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)

APPLICATION FOR REHEARING OF DECISION 12-02-014

CAlifornians for Renewable Energy, Inc. (CARE) requests rehearing of Decision (D.) 12-02-014 ("Decision") that was issued on February 9, 2012. CARE was a party to the proceeding and so is eligible to file a rehearing request pursuant to Rule 16.1[1] of the California Public Utilities Commission's ("Commission")'s Rules of Practice and Procedure. This request is timely because the decision was issued on February 9, 2012.

[1] 16.1. (Rule 16.1) Application for Rehearing

(a) Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c). An original plus four exact copies shall be tendered to the Commission for filing.

(b) Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the application is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

(c) Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.

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Introduction

According to Decision 12-02-014, issued February 9, 2012, purportedly "[t]his *decision modifies Pacific Gas and Electric Company's (PG&E)'s SmartMeter Program to include an option for residential customers who do not wish to have a wireless SmartMeter installed at their location. The opt-out option shall be an analog electric and/or gas meter*…This new opt-out option is a service that we are adopting with this decision. This opt-out option is a service because *the standard for metering has been transitioned* throughout the country and for the most part the world *from* the older technology, *analog meters, to today's technology, [wireless] SmartMeters*. In this decision *we are not reversing that transition*, however, we do approve an option for those customers who, for whatever reason, would prefer an analog meter. This option to *move away from the standard* will require PG&E to incur costs such as purchasing a new meter, *going back to the customer location to install and service the meter, and monthly cost of reading the meter*. These are some of the examples of the *additional costs required to opt-out of the standard wireless SmartMeters*. As a result, this decision further finds that customers electing the opt-option shall be responsible for costs associated with providing the option…."

CARE is informed and believes, and based thereon alleges, that CPUC, its Commissioners individually and collectively, including President Peevey, Commissioner Simon, and Pacific Gas and Electric Company (PG&E), routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC, positions under PG&E's *Application of Pacific Gas and Electric Company for Approval of Modifications to its SmartMeter™ Program and Increased Revenue Requirements to*

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Recover the Costs of the Modifications (U39M) purportedly regarding implementations of the CPUC and FCC regulations thereto, including FCC regulations which clearly are at variance with them, but which are intended to enable PG&E to take actions to induce CPUC to issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce local ordinances standards and regulations (LORS), requirements under the California Environmental Quality Act (CEQA), and the National Environmental Policy Act (NEPA) as well as CPUC and FCC regulations, and in fact violate LORS.

Summary

The Decision 12-02-014 is based on the Commission's post hoc rationalization of the deployment of millions of Smart Meters in what it characterized, in which without any prior authorization by PG&E's customers, "the standard for metering has been transitioned throughout the country and for the most part the world from the older technology, analog meters, to today's technology, [wireless] SmartMeters," without first conducting any sort of risk assessment of the meter to determine if the wireless meters being deployed are even Underwriter Laboratory ("UL") compliant for device safety standards required under most state and municipal building codes, and local municipal franchising agreements, nor has any agency conducted the prerequisite environmental review under requirements under the California Environmental Quality Act (CEQA), and/or the National Environmental Policies Act (NEPA), nor has the Commission provided proper notice to the utility's customer of this mandatory untested [wireless] SmartMeters standard's deployment until after the program is nearly fully deployed.

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Put in simple legal terms this deployment of [wireless] SmartMeters is violation of utility customers' federal civil rights under color of state law [specifically 42 U.S.C. 1983]. Since this proceeding is a ratemaking preceding this makes individual Commissioners individually and personally liable for their decision; continuing the post hoc rationalization of the deployment of millions of wireless Smart Meters; without customers' written consent first, and in the case of any physical harm to the health and safety of the public and PG&E's customers; those voting Commissioners should be held liable in a court of law.

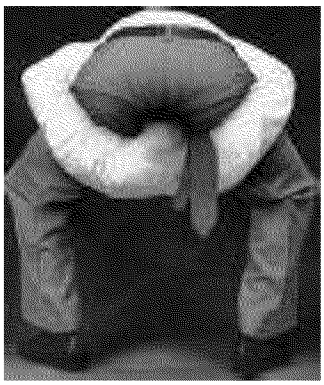

Figure 1 "your problem is obvious"[2]

Specific grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous

The Decision 12-02-014 is based on the Commission's post hoc rationalization of the deployment of millions of Smart Meters. The specific grounds are as follows.

1. Errors of facts and Errors of law

2. Procedural Errors/Outstanding Motions

1. Errors of facts and Errors of law

[2] Protected speech under the First Amendment, Bill of Rights, US Constitution

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A. Wireless Smart Meter Op-In option not provided in violation of the First Amendment CEQA and NEPA alternatives requirements

Generally section 2 Background is incomplete and provides misleading or incorrect facts that make the purported factual basis for support of said Decision improper; besides the clear pre-commitment of President Peevey for the deployment of millions of Smart Meters without customers' consent or providing proper notice of the change in standards to a wireless device of analog, which is the status quo CARE seeks to preserve.

> PG&E's application was filed in response to a directive by Commissioner Peevey to submit a proposal that would allow some form of opt-out for PG&E customers who did not wish to have a SmartMeter with radio frequency (RF) transmission. This is referred to in this proceeding as "opting out." [Decision at page 3]

CARE's understanding is that under federal and state law wireless Smart Meters are voluntary, not mandatory, as the Decision presupposes. CARE raised this issue at the first prehearing conference held on May 6, 2011 where the transcript states "Mr. Boyd. MR. BOYD: I did want to mention that we do have an alternative proposal to their opt-out. And what our proposal is is what I call an opt-in, which is; [you] don't get a Smart Meter unless you opt in. Thank you."[May 6, 2011 PHC RT at P 38 lines 1 to 7]

Under the requirements of both CEQA and NEPA the Commission, in adopting new standards under individual permit applications [the "project" under CEQA or "proposed action" under NEPA] must consider a reasonable range of alternatives, including what NEPA calls the "no-action" alternative. In specifically authorizing PG&E's wireless Smart Meter deployment without such alternatives analysis the Commission violated both state and federal environmental review laws which foreclosed

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and silenced the public's [including PG&E's customers'] First Amendment rights as was stated by CARE's representative at the May 6, 2011 PHC.

