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07-16-12
04:59 PM

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).	Application 11-03-014 (Filed March 24, 2011)
Application of Utility Consumers' Action Network for Modification of Decision 07-04-043 so as to Not Force residential Customers to Use Smart Meters.	Application 11-03-015 (Filed March 24, 2011)
Application of Consumers Power Alliance, Public Citizen, coalition of Energy Users, Eagle Forum of California, Neighborhood Defense League of California, Santa Barbara Tea Party, Concerned Citizens of La Quinta, Citizens Review Association, Palm Springs Patriots Coalition Desert Valley Tea Party, Menifee Tea Party-Hemet Tea Party-Temecula Tea Party, Rove Enterprises, Inc., Schooner Enterprises, Inc., Eagle Forum of San Diego, Southern Californians For Wired Solutions to Smart Meters, and Burbank Action For Modification of D.08-09-039 And A Commission Order Requiring Southern California Edison Company (U338E) To File An Application For Approval Of a Smart Meter Opt-Out Plan.	Application 11-07-020 (Filed July 26, 2011)

PACIFIC GAS AND ELECTRIC COMPANY'S (U39M) BRIEF ON QUESTIONS PRESENTED BY ASSIGNED COMMISSIONER'S RULING

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Dated: July 16, 2012

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PACIFIC GAS AND ELECTRIC COMPANY'S (U39M) BRIEF ON QUESTIONS PRESENTED BY ASSIGNED COMMISSIONER'S RULING

I. INTRODUCTION AND EXECUTIVE SUMMARY

Pursuant to the Assigned Commissioner's June 8, 2012, Ruling Amending Scope of Proceeding to Add a Second Phase ("Assigned Commissioner's Ruling"), Pacific Gas and Electric Company (PG&E) hereby provides its opening brief on questions presented by the Assigned Commissioner's Ruling. PG&E's brief concludes as follows on each of the 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 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?

ANSWER: No, because (a) the ADA's reasonable accommodation mandate does not apply to PG&E's services to residential customers; (b) even if the ADA applied, the ADA does not recognize claims of radio frequency (RF) sensitivity as a disability; (c) even if the ADA recognized claims of RF sensitivity, the Commission's imposition of opt-out fees is non-discriminatory, as any residential customer can choose to opt out of PG&E's SmartMeter Program for any reason, or no reason, and therefore no additional "accommodation" is required under the ADA. Likewise, Public Utilities Code Section 453(b) does not prohibit opt-out fees that are applied to all customers choosing an analog meter, without regard to their reason or medical condition. Moreover, stated sensitivity to RF emissions from SmartMeters is not defined as a characteristic under Section 11135 of the Government Code, as incorporated into Public Utilities Code Section 453(b).

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?

ANSWER: Under the California Constitution and the Public Utilities Code, the Public Utilities Commission has exclusive authority to regulate public utility services and rates, and may not delegate its authority over public utilities 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. This is because (a) Section 8 of Article XII of the California Constitution expressly prohibits a city, county or other public agency to regulate public utility matters that the California Legislature has delegated to the Public Utilities Commission; (b) the power to regulate public utilities conferred upon the Commission by the California Legislature is

exclusive and may not be delegated to another entity or public agency without statutory authorization; and (c) Section 3 of Article XII of the California Constitution confers upon the California Legislature the exclusive control over the Public Utilities Commission's regulation of public utilities.

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?

ANSWER: Even if the Commission had authority to delegate its authority over public utilities to local governments to exercise a "community opt-out," the definition of "community" would conflict with existing tariffs and utility service rights of both the affected utility customers and the utility serving those customers. This is because Public Utilities Code Section 453 and utility tariffs and customer contracts implementing Section 453 prohibit public utilities from maintaining or establishing any unreasonable difference in services or facilities to customers, *including between localities*. In addition, the rights of customers would be impacted because the Public Utilities Code implements the common law concept that a public utility's obligation to serve applies and extends to the public at large, i.e., to the individual customers of the public utility, and not to public or private entities or agencies.

