CASE NO. A135927

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

EMF SAFETY NETWORK,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

PACIFIC GAS & ELECTRIC COMPANY,
Real Party in Interest.

****

REPLY TO ANSWER TO PETITION FOR WRIT OF REVIEW

****

Challenging Decision 12-06-017 of the PUC,
Dismissing EMF Safety Network's Application to Reopen D.06-07-027 and D.09-12-001 related to PG&E's Smart Meter program, and Denial of Rehearing

James Hobson, SBN#50760
Harriet Steiner, SBN#109436
Joshua Nelson, SBN#260803
Best Best & Krieger LLP
500 Capitol Mall, Suite 1700
Sacramento, California 95814
Telephone: (916) 325-4000
Facsimile: (916) 325-4010

Attorneys for Petitioner EMF Safety Network

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I.

INTRODUCTION

On June 11, 2012, the California Public Utilities Commission ("CPUC") issued Decision ("D") 12-06-017, which modified the CPUC Decision D. 12-12-001 and denied the EMF Safety Network's ("Network") request for a rehearing (collectively D.12-06-017 and D. 12-12-001 are referred to as the "Decision"). The Decision, without the benefit of formal evidentiary hearings, the opportunity for the submission of prepared testimony or even the issuance of a traditional CPUC scoping memorandum, granted a motion by real part in interest Pacific Gas & Electric ("PG&E") to immediately dismiss the Network application to reopen the CPUC's investigation into PG&E's Smart Meter program.

Network has filed its Petition for Writ of Review ("Petition") requesting that this Court remand the erroneous Decision to the CPUC for further proceedings. The CPUC and PG&E have filed Answers to the Petition. These Answers fail to demonstrate that the Decision was supported by substantial evidence or otherwise lawful as set forth in the Petition and this Reply. Namely, Network properly argued in its Application for Rehearing and Petition that the CPUC departed from its low-cost/no-cost EMF mitigation policy without a legally adequate explanation. Moreover, the Commission improperly excluded evidence submitted by Network in its Application for Rehearing. Lastly, the Commission's Decision was not supported by substantial evidence. Accordingly, Network requests that this Court remand the Decision back to the CPUC to adequately and appropriately consider the potential health impacts of Smart Meters.

II.

CPUC IMPROPERLY SHIFTED ITS EMF MITIGATION POLICY WITHOUT AN ADEQUATE EXPLANATION

As set forth in Network's Petition, the CPUC failed to explain its radical departure from existing EMF mitigation policies with regard to Smart Meters. This departure was accompanied by purely conclusory statements and without the rational explanation required by law. (See *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 994.) The CPUC and PG&E do not provide any explanation for the CPUC's departure and instead attempt to (1) characterize Network's arguments as simply policy-based and (2) argue that Network is barred from asserting this argument on review. Both of these arguments fail as the CPUC is legally required when formulating quasi-legislative acts to adequately consider all relevant factors and demonstrate a rational connection between those factors, the choice made, and the purposes of the enabling statute. (*Kucharczyk v. Regents of University of California* (1996) 946 F.Supp. 1419, 1438; *see also US v. SWRCB* (1986) 182 Cal.App.3d 82, 113.

A. The CPUC Departed From Its Low-Cost/No Cost EMF Policy Without Any Rational Explanation.

In D.93-11-013 and D.06-01-042, the CPUC adopted and modified a low-cost/no cost policy to mitigate EMF exposure for new and upgraded electric facilities. This policy reflected public concern and the scientific uncertainty regarding the potential health effects of EMF exposure. (*In re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities* 52 Cal.P.U.C.2d. 1, *10; *Opinion on Commission Policies Addressing Electromagnetic Fields Emanating from Regulated Utility Facilities*, D.06.01.042 (2006), ___ Cal.P.U.C.3d ____, at p. 1; Appendix of Exhibits

in Support of Petition, Vol. 2, Ex. 23, p. 287.[1]) This policy generally required utilities to practice "prudent avoidance" to incorporate no cost and low cost (i.e., 4% or less of total project cost) EMF mitigation into projects. (*In re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities*, *supra*, 52 Cal.P.U.C.2d. at p. 83; App. 2, Ex. 23, p. 305-306.) It further recognized that future research was necessary into the health effects of EMF exposure. (*In re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities*, *supra*, 52 Cal.P.U.C.2d. at p. *80; App. 2, Ex. 23, p. 307.) This policy applies to both electrical facilities and cellular radiotelephone facilities (i.e., RF emitting facilities). (See *In re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities*, *supra*, 52 Cal.P.U.C.2d. at p. *3.)

