

**Before the  
PUBLIC UTILITIES COMMISSION  
OF THE  
STATE OF CALIFORNIA  
San Francisco, CA**

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**Request for Commission  
review of the status and any  
"disposition" by the Energy  
Division of PG&E Advice  
Letter 3278-G/4006-E**

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**EDWARD HASBROUCK,  
protester of PG&E Advice  
Letter 3278-G/4006-E and  
PG&E customer**

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28 March 2012

Pursuant to Rule 7.7.1 ("Review of Industry Division Disposition") of the California Public Utilities Commission (CPUC) rules of procedure as contained in General Order 96-B, I hereby request review by the Commission of the status and effectiveness (or lack thereof) of Pacific Gas & Electric Company (PG&E) Advice Letter 3278-G/4006-E, and of any action which is considered or purported by the Commission and/or the CPUC Energy Division to constitute a "disposition" by the the Energy Division of Advice Letter 3278-G/4006-E.

## **1. Summary of procedural history**

On 16 February 2012 PG&E filed Advice Letter 3278-G/4006-E with the CPUC Energy Division, to be effective immediately pending approval by the CPUC, and including *inter alia* the following provision:

"If PG&E makes a field visit to a customer's residence for purposes of installing a SmartMeter™ and the customer does not provide reasonable access to PG&E to install a SmartMeter™ after being provided notice of eligibility for service under this Opt-Out Program and not electing to opt-out, the customer shall be deemed to have elected service under this Opt-Out Program."

On 7 March 2012, I filed with the CPUC Energy Division a timely protest and request for an evidentiary hearing with respect to this provision of Advice Letter 3278-G/4006-E. My protest was served that same day on both the CPUC Energy Division and PG&E, at the addresses specified in the Advice Letter, by e-mail, fax, and depositing in the U.S. Mail, postage paid, and to all of the addresses in CPUC e-mail service list A1103014.

In accordance with Rule 7.4.3 of General Order 96-B, PG&E was required to reply to my protest, and to serve me with its reply, not later than 14 March 2012. PG&E did not do so.

When I received no service of any timely reply by PG&E to my protest, I reasonably assumed, and was entitled to assume, that PG&E had conceded my protest and that the Energy Division would be required either to reject the Advice Letter (pursuant to Rule 7.6.1 of General Order 96-B, "the Industry Division will (1) reject any advice letter where the advice letter or workpapers are clearly erroneous, including without limitation where there are clear inconsistencies with statute or Commission order", which would include where there is a lack of required notice to the protester), or to grant my protest, suspend the Advice Letter, and open a formal proceeding including an evidentiary hearing to consider the issues raised in my protest.

As a result, I assumed that a petition for Commission review (such as this one) would be unnecessary, and abandoned my efforts to draft such a petition or obtain legal counsel to do so.

In accordance with Rules 7.5.2 and 7.6.1 of General Order 96-B, the CPUC Energy Division was required to notify me as the protester (and, of course, PG&E), not later than 19 March 2012, either of the Division's disposition of the Advice Letter or that the Division's review of the Advice Letter would continue beyond that time. The Energy Division did neither.

When 19 March 2012 passed and I had received no notice regarding my protest or the Advice Letter from the Energy Division, any other office of the CPUC, or PG&E, I reasonably assumed, and was entitled to assume, that the Advice Letter had been suspended pursuant to Rule 7.5.2 of General Order 96-B ("For any advice letter that may not be deemed approved, suspension is automatic if disposition of the advice letter has not occurred by the end of the initial review period"). However, in an abundance of caution, I also began attempting to contact both PG&E and the CPUC to confirm that the Advice Letter had been suspended.

On 22 March 2012, perhaps in response to one of those several e-mail and telephone inquiries to PG&E and to the CPUC, I received an unsigned e-mail message from "PGETariffs@pge.com", to which was attached a purported "reply" to my protest dated 14 March 2012. There was no indication anywhere in this document, including in the address and "cc" lines, that any attempt had been made to serve it on me. These workpapers could be determined by inspection to be "clearly erroneous" and contained a "clear inconsistency" with General Order 96-B as it pertains to service by the utility on the protester of a reply to a protest.

