

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation on the Commission's)	Investigation 12-04-010
Own Motion into the Operations and Practices of)	(Filed April 19, 2012)
Pacific Gas and Electric Company regarding Anti-)	
Smart Meter Consumer Groups)	
_____)	

COMMENTS OF EMF SAFETY NETWORK TO PROPOSED DECISION

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COMMENTS ON PROPOSED DECISION

I. Introduction

Pursuant to CPUC Rules of Practice and Procedure 14.3, EMF Safety Network (Network) submits the following comments regarding the proposed decision (PD) of Administrative Law Judge Vieth to grant the Joint Motion of Consumer Protection and Safety Division (CPSD), Pacific Gas and Electric Company (PG&E) and the Utility Reform Network (Settling Parties) for Approval of Settlement Agreement (Motion). The PD approves the settlement of this proceeding requiring PG&E to make a \$390,000 payment to the State's general fund and operate and undertake some specific programs and actions.

Network appreciates the opportunity to comment on the PD and requests that the PD be rejected because it is not reasonable in light of the whole record and is not in the public interest. (RPP 12.1(d).) The proposed payment does not reflect any violations of law and is disproportionate to the fine that could be imposed by the Commission in this case. The PD is not in the public interest as it prevents Network and the other non-settling parties to this proceeding from submitting testimony and participating in evidentiary hearings to contest PG&E's contention, expressed in the Motion, that its senior management was not aware of and did not condone Mr. Devereaux's activities, and that PG&E did not violate Public Utilities Code sections 451, 2107-2109 or any other statute, rule or regulation.

II. Summary of Facts

The facts of this case are more particularly set forth in the PD, Motion, the OII and the Consumer Protection Safety Division (CPSD) staff report submitted with the OII (Staff Report). However, important to these comments, in late 2010 the head of PG&E's SmartMeter Program,

William Devereaux, other PG&E employees and third parties hid their true identities and purpose and used non-work related email addresses to infiltrate anti-SmartMeter online discussion lists. For example, Mr. Devereaux used the alias Ralph Florea and email address manasota99@gmail.com when interacting with anti-SmartMeter activists.

This infiltration was part of an on-going surveillance program of these groups conducted by PG&E and Edelman, a public relations firm PG&E hired in January of 2010 in response to escalating Smart Meter complaints and problems. They established objectives to educate customers and elected officials about the “benefits” of Smart Meters and to “change the tone of the discussion around Smart Meter devices to be more balanced and increase PG&E’s share of voice, moving toward more positive coverage”.¹

As part of this program, Mr. Devereaux, other PG&E employees and third parties spied on groups with the knowledge of senior PG&E staff.² PG&E employees and senior management exchanged emails insulting and demeaning the members of the anti-SmartMeter activist groups. For example, activists were referred to “insurgents.”³ PG&E coordinated moving an entire Smart Meter deployment yard to derail a non-violent protest and sent an employee to surreptitiously observe and report on the reactions of the protestors, who also transmitted pictures of them to PG&E. This “spy” expressed his pleasure in observing and taking photos of anti-SmartMeter activists.⁴

PG&E did not voluntarily end this program. Rather, it did so only after Network’s moderator, Sandi Maurer, discovered Mr. Devereaux’s identity after responding to “Ralph’s” request to join Network’s private email list, the California EMF Safety Coalition, which could only be accessed with moderator approval.⁵ Specifically, Mr. Devereaux’s name was included on the header of Ralph’s email.⁶ As Ms. Maurer was involved in SmartMeter issues; had filed Application A.10-04-018, which was an open proceeding before the Commission; had met and

¹ CPSD redacted investigation documents pdf 50 p. 20 of 410 PG&E hired Edelman January 2010. While Network signed the Nondisclosure Agreement in this proceeding, all citations are to the publicly available redacted version of all documents in this case.

² On p.169 of 309 of CPSD’s redacted investigation documents Edelman sent PG&E senior staff and employees online data harvested from EMF Safety Network and other websites; see Staff Report, pp. 8-9.

³ See e.g., Staff Report, Attachment 20.

