



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

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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)

And Related Matters.

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

**REPLY BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M) AND  
SOUTHERN CALIFORNIA GAS COMPANY (U 904 G)**

ALLEN K. TRIAL  
101 Ash Street, HQ-12B  
San Diego, California 92101  
Telephone: (619) 699-5162  
Facsimile: (619) 699-5027  
E-Mail: [ATrial@semprautilities.com](mailto:ATrial@semprautilities.com)

Attorney for  
SAN DIEGO GAS & ELECTRIC COMPANY

And

STEVEN D. PATRICK  
555 West Fifth Street, Suite 1400  
Los Angeles, California 90013  
Los Angeles, CA 90013-1011  
Phone: (213) 244-2954  
Fax: (213) 629-620  
E-Mail: [SDPatrick@semprautilities.com](mailto:SDPatrick@semprautilities.com)

Attorney for  
SOUTHERN CALIFORNIA GAS COMPANY

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**I. INTRODUCTION AND BACKGROUND**

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission (the “Commission”) and the *Assigned Commissioner’s Ruling Amending Scope of Proceeding to Add a Second Phase* (the “Ruling”), dated June 8, 2012, San Diego Gas & Electric Company (“SDG&E”) and Southern California Gas Company (“SoCalGas”) hereby submit the following reply brief in response to the opening briefs submitted by parties on July 16, 2012.<sup>1</sup> Opening briefs were submitted by SDG&E/SoCalGas, Pacific Gas & Electric Company, Southern California Edison Company, the Center for Electrosmog Prevention, the Center for Accessible Technology, Wilner & Associates, the EMF Safety Network, Southern Californians for Wired

<sup>1</sup> Ruling by Commissioner Michael R. Peevey is available at <http://docs.cpuc.ca.gov/EFILE/RULC/168362.PDF> .

Solutions for Smart Meters, the Peoples Initiative Foundation, Stop Smart Meters Irvine, the County of Marin<sup>2</sup>, et. al and the Utility Consumers Action Network (UCAN).

## **II. NUMEROUS PARTIES RAISE ISSUES OUTSIDE THE SCOPE**

Commissioner Peevey’s June 8 Ruling sets forth specific questions to be addressed in these briefs which generally focus on whether the Americans with Disabilities Act (ADA) or Pub. Util. Code § 453(b) limit the Commission’s ability to adopt opt-out fees for those residential customers who are required to have an analog meter for medical reasons.<sup>3</sup> Specifically, parties are requested to brief the following questions:

1. Does an opt-out fee, which is assessed on every residential customer who elects to not have a wireless smart meter installed in his/her location, violate the Americans with Disabilities Act or Pub. Util. Code § 453(b)?
2. Do the Americans with Disabilities Act or Pub. Util. Code § 453(b) limit the Commission’s ability to adopt opt-out fees for those residential customers who elect to have an analog meter for medical reasons?
3. Can the Commission delegate its authority to allow local governments or communities to determine what type of electric or gas meter can be installed within the government or community’s defined boundaries? If so, are there any limitations?
4. How should the term “community” be defined for purposes of allowing an opt-out option?
  - a. Would the proposed definition require modifications to existing utility tariffs?
  - b. Would the proposed definition conflict with existing contractual relationships or property rights?
5. If a local government (town or county) is able to select a community opt-out option on behalf of everyone within its jurisdiction and the opt-out

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<sup>2</sup> The Opening Brief was filed by the County of Marin, County of Santa Cruz, Town of Fairfax, City of Marina, City of Seaside, City of Capitola, City of Santa Cruz, Town of Ross, and the Alliance for Human and Environmental Health, referred to collectively as “County of Marin”.

<sup>3</sup> Ruling at p. 5.

includes an opt-out fee to be paid by those represented by the local government, would this fee constitute a tax?<sup>4</sup>

The Ruling further invites intervenors advocating adoption of a community opt-out option to include testimony on the following, assuming that a community opt-out option is adopted:

1. What requirements and procedures should the Commission establish to ensure that a community has properly elected to opt-out? Should there be an appeals process before the Commission if a customer within the community's boundaries challenges the determination?
2. How will a community electing to opt-out accommodate residential customers who wish to retain their smart meters (i.e., not opt-out) and commercial customers within its boundaries?<sup>5</sup>

Despite this narrowly defined scope for briefing, numerous parties raised issues related to radio frequency (RF) emissions, their associated health impacts and the Commission's consideration of such impacts, compliance with FCC guidelines for RF emissions, and the justification for the approved opt-out interim fees in D.12-02-014, D.12-04-018, and D.12-04-019. These issues are beyond the scope of the issues set forth in the Ruling to be considered in the second phase to the above proceedings and all remarks addressing these subjects should be ignored and not considered as part of the record.