In the present case, the CPUC failed to demonstrate a rational connection between any of the salient factors underlying its policy shift regarding EMF regulations for Smart Meters. Rather, the CPUC simply noted that Smart Meters were not covered by the low-cost/no cost EMF emission policy. (App. 1, Ex. 21, p. 276.) As Smart Meters are clearly a type of radiotelephone facility and are at least nominal "electrical facilities," the CPUC must present some rational connection between the applicable factors why a policy of prudent avoidance is not required in this case. (*Kucharczyk v. Regents of University of California*, supra, 946 F.Supp. at p. 1438; see generally *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1.)

PG&E's Answer (at p. 2) additionally claims that "the FCC health-based RF standards were adopted subsequent to the original EMF decisions" from which Petitioner claims a departure. This is not correct.

[1] Future references to the Appendix of Exhibits are cited as App. Followed by volume number, exhibit number and sometimes page number (i.e., App. 1, Ex. 1, p. 1.)

The FCC was required by the National Environmental Policy Act of 1969 ("NEPA") to take account of RF radiation and it did so as early as 1985.[2]

Nor would it have been a violation of due process (PG&E Answer, p. 5) for the CPUC to consider evidence submitted by Petitioner for the first time on Application for Rehearing because PG&E was afforded, and took, the opportunity to reply.

The CPUC attempts to characterize Network's argument as policy based. (CPUC Answer, p. 17.) CPUC even suggests that it is beyond this Court's jurisdiction to consider. (*Ibid.*) However, all administrative bodies, even constitutional ones like the CPUC, are subject to the rubric of judicial review set forth in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1. (See *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174 [generally applying *Yamaha* to CPUC proceedings].) Under this rubric, the CPUC has an obligation to minimally explain its departure from its low-cost/no cost policy, and conclusory statements like "PG&E's Smart Meters are not transmission or substation project to which our low-cost/no-cost policy was directed" are legally insufficient. (App. 2, Ex. 21, p. 276.)

B. Network Properly Raised This Argument in Its Application for Rehearing.

CPUC and PG&E argue that Network waived its right to assert the above argument by not raising it in its Application for Rehearing. (See Pub. Util. Code, § 1732. [3]) As Network clearly raised concerns with the CPUC's dramatic, unexplained departure from its low-cost/no cost EMF mitigation policy in its Application for Rehearing, this argument fails.

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[2] Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 FCC Rcd. 2849 (1993), ¶ 3.

[3] All further references to code sections are to the California Public Utilities Code unless otherwise stated.

Section 1732 is essentially an exhaustion requirement, and it prevents parties from raising issues on review that were not set forth in a party's application for rehearing before the CPUC. (See *Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1101, fn. 7.) Courts interpreting this section have held that while section 1732 and applicable regulations generally require that parties raise issues with specific references to evidence and law, the controlling consideration is whether the party provided the CPUC with sufficient notice to respond to the party's claims. (*Utility Consumers' Action Network v. Public Utilities Com.* (2010) 187 Cal.App.4th 688, 704; Cal. Code Regs., tit. 20, § 16.1.)

Here, Network included sections 4.3 and 4.4 of its Application for Rehearing that explained how the CPUC had improperly departed from low-cost/no-cost mitigation policy without an adequate explanation. (App. 2, Ex. 19, p. 234-236.) Network exhaustively discussed the history of this policy and then urged the CPUC to apply this policy to Smart Meters. (*Ibid.*) Network is now raising this argument again before this Court as permitted by Section 1732. The CPUC had adequate time to ponder and respond to Petitioner's claims.

