BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
07-16-12
04:59 PM

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).	)	A.11-03-014 (Filed March 24, 2011)
And Related Matters.	)	A.11-03-015 A.11-07-020

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) OPENING BRIEF

JANET S. COMBS
SHARON YANG

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-6680
Facsimile: (626) 302-3990
E-mail: Sharon.Yang@sce.com

Dated: **July 16, 2012**

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).	)	A.11-03-014 (Filed March 24, 2011)
And Related Matters.	)	A.11-03-015 A.11-07-020

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) OPENING BRIEF

I.

INTRODUCTION

Southern California Edison Company ("SCE") respectfully submits this Opening Brief to respond to the following five legal questions posed in the Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase dated June 8, 2012.

1. **Does an opt-out fee, which is assessed on every residential customer who elects not to have a wireless smart meter installed in his/her location violate the Americans with Disabilities Act ("ADA") or Cal. Pub. Util. Code § 453(b) ("Section 453(b)")?**

   No. An opt-out fee that is assessed on every residential customer who elects not to have a wireless smart meter violates neither the ADA nor Section 453(b).

2. **Does the ADA or Section 453(b) limit the California Public Utility Commission's ("Commission") ability to adopt opt-out fees for those residential customers who elect to have an analog meter for medical reasons?**

   No. Neither the ADA nor Section 453(b) limits the Commission's ability to adopt opt-out fees for 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?**

   No. The Commission may not delegate its authority to allow another entity, including a local government, to determine the types of meters to be installed.

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?**

   The Commission may not delegate its authority to another entity to determine the types of meters to be installed. SCE's service relationship is directly with the individual customer. Community opt-out negates the right of individual customers to choose.

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 includes an opt-out fee to be paid by those represented by the local government, would this fee constitute a tax?**

   Because opt-out fees are legitimate regulatory fees to allow SCE to recover its costs, an opt-out fee to be paid by those represented by a local government is unlikely to constitute a tax.

II.

ARGUMENT

A. Does an opt-out fee, which is assessed on every residential customer who elects not to have a wireless smart meter installed in his/her location violate the ADA or Section 453(b)?

An opt-out fee that is assessed on every residential customer who elects not to have a wireless smart meter violates neither the ADA nor Section 453(b).

1. An opt-out fee assessed on every residential customer who elects not to have a wireless smart meter does not violate the ADA.

Five Titles comprise the ADA: (I) Employment; (II) Public Services; (III) Public Accommodations and Services Operated by Private Entities; (IV) Telegraphs, Telephones, and Radiotelegraphs; and (V) Miscellaneous Provisions.

Title I of the ADA states that "employers" must provide "qualified individuals" with "reasonable accommodations" for those individuals to be able to perform the essential functions of their employment.[1] Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity,[2] or be subjected to discrimination by any such entity."[3] Title III of the ADA mandates, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges,

---

1 42 U.S.C. § 12111.

2 The term "public entity" means (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49). *See* 42 U.S.C. § 12131.

3 42 U.S.C. § 12132.

advantages, or accommodations of any place of public accommodation[4] by any person who owns, leases (or leases to), or operates a place of public accommodation."[5]

According to the ADA, the term "disability" means, with respect to an individual, "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[6] "Major life activities" include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, as well as major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[7]

An opt-out fee assessed on every residential customer who elects not to have a wireless smart meter does not violate the ADA. First, Title I's "reasonable accommodation" requirement does not apply to public utilities' services to residential customers. SCE is not an "employer" in the matter at hand, and residential customers are not "employees" or "qualified individuals" as defined by the ADA. Second, Title II does not apply because a public utility is not a "public entity" as defined in the statute.[8] Third, Title III does not apply because a public utility is not a "public accommodation" as defined in the statute.[9] Fourth, Titles IV and V do not apply to electric utilities. Fifth, even if any Title of the ADA applied here, radio frequency ("RF") sensitivity is not a "disability" covered by the ADA. Opt-out fees do not violate the ADA.

---

4 Title III identifies 12 private entities as "public accommodations," none of which is a public utility. *See* 42 U.S.C. § 12181(7).
5 42 U.S.C. § 12182(a).
6 42 U.S.C. § 12102(1).
7 42 U.S.C. § 12102(2).
8 *See* fn. 2, *supra*.
9 *See* fn. 4, *supra*.