### **III. OPT OUT FEES DO NOT VIOLATE ADA OR ANY OTHER FEDERAL OR STATE STATUTE**

As SDG&E and SoCalGas explained in their opening brief, the IOUs opt-out fees do not violate Title III of the ADA for at least three independent reasons.

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<sup>4</sup> Ruling at p. 5 – 6.

<sup>5</sup> Ruling at 6.

First, as a coverage matter, Title III does not apply to the operations of a public utility. Second, even if the ADA applied to public utilities as a coverage matter, which it does not, imposition of an opt-out fee would not amount to unlawful discrimination. And third, and finally, Title III does not prohibit imposition of surcharges in all cases.

None of the arguments put forward in the various intervenors' opening briefs provide a scintilla of credible legal precedent to support a claim that the Commission-approved opt-out fees violate ADA and/or Public Utilities Code 453. In addition, these parties disingenuously ignore a key legal factor that the utilities do not propose to impose opt-out fees solely on individuals with disabilities or other covered medical conditions, but instead allow any and all customers to independently elect to take service through an analog meter for a service specific, cost based fee. Thus, a customer's particular disability or lack thereof is simply irrelevant when considering the application of the ADA to opt-out fees.<sup>6</sup>

Therefore, the unsubstantiated arguments of the intervenors that the Commission-approved opt-out fees violate the ADA, Public Utilities Code 453, or any other alleged federal or state law constitute clear legal and factual error<sup>7</sup> because they fail to fully consider the non-discriminator framework of the utilities' opt-out fees, and the fact that the fees will be implemented uniformly among all customers electing to take service through an analog meter. Accordingly, SDG&E and SoCalGas request the Commission to disregard the intervenors' baseless arguments.

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<sup>6</sup> SDG&E and SoCalGas Opening Brief, page 7.

<sup>7</sup> In particular, the Center for Accessible Technology and Stop Smart Meters Irvine claim that the utilities' opt-out fee would violate the Unruh Civil Rights Act, which prohibits discrimination on the basis of disability. Again, SDG&E and SoCalGas' proposed opt-out fees are applied uniformly to all customers, and thus, are not discriminatory under the Unruh Civil Rights Act. (Center for Accessible Technology Opening Brief, page 12. Stop Smart Meters Irvine Opening Brief, page 5.)

**IV. COUNTY OF MARIN PROPOSAL TO TREAT COMMUNITY OPT-OUT LIKE CCA PROGRAM FAILS TO RECOGNIZE STATUTORY LIMITATIONS FOR ELECTRIC UTILITIES AND THE FACT, THAT THERE IS NO CCA PROGRAM FOR GAS UTILITIES**

The County of Marin presents in its opening brief that the Commission’s Community Choice Aggregation (“CCA”) program also provides, “a highly relevant example of how local government involvement in establishing significant aspects of the type of electric service provided to citizens within their jurisdictions can be implemented and not equate to a delegation of Commission authority, and is also instructive as to how problems with the opt-out fees proposed by the Utilities should be avoided in this proceeding.”<sup>8</sup>

SDG&E and SoCalGas must offer the Commission words of caution in the Commission’s consideration of the County of Marin’s comments and the proposal that a community opt-out program be modeled after the CCA program.

First, the CCA program is created by statute so any similar opt-out type of CCA program would very likely, and nevertheless should, require statutory authority granted by the State Legislature. Thus, the Commission must consider with caution the establishment of a CCA modeled opt-out program even if the desired outcome could be meritorious. Second, the current CCA program is only applicable to electric utilities. Furthermore, there is no comparable CCA program for gas utilities and without a proper factual foundation in the record, the statutorily based policy driven rules, procedures, benefits, or cost and outcomes underlying the CCA program cannot simply be assumed into existence out of thin air. Thus, the Commission currently lacks the necessary

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<sup>8</sup> Opening Brief of County of Marin, et. al, page 20-21.

legislative authority to impose a CCA modeled opt out program on gas utilities. Finally, the CCA program has nothing to do with the construction of utility infrastructure like that occurring with the IOUs Commission-approved electric and gas smart meter projects. The current CCA program is centered on the purchase of a commodity, which as a market, is not foundationally impacted by having CCA's participate. However, a program that could potentially result in hundreds of cities with different basic utility infrastructure presents a whole different range of issues for consideration. Besides, SDG&E and SoCalGas respectfully submit that it is bad policy to order into existence any new programs from a record which lacks material facts, contains significant unanswered questions of law, and fails to consider the true costs and benefits of its as yet unknown consequences.

