



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).
And Related Matters.

Application 11-03-014  
(Filed March 24, 2011)

Application 11-03-015  
Application 11-07-020

**REPLY BRIEF OF SOUTHERN CALIFORNIANS FOR WIRED SOLUTIONS TO SMART METERS (“SCWSSM”)**

**I.**

**INTRODUCTION**

Pursuant to Rule 13.11 of the Commission’s Rules of Practice and Procedure, and the June 27, 2012 e-mail ruling of Administrative Law Judge Amy Yip\_Kikugawa, SCWSSM submits this reply to opening briefs filed by active parties on July 19, 2012. This reply is timely as the due date for reply briefs is July 30, 2012.

**II.**

**DISCRIMINATION DOES NOT HAVE TO BE INTENTIONAL.**

The utilities argue that since the fees are applied to all customers it is not discriminatory or a violation of the ADA or 453(b). The Congress, U.S Supreme Court, Department of Justice and SCWSSM disagree with the utilities.

Title II of the ADA prohibits formal policies and actions which although neutral on their face, have a more burdensome effect upon persons with disabilities than upon

others. 42 U.S.C. section 12112(b) (3) (Supp.III 1992).

This is true even though the Commission [or utilities under Title III and Rehabilitation Act 1973 section 504 and Governemnt Code section 11135] has no intention to discriminate, as can be seen by the ADA's legislative history which shows that Congress intended Title II to prohibit more than intentional discrimination. The House Education and Labor Committee said that this statutory language “incorporates a disparate impact standard . . . consistent with the interpretation of section 504 by the U.S. Supreme Court in . . . Choate . . .” House Report Part II at 61, reprinted in 1990 U.S.C.C.A.N. at 343. Clearly then, Congress both believed that Alexander v. Choate 469 U.S. 287, 301 (1985) prohibits, under section 504, policies, practices, and procedures that have a disparate impact upon persons with disabilities, and intended section 202 of the ADA to prohibit such policies, practices, and procedures as well.

A good example of the application of these principals is seen in Communities Actively Living Independent and Free, Et. al. v. City of Los Angeles, ET. al., (2011) Case 2:09-cv-00287-CBM-RZ Filed 2/10/1<sup>1</sup>. In that case the City of Los Angeles (“City”) lost on summary judgment because its emergency preparedness plan did not allow for the disabled and it had no plan to notify, evacuate, transport, or shelter these individuals in the event of an emergency or natural disaster. The court in that case recognized,( as should be done with the case at bar), that “residents with disabilities are consequently at a higher risk than the general population to be harmed in an emergency or natural disaster.” (At page 18 of Decision)

The City argued, much like the utilities in this CPUC case, that its program is designed to apply equally to all of its residents. The Court stated “. . . . . that individuals with disabilities lack meaningful access to the city’s emergency preparedness programs due to the City’s failure to address or provide for their unique needs.” The Court went on to state that: The City’s emergency plan is seriously out of compliance with the ADA and section 504 and the city’s residents with disabilities (page 27 lines 9-16) will continue to be at-risk for suffering and death in disproportionate numbers unless the City drastically

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<sup>1</sup> [www.drlegal.org/downloads/cases/Calif/140\\_Order\\_MSJ.pdf](http://www.drlegal.org/downloads/cases/Calif/140_Order_MSJ.pdf)

enhances the existing disability related emergency management and disaster planning process and readiness as required by the ADA and other Statutes”. The court reasoned that 42 U.S.C. 12101(a) (5) applies with equal force to facially neutral policies that discriminate against individuals. [Please see full argument at Page 12 of SCWSSM brief section IV...]

In the instant case, much like the City case above, the qualified disabled customers and medical conditions customers<sup>2</sup> are disproportionately affected by the Commission’s Ruling which ignores their unique needs regarding smart meters and its mesh network as follows: 1.) the utilities are a monopoly and qualified disabled customers and medical conditions customers, do not have a choice with whom they do business, if they want electricity. 2.) This is a life sustaining service and effects the disabled and those with medical conditions, very often in a life and death manner because of medical equipment that requires electricity or implanted medical devices that are interfered with by the radio frequency given off by the smart meter and its mesh network. 3.) in extreme climates heating and cooling are the difference between life and death for disabled and medical conditions customers to a greater degree than the general population. 4.) For those that have radiation/radio frequency illness, the smart meter mesh network exacerbates existing disabilities and medical conditions and causes severe and extreme consequences including loss of use of their home and community.

The Commission’s Ruling in this case, fails to provide meaningful access to electric service for the unique needs of the qualified disabled customer and/or the medical conditions customer as set forth more fully in SCWSSM’s Opening Brief sections IV., V. & VI.

### III.

#### **PURSUANT TO THE ADA OR 453(b) DISABILITY IS DEPENANT ON WHETHER AN INDIVIDUAL HAS A DISABILITY OR MEDICAL CONDITION THAT EFFECTS ONE OR MORE MAJOR LIFE ACTIVITIES**

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<sup>2</sup> Qualified disabled customer is reference to ADA and medical conditions customer references California law requirements under Government Codes 11135, 12926 and CPUC Code 453(b) as used in the Opeing Brief of SCWSSM.

