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<br>Application 11-07-020 |

# CENTER FOR ACCESSIBLE TECHNOLOGY'S REVISED OPENING BRIEF ON LEGAL ISSUES

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## I. INTRODUCTION

Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure, and the schedule set forth in the Administrative Law Judge's Ruling Revising Schedule,[1] the Center for Accessible Technology (CforAT) submits this revised brief addressing the legality of assessing an opt-out fee on customers who are required to have an analog meter for medical reasons.

## II. OVERVIEW

CforAT has not been a party to these consolidated proceeding during the process that led to the Opt-Out Decisions[2] regarding wireless smart meters, nor has it taken any position on the questions concerning potential health impacts of smart meters.[3] CforAT further recognizes that this proceeding is not reviewing these alleged health impacts.[4] However, to the extent that such health impacts are found to exist in some appropriate forum, and to the extent that a customer can make an appropriate showing that he or she requires an analog meter for medical reasons, the Phase 2 Ruling asks about the legal implications that would flow from such a showing. In particular, the Phase 2 Ruling asks the parties to address whether opt-out fees, which are assessed generally on customers who prefer an analog meter, can properly be assessed on customers whose request to

[1] Administrative Law Judge's Ruling Revising Schedule, issued on July 3, 2012, at p. 3. On June 29, 2012, in accordance with the original schedule set forth in the Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase *(*Phase 2 Ruling), issued on June 8, 2012, CforAT served a prior draft of this brief. CforAT also attempted to file the prior draft, but it was never accepted through the efiling system at the Commission because no action had yet been taken on CforAT's motion for party status, submitted on June 28, 2012. This revised brief is intended to supersede the earlier brief in its entirety.

[2] D.12-02-014, D.12-04-018, and D.12-04-019 (*see* Phase 2 Ruling at p. 2, n. 2)

[3] CforAT filed its Motion for Party Status and NOI in these consolidated proceedings on June 28, 2012. The Motion for Party Status was granted in an email ruling issued on July 12, 2012. In these documents, CforAT explained its regular role as an intervenor at the Commission representing the interests of disabled consumers, and noted its intent to participate in these consolidated proceedings solely to address the legal issues regarding the applicability of various access laws to the issue of opt-out fees.

[4] Phase 2 Ruling at p. 5.

retain an analog meter is not based on personal preference but rather on a showing of health impacts.

Without addressing the form that such a showing would take, CforAT believes that both state and federal law prevent the Commission or the regulated utilities from assessing an opt-out fee on a customer who requires an analog meter for medical reasons, and that such a fee would constitute a prohibited surcharge on a customer with a disability.

The Phase 2 Ruling specifically asks parties to address the extent to which the Americans with Disabilities Act (ADA)[5] and California Public Utilities Code §453(b) impact the Opt-Out Decisions, asking whether an opt-out fee violates these laws[6] and whether the Commission's ability to adopt such an opt-out fee is constrained by these laws.[7] While the Commission does not ask the parties to address any other access laws, both the agency and the regulated utilities are also subject to California law that prohibits discrimination against people with disabilities, namely the Unruh Civil Rights Act.[8] The Commission is also subject to the provisions of the California Government Code prohibiting discrimination against people with disabilities by state agencies and entities that receive funding from the state.[9] Finally, to the extent that the IOUs' smart meter

[5] 42 U.S.C. §12101 *et seq*. In addition to the statute, which includes Title II (requiring public entities including states and state agencies to avoid discrimination based on disability) and Title III (requiring public accommodations to avoid discrimination based on disability), the ADA is implemented through regulations promulgated by the Department of Justice, and its interpretation is informed via guidance that has been issued by the Department of Justice through the publication of Technical Assistance Manuals, guidance letters, and other written statements. Such publications are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[6] Phase 2 Ruling at p. 5, Question 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)?"

[7] Phase 2 Ruling at p. 6, Question 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?"

[8] Cal. Civil Code §51 *et seq*.