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?

ANSWER: If a local government adopts a "community opt-out" ordinance or law that causes its residents to incur higher fees for public utility service solely by reason of the ordinance or law, or for purposes unrelated to the actual costs to serve the customers, a court could construe the fees as a tax on the local residents and in that case such a tax would be required to comply with any and all requirements applicable to the local government regarding the adoption and

collection of taxes.

II. ARGUMENT

A. Neither the Americans with Disabilities Act Nor Public Utilities Code Section 453(b) Prohibits or Restricts the Ability of the Commission to Adopt and Assess Opt-Out Fees on Utility Customers Who Elect to Have Analog Meters for Medical Reasons

The Assigned Commissioner's Ruling presents the following two questions on the Americans with Disabilities Act and Section 453(b) of the Public Utilities Code:

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 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?

The answer to both these questions is no, as discussed in detail below.

First, as a threshold matter, the ADA is a statutory scheme designed to protect the rights of certain persons with disabilities through a series of Titles, each regulating a different area. ADA Title I applies to employment relationships; Title II applies to public services; Title III applies to public accommodations and services operated by private entities; and Title IV applies to telecommunications. Title III ensures access to places of public accommodation, such as stores, restaurants, theaters, and other facilities open to the public, as well as commercial facilities. Under Title III, no individual may be discriminated against on the basis of disability with regard to the full and equal enjoyment of the goods, services, facilities, or accommodations of any place of public accommodation by any person who owns, leases, leases to, or operates a place of public accommodation. (42 U.S.C. § 12182(a)). To satisfy Title III, a covered building or location must meet the accessibility standards effective under the law at the time it is built or altered (with an additional, but more limited, requirement to retrofit existing facilities in certain

instances). Title III does not apply to private residences, however, as they are neither commercial facilities (42 U.S.C.§ 12181(2)) nor public accommodations (42 U.S.C.§ 12181(7)). Further, no cases have applied Title III to private residences or utility easements. In sum, as a threshold matter, the ADA does not apply to the charges or services that PG&E provides to residential customers for utility service, including opt-out fees approved by the Commission and assessed by PG&E on residential customers who elect not to have SmartMeters installed at their homes.

Second, even assuming residential customers have standing under the ADA to seek the removal of a SmartMeter, such an accommodation would likely be denied as unreasonable. Under the ADA, a disability is defined as:

- Having a physical or mental impairment that substantially limits/limits one or more major life activities;
- Having a record of such an impairment; or
- Being regarded as having such an impairment.

Broadly speaking, the ADA also defines a physical impairment as:

- a physiological disorder or condition;
- a cosmetic disfigurement; or
- an anatomical loss affecting one or more body systems (neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, genitourinary, hemic, lymphatic, skin and endocrine systems).

See, e.g., 29 C.F.R. § 1630.2(h) & Pt. 1630, App. § 1630.2(h). No court has ever found sensitivity to RF to be a disability under the ADA, nor are there any cases finding that RF sensitivity exacerbated an existing ADA-recognized disability.[1/]

1/ See, e.g., *Mary D. Owen v. Computer Sciences Corp* (1999) 1999 U.S. Dist. LEXIS 12635; *Jesus Mendoza v. David Moron et al*. (2006) 2006 U.S. Dist. LEXIS 11185. Although the courts disposed of these cases on summary judgment and they are not precedential appellate decisions, they underscore the lack of any legal precedent for establishing RF sensitivity as a disability under the ADA.

Third, even assuming *arguendo* an ADA-recognized causal connection between wireless smart meters and RF sensitivity, the approval and collection of an opt-out fee does not violate any ADA or Public Utilities Code requirement that RF-sensitive customers be granted "reasonable accommodation" or that they be treated in a non-discriminatory fashion. The opt-out fees in this proceeding do not in any way restrict the ability of a customer, whether he or she considers himself or herself to be RF-sensitive or not, to choose an analog electromechanical meter instead of a wireless SmartMeter. Nor do the fees discriminate in any way against customers based on their medical or any other status; all Opt-Out Program customers pay these charges to cover Opt-Out Program costs, and do so irrespective of any other factor.