> MR. BOYD: My name is Mike Boyd, and I'm the President of Californians for Renewable Energy, Inc., CARE, and I'd like to file an appearance today. CARE already has a application for modification on the original SmartMeter proceeding that was opened in 2006. The original SmartMeter proceeding involved a wired SmartMeter, which they got away from and went to the wireless SmartMeter. CARE wasn't against the original SmartMeter because it was wired, because we looked at the concerns with -- there weren't the same concerns with EMF and such because you have a shielded cable to protect you from the radiation. Now, in fact, what happened is they changed over to the wireless meter, but they never let us know that they'd opened a new proceeding. Sort of like this. I didn't know about this until I got here today on the San Bruno workshop, and then when I heard about this, I came over here. The issue, our issue is that in the original SmartMeter proceeding they didn't do a CEQA analysis. They didn't do a risk assessment. They didn't perform any of the normal environmental review processes that would have provided the public an opportunity to come and give input on the project, in this case the installation of all these SmartMeters. And as a result, we have what we have today where people don't – because they didn't do the original analysis, we don't know really the harm or if there is harm. There's a lot of speculation involved. Essentially, what the petition for modification we filed was because we're concerned about the safety of the SmartMeter. The SmartMeter itself does not have a UL Mark on it. It's not safety tested. I contacted Underwriter Laboratory to find out who has the jurisdictional authority over the --whether or not the meter has a UL Mark. I was told by the UL engineer that that's an issue for the building inspector. The City and County Building Inspector have jurisdiction under the building codes to tag any meter, any device that does not have a UL Mark on it. So the

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jurisdiction is in the hands of the local government to enforce the building codes, not the PUC. So that's one of the issues that I would like to see in the scope of this proceeding is who has what jurisdiction. I don't believe that the PUC has jurisdiction over the safety of the meter. The meters have had problems safety-wise. We've had blowing up, catching fire. I have a theory that the San Bruno pipeline explosion fire could have been started by SmartMeters. So the fact of the matter is when you don't have a UL tested component installed in your home or your business, there's a risk, and the reason you go to UL is for insurance purposes. Okay. You can't insure something that doesn't have a UL Mark on it. So the bottom line is PUC doesn't have the jurisdiction over this. Now, what PUC does have jurisdiction over is the EMF issue, the RFR. The reason I know that is because I went to FCC and filed a complaint against PG&E's SmartMeter. And they sent me a letter which is on line in our application for modification, A.10-09-012. In there you will see that they specifically say that the PUC has jurisdiction over the RFR EMF issue. That being the case, I believe that should be rightfully in this proceeding within the scope of this proceeding because it wasn't examined back in the original smart grid, SmartMeter proceeding, and the reason we were told that they weren't going to address it is because the FCC had jurisdiction. Now we know that FCC doesn't have jurisdiction but PUC does. We think the PUC needs to look at that. Now, finally, the last thing is, PG&E is operating an unlicensed transmitter. Okay. They're operating as a wireless network that is unlicensed. Again, this isn't something the FCC regulates. This is something the PUC regulates. All they have to do is file their application for a Certificate of Public Convenience and Necessity with the PUC to get their license to operate their wireless network. They haven't done that and none of the other utilities have done that. They're operating an unlicensed transmitter. So these are issues that need to be examined and should be done in a evidentiary hearing process where my group and other groups can bring in their experts where we can bring a UL engineer in to testify over

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the requirements for building codes and such when it comes to SmartMeters. So that's my issues. That's the scope. And I look forward to a thorough analysis by the Commission. And I hope out of this comes a process where the Commission and the local government agencies know who's got what authority, and then they can go forward on their own without interfering with each other. Thank you. [May 6, 2011 PHC RT at P 30 lines 19 to page 34 line 24]

CARE and Mr. Boyd allege that subsequent actions including voting on February 1, 2012 on D.12-02-014 was taken by the Commission in retaliation for CARE and Mr. Boyd engaging in this protected speech under the First Amendment; actions that where taken by CPUC, and its individual Commissioners, in retaliation for CARE and Mr. Boyd engaging in protected speech. [See Figure 1]

B. Decision violates Proposition 26 and Section 3 of Article XIII A of the State Constitution

In PG&E's Application according to the Decision at page 7 it states "PG&E estimates the costs to implement the radio off option to be $113.4 million for the years 2012 and 2013, assuming 148,500 customers will elect to opt out.[3] It proposes that these costs be recovered from those customers choosing to opt-out of a wireless SmartMeter through the assessment of an up-front fee covering all or a portion of PG&E's immediate costs of implementing the opt-out option, monthly fees covering ongoing monthly expenses and an "exit fee" upon termination of participation in the opt-out option."

This so-called "costs to implement the radio off option" is in direct violation of the November 2010 voter approved *Requires that Certain State and Local Fees Be Approved by Two-Thirds Vote Fees Include Those That Address Adverse Impacts on*

[3] PG&E Testimony at 3-2.

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Society or the Environment Caused by the Fee-Payer's Business Initiative Constitutional Amendment [AKA Proposition 26]. Proposition 26 amended parts of the state's constitution; Section 3 of Article XIII A "Section 3:(a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature,….(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits,… and the administrative enforcement and adjudication thereof. " CARE alleges the Decision in this ratemaking proceeding constitutes an actionable license and permit to PG&E to deploy millions of wireless Smart Meters without customers' written consent first and then to charge a fee to remove them in violation of Prop 26. [See Figure 1]

C. Decision provides false and misleading information over who has regulatory authority over how many times in total (average and maximum) an electric SmartMeter transmits during a 24-hour period visa vi FCC regulations

A specific example of the Decision creating a false "controversy" purportedly regarding implementations of the CPUC and FCC regulations thereto, including FCC regulations which clearly are at variance with them, but which are intended to enable PG&E to take actions to induce CPUC to issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture as shown in the Decision at page 12 to 13.

