

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND  
ELECTRIC COMPANY (U-39-E) for  
Authority to Increase Revenue  
Requirements to Recover the Costs to  
Upgrade its SmartMeter™ Program

Application No. 07-12-009  
(Filed December 12, 2007)

**OPENING COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO  
ON THE PROPOSED DECISION DENYING THE PETITION TO MODIFY  
DECISION 09-03-026**

**I. INTRODUCTION**

Pursuant to Commission Rule of Practice and Procedure (“Rule”) 14.3, the City and County of San Francisco (the “City”) submits these opening comments on the proposed decision of Administrative Law Judge Sullivan denying the City’s petition to modify Commission Decision (“D.”) 09-03-26 (the “PD”).

The Commission should modify the PD as follows:

- Find that the City supported its Petition with sufficient material new facts to justify a temporary suspension of PG&E’s SmartMeter installation pending the issuance of the Structure Report.
- Find that the Petition conforms to Rule 16.4.
- Continue to hold this proceeding open to allow parties to comment on the findings contained in the Structure Report and concerns over RF emissions.

**II. SUMMARY OF COMMENTS ON THE PROPOSED DECISION**

The PD would dismiss the Petition because “neither CCSF nor any other party has identified material new facts that would support suspension of the SmartMeter program,

and because issues concerning customer service and program costs have other procedural homes.” (PD at 13). This result would constitute both legal error and bad public policy.

First, by asserting that the City did not submit any new material facts to support the suspension of the SmartMeter program, the PD ignores the Petition’s references to media reports showing the public outcry over PG&E’s SmartMeter installation. In addition, this conclusion also ignores the City’s references to PG&E’s own reports demonstrating that SmartMeters were: (1) being installed incorrectly; (2) having data storage issues; (3) experiencing wireless transmission problems; or (4) having poor read performance.<sup>1</sup> Not only does the PD appear to apply an overly technical and unprecedented reading of Rule 16.4, it ignores the fact that the City supported its Petition with officially noticeable documents that PG&E had filed with the Commission. These reports establish sufficient cause for the Commission to have examined the issue of whether a temporary suspension was justified at the time the City filed its Petition.

Second, the PD asserts that any issues related to customer concerns and installation costs “already have procedural homes.” (PD at p. 2). The PD, however, ignores the fact that the Commission has not examined the Structure Report and that this proceeding offers the Commission the perfect “procedural home” to conduct such an examination. The Structure Report findings and conclusions have no evidentiary value absent such an examination by the Commission.

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<sup>1</sup> See Application 07-12-009, *City and County of San Francisco’s Petition to Modify Decision 09-3-26 to Temporarily Suspend Pacific Gas & Electric Company’s Installation of SmartMeters*, at pp. 5-7.

### III. DISCUSSION

#### A. **The PD Would Improperly Deny the City's Petition on Overly Technical Grounds in Light of the Nature of the Information the City Used to Support the Petition**

Commission Rule 16.4(b) provides that in a petition for modification “[a]ny factual allegations must be supported with specific citations to the record in the proceeding or matters that may be officially noticed.” Rule 16.4(b) further states that “[a]llegations of new or changed facts must be supported by an appropriate declaration or affidavit.” For a number of reasons, the Commission should find that the City has complied with Rule 16.4.

First, the Petition provided new facts that were not available to the Commission at the time it issued D. 09-03-026. The Petition contains numerous references to reports PG&E filed with the Commission detailing the status of the SmartMeter deployment, and with newspaper reports discussing PG&E's reports and local concerns over PG&E's deployment.<sup>2</sup> While PG&E had been filing these reports for months, it wasn't until May 2010 that the Commission ordered PG&E to make these reports public.<sup>3</sup> Prior to then, the City had nothing but anecdotal evidence concerning the extent of PG&E's problems with its SmartMeter deployment. Once the reports were available, the City was able to substantiate the factual basis for its Petition with citations to the reports. These are new facts that only became available when the Commission ordered PG&E to release them to the public.

Second, to the extent the PD finds that the City failed to satisfy the declaration or affidavit requirement, the PD applies an overly narrow reading of Rule 16.4.<sup>4</sup> Most of the

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<sup>2</sup> The City incorporates by reference the facts cited in its Petition.