Customers who have wireless SmartMeters pay rates based on the lower costs to serve them due to remote rather than manual meter reading; customers with analog meters pay rates and fees that are based on the incremental costs to serve them, including somewhat higher costs due to the need to manually read their meters rather than remotely read them. In both cases, the rates and fees are non-discriminatory and do not in any way affect the right of customers to choose to be served by an analog meter instead of a SmartMeter.[2/]

Nor do the opt-out fees violate Section 453(b)'s prohibition on different rates based on "medical condition" or any "characteristic" listed in Government Code Section 11135 as referenced by Section 453(b). As discussed above, there is no scientific evidence that concludes that wireless SmartMeters cause any medical condition or disability. Even if there were, the opt-out fees are not based on any customer's medical condition; they are based solely on whether a customer chooses an analog meter or a wireless meter, without regard to the reason for doing so.

2/ The level or affordability of the fees and rates does not trigger any right to "accommodation" under the ADA, nor establish a "discrimination" claim. The Public Utilities Code and the Commission's orders and decisions already address affordability of electric and gas rates and charges based on income, including the Commission's opt-out decision itself, D.12-02-014, that adopted significantly lower initial opt-out fees and monthly charges for low-income CARE and FERA customers, whose electric and gas rates are already significantly discounted based on income and affordability.

Section 11135 of the California Government Code provides that "disability" means any mental or physical disability, as defined in Section 12926.[3/] Section 12926 of the Government Code defines "medical condition," "mental disability," and "physical disability" very specifically.[4/]

Claimed RF sensitivity is not included in any of the extensive definitions of "medical condition," "mental disability," or "physical disability" in the Government Code. Even if RF sensitivity were a "medical condition," "mental disability," or "physical disability" covered by Section 453(b), the Commission's opt-out fees do not discriminate; ***all*** opt-out customers pay the same opt-out fees regardless of their reasons for opting out, including if they opt-out for no reason at all.

Thus, an opt-out fee imposed on residential customers choosing analog meters instead of wireless meters does not violate the ADA or Public Utilities Code Section 453(b), and neither the ADA nor the Public Utilities Code restricts the Commission's ability to adopt reasonable opt-out fees for this purpose.

B. The Commission Has Exclusive Authority to Regulate Public Utilities and May Not Delegate to Local Governments or Communities Its Power to Regulate the Services and Facilities Provided by Public Utilities, Such as the Power To Determine What Type of Electric or Gas Meter Can Be Installed Within the Local Government's or Community's Boundaries

The Assigned Commissioner's Ruling presented the following question on the ability of the Commission to delegate its public utility regulatory authority to local governments:

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?

The answer to this question is no, as discussed in more detail below.

3/ Cal. Gov't Code § 11135(c)(1).
4/ Cal. Gov't Code § 12926(i), (j), (*l*).

Section 8 of Article XII of the California Constitution states that "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory authority to the Commission."[5/] This authority does not allow the Commission to delegate its authority to other branches or levels of government, such as to local governments. In addition, Section 3 of Article XII of the California Constitution expressly provides that public utilities are "subject to control by the Legislature." The California Legislature has vested the Commission with broad and exclusive authority to regulate public utilities. (See, *e.g.*, Public Utilities Code Section 761, granting the Commission authority (a) to regulate the practices, equipment, appliances, facilities, services and the methods of supply and distribution of public utilities and (b) to determine whether any of those are unjust, unreasonable, unsafe, improper, inadequate, or insufficient; *see also*, Public Utilities Code Section 701, granting the Commission jurisdiction to regulate every public utility in the State and to do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.)