> "One of the more controversial disputes raised during the September 14 workshop was how many times in total (average and maximum) an electric SmartMeter transmits during a 24-hour period.…PG&E also includes in its November 1st response the FCC's response to a request for

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the FCC to step in and ask for the removal of SmartMeters. The FCC said:

> The exposure limits were developed to ensure that FCC regulated transmitters do not expose the public or workers to levels of RF energy that are considered by expert organizations to be potentially harmful…
>
> In the case of SmartMeters, the FCC has no data or report to suggest that exposure is occurring at levels of RF energy that exceed our RF exposure guidelines.[4]"

First the FCC letter alluded to in PG&E's November 1st response; whose date is conveniently excluded from the Decision; is August 6, 2010. On September 20, 2010 we filed the [Application 10-09-012] of CAlifornians for Renewable Energy, Inc. (CARE) to modify Decision 06-07-027.

Decision (D.) 06-07-027 authorized Pacific Gas and Electric Company (PG&E) to deploy an Advanced Metering Infrastructure (AMI). Purportedly the Commission adopted a modified revenue requirement and guaranteed ratepayer benefits. The ratemaking mechanisms was purportedly to be in place at least until PG&E's next general rate case which was expected to occur for test-year 2010 or later. The Commission also adopted PG&E's rate proposal for critical peak pricing tariffs.

According to CARE's Application[5] the PG&E Smart Meters deployed may have sparked the fire in the San Bruno neighborhood where PG&E's gas transmission pipeline exploded on September 9, 2010, killing eight.

> On September 15, 2010 CARE filed a Complaint[6] with Federal Communications Commission [FCC] stating "I wish to file a complaint

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[4] PG&E's Response to ALJ's October 18 Ruling, filed November 1, 2011 (Attachment B).

[5] *See* http://docs.cpuc.ca.gov/efile/A/123808.pdf at P 3 to 4.

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against Pacific Gas and Electric Company (PG&E) and the California Public Utilities Commission (CPUC) for allowing PG&E to install 5.5 million SmartMeters in its California territories that do not meet FCC regulations 47CFR15.5 b)"*Operation of an intentional, unintentional, or incidental radiator is subject to the conditions that no harmful interference is caused* and that interference must be accepted that may be caused by the operation of an authorized radio station, by another intentional or unintentional radiator, by industrial, scientific and medical (ISM) equipment, or by an incidental radiator". 1,378 electric SmartMeter complaints have been filed with the CPUC without any actions to stop and on September 9, 2010 a PG&E gas line ruptured and a towering fireball roared through a San Bruno neighborhood, killing four people, and officials have yet to determine what led to a blast. I allege EMF from PG&E's SmartMeters created the ignition source." CARE is seeking the FCC to pursuant to 47CFR15.5 c) "The operator of a radio frequency device shall be required to cease operating the device upon notification by a [FCC] representative that the device is causing harmful interference. Operation shall not resume until the condition causing the harmful interference has been corrected."…This Petition seeks therefore that D.06-07-027 be Modify to Order PG&E to stay further deployment of PG&E SmartMeters until PG&E provides the Commission evidence of compliance with FCC regulation 47CFR15.5 b).

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[6] Filling for: Michael Boyd has been received by the FCC. Thanks for your information. When inquiring about your complaint, be sure to reference this number: 10-C00246969 and, be sure to mention that you filed this complaint over the internet.
Use this page as a Fax Cover Sheet when faxing additional details to the FCC.
Fax Number (866) 418-0232
Date: 09/15/2010
To: Federal Communications Commission
Total Number of Pages: _____
Subject: 10-C00246969(Form 2000 Filed Via The Internet)
Address: 5439 Soquel Dr
Soquel CA 95073
Carrier/Company Name(s): CAlifornians for Renewable Energy, Inc. (CARE)

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In response to CARE's FCC complaint on October 20, 2010 the FCC replied that CPUC[7]; not FCC; had jurisdiction over PG&E's wireless Smart Meters. [See figure 2]

Federal Communications Commission
Consumer & Governmental Affairs Bureau
Consumer Inquiries and Complaints Division
445 12th Street, SW., Room 5-A847
Washington, DC 20554

Date:10/20/2010

MICHAEL BOYD
5439 SOQUEL DR
SOQUEL, CA 95073

Dear Consumer:

Re: Complaint # **10-C00246969-1**

This letter is in response to your complaint filed with the Federal Communications Commission (FCC). The matter you have outlined in your correspondence does not come under the jurisdictior of the FCC. Included below is contact information for an agency that may be of more assistance.

For your convenience, a copy of your complaint information has been attached for your records. Please note that if your complaint was transferred to a different form, other than the one on which i was originally captured, copies of both forms will be attached. Please use the complaint number referenced above in lieu of any previously provided complaint number.

If you have further questions please feel free to visit the Consumer & Governmental Affairs Bureau (CGB) website at www.fcc.gov/cgb or call us at 1-888-CALL-FCC (1-888-225-5322) voice; 1-888-TELL-FCC (1-888-835-5322) TTY.

Contact Information:
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102 - 3298
Phone:(800) 649 - 7570
Fax: (415) 703 - 1158

Sincerely,

Sharon C. Bowers, Acting Division Chief
Consumer Inquiries & Complaints Division
Consumer & Governmental Affairs Bureau

Figure 2

[7] http://docs.cpuc.ca.gov/efile/REP/126055.pdf

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D. Decision provides false and misleading information over harm due to exposure to an Instantaneous Peak Level (Effective Isotropic Radiated Power)"; "2500 mW", or 2.5 Watts irradiance at 20 cm distance

Another example of the Decision creating a false "controversy" without actual scientifically supporting facts purportedly regarding implementations of the CPUC and FCC regulations thereto, including FCC regulations which clearly are at variance with them, but which are intended to enable PG&E to take actions to induce CPUC to issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture as shown in the Decision at page 14 to 15.