2. An opt-out fee assessed on every residential customer who elects not to have a wireless smart meter does not violate Section 453(b).

Section 453(b) of the California Public Utilities Code states in part:

> No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of ancestry, medical condition, marital status or change in marital status, occupation, or any characteristic listed or defined in Section 11135 of the Government Code.[10]

Section 11135 of the California Government Code provides that "disability" means any mental or physical disability, as defined in Section 12926.[11] Section 12926 of the California Government Code defines "medical condition," "mental disability," and "physical disability" very specifically.[12]

An opt-out fee assessed on every residential customer who elects not to have a wireless smart meter does not violate Section 453(b). First, RF sensitivity is not included in any of the extensive definitions of "medical condition," "mental disability," or "physical disability" in the California Government Code. Second, even if RF sensitivity were a "medical condition," "mental disability," or "physical disability" covered by Section 453(b), the Commission's imposition of opt-out fees does not discriminate because ***all*** opt-out customers pay the same opt-out fee regardless of their reasons for opting out.[13] The opt-out fees assessed by SCE are not required because of a customer's "medical condition" or any other characteristic identified in Section 453(b). Rather, the opt-out fees are assessed to recover the costs associated with providing opt-out customers with a different service from the service provided to the majority of SCE's customers. Opt-out fees do not violate Section 453(b).

---

[10] Cal. Pub. Util. Code § 453(b).

[11] Cal. Gov't Code § 11135(c)(1).

[12] Cal. Gov't Code § 12926(i), (j), (*l*).

[13] Fees for CARE customers are lower than fees for non-CARE customers. All CARE customers pay the same fee as other CARE customers, regardless of their reasons for opting out. All non-CARE customers pay the same fee as other non-CARE customers, regardless of their reasons for opting out. Just as charging CARE customers a lower energy rate does not violate Section 453(b), charging CARE customers a lower opt-out fee does not violate Section 453(b).

B. Does the ADA or Section 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?

Neither the ADA nor Section 453(b) limits the Commission's ability to adopt opt-out fees for residential customers who elect to have an analog meter for medical reasons. As explained in Section A.2. above, the opt-out program does not discriminate against such customers because ***all*** opt-out customers pay the same opt-out fee regardless of their reasons for opting out. In other words, customers who opt out of smart meters for medical reasons pay the same cost-of-service based fees as customers who opt out of smart meters for some other reason. Accordingly, there is no violation of the ADA or Section 453(b).

C. 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?

The Commission may not delegate its authority to allow local governments to determine the types of meters to be installed within their defined boundaries. The Commission does not have leave to delegate its judgment and discretion regarding such matters.

Article XII, Section 3 of the California Constitution grants Legislature control over the Commission's regulation of public utilities,[14] and Article XII, Section 8 of the California Constitution specifically provides, "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."[15]

The Commission's delegation of authority to local governments to determine the types of meters to be installed would violate the doctrine of separation of powers, as this is a matter over

---

[14] California Constitution, Art. XII, § 3.
[15] California Constitution, Art. XII, § 8.

which the Commission has exclusive regulatory power. The long-standing doctrine of nondelegation requires that one branch of government must not authorize another entity to exercise the power or function that it is constitutionally authorized to exercise itself.[16] It is improper for the Commission to delegate its discretionary power because, "[a]s a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated…in the absence of statutory authorization."[17] Here, delegation of authority to local governments to determine the types of meters to be installed would, at the very least, impede the Commission's ability to regulate these meters and would require statutory authorization.

Article XII, Sections 2 and 6 of the California Constitution grant the Commission, not local governments, the power to supervise and regulate utilities.[18] The Commission has broad regulatory authority to ensure and enforce compliance with policy rules and requirements based on current statute and Constitutional authority.[19] The Commission may not delegate the authority to local governments to determine the types of meters to be installed, as the Commission would be unable to supervise and regulate local governments and would not be able to ensure and enforce compliance with rules and requirements.