Thus, the Legislature retains control over the Commission's exercise of its general regulatory powers with respect to public utilities, and the Commission may not abdicate or delegate that authority to another branch of California government other than the Legislature, including to a city, county or other public body. Nor can the Commission exercise its general ratemaking and rulemaking authority conferred by the Legislature in a manner which conflicts with the Legislature's specific actions, including the provisions of the Public Utilities Code that give the Commission *exclusive* control and authority over the regulation of the rates, services, equipment and facilities employed by public utilities within its jurisdiction.[6/]

5/ The Commission's exclusive jurisdiction over PG&E's wireless meters and metering infrastructure in general, and the California Constitution's prohibition on city or county regulation of public utility matters, have been described in letters from the CPUC's General Counsel to various local governments, including the Town of Fairfax and City of San Rafael, copies of which are attached to this brief.

6/ See, *e.g.*, Public Utilities Code Sections 451, 701, 728 and 761.

These provisions of the California Constitution and the Public Utilities Code are consistent with the general legal doctrine of non-delegation that provides that one branch of government may not authorize another entity to exercise the power or function that it is constitutionally authorized to exercise itself. In 1892, the United States Supreme Court in *Field v. Clark*, 143 U.S. 649, noted that the doctrine "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[7/] It is explicit or implicit in all written constitutions that impose a strict structural separation of powers. With specific respect to executive branch agencies, particularly constitutional agencies such as the Commission, it is improper for a public agency or officer to delegate its discretionary power to another 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 to subordinates in the absence of statutory authorization."[8/]

The non-delegation doctrine as applied to the Commission is also supported by Commission decisions beyond the utility metering area. In Decision ("D.") 05-01-055 in Rulemaking 01-08-028, the Commission addressed its ability to delegate administration of energy efficiency programs to third parties, including government agencies, and specifically found that such third party administration of public purpose programs funded by IOU ratepayers would: (1) impede its ability to discharge its statutory obligation to oversee program funds, (2) require statutory authorization because public goods charge ("PGC") funds are public trust funds, and (3) "render program funding vulnerable to borrowing by the Legislature."[9/]

7/ *Marshall Field & Co. v. Clark* (1892) 143 U.S. 649, 692.

8/ *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal. 3d 139, 144; *see San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal. App. 3d 896, 901-04 (fire commission lacked authority to delegate its discretionary powers and duties to an arbitrator).

9/ D.05-01-055 at pp. 8-9, 141-42, Finding of Fact 13 ("Based on past rulings from the Attorney General and the Department of Finance, such transfers require statutory authority. Seeking such authority would . . . render program funding vulnerable to borrowing by the Legislature."); p. 35 ("Commission staff met with the California Attorney General's office and representatives from the Department of Finance, who . . . opined that absent explicit statutory authorization, the Commission could not create additional entities to perform tasks under the oversight of the Commission. In their view, Sections 381(c) (1) and 701 of the Public Utilities Code were not sufficient . . . . Both . . . stated that the ratepayer money such as the PGC

Specifically, the Decision agreed with the State Attorney General's assessment that "ratepayer money such as the PGC [energy efficiency funds] were public funds that could be held by the IOUs and spent under Commission direction, but in the absence of specific legislation, they could not be moved to an outside trust account or bank account" or to another government agency for administration.[10/] The same is even more applicable here with respect to decisions regarding the particular equipment and facilities, such as metering equipment, used by a public utility to serve its customers.[11/]

In the Commission's recent Electric Program Investment Charge decision, D.11-12-035, the Commission reaffirmed that it lacks authority to delegate its constitutionally-established role to determine utility services, practices and rates: "[T]he Commission cannot delegate its authority and responsibility to determine rates, program rules, regulations and policies, [even if] it does have authority to transfer the day to day administration of a program, as it does with a variety of programs."[12/] A "community opt-out" program – delegating the fundamental decision regarding the type of electric or gas meter available to utility customers – is a core regulatory matter for the Commission, and not merely a ministerial, "administrative" matter.