To date, I have received no service from the CPUC Energy Division or any office of the CPUC of any "disposition" by the Energy Division and/or the CPUC of the Advice Letter, or any notice that the Energy Division's review would continue beyond 19 March 2012.

However, PG&E has posted on its Web site what it claims to be a letter to PG&E from the director of the CPUC Energy Division dated 19 March 2012, denying my protest.

This letter was not served on me by the CPUC (or by anyone else) in a timely manner as would have required in order for it to constitute a valid "disposition" by the Energy Division. I have, nonetheless, attempted to verify its authenticity (even as an invalid but genuine document), but have been unable to do so after almost a week of diligent effort. The letter posted by PG&E contains no e-mail address or telephone number for the purported signer of the letter at the CPUC, and I have been unable to find such contact information. In response to e-mail and telephone inquiries to the CPUC and PG&E, I have repeatedly been referred to different people, and have been given contradictory information about what, if any, action the CPUC thinks it has taken, and whether it believes that action to be valid in whole or in part.

Mr. Brian K. Cherry, who signed the Advice Letter on behalf of PG&E, and on whom (among others) my protest was served, has not taken any of my phone calls or responded or responded to numerous messages left with him requesting that he contact me directly.

The most recent information I have received is from a staff member of the CPUC Public Advisor's office, who informed me by telephone late in the day on 27 March 2012 that despite diligent and continuing inquiries the Public Advisor's office had not yet been able to determine what action had been taken by the Energy Division or the current status of the Advice Letter.

## **2. Required and requested action by the Commission**

The CPUC's rules are explicit that the utility must reply to a protest and must serve the reply on the protester, and that the Division must serve any disposition on the protester.

Rule 7.4.3 of General Order 96-B provides that "The utility filing an advice letter shall reply to each protest and may reply to any response." The contrast between the use of "shall" with respect to a reply to a protest and "may" with respect to a reply to a response makes clear that once a timely protest of an Advice Letter has been filed, the filing and service on the protester of a reply by the utility is mandatory, not discretionary.

The mandatory language "will" is also used in Rule 7.6.1 with respect to the Energy Division's mandatory duty to serve notice of any disposition, and of the basis for any rejection for a protest, on the protester: "In all cases where there is Industry Division disposition of an advice letter (including "deemed approval"), the Industry Division will issue a written disposition. If the Industry Division rejects an advice letter or grants a protested advice letter, the Industry Division's disposition will state the basis for rejecting the advice letter or the protest. The Industry Division will serve the disposition on the utility and on any person filing a protest or response to the advice letter."

Rule 7.6.1 of General Order 96-B also provides that, "Notwithstanding a timely protest, the reviewing Industry Division may approve an advice letter that is subject to disposition under this rule and is otherwise proper," when any of three other specified conditions are met.

I do not concede that any of those three other conditions are met in this case, and cannot meaningfully contest, as of now, possible claims or any purported basis of a "disposition" with which I haven't been served. I believe that any consideration of such arguments by the Commission would be improper. However, if the Commission nonetheless rules that such arguments are admissible, I reserve the right of response once I am properly served with such documents (as well as the right to continue to contest the admissibility of any such late-filed and/or late-served pleadings by PG&E or "disposition" by the Energy Division).

But even if those conditions were met, the approval of a protested Advice Letter by the Division under this provision is limited to "an advice letter that is subject to disposition under this rule and is otherwise proper". A protested Advice Letter that has not properly and timely been replied to by the utility is neither "subject to disposition under this rule" nor "otherwise proper" within the meaning of this rule.