---

16 *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).
17 *California Sch. Employees Ass'n v. Personnel Comm'n*, 3 Cal. 3d 139, 144 (1970).
18 California Constitution, Art. XII, §§ 2, 6.
19 *Id.* at p. 63.

D. How should the term "community" be defined for purposes of allowing an opt-out option? Would the proposed definition require modifications to existing utility tariffs? Would the proposed definition conflict with existing contractual relationships or property rights?

The question posed by the Assigned Commissioner's Ruling of how "community" should be defined for purposes of allowing an opt-out option assumes that an opt-out option for a "community" is even permissible.

It is not.

As discussed above, the Commission may not delegate its authority to another entity to determine the types of meters to be installed.

Even if community opt-out were permissible, any type of community opt-out would conflict with existing utility tariffs, contractual relationships, and property rights. Any person may obtain service from SCE by making an application in accordance with SCE's Tariff Rule 3 and, if required, by signing a contract in accordance with SCE's Tariff Rule 4, and applicants for service must conform to and comply with SCE's tariff schedules.[20] SCE's service and relationship is directly with the individual customer.[21]

Moreover, community opt-out negates the right of individual customers to choose smart metering. Each customer funds its fair share of costs associated with smart meters and has the right to enjoy smart metering benefits, such as access to dynamic pricing and demand response programs and near real-time consumption data. Opting out of smart metering requires each customer to bear additional costs, and the decision to opt out and bear these additional costs should be the individual's choice. A community has no authority to decide that all of its

---

[20] SCE's Tariff Preliminary Statement Section C.

[21] SCE's Tariff Rule 1, Definitions of "Customer" and "Applicant"; *see also Barnett v. Delta Lines, Inc.*, 137 Cal. App. 3d 674, 683 (1982) (a public utility's authority will be utilized for the good of the public need—*i.e.*, each individual customer—and not to particular agencies or entities); Cal. Pub. Util. Code § 451.

residents should incur additional costs and lose the benefits of smart metering. As such, any community opt-out is improper.

E. 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 includes an opt-out fee to be paid by those represented by the local government, would this fee constitute a tax?

Because opt-out fees are legitimate regulatory fees to allow SCE to recover its costs, an opt-out fee to be paid by those represented by a local government is unlikely to constitute a tax.

Whether impositions are "taxes" or "fees" is a question of law for the appellate courts to decide on independent review of the facts.[22] Generally, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.[23]

A regulatory fee is not a tax if it is (1) charged in connection with regulatory activities, (2) does not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged, and (3) is not levied for unrelated revenue purposes.[24] In *Sinclair Paint Co. v. State Board of Equalization*, fees paid under the Childhood Lead Poisoning Prevention Act were reasonably characterized as regulatory fees rather than taxes because they were charged in connection with regulatory activities, did not exceed the reasonable cost of providing services necessary to the prevention of childhood lead poisoning, and were not levied for unrelated revenue purposes.[25]

Opt-out fees will be charged in connection with regulatory activities, do not exceed the reasonable cost of providing services necessary to opting out of smart metering, and are not levied for unrelated revenue purposes. Accordingly, opt-out fees are unlikely to constitute a tax.

---

22 *Sinclair Paint Co. v. State Board of Equalization*, 15 Cal. 4th 866, 874 (1997).
23 *Id.*
24 *Id.* at 876.
25 *Id.* at 880-81.

III.

CONCLUSION

An opt-out fee that is assessed on every residential customer who elects not to have a wireless smart meter violates neither the ADA nor Section 453(b). The opt-out program does not discriminate because all opt-out customers pay the same opt-out fee regardless of their reasons for opting out. The Commission may not delegate its authority to allow another entity, including a local government, to determine the types of meters to be installed. Accordingly, any community opt-out is impermissible. Finally, because opt-out fees are legitimate regulatory fees to allow SCE to recover its costs, an opt-out fee to be paid by those represented by a local government is unlikely to constitute a tax.

Respectfully submitted,

JANET S. COMBS
SHARON YANG

/s/ SHARON YANG
By: Sharon Yang

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Rosemead, California 91770
Telephone: (626) 302-6680
Facsimile: (626) 302-3990
E-mail: sharon.yang@sce.com

July 16, 2012