[9] Cal. Gov't Code §11135.

programs are supported by federal funds, for example stimulus funding, they are subject to the requirements of Section 504 of the Rehabilitation Act of 1973.[10]

California's anti-discrimination statutes are interpreted to be consistent with the ADA except to the extent that state law provides greater protection for people with disabilities than the federal statute. Section 504 of the Rehabilitation Act is also interpreted consistently with the ADA. Because these various statutes are all interpreted consistently, they are all addressed in the discussion below, and they all require a finding that the neither the Commission nor the IOUs can assess a surcharge on people whose ability to access electrical service is impacted by installation of a wireless smart meter. Without commenting on the nature of the showing that would be required to demonstrate that an analog meter is a necessary accommodation, CforAT believes that the law is clear: to the extent that such a showing is provided, a customer who cannot tolerate a wireless smart meter for medical reasons must be permitted to retain an analog meter without paying an opt-out fee.

## III. THE AMERICANS WITH DISABILITIES ACT

The ADA generally prohibits discrimination on the basis of disability. It is predicated on findings that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,"[11] and it is intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[12]

[10] 29 U.S.C. § 794 (" No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .").

[11] 42 U.S.C. § 12101(a)(3).

[12] 42 U.S.C. § 12101(b)(1).

Title II of the ADA applies to public entities, and prohibits discrimination by forbidding people with disabilities from being "excluded from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity."[13] Title III of the ADA applies to public accommodations, and prohibits activity that would deny "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" to people with disabilities.[14] The ADA is intended to be a floor, not a ceiling, on rights for people with disabilities, and states are free to provide greater protection for people with disabilities than is required by the federal statute.[15]

### A. Prohibition on Surcharges

Title III of the ADA generally requires public accommodations to provide equal access to goods and services to people with disabilities as are provided to non-disabled patrons.[16] This prohibition on discrimination specifically includes a requirement to modify standard practices and procedures when necessary to provide access,[17] and to provide auxiliary aids and services to the extent necessary to ensure that a person is not denied service due to a disability.[18] The federal regulations implementing Title III of the ADA unambiguously prohibit covered entities from assessing a surcharge to cover the costs of providing access, stating:

> A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier

[13] 42 U.S.C. § 12132.

[14] 42 U.S.C. § 12182.

[15] 42 U.S.C. §12201(b).

[16] The question of whether the IOUs whose programs are under review in this consolidated proceeding are public accommodations subject to Title III of the ADA is discussed below.

[17] 42 U.S.C. §12182(b)(2)(A)(ii).

[18] 42 U.S.C. § 12182(b)(2)(A)(iii).

> removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.[19]

In guidance issued by the U.S. Department of Justice, the agency charged with enforcing the ADA, the requirement is equally clear: "Although compliance [with Title III] may result in some additional cost, a public accommodation may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses."[20] The non-exhaustive set of illustrations of this requirement showing situations in which a surcharge is prohibited include a pharmacy located on the second floor of a building without an elevator that provides home delivery to a customer who cannot enter the facility and several situations regarding the cost of sign-language interpreters.[21]

Title II of the ADA generally requires public entities to ensure that their programs, services and activities are accessible to people with disabilities. As with Title III, the federal regulations implementing Title II unambiguously forbid the use of surcharges on people with disabilities to cover the cost of providing accommodation, stating:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.[22]

At this time, the Commission has made the installation of wireless smart meters the standard for the major IOUs in California, and has provided an opportunity for any

[19] 28 C.F.R. §36.301(c).

[20] Americans With Disabilities Act Title III Technical Assistance Manual (Title III TAM), §III-4.1400 (Surcharges), available at http://www.ada.gov//taman3.html .

[21] Title III TAM, §III-4.1400.

[22] 28 C.F.R. §35.130(f).

customer to opt-out of the standard in conjunction with a fee. CforAT is not addressing the legality of the opt-out fee for customers who simply prefer an analog meter in this brief; however, to the extent that a customer can reach an appropriate threshold to show that the decision to maintain an analog meter is not simply a preference, but rather is a medical necessity due to a disability, the ADA and its supporting regulations[23] require that the standard policy of installing a smart meter be modified, with no charge to the customer.[24]

### B. Applicability to Utilities

Title III of the ADA applies to public accommodations; the term "public accommodations" is defined in the statute, which provides a list of twelve categories that constitute public accommodations.[25] According to the Title III Technical Assistance Manual, these twelve categories are an exhaustive list, though the examples given within each category are just illustrations.[26] CforAT has been unable to locate any authority definitively addressing the extent to which an IOU providing electrical service to a customer at a customer's residence (using a meter located at or near such residence) is a public accommodation subject to the provisions of the ADA.[27] To the extent that an IOU falls into one of the articulated categories, it would appear to be category F, which consists of service establishments, including: "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of

[23] Assuming for the sake of this analysis that the ADA applies to the IOUs; this is discussed in detail below.