Rule 7.4.4 of General Order 96-B provides that the reviewing Division "may", at its discretion, consider a late protest or late response by a third party to an Advice Letter. But nothing in General Order 96-B authorizes, even on a discretionary basis, consideration of a late reply by a utility to a protest, or late issuance of a disposition by the Division.

Late service cannot cure these errors. Timely service on the protester is an essential element of a valid (required) reply by the utility to a protest, and timely service on the protester is an essential element of a valid disposition by the Division of a protested Advice Letter. The requirement of timely notice is essential to the protester's rights, including the right to petition for review of a disposition, the right to know which actions by a utility are and are not authorized by the CPUC, and the right to be forewarned of actions to be taken by the utility implicating the protester's rights (and, in this case, rights of other customers, property owners, and third parties).

A "reply" or "disposition" not timely served on the protester, as required by General Order 96-B, is invalid and should be deemed void. In the absence of a valid and timely reply, the Advice Letter should have been rejected by the Energy Division pursuant to Rule 7.6.1 of General Order 96-B: "the Industry Division will (1) reject any advice letter where the advice letter or workpapers are clearly erroneous, including without limitation where there are clear inconsistencies with statute or Commission order."

In the absence of a valid and timely disposition by the Division, pursuant to Rule 7.5.2 of General Order 96-B, "For any advice letter that may not be deemed approved, suspension is automatic if disposition of the advice letter has not occurred by the end of the initial review period." No claim was made in the Advice Letter that it was subject to "deemed approval".

And in the absence of a valid disposition of the protested Advice Letter by the Division, the subject of the Advice Letter must be made the subject of a formal proceeding including, since I had so requested in my protest and as has not been contested, an evidentiary hearing.

For the forgoing reasons, I request that the Commission:

- (a) Clarify that, pursuant to Rule 7.6.1 of General Order 96-B, the duty of the Energy Division was to reject PG&E Advice Letter 3278-G/4006-E for lack of valid timely-served reply by PG&E to my protest, and to timely notify me of that disposition.
- (b) Clarify that, pursuant to Rule 7.5.2 of General Order 96-B, PG&E Advice Letter 3278-G/4006-E was automatically suspended at the expiration of the 30-day Initial Review Period on 19 March 2012 when the Energy Division had not made and timely served a valid disposition of the Advice Letter.
- (c) Clarify that any purported "disposition" of a protest and/or of a protested Advice Letter by a Division, not timely served on the protester, is null and void, and specifically that there has been no valid Division disposition of my protest or of PG&E Advice Letter 3278-G/4006-E.
- (d) Open a formal proceeding, to include an evidentiary hearing, to consider the factual and other issues raised in my protest of PG&E Advice Letter 3278-G/4006-E, as required where neither PG&E nor the Energy Division have satisfied the conditions specified in General Order 96-B for disposal of a matter by Advice Letter.
- (e) Direct that any expenses attributable to PG&E's failure to serve timely notice on me of a reply to my protest, including any delay in implementation of the tariffs, factual determinations, or other relief requested by PG&E through the Advice Letter, be charged to PG&E stockholders and not to ratepayers.

### 3. The scope and effect of the requested actions

During my telephone conversations seeking information about the status of my protest, some CPUC staff have falsely claimed that suspending or rejecting PG&E Advice Letter 3278-G/4006-E would require suspending the PG&E "SmartMeter Opt-Out" program.

While this is irrelevant, it is also untrue. As should be clear from my protest, I did not -- in this protest -- object to SmartMeters in general, CPUC decision D.12-02-014, or an "opt-out" program within the scope authorized by that decision. I protested specific aspects of the Advice Letter which exceeded the scope of that decision by making erroneous, or at least disputed, factual determinations with respect to customers' intentions and access to customer premises, and imposing fees and a higher tariff on customers who do not, in fact, "not wish to have a SmartMeter".

Suspending or rejecting Advice Letter 3278-G/4006-E would not prevent PG&E from seeking approval -- by Advice Letter or Commission resolution, or as the outcome of a formal proceeding -- for an "opt-out" program that does not contain the provisions I have protested and which must now be the subject of a formal proceeding and evidentiary hearing.