<sup>3</sup> Application 06-06-028, *Assigned Commissioner's Ruling Reopening Proceeding, Requiring that Reports be Filed in this Proceeding, and Order Pacific Gas and Electric Company to Release Prior Reports and Future Reports to the Public* (issued May 4, 2010).

<sup>4</sup> The City could not have attested to the truth of PG&E's reports. At best, the City could have provided a declaration showing that PG&E had filed reports with the Commission.

documents referred to in the Petition may be officially noticed by the Commission.<sup>5</sup>

Whether or not there are problems in addition to those admitted in PG&E's reports, it is reasonable to assume the problems actually admitted are not subject to dispute. For this reason, the Commission should take official notice of the facts contained in PG&E's reports cited by the Petition.

Third, the Commission should consider the purpose of Rule 16.4(b), which is to prevent parties from filing petitions to modify based on unsubstantiated facts. Here, the City based its Petition on facts from PG&E's own reports, which the City has shown are subject to the Commission's official notice. For this reason too, the Commission should find that the City complied with Rule 16.4(b).

Finally, if the Commission or the ALJ thought that the City had not complied with Rule 16.4, it should have identified that failing and allowed the City to correct it. To raise this issue for the first time and use it to reject the City's petition is inconsistent with the Commission's rules and with basic notions of fairness. Even if the City failed to comply with the technicalities of the rule, the Commission will waive strict compliance with Rule 16.4 where issues of "significant importance" are at stake.<sup>6</sup> This is consistent with the maxim of jurisprudence that "the law respects form less than substance."<sup>7</sup>

Here, the City and other parties to this proceeding have raised significant issues related to: (1) the reliability of PG&E's SmartMeter installation; (2) the likelihood that

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<sup>5</sup> See Commission Rule 13.9 ("Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq."). See also Evidence Code § 452(h) (Court make take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonable indisputable accuracy.").

<sup>6</sup> Rulemaking 06-02-012, *Proposed Decision Modifying Decision 10-03-021 Authorizing Use of Renewable Energy Credits for Compliance with Renewable Portfolio Standard and Lifting Stay and Moratorium Imposed by Decision 10-06-018*, at p. 6, n. 3 (issued October 28, 2010).

<sup>7</sup> Civil Code § 3528.

SmartMeters will deliver the proposed consumer benefits; (3) whether PG&E had been prudent with ratepayer funds; and (4) questions of public safety. It is legal error for the Commission to reject the City's petition based on the City's purported noncompliance with Rule 16.4.

**B. The Commission Should Use this Proceeding To Review the Structure Group Report.**

The PD would dismiss the City's Petition because the issues raised by the City are being considered by the Commission in other proceedings. As the PD notes, "[o]utstanding issues concerning projected SmartMeter costs are the subject of a pending settlement agreement" filed in PG&E's General Rate Case. (PD at p. 1.) The PD, however, ignores the fact that the Commission lacks any "procedural home" to conduct a thorough examination of the Structure Report.

The Commission retained the Structure Group to "conduct an independent evaluation" of PG&E's SmartMeter deployment in response to concerns from consumers and members of the California State Assembly.<sup>8</sup> The Structure Report is useful in that it identifies issues and provides potential explanations for PG&E's deployment problems. The issuance of the Structure Report, however, should not end the Commission's inquiry into PG&E's SmartMeter deployment. Instead, it should be a new beginning. The Commission cannot reasonably rely on the findings in the Structure Report, or satisfy the public's concerns over the deployment of SmartMeters, unless it reviews and provides the opportunity for others to review and comment on the report.<sup>9</sup>

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<sup>8</sup> See CPUC press release dated March 30, 2010 entitled *CPUC Selects Independent Evaluator for PG&E Smart Meters*.