This is particularly important with respect to such a critical energy policy driver as smart metering. The choice of the type of meter that a public utility uses to serve customers is even more important from the Commission's regulatory perspective today, when the choice of the meter also affects California's energy and environmental policies that are only achievable with the public utility products and services that are enabled and made available to customers by the choice of meter. As the Commission in D.12-02-014 discussed at some length, the wireless

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were public funds that could be held by the IOUs and spent under Commission direction, but in the absence of specific legislation, they could not be moved to an outside trust account or bank account."); p. 63 (". . . [The Commission] would have significant concerns about the degree of control we could exert over . . . third parties under an independent administrative structure. The Commission has broad regulatory authority to ensure and enforce the IOU's compliance with our policy rules and requirements based on current statute and Constitutional authority.")

10/ *Id.*

11/ The non-delegability of the Commission's exclusive authority and jurisdiction applies regardless of whether the third-party is a governmental entity or a private entity, e.g., a building owner or landlord whose tenants are PG&E's customers of record for purposes of utility services and metering.

12/ D.11-12-035, p. 23.

smart meter and the new services and products it enables are key goals of California's energy and environmental policies, including the ability of consumers to control their own energy usage and choose among a broad array of new programs and services, including distributed renewable generation and demand response programs.[13/]

Thus, in D.12-02-014, the Commission has already exercised its broad regulatory authority to strike a balance between the competing state objectives of California's energy and environmental policies, on the one hand, and the ability of customers to choose an analog meter that does not help achieve those policies. D.12-02-014 in turn builds on over a decade of the Commission's prior comprehensive regulation of the utilities' deployment of advanced metering infrastructure, including PG&E's wireless meters in D.06-07-027 and D.09-03-026. This is precisely the type of comprehensive regulatory decision-making – involving major and significant public utility regulatory policies, facilities and services – that the Commission may *not* delegate to another public or private entity, such as a local government.

Just as importantly, if the Commission did attempt to delegate its authority to a local government or community via a "community opt-out," it would have no jurisdiction to enforce the terms and conditions of that delegation. Sections 2 and 6 of Article XII of the California Constitution and the Public Utilities Code grant the Commission the power to supervise and regulate only *utilities*, not local governments or other government agencies.[14/] The fact that neither the California Constitution nor the Legislature has delegated to the Commission any authority to enforce its rules and regulations directly against local governments, strongly supports the conclusion that the Commission lacks authority to delegate those powers to the same entities. For these reasons, the proposal of some parties in this proceeding that the Commission delegate a "community opt-out" option to local governments is unlawful under the California Constitution and the Public Utilities Code.

13/ D.12-02-014, pp. 16- 17, 19- 20.
14/ *County of Inyo* (1980) 26 Cal. 3d 154, 604 P.2d 566.

C. The Definition of "Community" for Purposes of Defining a "Community Opt-Out" Would Require Statutory Changes to the Public Utilities Code, Utility Tariffs and Service Agreements

The Assigned Commissioner's Ruling presented the following questions concerning how the term "community" would be defined for purposes of allowing a "community opt-out" option:

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?

For the reasons discussed in more detail below, the answers to these questions are yes, without regard to how the Commission defines "community."

The Commission rightly anticipated these questions in D.12-02-014, when at footnote 37 it referenced PG&E's tariffs, which implement the statutory cornerstone of public utility regulation under which a public utility is obligated to serve *customers*, not third-parties whether governmental or private:

> For example, both PG&E's gas and electric rules define a "customer" as the person "in whose name service is rendered" and whose signature is on the application, contract or agreement for service. (*See* PG&E Electric Rule 1; PG&E Gas Rule 1.) The rules further state that a customer may seek relief from the Commission if it is "dissatisfied with [PG&E's] determination regarding level, charge or type of service, or refusal to provide service as requested." (*See* PG&E Electric Rule 4; PG&E Gas Rule 4.) Further development of the record is needed so that we may address whether and how a local entity or community can lawfully impact a customer's utility bill.