> Another issue that was the topic of intense discussion during the workshop was whether the SmartMeter was a 1-watt powered meter, as represented by PG&E, or actually two or more watts, as represented by EON. PG&E's response indicates that its electric SmartMeters are rated to transmit at one watt. However, *PG&E also states the meter's instantaneous peak level in terms of "effective isotropic radiated power" (EIRP) is 2.5 watts based on the SmartMeters' 4.0 dBμ antenna gain.*[8] *This is similar to saying that a flashlight with a 1 watt bulb that focuses the light output in one direction appears as bright as a 2.5 watt bulb without the help of the flashlight's focusing capability.* Therefore, *while it is true that the EIRP from the SmartMeter is 2.5 watts, this level of emissions is below the FCC allowable RF emissions.*[9]. The Commission has also received a number of questions regarding whether there is RF emission when the meter is not transmitting. …. PG&E acknowledges that the analog meters emit no RF. However, this fact alone does not lead to the conclusion that the analog meter opt-out option should be

[8] PG&E's Response to ALJ's October 18 Ruling, filed November 1, 2011 at 10 (Table 6-1).

[9] 47 C.F.R. § 15.247(c)(3) & (4).

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selected. As noted in Table 1 above, the RF emissions for SmartMeters with the radio off and a digital meter with no radio installed are below the FCC allowable RF emissions.

The Decision further makes several unsupported statements of fact at page 16 "Further, we determined in Decision (D.) 10-12-001 that PG&E's SmartMeter technology complies with FCC requirements…More importantly, the alleged effect of RF emissions on health is not material to the resolution of this application. Eligibility to opt out of receiving a wireless SmartMeter is not predicated on whether the meter has affected the customer's health."

On November 2, 2011 CARE filed its request for "procedural relief from Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE) exposing their customers to harmful wireless radiation and provide for remedial measures to immediately remove wireless Smart Meters as requested by customers or that are co-located and replace them with analog meters instead."

CARE addressed the Commissioners' unqualified[10] findings of the facts in this regard providing supporting publicly available independent scientific analysis in support of CARE's position [which the Commission knowingly and willfully ignored] that an exposure to an **Instantaneous Peak Level (Effective Isotropic Radiated Power)"; "2500 mW", or** 2.5 Watts irradiance at 20 cm **distance** is quantifiably harmful to mammalian brain cells. [CARE request at page 5 to 9]

On November 1, 2011 PG&E filed its response to the October 18, 2011, Administrative Law Judge's Ruling Seeking Clarification; wherein PG&E

[10] Unqualified because the individual Commissioners lack expertise in the subject matter.

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stated in response to the ALJ's question 6 [11] *What is the amount of RF emission at the source when a meter is transmitting data (instantaneous maximum peak level, averaged over 30 minutes)?* PG&E provided Table 6.1 [at page 10] which lists for " **Electric** 900 MHz"; "Instantaneous Peak Level (Effective Isotropic Radiated Power)"; "2500 mW", or **2.5 Watts irradiance at 20 cm** distance.[12] The response to question 1 stated [at footnote 3 page 3] "PG&E's electric SmartMeters™ have two radios installed: 1) a radio that utilizes the licensed *902-928 megahertz (MHz) band* for connection to the PG&E back office, and 2) a 2.4 gigahertz (GHz) radio to transmit to devices in the customer premises. The transmissions measured and addressed in this Response relate to the 900 MHz radio. *Currently, PG&E does not have any SmartMeters™ utilizing the 2.4 GHz radio*." [*Emphasis* added]

According to the January 29, 2003 article titled *Nerve Cell Damage in Mammalian Brain after Exposure to Microwaves from GSM Mobile Phones*,[13] by Leif G. Salford, Arne E. Brun, Jacob L. Eberhardt, and Lars Malmgren, Bertil R.R. Persson; reported in the Journal of the National Institute of Environmental Health Sciences; "[t]he possible risks of radio-frequent electromagnetic fields for the human body, is a growing concern for the society. We have earlier shown that weak pulsed microwaves give rise to a significant leakage of albumin through the blood-brain barrier (BBB). Now we have investigated whether a pathological leakage over the BBB might be combined with damage to the neurons. Three groups of each 8 rats were exposed for 2 hours to GSM mobile phone electromagnetic fields of different strengths. We found, and present here for the first time, highly significant ($p<0.002$) evidence for neuronal damage in both the

[11] See PG&E response at page 10
[12] *Id* footnote 5. "Average electric exposure has been calculated from duty cycles consistent with field observations at a distance of 20 centimeters. Average gas exposure has been calculated based on system specifications."
[13] *See* http://www.elektrosmognews.de/salfordjan2003.pdf Abstract at page 3.

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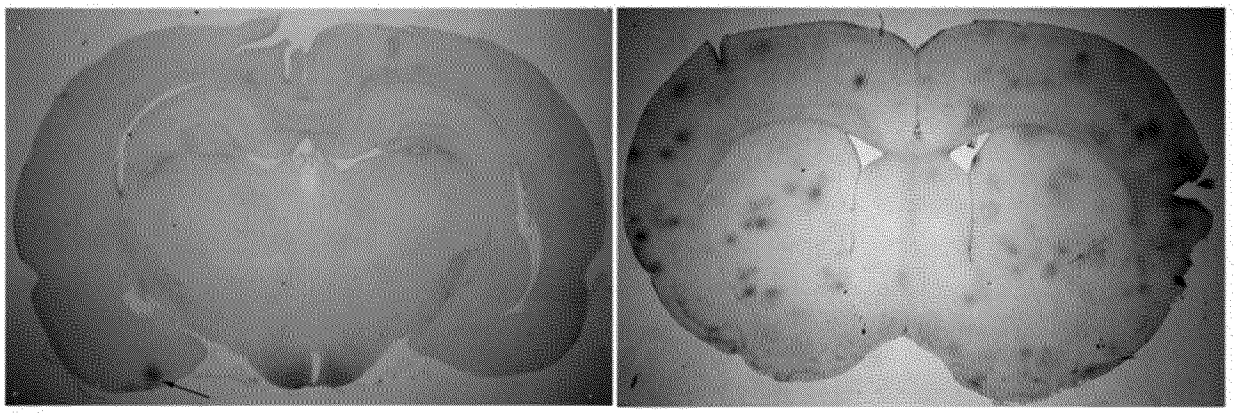
cortex, the hippocampus and the basal ganglia in the brains of exposed rats."