<sup>9</sup> In its comments on the Administrative Law Judge's ruling denying the City's motion for expedited hearing, the Division of Ratepayer Advocates similarly recommended that the Commission use this proceeding to examine whether: (1) to adopt the findings in the Structure Report; (2) the Structure Report satisfactorily answers the concerns that PG&E customers, local governments, and other groups have raised about the project; (3) PG&E has satisfactorily addressed all problems that have been specifically identified by PG&E

Indeed, the Commission does not typically accept the findings presented in a report by any party – whether that party is a utility, a customer, an independent consultant, or even Commission staff – without first reviewing the report to determine what weight it should be given. This has been the Commission’s practice under many similar circumstances. When the Commission sought to audit the utilities’ energy efficiency efforts, it directed the Energy Division to prepare a report evaluating the efficacy of the programs. The Energy Division issued a report in mid-April 2010, which questioned the cost-effectiveness of the energy efficiency programs. The Commission published the report in early May 2010 and solicited comments on the report from the parties to the energy efficiency rulemaking.<sup>10</sup>

In their comments, interested parties either contested or supported the assumptions and methodologies used in the Energy Division’s scenario analysis. Based on these comments, the Commission sought further clarification and ordered the utilities to produce additional data supporting their arguments.<sup>11</sup> The Commission has yet to vote on a final decision, as there are three decisions pending: the ALJ’s proposed decision finding that no further incentive payments are warranted, Commissioner Bohn’s alternate decision awarding \$77.3 million in incentive payments, and President Peevey’s alternate awarding \$62.7 million in incentive payments. Clearly, each proposed decision assigns a different evidentiary weight to the Energy Division’s report, a fact that demonstrates that different conclusions may be reached from the same report.

When PG&E sought to recover sunk costs associated with its Diablo Canyon facility, the Commission required an independent accounting firm to perform a financial

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or by the Structure Report; and (4) the Commission needs to take further action to address any remaining problems.

<sup>10</sup> Rulemaking 09-01-019, *Assigned Commissioner’s Ruling Providing Energy Division Report and Soliciting Comments on Scenario Runs*, at p. 2 (issued May 4, 2010).

<sup>11</sup> Rulemaking 09-01-019, *Administrative Law Judge’s Ruling Directing Production of Supporting Data*, at p. 3 (issued July 6, 2010).

verification audit of Diablo Canyon’s plant accounts in order to ensure that the net book value amounts were independently established.<sup>12</sup> Before the Commission accepted the results of the independent audit, the Commission required the audit to be served on all parties to the proceeding, and ensured that the parties had an opportunity to respond to the audit report.<sup>13</sup>

In the realm of resource adequacy requirements, before the Commission adopted the Load Capacity Requirements (“LCR”) for load serving entities for 2007, the Commission provided interested parties with an extensive opportunity to review and comment on the California Independent System Operator’s LCR report.<sup>14</sup> The Commission ultimately relied on much of the report, but did so subject to conditions and specified changes to the methodology for future years. In these instances, and many others, the Commission recognized that it would benefit from having parties comment on a report before the Commission determined how to use the findings contained in that report.

The Structure Group report is lengthy, convoluted and far from a ringing endorsement of PG&E’s SmartMeter deployment. As it has in the past, the Commission should provide opportunity for parties to comment on the Structure Report as part of its determination of how to use the report. This proceeding is the appropriate “procedural home” for such review.

There is another reason to keep this proceeding open. Since the City filed its Petition and the Structure Report was issued other parties have filed new proceedings with

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<sup>12</sup> Application 96-03-054, Decision 00-09-008, at p. 2. *Application to Modify Diablo Canyon Pricing and Adopt a Customer Electric Rate Freeze in Compliance with D. 95-12-063* (issued September 7, 2000).

<sup>13</sup> *Id.*

<sup>14</sup> See Rulemaking 05-12-013, D. 06-06-064, *Opinion on Local Resource Adequacy Requirements*, at pp. 2-3, 8, 13-14 (issued June 30, 2006).

the Commission related to concerns over radio frequency emissions from SmartMeters.<sup>15</sup> While the Structure Group did not independently examine this issue, it included in its report a “summary” of PG&E’s position regarding the issue.<sup>16</sup> The California Legislature is concerned enough about this issue to have requested a report from the California Council on Science and Technology, a draft of which is expected in mid-December.<sup>17</sup> Furthermore, PG&E is considering alternatives to SmartMeters for certain of its customers, which could include allowing certain customers to opt out of the program.<sup>18</sup>

For these reasons, rather than denying the City’s Petition the Commission should use this proceeding to consider the Structure Report and other issues concerning SmartMeters that presently have no “procedural home.”