(D.12-02-014, p. 21, fn. 37.)

The legal foundation of a public utility's obligation to serve its customers is the common law doctrine of "dedication" by a private entity to render services generally to the public in a non-discriminatory manner. The California Constitution, and the California Legislature in enacting Public Utilities Code Section 216, have defined a California public utility's "dedication" of services to the public as when an electrical corporation or gas corporation

"performs a service, for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received." If these facts are present, then the electrical or gas corporation "is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."[15/]

Accordingly, PG&E's tariffs and the tariffs of all Commission-regulated public utilities are drafted and applied consistently across all aspects of public utility rates and services to reflect the legal and commercial requirement that *the public utility's primary contractual and legal relationship is with its customers*, in accordance with the rules and regulations for safe, reliable, non-discriminatory and reasonably-priced services and facilities established by the Commission. Footnote 37 of D.12-02-014 accurately provides examples of PG&E's tariffs that would be affected if a "community opt-out" were implemented.

Public Utilities Code Sections 451 and 453 are the key statutes on which PG&E's electric tariffs are based. Section 451 requires every public utility to furnish and maintain service, equipment and facilities "as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees and the public." In turn, Section 453 prohibits any public utility from establishing or maintaining "any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either *as between localities* or as between classes of service." (Emphasis added.)

Thus, even assuming *arguendo* that the Commission had authority to grant a "community opt-out" to local governments or communities, the implementation of such a program would necessitate extensive and comprehensive changes to PG&E's electric and gas tariffs, such as those cited in D.12-02-014, in order to make clear that PG&E is no longer obligated to serve the customers in geographically-defined "community opt-out" areas with the same wireless metering equipment and wireless meter-enabled rates, products and programs *even if the customer requests service with a Smart Meter.* More importantly, as Public Utilities Code Section 453(c)

15/ Public Utilities Code Section 216(b).

makes clear, PG&E is prohibited by the California Legislature from establishing or maintaining any unreasonable difference in metering services to customers "*as between localities."* Although the Commission might attempt to justify the difference in metering services on a basis other than "differences between localities," PG&E expects that such a Commission decision would end up being litigated in the courts by individual customers within the boundaries of a defined "community opt-out" area who wish to keep or use a wireless meter that the locality has banned.[16/]

For these reasons, the definition of a "community" for purposes of a "community opt-out" would conflict with existing utility tariffs and contract obligations. More importantly, because the California Legislature in Public Utilities Code Section 453(b) has prohibited a public utility from establishing or maintaining any unreasonable difference in facilities or services "*as between localities*," a "community opt-out" would violate Section 453(b) unless and until the Legislature were to amend the statute.

D. A Local Government Ordinance or Law Adopting a "Community Opt Out" that Causes Residents to Incur Fees or Higher Costs for Public Utility Service Solely by Reason of the "Community Opt Out" May Be a "Tax" Subject to All Requirements Applicable to Tax-Assessment and Collection

The Assigned Commissioner's Ruling presented the following question regarding whether fees paid by local residents under a "community opt-out" would constitute a "tax" or not:

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?

The court could construe a fee charged to utility customers because of a "community opt-out" as a "tax" rather than a "regulatory fee" which therefore would be subject to the legal and

16/ This is particularly likely in areas where very few customers have "opted out" individually, and the majority of customers have chosen to retain their wireless meters, such as in the Marin County region of PG&E's service area. As of July 6, 2012, PG&E has installed 167,541 wireless meters in Marin County, and only 2,791 Marin County customers have chosen to "opt out" under PG&E's Opt-Out Program.

procedural requirements applicable to assessment and collection of local taxes. Standard fees and rates that the Public Utilities Commission authorizes a public utility to charge its customers to recover the costs of serving its customers are not "taxes." But that fee may be construed as a tax when charged to taxpayers or residents of a local government solely as a result of the local government exercising its governmental authority, rather than on the actual cost of providing services to affected customers or for purposes other than recovering costs associated with the government services.