[24] Alternatively, the analog meter can be considered an auxiliary aid provided to a customer in place of the standard smart meter. Under this conceptualization, too, no surcharge is permitted.

[25] 42 U.S.C. §12181(7).

[26] Title III TAM at §III-1.2000.

[27] There is no doubt that the policy basis of the ADA, discussed in greater detail below, is applicable to utilities, nor is there any doubt that California's state laws prohibiting discrimination on the basis of disability, specifically the Unruh Act (Cal. Civil Code § 51 *et seq.*), also discussed in greater detail below, apply to IOUs.

an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment."

There can be no dispute that an electric utility's local offices that are open to the public for purposes such as paying bills are "service establishments" subject to Title III of the ADA and must be accessible to people with disabilities.[28] The extent to which services that are not offered to the customer at a public, physical facility are subject to Title III of the ADA is unclear.

To the extent that this question has been addressed, it has largely been raised in the context of the obligations of businesses to provide accessible internet service or to provide access to services offered by phone or mail. Within the Ninth Circuit, case law notes that the applicability of Title III of the ADA may be limited to physical places;[29] however, it also applies the statute to off-site discrimination if there is a nexus between the service and a physical facility operated by the business establishment.[30] Other circuits have found that no such physical nexus is required.[31]

Even under the interpretation offered by the Ninth Circuit, however, off-site discrimination is actionable if a nexus exists, since "the statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of

[28] 42 U.S.C. § 12181 (7) (F). Similarly, there is no dispute that municipal utilities are broadly subject to Title II, and must ensure that all of their programs, services and activities are accessible. *See* Settlement Agreement Between the United States of America and City Utilities of Springfield, Missouri, Department of Justice Complaint Number 204-43-140, available at http://www.ada.gov/sprfldmo.htm#anchor262953 (finding that Title II of the ADA applies to municipal utility, and requiring multiple actions to ensure that all utility services, activities and facilities are accessible to people with disabilities).

[29] *Weyer v Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1114 (9th Cir. 2000).

[30] *Nat'l Federation of the Blind v. Target Corp.*, 452 F.Supp. 2d 946, 952 (N.D. Cal., 2006).

[31] *See e.g. Carparts Distribution Ctr. Inc. v. Automotive Wholesalers Assoc. of New England, Inc.,* 37 F.3d 12, 19-20 (1st Cir. 1994) (holding that "public accommodations" encompasses more than actual physical structure and includes the defendant insurance company); *Doe v. Mutual of Omaha Ins. Co.,* 179 F.3d 557, 559 (7th Cir. 1999) (noting, in dicta, that a "place of public accommodation" encompasses facilities open to the public in both physical and electronic space, including websites).

a public accommodation would contradict the plain language of the statute."[32] Indeed, courts have rejected efforts to limit access requirements to physical facilities even under the Ninth Circuit's more constrained reading of the statute, noting that such action would "effectively read[] out of the ADA the broader provisions enacted by Congress," and noting that "the Ninth Circuit has stated that the 'ordinary meaning' of the ADA's prohibition against 'discrimination in the enjoyment of goods, services, facilities or privileges is that *whatever* goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services.'"[33]

Here, there is a nexus between the service offered and the entity offering the service, based on the placement of a wireless smart meter at the customer's residence. As noted above, courts have found that the ADA applies to services of a public accommodation accessed in private residences, noting that "the ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation."[34] Thus, the *Netflix* Court concluded that "while the home itself is not a place of public accommodation, entities that provide services in the home may qualify as places of public accommodation."[35] This is consistent with the legislative history of the ADA, which states that states that the list of public accommodations is to be liberally construed:

> [W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar entities.' The Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation that people

[32] *Nat'l Federation of the Blind*, 452 F.Supp. 2d at 953 (emphasis in the original) (citing 42 U.S.C. § 12182(a)).

[33] *Nat'l Federation of the Blind,* 452 F.Supp. 2d at 955 (quoting *Weyer,* 198 F. 3d at 1115).