⁴ PG&E response to DR1, December 10, 2010, Attachment CPSD_001-13-1, p. 270 of 309.

⁵ Staff Report, p. 5-7; EMF Safety Network Opposition to Motion, Declaration of Sandra Maurer, ¶ 2.

⁶ *Ibid.*

talked with him at a public forum in Sebastopol; she recognized Mr. Devereaux's name and his association with PG&E.⁷

After Mr. Devereaux's improper activities were exposed, media outlets reported on the spying after PG&E sent redacted investigation documents that they provided to CPSD regarding the matter.⁸ PG&E only redacted PG&E and third party information, but did not redact private information of anti-SmartMeter activists, including names, email addresses and telephone numbers.⁹ The vast majority of, if not all, activists identified in the documents reside within PG&E's service area, and are presumably PG&E customers.¹⁰

After the Settling Parties filed the Motion, Network filed comments regarding and an opposition to the Motion. Californians for Renewable Energy, Inc., Joshua Hart and Ecological Options Networks filed separate comments and an opposition to the Motion.

III. Standard of Review

Under RPP 12.1(d), "the Commission will not approve settlements, whether contested or uncontested, unless settlement is reasonable in light of the whole record, consistent with law, and in the public interest." Prior to filing a settlement motion, the settling parties must conduct at least one settlement conference with seven-day advance notice to all parties.¹¹ As discussed below, the PD should be amended as the settlement is (1) unreasonable in light of the whole record and (2) not in the public interest.

Under RPP 14.3(c), comments proposing changes to the PD must include supporting findings of fact and conclusions of law. Attached to these comments as Exhibit "A" are appropriate findings of fact and conclusions of law.

IV. The Settlement is Not in the Public Interest as it Precludes an Evidentiary Hearing

The proposed settlement is not in the public interest as it would preclude Network and the other non-settling parties from participating in an evidentiary hearing. This hearing would allow

⁷ EMF Safety Network Opposition to Motion, Maurer Decl., ¶ 3.

⁸ Staff Report, Attachment 1. PG&E provided redacted documents (102 pdfs of 21 questions from CPSD and prepared responses by PG&E for the initial investigation on Dec.10, 2010) to San Jose Mercury News, who provided the information by email to Network on Dec.13, 2010.

⁹ See e.g., PG&E response to DR1, December 10, 2010, Attachment CPSD_001-13-1, p. 144 of 309.

¹⁰ EMF Safety Network Opposition to Motion, Maurer Decl., ¶ 4.

¹¹ Network does not contend that the Motion was procedurally improper.

Network and the other parties to refute PG&E's assertion that PG&E's senior management were unaware of Mr. Devereaux's activities and he was not simply a "rogue" employee.

While the Commission has recognized a public interest in settling cases to avoid litigation expenses and mitigating the risk to parties of an unacceptable result, this interest is lessened when a case is prematurely settled by the parties for a modest fine amount. (See generally *Investigation into the Operations and Practices of Qwest Communications Corporation*, D.06-10-027, 2006 Cal. PUC LEXIS 402, *45.) For example, one of the reasons that the Commission approved a settlement not joined by all parties in the *Qwest* proceeding was because the non-settling party wanted to dramatically expand the scope of the matter, likely requiring years to resolve. Network is not proposing such an expansion.

Here, the public interest in avoiding litigation expenses and mitigating the risk of an unacceptable result does not override the public interest in conducting an evidentiary hearing to permit Network and the other non-settling parties to further illustrate senior PG&E involvement in the case. Unlike *Qwest*, an evidentiary hearing would not expand the scope of the proceeding or otherwise unnecessarily delay its resolution.

The PD concludes that a hearing is unnecessary because the parties have had the opportunity to conduct extensive discovery and a hearing is not a discovery tool. (PD, p. 14-15.) The PD also suggests that Network concedes that existing factual support for the proposition that Mr. Devereaux was simply a rogue employee is "less than persuasive" because Network suggests that hearings may lead to the discovery of direct evidence of senior PG&E involvement through the cross-examination of PG&E witnesses. (*Ibid.*) Network disputes both of these conclusions. First, Network is not suggesting that a hearing is a discovery tool or substitute. Rather, Network submits that a hearing regarding the settlement is necessary because there is a disputed, fundamental factual question: whether other PG&E employees and officers were aware of Mr. Devereaux's activities. (RPP 12.3.) Network and the other non-settling parties should have the opportunity to submit evidence to present the overwhelming circumstantial evidence of senior PG&E involvement in the case.