**C. The Commission Should Correct a Typographical Error**

The PD states that “On June 17, 2010, Pacific Gas and Electric Company’s (PG&E) petition to modify Decision (D.) 09-03-026 reopened this proceeding.” Clearly, PG&E did not file the petition for modification challenging its own SmartMeter rollout. The Commission should correct this error to reflect the fact that the City filed its Petition and motion for expedited treatment nearly six months ago.

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<sup>15</sup> Application 10-04-018, *Application of EMF Safety Network for Modification of D.06-07-027 and D.09-03-026*; and Application 10-09-012, *Application of Californians for Renewable Energy to Modify Decision 06-07-027*. On December 2, 2010, the Commission voted to dismiss Application 10-04-018.

<sup>16</sup> See Structure Report at p. 47.

<sup>17</sup> See <http://www.ccst.us/newsletter/2010/2010nov2.php>.

<sup>18</sup> See Baker, *PG&E considers SmartMeter Compromise*, San Francisco Chronicle (November 22, 2010).



**IV. CONCLUSION**

The Commission should reject aspects of the PD denying the City's Petition to Modify Decision 09-03-026. Instead, the Commission should keep this proceeding open to fully examine in a public forum the conclusions and recommendations contained in the Structure Group report and other issues that have arisen concerning SmartMeters.

Dated: December 6, 2010

Respectfully submitted,

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## PROPOSED CHANGES TO THE DECISION

### Findings of Fact

1. *The City and County of San Francisco's Petition to Modify Decision 09-03-026 to Temporarily Suspend Pacific Gas and Electric Company's Installation of SmartMeters* (Petition) ~~ne~~ established sufficient new material facts to support its request for suspension of the SmartMeter installation program pending the issuance of the Structure Report.

2. PG&E's General Rate Case, A.09-12-020, is addressing the costs incurred by PG&E in PG&E's SmartMeter Program.

3. General Rate Cases typically address customer service issues.

4. No pending Commission proceeding is available to enable the general public to express its concerns over the Structure Report and for the Commission to examine the Structure Reports' findings and conclusions.

5. In the past the Commission has allowed parties to comment on findings contained in independent reports before the Commission adopts those findings.

6. The Legislature asked the California Council on Science and Technology to provide an assessment on whether Federal Communications Commission standards for radio frequency emissions, as applied to SmartMeters, are sufficiently protective of public health, and whether technology specific standards are needed to ensure adequate protection from adverse health effects.

7. The California Council on Science and Technology expects to release this report sometime in December 2010.

### Conclusions of Law

1. The Petition ~~should be denied since no~~ contains new facts that justify could have justified modification of D.09-03-026 pending the issuance of the Structure Report.

2. The Petition ~~fails to conform~~ conforms to Rule 16.4(b) of the Commission's Rules of Practice and Procedure because the PG&E reports the City cites in the Petition are subject to the Commission's official notice.

3. D.09-03-026 deferred cost issues associated with PG&E's SmartMeter installation program to PG&E's General Rate Case.

4. The Commission can use this proceeding to examine the Structure Report and other concerns that have been raised concerning PG&E's SmartMeter deployment, including concerns over radio frequency emissions.

5. There is good cause to keep this matter open to allow interested parties to comment on the Structure Report and to address their concerns about radio frequency emissions.

## ORDER

### IT IS ORDERED that:

1. In light of the issuance of the Structure Report, the *The City and County of San Francisco's Petition to Modify Decision 09-03-026 to Temporarily Suspend Pacific Gas and Electric Company's Installation of SmartMeters* is ~~denied~~ shall remain open for the Commission to examine the Structure Report and other matters related to PG&E's SmartMeter deployment, including concerns over radio frequency emissions.

2. Application 07-12-009 is closed. After the Commission's examination is completed, the Commission will determine whether any further Commission action is required.

3. Parties may file comments on the Structure Report and other matters related to PG&E's SmartMeter deployment within 90 days of this order.

**CERTIFICATE OF SERVICE**

I, **KIANA V. DAVIS**, declare that:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is City Attorney's Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102; telephone (415) 554-4698.

On December 6, 2010, I served **OPENING COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO ON THE PROPOSED DECISION DENYING THE PETITION TO MODIFY DECISION 09-03-026** by electronic mail on the CPUC Service List, Proceeding No. A.07-12-009.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 6, 2010, at San Francisco, California.

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/S/  
**KIANA V. DAVIS**