[34] *Nat'l Assoc. of the Deaf v. Netflix, Inc.,* __ F.Supp. 2d __, 2012 WL 2343666, *4 (D. Mass) (June 19, 2012) (citing *Nat'l Federation of the Blind,* 452 F.Supp. 2d at 953).

[35] *Nat'l Assoc. of the Deaf ,* 2012 WL 2343666 at *4. The same court noted that the statute requires the public entity to own, lease or operate the public accommodation, but concludes that the relevant inquiry is whether the covered entity controls the modification of the thing at issue that impacts accessibility. *Id.* at *4-*5 ) (citing *Neff v. Am. Dairy Queen Corp.,* 58 F.3d 1063, 1066 (5th Cir. 1995)). Here, there is no question that the IOU controls the meter installed at a customer's residence.

> with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.[36]

Of course, access to electricity, which requires a meter of some sort, is the essence of the service offered by an IOU. If the standard meter (a wireless smart meter) cannot be tolerated by a customer due to medical reasons, then the use of such a meter would prevent the customer from being able to access electrical services. In such a situation, Title III of the ADA should require the utility to accommodate the customer by modifying its standard practice of installing a wireless smart meter or assessing an opt-out fee for an analog meter, and by making available an analog meter at no additional charge, so that the customer can continue to access necessary electrical service.[37]

### C. Applicability to the Commission

In its second question issued for legal briefing, the Phase 2 Ruling specifically asks whether the Commission's ability to adopt opt-out fees is limited by the ADA or state law. Unlike the utilities themselves, whose status under the ADA is unclear, the Commission is expressly bound by Title II of the ADA to avoid discrimination against people with disabilities by ensuring 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. . . ."[38] The Commission broadly ensures that customers of regulated electric utilities have access to essential services such as electricity;[39] to the extent that a Commission decision regarding the installation of a

[36] S. Rep. No. 116, 101st Cong., 1st Sess. 59 (1989). Similarly, the fact that wireless smart meters were not available at the time that the ADA and its implementing statutes were drafted is no impediment to the applicability of the law. The legislative history of the ADA makes clear that Congress intended the statute to be interpreted to adapt to changes in technology. *See, e.g.* H.R. Rep. 101-485(II), at 108 (1990) ("[T]he Committee intends that they types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times").

[37] *See Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 1565 (1978) ("Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.")

[38] 42 U.S.C. § 12132.

[39] *See Memphis Light, Gas and Water Division*, 98 S.Ct. at 1565.

wireless smart meter prevents a customer from the benefits of access to electricity, the ADA requires the Commission to take action to avoid such an outcome.

There can be no dispute that the Commission is an entity subject to the provisions of Title II of the ADA, which applies to all public entities.[40] Nor can there be a reasonable dispute that Title II applies to the way in which the Commission sets rates and charges for electrical service. On its face, Title II applies to all services, programs and activities of a public entity; in determining what constitutes a service, program or activity, the Ninth Circuit has "construed the ADA's broad language as bringing within its scope anything a public entity does."[41]

Because the Commission is responsible for determining whether regulated IOUs install wireless smart meters or analog meters at the homes of residential customers, and because the Commission is responsible for determining whether an opt-out charge is generally applicable if a customer prefers to retain an analog meter,[42] the Commission is also responsible under Title II of the ADA to ensure that a person with a disability is not denied access to utility service based on Commission decisions regulating such activities.

While courts have previously held that other state commissions are not providing programs, services or activities simply by issuing a certificate of public convenience and necessity to a public utility,[43] there can be no doubt that providing just and reasonable

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[40] 42 U.S.C. § 12132.

[41] *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir. 2002) (internal citations omitted).

[42] Cal. Pub. Util. Code § 701 ("The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction"); s*ee also* Cal. Pub. Util. Code § 454(a) (Except as provided in Section 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified).

[43] *See Reeves v. Queen City Transp.,* 10 F. Supp. 2d 1181 (D. Colo., 1998) (dismissing claim against Colorado PUC for issuing CPCN to private transit company that allegedly failed to provide access to people with disabilities).

rates for electric service is a key activity of the Commission.[44] If a person cannot tolerate use of a wireless smart meter for medical reasons, the person must have access to an analog meter or be denied necessary utility service, putting their health and safety at greater risk. To the extent that the ability to assess a surcharge on a customer who requests an analog meter is based on legal decisions issued by the Commission, the Commission must ensure that such a surcharge is waived for a person who has a medical need for an analog meter.