Second, while Network noted that hearings may result in additional evidence through cross-examination, it does not implicitly or explicitly concede that evidence of other PG&E employees' and officers' involvement is lacking. As set forth in Network's comments to the

Motion and the comments of the other non-settling parties, there is already sufficient evidence to warrant requiring a hearing. Network merely notes that a hearing would likely yield additional evidence as an additional, ancillary benefit of holding one.

The scoping memo asked four questions. The first was to determine if PG&E violated the Public Utilities Code or other laws. Although a \$390,000 fine is suggested, no violation of law is charged. There is no clear basis for the fine amount. Network asserts this remedy is simply a matter of convenience. The second was to determine if PG&E management was aware of Mr. Devereaux's activities. PG&E has masterfully highlighted the issue of whether or not management knew Mr. Devereaux was using a false alias. But that's not what the scoping memo asked and unfairly narrows the scope of this proceeding. This spying was a coordinated attack on groups opposed to Smart Meters and PG&E was fully aware and involved with this, including Mr. Devereaux's boss Greg Kiraly.¹² Other PGE employees and Edelman were very much involved.¹³ We *do know* PG&E management received emails from Devereaux where he used a non- PG&E email address in relation to harvesting information about groups opposed to Smart Meters.¹⁴ These facts are the basis for the violation of Public Utilities Code section 451. The issue of whether or not senior management knew Mr. Devereaux pretended to be Ralph is simply a side show.

V. The Settlement is Unreasonable in Light of the Whole Record

As discussed in Network's comments to the Motion, the proposed settlement is not reasonable in light of the whole record as the proposed fine is disproportionate to the fine that could be imposed by the Commission in this proceeding. When determining whether or not a settlement is reasonable, the Commission has noted that "[t]he most important element in determining the fairness of a settlement is the relationship of the amount agreed upon to the risk of obtaining the desired result." (See *In the Matter of the Application of Pacific Bell*, D.92-07-076, 45 CPUC2d 158 at *22-23 [citing 30 CPUC2d 189, 267.]

¹² EMF Safety Network Opposition to Motion, Maurer Decl., ¶ 6; EMF Safety Network Opposition to Motion, Maurer Decl., ¶ 5; Opposition of Joshua Hart, et al. to Motion, Ex. A, B.

¹³ EMF Safety Network Opposition to Motion, Maurer Decl., ¶ 5; Opposition of Joshua Hart, et al. to Motion, Ex. A, B.

¹⁴ EMF Safety Network Opposition to Motion, Maurer Decl., ¶ 5; Opposition of Joshua Hart, et al. to Motion, Ex. A, B.

Here, CPSD has alleged that PG&E through the activities of Mr. Devereaux has violated Public Utilities Code section 451. (See Pub. Util. Code, § 2109.) Each of the emails (i.e., from Mr. Devereaux to each recipient) is a violation of section 451. (Pub. Util. Code, § 2108.) Based on the version of Public Utilities Code section 2107 in effect at the time at issue in this proceeding, each of these violations was subject to a range of fines from \$500 to \$20,000. (See Stats. 1993, ch 222, § 1 (SB 485).)

Therefore, at its simplest level, the \$390,000 fine assumes between 780 and 19.5 violations. Assuming a \$10,000 per violation fine, the settlement assumes 39 violations. Admittedly, these ranges do not account for the probability of the Commission finding a violation or the risk of obtaining the desired outcome.

However, even allowing for some discounting due to the probability of an adverse outcome, the \$390,000 fine is disproportionate to the expected fine and unreasonable. There are at least 471 violations committed by Mr. Devereaux alone in this case.¹⁵ This does not account for others who were also monitoring and obtaining anti-SmartMeter discussion list emails. For the actions uncovered so far, these violations would result in a range of fines between \$235,000 and \$9,420,000. At a \$10,000 fine level, the expected fine is at least \$4,710,000. Even allowing for some discounting, a \$390,000 fine is unreasonable in light of these expected outcomes.