"Inspired by this work, our group has since 1988 *studied the effects of different intensities and modulations of 915 MHz RF* in a rat model where the exposure takes place in a TEM-cell during various time periods. In series of more than 1600 animals, we have proven that subthermal energies from both pulse-modulated and continuous RF fields – including those from real GSM mobile phones - have the potency to significantly open the BBB for the animals´ own albumin (but not fibrinogen) to pass out into the brain and to accumulate in the neurons and glial cells surrounding the capillaries (Malmgren 1998; Persson et al. 1997; Persson and Salford 1996; Salford et al.1992, 1993, 1994, 1997b, 2001) (fig 1). These results are duplicated recently in another laboratory (Töre et al. 2001). Similar results are found by others (Fritze et al. 1997)."[14]



(a) (b)

Figure 1

[15]

"Thirty-two male and female Fischer 344 rats aged 12 - 26 weeks and weighing 282 ± 91 g were divided into 4 groups of each 8 rats. The peak output power from the GSM mobile telephone fed into *two TEM-cells simultaneously for 2 hours were 10 mW, 100 mW and 1000 mW per cell,*

[14] *Id* at pages 5 to 6.
[15] *Id* at page 16.

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respectively. This exposed the rats to peak power densities of 0.24. 2.4 and 24 W/m^2, respectively. This *exposure resulted in average whole-body specific absorption rates (SAR) of 2 mW/kg, 20 mW/kg and 200 mW/kg,* respectively. For further details about exposure conditions and SAR calculations, see (Martens et al. 1993; Malmgren 1998). The fourth group of rats was simultaneously kept for 2 hours in non-activated TEM-cells. The animals were awake during the exposure and could move and turn within the exposure chamber."[16]

The scientists reported "The occurrence of dark neurons under the different exposure conditions is shown in figure 3 which shows a significant positive relation between EMF dosage (SAR) and number of dark neurons."[17]

[18]

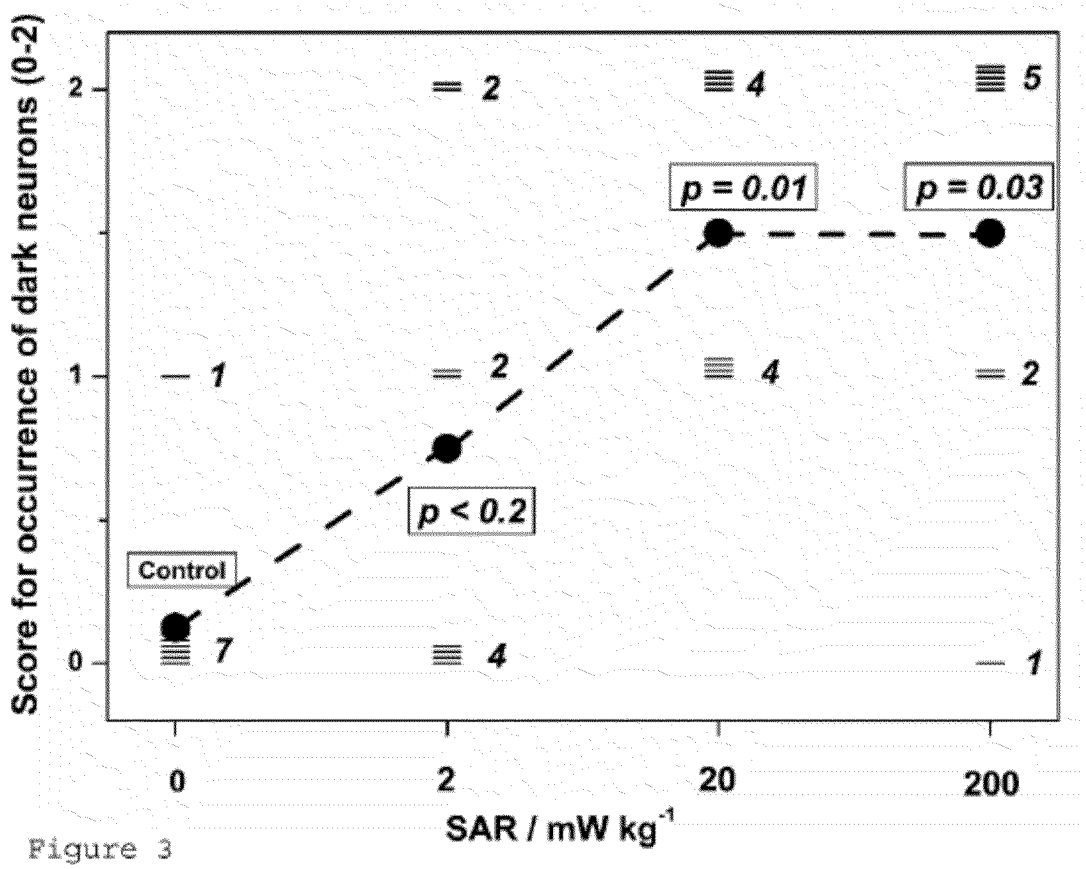

Figure 3

[16] *Id* at page 7.
[17] *Id* at page 9.