Moreover, even assuming one construes the Application for Rehearing as changing the exact legal framework of this issue, Network's discussion in its Application for Rehearing clearly raised this issue for the CPUC, permitting it to respond to Network's claims. (See *Utility Consumers' Action Network v. Public Utilities Com.*, *supra*, 187 Cal.App.4th at p. 704 [considering argument on merits where party arguably violated Section 1732 but raised issue for CPUC's consideration].) In fact, after raising legal defenses to the argument, including Section 1732, the CPUC did respond to the merits of Network's claim. (App. 2, Ex. 21, p. 275-276.) Accordingly, Network properly brought this argument before

the CPUC, and section 1732 does not preclude this court from considering the merits of Network's argument.

III.
THE CPUC IMPROPERLY REFUSED TO CONSIDER EVIDENCE SUBMITTED BY THE NETWORK

The CPUC and PG&E argue in their Answers that this Court is precluded from accepting and considering the Declaration of Cynthia Sage[4] appended to Network's Petition for Rehearing. The parties base this on two arguments: (1) doing so violates procedural due process and (2) Section 1757 prevents this Court from doing so. Both of these arguments fail.

For the first, procedural due process generally requires that a party affected by government action be given "the opportunity to be heard at a meaningful time and in a meaningful manner." (*S. Cal. Edison Co. v. Lynch* (9th Cir. 2002) 307 F.3d 794, 807 *quoting Mathews v. Eldridge* (1976) 424 U.S. 319.) Here, the CPUC and PG&E argue that accepting the Declaration of Cynthia Sage would violate PG&E's procedural due process rights. (CPUC Answer, p. 14; PG&E Answer, p. 5.) This argument ignores the fact that PG&E received both notice of the Declaration in the Application for Rehearing and an opportunity to respond to its contents -- an opportunity that PG&E exercised in its response to the Application for Rehearing. (App. 2, Ex. 20, p. 262-263.)

For the second, while Section 1757 prevents the Court from conducting a trial de novo on review, it does not prevent the Court from considering the Declaration. To support this argument and explain Network's options, the CPUC argued that Network could have requested that the CPUC reopen the proceeding to receive the information or included the information as part of its initial Application. (CPUC Answer, p. 14-15.)

These were false options in this case. First, the Declaration did not exist when Network filed its Application. Second, the CPUC did not

[4] Repeatedly referenced in error as the "Saga" declaration. CPUC Answer, 13-15.

conduct a normal procedure in this case with a scoping memorandum and series of evidentiary hearings. Rather, it simply granted PG&E's motion to essentially end the proceeding before it even began. Any request for reopening would have been similarly opposed and rejected and was futile. (See generally *Econ. Empowerment Found. v. Quackenbush* (1997) 57 Cal.App.4th 677, 684.)

IV.
THE EVIDENCE OFFERED IN SUPPORT OF PG&E'S MOTION FAILS TO DEMONSTRATE THAT SMART METERS COMPLY WITH FCC REQUIREMENTS

As set forth in Network Petition, the CPUC granted PG&E's Motion essentially based on a single, contradictory declaration submitted by a PG&E employee. Even under the deferential "substantial evidence" test, the evidence does not support this determination. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

The CPUC and PG&E argue that the determination is supported by substantial evidence, and Network is simply asking this Court to re-weigh the evidence. (CPUC Answer, p. 15; PG&E Answer, p. 7.) This is incorrect. Network is not asking the Court to re-weigh the evidence.

Rather, under the admittedly deferential substantial evidence standard, the decision must be overturned. (*Costco Wholesale Corp. v. Superior Court*, *supra*, 47 Cal.4th at p. 733.) As noted in the Petition, substantial evidence is not synonymous with "any" evidence. To the contrary, the evidence supporting the judgment must be credible, reasonable in nature, and of solid value. (*Sasco Elec. v. FEHC* (2009) 176 Cal.App.4th 532, 535; *Estate of Teed* (1952) 112 Cal.App.2d 638, 644; see, e.g., *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567 [expert testimony does not constitute substantial evidence when based on conclusions or assumptions not supported in record, matters not reasonably relied on by other experts, or speculative,

remote, or conjectural factors].) The word "substantial" refers to the quality of the evidence, not the quantity. (*Hope v. California Youth Auth.* (2005) 134 Cal.App.4th 577, 589.)