The utilities make conclusory statements that ‘electric sensitivity’ (aka radiation illness or radio frequency illness) is not a disability. This is not the analyses the statutes require. The issue is not the label one chooses to use but the actual effect the physical or mental condition has on one or more major life activities. (SCWSSM’s Opening Brief Page 12, Section IV for full analyses).

Customers with radiation illness also have autonomic nervous system dysfunction, cognitive damage, cardiac and pulmonary symptoms such as asthma, arrhythmias etc. Any one of the accompanying physical medical conditions of the customer with radiation illness qualifies them under the ADA and 453(b), if it limits or makes a major life activity more difficult. Therefore simply stating we don’t recognize electric sensitivity or radiation illness begs the question and does not comply with the law.

Also many medical conditions and disabilities are known to be adversely affected by emf/rf such as that emitted by the smart meter. For example, those with medical implants such as pacemakers, Parkinson’s disease, dementia, pregnancy, neurological conditions, immune dysfunction, autonomic nervous system dysfunction etc. etc.( See SCWSSM’s opening brief Section VI.)

SDG&E states that under California law it has to be “unreasonable or unfair” page 7 of SDG&E brief.] That is not the standard. Under California disability law, prejudice and disadvantage... are what is prohibited. (CPUC section 453(b))

It is also important to note that the Americans With Disabilities Act Amendments Act of 2008 (ADAAA) which went into effect in 2009 addressed “invisible disabilities”. The ADAAA made several changes to the definition of disability under the ADA, in part, as follows:

- 1.) The definition of disability is to be construed in favor of broad coverage to the maximum extent permitted.
- 2.) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active, such as mental illness, HIV, cancer, epilepsy and diabetes; and

3.) Whether an impairment substantially limits a major life activity shall be made without taking into account mitigating measures;

Major life activities relevant to people with invisible disabilities include: concentrating and thinking; caring for oneself, lifting, bending, eating, speaking, sleeping, breathing, learning, reading, communicating, and additionally congress listed a number of major bodily functions under the definition of ‘major life activity’ [See SCWSSM Opening Brief, page 30 section VI. 2.]

Therefore simply labeling a customer and dismissing them does not meet the analyses required by federal or state statutes and does not meet requirements implemented by congress or interpreted by the U.S. Supreme Court.

#### IV.

#### **THE ADA TITLE III APPLIES TO UTILITY COMPANIES UNDER THE “COMMERCIAL FACILITY” DEFINITION NOT ‘PUBLIC ACCOMMODATION’**

SCWSSM agrees with the utilities that they do not come under the ADA as a ‘public accommodation’, except of course, locations open to the public such as payment centers. The arguments regarding ‘public accommodations’ are irrelevant to the smart meter analyses. Whether the electric utilities are “commercial facilities” under Title III of the ADA is the relevant question. The answer to that question is yes.

California Public Utility Code section 217, 218, defines an “electrical plant” as: “includes all real estate fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power”.

The electric wires, poles other wireless devices and smart meters constitute personal property, devices, or materials used to deliver electric service to customers. These are

maintained by the “commercial facility” (or electric plant) on each individual’s home and business. Therefore the utilities are covered under the ADA Title III as a “commercial facility” and are subject to anti discrimination laws set forth in that Act. Utilities are also subject to Rehabilitation Act of 1973 section 504 and Government Code 11135 and other laws.

The letters attached to SDG&E’s brief are of no significance to this analyses as they discuss ‘public accommodation’ under the ADA not ‘commercial facility’. These letters are also of no relevance or legal significance to the argument in front of the Commission at this time. SCWSSM moves to strike these letters from the record.

## **V.**

### **ADDITIONAL RECOMMENDATIONS FOR MODIFICATION OF POLICIES PROCEDURES AND PRACTICES TO ACCOMMODATE DISABLED INDIVIDUALS AND THOSE WITH COVERED MEDICAL CONDITIONS.**

1. Utilities to set up a department to implement and facilitate accommodations for the disabled and those with covered medical conditions.
2. Follow-up survey to determine all wireless is off home and poles in “zone of safety’ surrounding persons home.
3. Make changes to website to include sections that gives notice and warning re: disability signs, and symptoms,
4. Conduct targeted outreach identify their preferences and needs to be able to be comfortable in their home
5. Shielding of home where necessary.
6. This is a floor not a ceiling regarding recommendations.
7. A series of workshops should be set up with experts and affected customers to make recommendations
8. Other matters to be included at a later time.

**VI.**  
**CONCLUSION**

The utilities have made no credible well thought out argument as to why they are not subject to the ADA and CPUC section 453(b). On the other hand the Commission is presented with well thought out, analysis and supporting authority showing that the Commission as well as the utilities are in deed subject to the ADA and CPUC section 453(b) and other laws and therefore charging fees and continued failures to modify its policies practices and procedures to take into account the unique needs of the qualified disabled customer and medical conditions customers, is a violation of multiple federal and state laws and this incorrect course should be corrected.

Respectfully:

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