It was PG&E's choice, not mine, to propose a program beyond the scope of the Commission's decision D.12-02-014, and protests such as mine to such an Advice Letter were entirely foreseeable. Any costs to PG&E from failing to anticipate such protests, or from failing to comply with CPUC notice requirements, are entirely self-inflicted.

Rule 5.1 of General Order 96-B makes clear that, "The advice letter process provides a quick and simplified review of the types of utility requests that are expected neither to be controversial nor to raise important policy questions. The advice letter process does not provide for an evidentiary hearing; a matter that requires an evidentiary hearing may be considered only in a formal proceeding."

Neither PG&E nor the CPUC could credibly claim that they do not believe that the protested portions of Advice Letter 3278-G/4006-E are highly controversial -- indeed, among the most controversial issues ever to come before the CPUC -- and raise important policy questions.

Regardless of what the Commission may have "assumed" regarding the extent of PG&E's rights of access to any particular customer premises, the actual intentions of any particular PG&E customer with respect to whether they do or do not wish to have a SmartMeter, or what factual inferences can validly be drawn from access to customer premises not being granted in particular circumstances, there are material factual disputes with respect to each of these issues.

PG&E knew or reasonably should have known of the existence of these factual disputes, since they have been the subject of extensive and ongoing litigation regarding PG&E's assertion of disputed "rights" to sell access to PG&E purpose-limited gas and electric transmission easements for third-party telecommunications data transmission facilities. While most of these cases to date have involved fiber optic cables, PG&E should reasonably have anticipated the same objections to SmartMeters incorporating third-party data transmission capabilities.

In *Koponen v. Pacific Gas & Electric Co.* (2008), 165 Cal.App.4th 345, the Court of Appeal found that while the CPUC could regulate how PG&E used its easements or rights-of-way, "the commission cannot 'modify' the terms of the rights-of-way obtained by PG&E by eminent domain or private contract." And PG&E itself argued successfully in 2011, in opposition to class certification of such claims by property owners against PG&E, that determination of the extent of such rights requires individualized fact-finding regarding the terms of the easement(s), rights(s)-of-way, and any other contracts(s) related to each property.

That is part of precisely the fact-finding (along with fact-finding as to the intentions of customers who do not affirmatively opt out, the relationships between customers and property owners, and the reasons access to customer premises might not be granted) that I have requested.

Having argued in other litigation that such individualized fact-finding is an essential precondition to any determination of the extent of PG&E's rights of access to non-PG&E premises for installation, maintenance, or operation of data transmission facilities, PG&E is estopped from arguing in this proceeding that there are no material factual disputes with respect to such rights, or that no such fact-finding (which required a formal proceeding) is necessary.

CPUC decision D.12-02-014 does not mention, even in passing, much less make any factual determinations with respect to, access to customer premises, the intentions of PG&E customers who do not affirmatively "opt out" or indicate that they do not want to have a SmartMeter, what if any factual inferences can or should be drawn for anon-grant of access, or the reasons why access to customer premises might not be granted. No fact-finding whatsoever has been conducted by the CPUC or the Energy Division with respect to these factual issues.

No plausible reading of decision D.12-02-014 or the record supports a conclusion that that decision was based on an adequate evidentiary record to support any such factual findings.

While I believe that any consideration by the Commission of evidence or arguments from PG&E, the Energy Division, or other parties with which I have not been served would be improper, I reserve the right to submit additional factual and legal evidence or arguments if the Commission decides to consider any such materials.

Respectfully submitted,

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28 March 2012

## CERTIFICATE OF SERVICE

I, Edward Hasbrouck, certify that I am serving this request for Commission review today by e-mail, fax, and depositing copies in the U.S. Mail, postage paid, to each of the e-mail addresses, fax numbers, and postal addresses below:

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28 March 2012