**D. Intent of the ADA and Applicability of Policy Regarding Accessibility**

In addition to the legal applicability of the ADA to the Commission and the regulated IOUs, the Commission, as a policy-making entity, can and should look to the policy basis underlying the ADA, including the findings of Congress that supported the adoption of the ADA and the purposes of the federal statute as articulated in 42 U.S.C. 12101(b). These findings and the law's purpose are directly applicable to the situation of people who need an analog meter for medical reasons, and the Commission should consider its obligation as a matter of policy to address the needs of IOU customers who require an accommodation in order to have access to electrical service. As noted above, the ADA was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[45] based on findings including that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[46] Congress further found that "the Nation's proper goals regarding

[44] *See* Cal. Pub. Util. Code § 451.

[45] 42 U.S.C. § 12101(b)(1).

[46] 42 U.S.C. § 12101(a)(8).

individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[47]

To the extent that a person's ability to live independently and to fully participate in society is compromised by installation of a wireless smart meter when a person has a medical basis for being unable to tolerate such a device, the societal goals of nondiscrimination are directly implicated. The affected person must be accommodated, or else he or she will be denied opportunity solely due to a physical condition, a situation which has resoundingly been rejected by state and federal policy-makers. The Commission, as an independent policy-making agency, is free to adopt the same reasoning as was used to support the adoption of the ADA as a basis for ensuring that IOU customers who have a medical reason to require an analog meter in order to obtain electrical service are accommodated without a burdensome surcharge.

## IV. CALIFORNIA STATE LAW

### A. California Civil Code § 51 (Unruh Act)

While the Phase 2 Ruling does not request an analysis of whether California state law other than Public Utilities Code §453(b) prohibits opt-out fees for residential customers who are required to have an analog meter for medical reasons, CforAT would like to call the Commission's attention to California's general prohibition against discrimination on the basis of disability, which is part of California's broad anti-discrimination statute known as the Unruh Civil Rights Act.[48] The Unruh Act is broadly applicable to any entity that provides goods or services to the public, and it states in sweeping language that "all persons within the jurisdiction of this state" are "entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[49]

[47] 42 U.S.C. § 12101(a)(7).

[48] Cal. Civil Code § 51 *et seq.*

[49] Cal. Civil Code § 51(b).

California courts have stated for decades that the Unruh Act must be construed liberally to provide broad protection against discrimination. One leading case states:

> The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act (Cal. Civ. Code § 51), and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible … The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position as in life or business.[50]

Similarly, the California Supreme Court has explained that "the language of the statute encompasses not solely access to business establishments, but also treatment of patrons."[51]

The broad, all-encompassing nature of the Unruh Act has allowed courts which have grappled with the applicable boundaries of Title III of the ADA to confidently find the same questions easily answered with regard to California law.[52] At the same time, however, the Unruh Act explicitly forbids all activities that are prohibited by the ADA, expressly stating that a "violation of the right of any individual under the federal Americans with Disabilities Act of 1990 shall also constitute a violation of this section."[53] Thus, if a use of a surcharge is prohibited by the ADA, it is also prohibited by

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[50] *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 795 (1983); *see also Curran v. Mount Diablo Council of the Boy Scouts,* 17 Cal. 4th 670, 696 (1998) ("The term 'business establishments' must properly be interpreted in the broadest sense reasonably possible").

[51] *Angelucci v. Century Supper Club*, 41 Cal.4th 160, 174 (2007).

[52] *See, e.g. Nat'l Federation of the Blind,* 452 F.Supp. 2d at 957 (quickly finding viability of Unruh Act claim, following lengthy discussion of applicability of ADA); for a detailed discussion of the breadth and scope of the Unruh Act, *see Sisemore v. Master Financial, Inc.,* 151 Cal.App. 4th 1386, 1402-1409 (2007).

[53] Cal. Civil Code § 51(f).

the Unruh Act, as is any action that would burden a person strictly because of their disability.[54]

Again, in addition to the direct applicability of the Unruh Act to utilities, the Commission, as an independent policy-making entity, can and should adopt the same broad perspective as the California legislature has previously taken in ensuring that people with disabilities are not limited in their ability to live independently and obtain electrical service as a necessity of modern life due to a medical condition.