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> Therefore there exists sufficient empirical evidence to infer; since independent scientists reported a increased risk of "occurrence of dark neurons" resulting from exposure to a 100 mW microwave source or a 20 mW/kg exposure level in average whole-body specific absorption rates (SAR); therefore it is reasonable foreseeable, that for PG&E's " **Electric** 900 MHz" SmartMeters; emitting the "Instantaneous Peak Level (Effective Isotropic Radiated Power)"of "2500 mW"; or **2.5 Watts irradiance at 20 cm** distance, that this could significantly increase the risk of Nerve Cell Damage in [the] Mammalian Brain.

Therefore the Decision's findings regarding the safety of human exposure to Instantaneous Peak Level (Effective Isotropic Radiated Power)"; "2500 mW", or **2.5 Watts irradiance at 20 cm** distance is unsupported by the record in this case at best and unsupportable at worst. [See Figure 1]

E. Decision provides false and misleading information over 47 C.F.R. § 15

Another example of the Decision creating a false "controversy" purportedly regarding implementations of the CPUC and FCC regulations thereto, including FCC regulations which clearly are at variance with them, but which are intended to enable PG&E to take actions to induce CPUC to issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture as shown in the Decision specifically points to FCC regulations pertaining to the regulation of "Radio Frequency Devices" under 47 C.F.R. § 15. [Decision at page 14 footnote 276] Under this part of the FCC regulations of Smart Meters; prior to public release and deployment of the Smart Meters in PG&E's territory; the device must be certified by the FCC as a Low Power Communication Device

[18] *Id* at page 17.

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Transmitter under 47 C.F.R. § 15.[19] Additionally, the Smart Meters must comply with the technical labeling requirements regulation set forth in 47 C.F.R. § 15.19. (*Id.*) The labeling regulation requires that the device "bear the following statement in a conspicuous location on the device: This device complies with Part 15 of the FCC Rules. Operation is subject to the following two conditions: (1) This device may not cause harmful interference, and (2) this device must accept any interference received, including interference that may cause undesired operation." 47 C.F.R. § 15.19. Given this labeling requirement and the FCC's broad authority "to regulate all Radio Frequency Devices," therefore CPUC's interpretation of FCC regulations is specifically preempted. On the other hand this is not the case for local government's building codes.

F. City and County Building Inspector have jurisdiction under the building codes to tag any meter, any device that does not have a UL Mark on it

The Decision findings regarding local building inspectors authority over the deployment of wireless meters within their local jurisdiction is intentionally miss leading.

> Finally, we do not make any determination on whether to allow the opt-out option to be exercised by local entities and communities at this time. Parties advocating for a community opt-out option have not sufficiently addressed issues regarding implementation of such an option, including whether such an option is consistent with existing statutes and rules. [20]

[19] These are part Underwriter Laboratory ("UL") device safety standards testing protocols.

[20] For example, both PG&E's gas and electric rules define a "customer" as the person "in whose name service is rendered" and whose signature is on the application, contract or agreement for service. (*See* PG&E Electric Rule 1; PG&E Gas Rule 1.) The rules further state that a customer may seek relief from the Commission if it is "dissatisfied with [PG&E's] determination regarding level, charge or type of service, or refusal to provide service as requested." (*See* PG&E Electric Rule 4; PG&E Gas Rule 4.) Further development of the record is needed so that we may address whether and how a local entity or community can lawfully impact a customer's utility bill.

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> Further, as discussed below, we have determined that any residential customer electing the opt-out option will be assessed an initial fee and monthly charges. It is unknown at this time whether customers who are part of a community opt-out option should be assessed the same, or different, opt-out fees and charges. Consequently, we find that further consideration of whether to allow a community opt-out option should be included in the second phase of this proceeding. [Decision at P. 21]

For example in Santa Cruz County the County has a Franchise Agreement with PG&E, executed August 30, 1955, [*See* Ordinance 470] that fails to even include the word "wireless" as part of the words listed under the phrase "poles, wires, conduits and appurtenances". In 1996, Congress passed the Federal Telecommunications Act. PL 104-104, 110 Stat 56. The full title of the Act is "An act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunication technologies." Qwest Communications v. City of Berkeley, 433 F.3d 1253, 1255 (9th Cir. 2006) (quoting H.R.Rep. No.104-458 (1996) (Conf. Rep.)).

Section 253(a) of the Act furthers this regulatory purpose by precluding states and municipalities from passing laws that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). In order to show that a local regulation is preempted, the telecommunications provider need not show that the local regulation *actually* prohibits its ability to provide telecommunications services. Rather, it is sufficient if the regulation *may* have the effect of prohibiting the provision of services. NextG I, 2006 WL 1529990 at *4 (citing Qwest Corp. v. City of Portland, 385 F.3d 1236, 1241 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005)). The Ninth Circuit has interpreted section 253(a) as an

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express preemption of state regulation that is "'virtually absolute' in restricting municipalities to a `very limited and proscribed role in the regulation of telecommunications.'" Id. at 1256 (quoting City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175 (9th Cir. 2001)). The narrowly circumscribed role is set forth in sections 253(c) and 253(b).

Section 253(c) preserves the authority of state and local governments "to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis." 47 U.S.C. § 253(c). The Telecommunications Act does not define "manage[ment of] the public rights-of-way," but the Ninth Circuit has looked for guidance from other sources including the Act's legislative history and the FCC, the agency charged with interpreting and enforcing the Act. City of Auburn, 260 F.3d at 1177. Based on these sources, the Ninth Circuit has noted that management of the public rights-of-way includes the authority to preserve the physical integrity of streets and highways; control the orderly flow of vehicles and pedestrians; manage gas, water, cable, and telephone facilities that crisscross the streets and public rights-of way; coordinate schedules; determine insurance, bonding and indemnity requirements; establish and enforce building codes and local zoning regulations; keep track of various systems using rights-of-way to prevent interference between them; require a company to pay fees to recover an appropriate share of increased street repair and paving costs that result from excavation; and require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies. *Id.*