The other non-settling parties also dispute that the \$390,000 fine is reasonable. Through slightly different calculations, they suggest fines in the amount of \$9,420,000 to \$42,000,000. (See PD, p. 24.) As these amounts are above the amount calculated by Network, they also suggest that the \$390,000 fine is unreasonable.

The PD rejects this argument and concludes that the fine amounts above are speculation that assume that all emails or communications are actually violations. (PD, p. 25-26.) Network recognizes that the estimations above are projections of potential fine ranges. They are included to demonstrate that the \$390,000 fine amount is unreasonably on the low end of that range.

VI. Comments on PG&E's Failure to Apologize

In its comments to the Motion, Network noted that PG&E had failed to even apologize to Network and the other victims of Mr. Devereaux's spying. The PD acknowledged this but

¹⁵ EMF Safety Network Opposition to Motion, Maurer Decl., ¶ 5.

declined to require PG&E to apologize. As the PD noted, "... a forced apology is an empty one." (PD, p. 27.) It also termed PG&E's failure to provide one as "disappointing" and a "missed opportunity." (*Ibid.*) Network thanks and commends ALJ Vieth. Network agrees that a forced apology is an empty one. It also agrees that PG&E's failure to apologize for PG&E's activities is certainly disappointing to Network and the other victims in this case.

In response, PG&E's comments to the PD state that Mr. Devereaux's activities were wrong and apologize to those affected by the incident.¹⁶ Network does not consider this an apology to Network or others PG&E has harmed. In fact, for PG&E to continue asserting this misleading position that Devereaux was a rogue actor is an insult.

VII. Conclusion

For the reasons discussed above, Network requests that the Commission reject the proposed settlement and revise the PD to reject the settlement or at least require a hearing before approving the same. Network's proposed amendments to the PD are attached as Exhibit A.

Dated: March __, 2013 at Sebastopol
California.

Respectfully submitted,

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¹⁶ PG&E's Comments on Proposed Decision, p. 1.

EXHIBIT A

PROPOSED REVISIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS

Below are Network's proposed revisions to the Proposed Decision.

I. PROPOSED REVISIONS TO FINDINGS OF FACT

8. The Bayless declaration, attached to the joint reply comments, includes information about two contentious events that was found through a public internet search and could be downloaded readily, at least at one time (the Marina/Monterey council meetings and the protest planned for PG&E's Rohnert Park installation yard). It is wrong to accept this declaration as a fact without cross examination of the witness. This disputed factual information is further support for the need for a hearing before the Commission can approve the proposed settlement.

10. Similarly, the potential violation numbers and penalty amounts offered by Network, CARE, Hart and EON establish that other conceivable outcomes could include substantially greater fine amounts for PG&E. This clear disagreement regarding the facts of this case requires a hearing before the Commission can approve the proposed settlement.

II. PROPOSED REVISIONS TO CONCLUSIONS OF LAW

7. Following upon extensive discovery, there still remain numerous unresolved factual issues in this case. Accordingly, it is necessary to conduct a hearing before the Commission can determine whether the proposed settlement in the public interest or reasonable in light of the whole record. However, such hearing should be limited to the issues raised in the OII and scoping memo.

9. The settlement, as modified by CPSD, PG&E and TURN in their joint reply comments, should not be approved at this time. A hearing is necessary to resolve the disputed factual issues.

10. This decision should be effective immediately.

11, 12. [Delete items 11 and 12]

III. PROPOSED REVISIONS TO ORDERING PARAGRAPHS

1. The settlement of the Consumer Protection and Safety Division (the predecessor of the Safety and Enforcement Division), Pacific Gas and Electric Company and The Utility Reform Network is rejected, as modified by these three parties in their *Joint Reply Comments*, filed on January 15, 2013.

4. The Administrative Law Judge is directed to schedule hearings regarding the disputed factual issues regarding whether other PG&E employees and officers beyond Devereaux were involved.

5. [Delete item 5]