### B. Public Utilities Code § 453(b) and Government Code §11135

Public Utilities Code § 453(b) states that " no public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of. . . medical condition, . . .or any characteristic listed or defined in Section 11135 of the Government Code." The cited provision of the Government Code prohibits discrimination by any state agency or program that receives state funding based on multiple characteristics including disability.[55] Section 11135 of the Government Code further requires that the prohibition against discrimination on the basis of disability should be interpreted to be consistent with the provisions of the ADA except to the extent that state law provides stronger protections than the federal nondiscrimination statute.[56]

The Commission has previously relied on Section 453(b) to enforce accessibility obligations for regulated utilities, viewing such obligations as consistent with the utilities' obligation to provide just and reasonable "service, instrumentalities, equipment, and facilities."[57] In D.08-10-018, the Commission disagreed with efforts by the Division of Ratepayer Advocates to require the San Jose Water Company to retain a main office that

[54] *See Stevens v. Optimum Health Institute – San Diego,* 810 F. Supp. 2d 1074, 1089-1092 (S. D. Cal. 2011) (finding violation of Unruh Act where facility would only allow blind plaintiff admittance to facility if plaintiff brought sighted companion to accompany her and paid half-price for the sighted companion).

[55] Cal. Gov't Code § 11135(a).

[56] Cal. Gov't Code § 11135(b).

[57] Cal. Pub. Util. Code § 451.

was not physically accessible, as a less expensive alternative than acquiring a new facility. The Commission noted that a physically inaccessible office that required employee escort through a rear door for entrance was "inconvenient and possibly demeaning" to disabled customers, and clearly stated that persons with disabilities should have adequate access so that they could effectively conduct business with the utility.[58] The Commission then referenced a number of other actions taken to require accessible utility services,[59] and concluded by acknowledging "the importance of access for disabled person with respect to utilities' obligations, pursuant to §451, to furnish and maintain adequate facilities necessary to promote the safety, health, comfort, and convenience of patrons, employees, and the public."[60]

This understanding of the importance of access to disabled utility customers is consistent with the plain meaning of Section 453(b) of the Public Utilities Code, which, on its face, prohibits a surcharge on customers who require accommodation in the delivery of a public utility's service. If a person can make an appropriate showing that they have a medical condition which requires them to have an analog meter at their home, they cannot be disadvantaged (by denying them an analog meter) or charged a different rate due to the medical condition. While the Opt-out Decisions allow any customer to choose an analog meter for any reason, including simple preference, by paying an opt-out fee, a customer who has no medical reason to require an analog meter can avoid the fee by accepting the default installation of a wireless smart meter. A person who can show that he or she requires an analog meter for medical reasons has no ability to avoid the opt-out fee, and thus is either disadvantaged (by being forced to pay the opt-out fee or

[58] D.08-10-018 at p. 30-31.

[59] D.08-10-018 at p. 32 (citing as examples D.07-03-044, approving a Memorandum of Understanding between PG&E and Disability Rights Advocates that required access improvements, and D.06-12-038, requiring Cool Centers to be accessible to disabled customers). Since D.08-10-018 was issued, the Commission has required improved accessibility to numerous additional services and programs provided by regulated utilities.

[60] D.08-10-018 at pp. 32-33.

else being subject to installation of a meter that aggravates their medical condition) or charged different rates than those customers who do not have a similar medical condition.

This reading of the Public Utilities Code is consistent with the referenced provision of the Government Code, which adopts the same broad scope of applicability found in California's leading anti-discrimination law, the Unruh Act. Like the Unruh Act, it allows for broader applicability than the ADA, while also requiring interpretation consistent with the provisions of the ADA that would prohibit the assessment of surcharges.

Given the Commission's authority to regulate IOUs, its authority to set rates and charges, the constraints on the Commission through both state and federal law and the constraints on the IOUs under both state and federal law, there is no basis to permit opt-out fees for IOU customers who require an analog meter due to a medical condition. Additionally, as noted above, the Commission can and should use its independent authority to join other policy-makers in articulating its clear intent to broadly protect the rights of people with disabilities, and ensure that they have access to electricity under modified policies to ensure that they can maintain independence and receive equal treatment as non-disabled customers.