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Additionally, section 253(b) provides an additional "safe harbor" preserving the authority of a state "to impose, on a competitively neutral basis . . . requirements necessary . . . to protect the public safety and welfare." 47 U.S.C. § 253(b). Unlike section 253(c), section 253(b) refers to the reserved authority of a *state only* and does not also refer to local governments. Section 253(b), however, may apply to local governments to the extent that a state has delegated to a municipality its authority to protect the public safety and welfare. See Cox Commc'ns PCS v. City of San Marcos, 204 F. Supp. 2d 1206, 1268-69 (S.D. Cal. 2002); GTE Mobilnet of California Limited Partnership v. City and County of San Francisco, 2007 WL 420089 at *5 (N.D. Cal. February 6, 2007) (Illston, J.). California has delegated such authority to the City through the California Constitution [21] and the California Public Utilities Code,[22] and accordingly, section 253(b) allows a municipality to regulate telecommunications carriers to protect the public safety and welfare.[23]

A steady stream of litigation since the year 2000 has resulted in some guidance on what types of municipal regulations are preempted under section 253(a). As one district court has summarized, the "common features" of ordinances that have been preempted include: (1) a complicated application process (including reporting of financial and other

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[21] California Constitution article XII, section 8 reserves to municipalities the "power over public utilities relating to the making and enforcement of . . . regulations concerning municipal affairs."

[22] California Public Utilities Code section 2902 protects a municipality's powers to regulate "matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility [and] the location of the poles, wires, mains, and conduits of any public utility, on under, or above any public streets."

[23] In NextG I, this court assumed without deciding that section 253(b) was applicable to not just states, but local governments as well. NextG I, 2006 WL 1529990 at *9. In now holding that section 253(b) does in fact apply, the court joins its colleagues in Cox and GTE Mobilnet.

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information related to the fitness of a provider to provide services); (2) a public hearing on the application; (3) imposition of criminal or civil sanctions for violations; and (4) unfettered discretion to approve or deny the application, or revoke a permit once issued. NextG Networks of California, Inc. v. County of Los Angeles, 522 F. Supp. 2d 1240, 1249 (C.D. Cal. 2007) (summarizing Ninth Circuit cases in City of Berkeley and City of Auburn together with district court cases including GTE Mobilnet of California L.P. v. City and County of San Francisco, 2007 WL 420089 at *4-5 (N.D. Cal. Feb. 6, 2007); NextG Networks of California, Inc. v. City and County of San Francisco, 2006 WL 1529990 at *5 (N.D. Cal. June 2, 2006); Cox Commc'ncs PCS, L.P. v. City of San Marcos, 204 F. Supp. 2d 1260, 1265-66 (S.D. Cal. 2002)).

Since NextG v. County of Los Angeles, district courts in the Ninth Circuit have continued to find municipal regulations to be preempted by section 253(a). See T-Mobile USA, Inc. v. City of Anacortes, 2008 U.S. Dist. LEXIS 37481 (W.D. Wa.. May 6, 2008); New Path Networks v. City of Irvine, 2008 WL 2199689 at *3-4 (C.D. Cal. Mar. 10, 2008); NextG Networks of California, Inc. v. City of Huntington Beach, SACV 07-1471 ABC (RNBx), Docket No. 30, (C.D. Cal. February 7, 2008). These cases, like their predecessors, struck down municipal regulations that involved burdensome application requirements, public hearings, criminal or civil sanctions, unfettered discretion, or some combination thereof.

The municipal regulations at issue here are distinguishable in a variety of aspects from the preempted regulations at issue in these prior cases. First, telecommunications providers are not subject to any civil or criminal penalties for failure to comply with the regulations. Second, no public hearings are required for the initial application process.

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Third, the application process is relatively basic, streamlined, and inexpensive. The information required for the application is limited to the information necessary to identify the proposed locations of the wireless facilities; information related to whether or not the applicant has permission to use a particular utility pole; *a certification that the applicant has obtained approvals required under the California Environmental Quality Act; and a certification that radio frequency emissions are within FCC limits*. Review by the local Public Health Department is required for a single limited purpose—to determine whether radio frequency emissions are within FCC limits. Although denial of an application because emissions are not within FCC limits may have the effect of prohibiting telecommunications service, the regulation is saved by section 253(c) because it is directly related to protecting the public health and safety. In Santa Cruz County for example the Health Department has issued analysis finding PG&E's wireless Smart Meters as potentially harmful to health and safety.

In NextG I, this court "acknowledge[d] the City's concern that absent regulation, wireless antennas will proliferate without regard for public convenience, the negative views of residents, or aesthetic guidelines." NextG I, 2006 WL 1529990 at *9. In regulating the placement of wireless antennas and taking into account such concerns as aesthetic values, scenic views, and visual clutter, the City is exercising a legitimate interest in regulating the public rights-of-way. Management of the public rights-of-way has been recognized to include requiring equipment to be placed underground, maintaining the physical integrity of the rights-of-way, and preventing a tangled mass of criss-crossing wires and equipment. See City of Auburn, 260 F.3d at 1177. If each of these regulations constitutes permissible management of the rights-of-way, then

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regulation to control the placement of wireless facilities on utility poles and other locations, even if driven primarily by aesthetic concerns, is also permissible. The courts have concluded that the component of the regulations requiring review by the Planning and Building Code Enforcement falls within the safe harbor of section 253(c).

The regulations here are not as broad as those in City of Auburn where the city had discretion to grant, deny or revoke a franchise based on whether a franchise would "use the public ways [to] serve the community interest" or whether granting a license agreement would be "deemed in the best interest of the City." City of Auburn, 260 F.3d at 1179 n.18.

Additionally California Public Utilities Code section 7901 permits local governments to regulate the placement of telephone equipment in public rights-of-way on aesthetic grounds, which is a complex issue of state law.