SDG&E and SoCalGas raise the above concerns for the benefit of the Commission's consideration as to whether and to what extent it can delegate its authority to allow local governments or communities to determine what type of electric or gas meter can be installed within the government or community's defined boundaries. Nonetheless, SDG&E and SoCalGas remain committed to the view that "the Commission's authority preempts local governments or communities from the exercise of discretionary actions that would prevent or substantially impede the installation of electric or gas metering equipment."<sup>9</sup>

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<sup>9</sup> SDG&E and SoCalGas Opening Brief, page 9.

**V. SOCALGAS AND SDG&E SUPPORT UCAN FINDINGS THAT COMMISSION CAN NOT OPT-OUT OF ITS DEFINED AUTHORITY**

In their opening brief, UCAN supports the position of SoCalGas and SDG&E and the other IOUs reflected in their own opening briefs, that, “the Commission may not delegate its regulatory authority to local and community governments without enabling legislation.”<sup>10</sup> UCAN further adds that: “local governments are forbidden from regulating matters that fall under the Commission’s jurisdiction, including the regulation of metering.”<sup>11</sup> UCAN’s position concurs with that echoed by SDG&E and SoCalGas in their opening brief that the Commission’s authority over public utilities arises from the state Constitution and is enumerated in detail in the California Public Utilities Commission.<sup>12</sup> Therefore, as UCAN, SoCalGas and SDG&E contend, the Commission cannot delegate authority to allow local governments or communities to determine what type of electric or gas meter can be installed. Accordingly, SDG&E and SoCalGas request the Commission’s decision in this proceeding unambiguously reflect the Commission’s exclusive jurisdiction over the regulation of public utilities.

**VI. SDG&E DID NOT RECEIVE FEDERAL FUNDING FOR ITS SMART METER PROJECT**

Both the Center for Electrosmog Prevention and Center for Accessible Technology allege that SDG&E is somehow subject to additional federal regulations because SDG&E received federal funding for the SDG&E Smart Meter project. The Center for Electrosmog Prevention contends: “utilities such as SDG&E, SCE, and PG&E, which received federal Stimulus Act funding for smart meters and smart grid from opt-

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<sup>10</sup> UCAN Opening Brief, page 3.

<sup>11</sup> UCAN Protest, page 5.

<sup>12</sup> Opening Brief of San Diego Gas & Electric Company and Southern California Gas Company, dated July 16, 2012, page 10.

out fees are subject to Title 10 of the Energy Act.”<sup>13</sup> The Center for Accessible Technology claims SDG&E is subject to Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability, because it received federal funding for its Smart Meter project.<sup>14</sup>

SDG&E takes this opportunity to clearly state for the record that it did not receive federal funding to support its Smart Meter project.<sup>15</sup> SDG&E’s Smart Meter project was fully funded through Commission decision, D.07-04-043. Therefore, the comments of the Center for Electromog Prevention and the Center for Accessible Technology should be disregarded as there is no factual basis for its unsupported contention that SDG&E is subject to the Rehabilitation Act of 1973.

## **VII. CONCLUSION**

For the reasons set forth herein, the Commission should adopt opt-out policy measures in accordance with its opening and reply briefs.

Respectfully submitted this 30<sup>th</sup> day of July, 2012.

By /s/ Allen K. Trial  
ALLEN K. TRIAL  
101 Ash Street, HQ-12  
San Diego, California 92101  
Telephone: (619) 699-5162  
Facsimile: (619) 699-5027  
[ATrial@semprautilities.com](mailto:ATrial@semprautilities.com)

Attorney for  
SAN DIEGO GAS & ELECTRIC COMPANY and  
SOUTHERN CALIFORNIA GAS COMPANY

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<sup>13</sup> Center for Electromog Prevention Opening Brief, page 7.

<sup>14</sup> Center for Accessible Technology, Opening Brief, page 17.

<sup>15</sup> SDG&E did receive federal funding for its Smart Gridcomm Project (DE-FOA-0000058), but this project is separate from the Smart Meter project funded through D.07-07-043.