However, even under this weighty standard, the Decision cannot stand. As with the matter of cumulative time of exposure to RF radiation under FCC rules, the CPUC orders rely entirely on PG&E's Partridge Declaration for their conclusion that "PG&E's Smart Meters are licensed or certified by the FCC and comply with all FCC requirements . . ." (App. 2, Ex. 21, p. 277.) In reply, Network repeated its reminders that "the FCC Grants of Equipment Authorization, which govern the rules upon which FCC compliance is based, warn that RF exposure compliance depends on [fulfillment of] specific conditions." (App. 2, Ex. 19, p. 237.)

Among these are to assure a distance separation of 20 centimeters (eight inches); professional installation of the meters; and provision to installers and end-users of antenna installation and transmitter operating conditions for satisfying RF exposure compliance. (App. 2, Ex. 16, p. 191.) On none of these conditions did the CPUC bother to inquire beyond the Declaration of Daniel Partridge on PG&E's behalf. (See App. 1, Ex. 4, p. 47.)

Mr. Partridge describes himself as an engineering manager. (*Ibid.*) He mentions no particular knowledge of the effects of non-ionizing RF radiation on the human body. There is no explanation of why he chose 10 feet as a test distance for RF radiation measurement when the viewing of Smart Meters is more likely to be at the distances involved in cellphone safety – beyond 20 centimeters but still allowing reading of the meter. We do not learn what might be the effects of exposure at one-fifteenth of 10 feet (or 20 centimeters).

By contrast, Petitioner's Declarant, Cynthia Sage, has a lifetime of experience in consulting and teaching about the human bioeffects of RF

radiation. (App. 2, Ex. 19, p. 245.) Nevertheless, Network did not ask the CPUC, and is not asking the Court now, to evaluate the two declarations for the purpose of determining likelihood of harm. Instead, Network simply wants the CPUC to conduct an inquiry of more breadth and intensity than has been the case thus far.

Thus, the CPUC could not have satisfied itself of PG&E's fulfillment of the conditions on its Smart Meter authorizations. The Court should remand this proceeding to the CPUC for the purpose of greater assurance of PG&E compliance.

V.
CONCLUSION

For the reasons stated in the Petition and above, this Court should grant the writ of review and remand this proceeding to the CPUC.

Dated: September 7, 2012

BEST BEST & KRIEGER LLP

By: _____
JAMES HOBSON
HARRIET STEINER
JOSHUA NELSON
Attorneys for Petitioner
EMF SAFETY NETWORK

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), counsel for Petitioner EMF Safety Network hereby certifies that this brief is produced using 13-point Roman type including footnotes and contains 2,434 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count feature of the computer program used to prepare this brief.

BEST BEST & KRIEGER LLP

Dated: September 7, 2012

By: _____
Joshua Nelson
Attorneys for Petitioner
EMF Safety Network

Court of Appeal, First Appellate District, Division Two, Case No. A135927

PROOF OF SERVICE

I, MONIQUE MONCEBAIZ, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause.

2. I am employed by Best Best & Krieger LLP located in the City of Sacramento, California.

3. My business address is 500 Capitol Mall, Suite 1700, Sacramento, California 95814. My electronic email address is monique.moncebaiz@bbklaw.com.

4. On September 7, 2012, in the city where I am employed, I served a true copy of the document titled exactly REPLY TO ANSWER TO PETITION FOR WRIT OF REVIEW by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the **United States mail** at Sacramento, California addressed as set forth below:

Chonda J. Nwamu, Esq., Pacific Gas & Electric Company 77 Beale Street, B30A San Francisco, CA 94177 *Attorney for Real Party in Interest* *Pacific Gas & Electric Company*	General Counsel California Public Utilities Commission 505 Van Ness Avenue San Francisco, CA 94102 *General Counsel for Respondent CPUC* Executive Director California Public Utilities Commission 505 Van Ness Avenue San Francisco, CA 94102 *Executive Director for Respondent CPUC*

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of September, 2012, at Sacramento, California.

Monique Moncebaiz