify under penalty of perjury that the foregoing is true and correct.



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