Two courts have addressed this issue. The Ninth Circuit concluded that section 7901 preempted local ordinances. Sprint PCS Assets L.L.C. v. City of La Canada Flintridge, 435 F.3d 993, 997-98, amended, 448 F.3d 1067 (9th Cir. 2006). The California Court of Appeal reached the opposite conclusion, expressly disagreeing with the Ninth Circuit. Sprint Telephony v. County of San Diego, 140 Cal. App. 4th 748, 768 n.13, 44 Cal. Rptr. 3d 754 (2006). In light of the disagreement, the Ninth Circuit amended its prior opinion in City of La Canada Flintridge, placing its discussion of section 7901 into an unpublished memorandum disposition. See 2006 WL 1457785.

The Ninth Circuit also requested the California Supreme Court to decide the issue. Sprint PCS Assets, LLC v. City of Palos Verdes, 487 F.3d 694 (9th Cir. 2007). The California Supreme Court granted review of the California Court of Appeal decision in

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Sprint Telephony v. County of San Diego, see 143 P.3d 654, 49 Cal. Rptr. 3d 653, but later dismissed the appeal, see 175 P.3d 1, 71 Cal. Rptr. 3d 251. In dismissing the appeal of Sprint Telephony v. County of San Diego, the California Supreme Court cited to the Ninth Circuit's decision in Sprint Telephony v. County of San Diego, 490 F.3d 700 (9th Cir. 2007), which the Ninth Circuit granted a petition to rehear en banc, 2008 WL 2051371 (9th Cir. 2008).

Faced with uncertainty over the construction of a state statute that is over 100 years old, district courts have generally declined to exercise supplemental jurisdiction over claims under section 7901. See e.g., Pacific Bell Tel. Co. v. City of Walnut Creek, 428 F. Supp. 2d 1037, 1049 (2006); Qwest Communications Corp. v. City of Berkeley, 146 F. Supp. 2d 1081, 1101 (N.D. Cal. 2001); Cox Communications v. City of San Marcos, 204 F. Supp. 2d 1272, 1284-85 (S.D. Cal. 2002); but see, GTE Mobilnet of California L.P. v. City and County of San Francisco, 440 F. Supp. 2d 1097, 1102-06 (N.D. Ca. 2006).

2. Procedural Errors/Outstanding Motions

The Commission continues to pursue a pattern and practice of delay defer and ultimately to deny CARE Motions and requests for procedural relief in violation of the procedural due process and the First Amendment.

On May 9, 2011 CARE filed a Motion requesting "the admission of the following information for filing in the above caption proceedings[]…In the Pacific Gas and Electric Company ("PG&E") response to protests/responses to its Application for Approval of Modifications to its SmartMeter™ Program and Increased Revenue Requirements to

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Recover the Costs of the Modifications[24] it knowingly makes false statements regarding the jurisdictional authorities over "whether PG&E's SmartMeters™ comply with Federal Communications Commission (FCC) standards" further stating that "the FCC has exclusive jurisdiction to regulate RF emissions and establish safe RF emissions standards." These statements and subsequent statements by PG&E to that effect are knowingly false, since on October 26, 2010 in the Application of CARE to modify Decision 06-07-027, under Application 10-09-012[25] (filed September 20, 2010) in our response to PG&E's protests we provided PG&E and the Commission notice[26] that "[r]egarding whether or not, as PG&E falsely claims, that CARE's Application for Modification should be dismissed "on the grounds that the field of RF emissions is preempted by federal law" just the opposite is true in fact as demonstrated by the response received from the amended complaint CARE filed with the FCC on October 13, 2010.[27]" CARE therefore respectfully requests the paperless admission referencing the prior filing of this letter from the FCC to CARE dated October 20, 2010 in the above captioned proceedings as an offer of proof that the CPUC has "jurisdiction to regulate RF emissions and establish safe RF emissions standards."

On November 2, 2011 CARE filed its Motion for procedural relief from the utilities' exposing their customers to harmful wireless radiation and to provide for remedial measures to immediately remove wireless Smart Meters as requested by customers or that are co-located and replace them with analog meters instead.

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[24] http://docs.cpuc.ca.gov/efile/REP/134717.pdf at page 7 and 8.
[25] http://docs.cpuc.ca.gov/published/proceedings/A1009012.htm
[26] http://docs.cpuc.ca.gov/efile/REP/126053.pdf at page 3
[27] http://docs.cpuc.ca.gov/efile/REP/126055.pdf

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CARE is informed and believes and therein alleges the Commission's failure to act on these two pending Motions is an abuse of discretion; is arbitrary and capricious; and intended to knowingly silence utility customers' federal civil rights under color of state law [specifically 42 U.S.C. 1983 and the First Amendment].

Conclusion

CARE and Michael Boyd do not to plan to sue the Commission and its Commissioners individually at some future date over this violation of our federal civil rights under color of state law; we are suing the Commission currently; and its Commissioners individually; in that regard; in the US federal District Court of the Central District of California; where we are currently proceeding on our First Amendment Violation claims against the CPUC.

The underlying issue to this claim is the same as here; the Commission has no lawful right to chill customer's First Amendment rights when the overwhelming public comment at the Commission's Regular business meeting for the last year have been against the deployment of [wireless] Smart Meters; predominantly complaining of health effects, some but not all, documented by a Physician.

When the public speaks out overwhelming against [wireless] Smart Meters and the Commission overwhelming endorses a post hoc rationalization of the deployment of millions of Smart Meters, this can be used to prove to a jury of our peers that the Commission caused harm through their individual actions, and that individual [voting] Commissioners can be held personally liable therefore for their actions.

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Respectfully Submitted,

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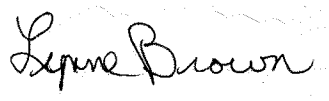

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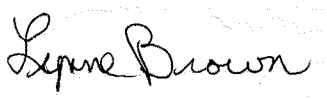
February 17, 2012

Verification

I am an officer of the Protesting Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

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

Executed on this 17th day of February 2012, at San Francisco, California.



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