## V. SECTION 504 OF THE REHABILITATION ACT OF 1973

While the Phase 2 Ruling does not directly address any federal laws other than the ADA in requesting analysis of the legality of opt-out fees, CforAT would like to call the Commission's attention to the other key federal law prohibiting discrimination on the basis of disability, Section 504 of the Rehabilitation Act (Rehab Act).[61] This law, which predates the ADA by almost two decades, prohibits discrimination by federal entities and entities that received federal funding.

CforAT has not attempted to engage in detailed research to determine the extent to which the IOUs' smart meter programs have been supported with federal funding.

[61] 29 U.S.C. § 794.

However, a simple Google search reveals that, at minimum, SDG&E received federal funding through the 2009 federal stimulus[62] for its smart meter/smart grid program.[63] Thus, the smart meter program in place at SDG&E must comply with the requirements of Section 504. [64] To the extent that the other IOUs have also received any federal support for their smart meter programs, the federal anti-discrimination requirements are also controlling.

Section 504 is interpreted to be consistent with the ADA.[65] Thus, the ADA regulations and other supporting material expressly prohibiting the use of a surcharge for people with disabilities would also apply to any entity receiving federal funds. This is an independent basis to prohibit SDG&E, at minimum, from charging an opt-out fee to any customer who can show that his or her household requires an analog meter for medical reasons. To the extent that the other IOUs are also the recipients of federal funding,

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[62] The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

[63] *See* "SDG&E to Get Federal Smart-Grid Funding," U-T San Diego, October 28, 2009, available at http://www.utsandiego.com/news/2009/oct/28/sgampe-get-federal-smart-grid-funding/ ("Federal stimulus funds will pay for part of a new $60 million wireless communications system linking San Diego Gas & Electric Co.'s workers, substations, and meters, the company said yesterday").

[64] The question of the necessary nexus between the specific programs that receive federal funding and the programs for which access must be provided has been the subject of substantial legal activity since the Rehabilitation Act was passed, as the reach of the federal funding provisions of the Rehab Act has been interpreted to be consistent with other federal anti-discrimination statutes. For a discussion of the legal evolution of this issue, see "Title VI Legal Manual" issued by the Civil Rights Division of the U.S. Department of Justice in 1998, available at http://www.justice.gov/crt/grants_statutes/legalman.php#Introduction. Briefly, in 1984, the U.S. Supreme Court severely narrowed the interpretation of "program or activity" as it was used in multiple civil rights laws, including the Rehab Act. *Grove City College v. Bell*, 465 U.S. 555, 571-574 (1984). In *Grove City College,* the Court ruled that Title IX's prohibitions against discrimination applied only to the limited aspect of the institution's operations that specifically received the Federal funding. In response, Congress passed the Civil Rights Restoration Act (CRRA), Pub. L. No. 100-259, 102 Stat. 28 (1988), which was expressly intended to overturn *Grove City College* and ensure that various anti-discrimination laws, including the Rehab Act, would be widely applied to entities receiving federal funds in any capacity, without the Court's prior restrictive view of the programs subject to the civil rights provisions. Even without such direction, however, there would never be any dispute that federal funding targeted specifically to support a smart grid/smart meter program would require that particular program to be operated in such a manner as to avoid discrimination against people with disabilities.

[65] *See, e.g. Crawford v. Indiana Dept. of Corrections,* 115 F.3d 481, 483 (7th Cir.1997) ("The Rehabilitation Act is materially identical to and the model for the ADA, except that it is limited to programs that receive federal financial assistance. . .").

Section 504 of the Rehab Act also serves as an independent basis to prohibit application of surcharges for their customers as well.

## VI. CONCLUSION

For the foregoing reasons, the Commission should find that federal and state law prohibit the Commission from authorizing, and prohibit California IOUs from assessing, an opt-out fee on any customer who is required to have an analog meter for medical reasons, because such a fee would constitute a prohibited surcharge. The Commission should also independently acknowledge as a matter of policy that people with disabilities are entitled to accommodation in utility service to the extent such accommodation is necessary to allow them to maintain independence and to support the goal of eliminating discrimination against people with disabilities.

Respectfully submitted,

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