This issue is likely to arise in connection with two factual situations relating to the proposed "community opt-out" in this proceeding.

First, to the extent that the Commission were to delegate its public utility regulatory authority to a local government or community – which as stated above would be an unlawful delegation of its authority – and then authorizes assessment or collection of a fee from utility customers to reimburse the direct and indirect costs of the "community opt-out," a local resident who objects to the "community opt-out" and requests to be served instead by a wireless meter without a fee, may argue that the "fee" is a disguised "tax" that is effectively being imposed as a result of the unlawful delegation of authority to the local government.

Second, even assuming *arguendo* that the delegation of a "community opt-out" were lawful, a local resident who objects to paying the utility fees and charges resulting from the "community opt-out" may argue that the "fee" is actually a "tax" because it is a result of direct local government action which has no valid relationship to the actual cost of providing utility service to that customer.

The distinction between a "tax" and a "regulatory fee" is highly dependent on the specific facts of the particular government activity. However, if a court were to construe the residential fees resulting from a "community opt-out" as a "tax," then the local government would need to obtain voter approval and other authority necessary to assess and collect the "tax" prior to implementing its "community opt-out."

III. CONCLUSION

As discussed above, under the California Constitution and the Public Utilities Code, the Commission lacks authority to approve or implement a "community opt-out" option as proposed by some parties in this proceeding.

Respectfully Submitted,

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Dated: July 16, 2012

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 2, 2010

Michael Rock, Town Manager
Fairfax Town Hall
142 Bolinas Road
Fairfax, CA 94930
Fax: 415.453.1618

Re: Proposed Emergency Ordinance Establishing A Temporary Moratorium On The Installation Of Smart Meters

Dear Mr. Rock:

It has been brought to our attention that on August 4, 2010, the Town Council of the Town of Fairfax is scheduled to consider a proposed emergency ordinance establishing a six-month moratorium on the installation of Smart Meters and related equipment within the Town of Fairfax or in, along, across, upon, under and over the public streets and places within the Town of Fairfax, and declaring the urgency thereof.

We are writing to inform you of our view that the Town of Fairfax's proposed ordinance would interfere with the exclusive jurisdiction of the California Public Utilities Commission (CPUC or Commission) over the regulation of public utilities.

Section 8 of Article 12 of the California Constitution states that "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."[1] The Legislature has granted the Commission authority over a public utility's infrastructure, including the installation of meters. (See Public Utilities Code section 761, granting the Commission authority (i) to regulate the practices, equipment, appliances, facilities, service and the methods of supply and distribution of public utilities and (ii) to determine whether any of those are unjust, unreasonable, unsafe, improper, inadequate, or insufficient; *see also* Public Utilities Code section 701, granting the Commission jurisdiction to regulate every public utility in the State and do all things,

[1] Although Section 8 contains a limited exception for municipal regulations adopted pursuant to a city charter existing on October 10, 1911, we note that the Town of Fairfax was not incorporated until 1931.

whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.)

Pursuant to CPUC Decision (D.) 06-07-027, since 2006 Pacific Gas and Electric Company (PG&E) has been and continues to deploy "Smart Meters" in its service territory. Similar initiatives are underway pursuant to subsequent Commission decisions pertaining to the other major electric utilities in the state in their respective service territories. In D.06-07-027, the Commission recognized that new, advanced metering technology may evolve, and ordered PG&E to monitor technological developments in order to upgrade its Advanced Metering Infrastructure (AMI) system as deemed appropriate by the CPUC. Thereafter, in D.09-03-026, the Commission approved PG&E's proposed upgrades to its Smart Meter program. The installation of advanced metering technology is an important component of the CPUC's long term goals to develop a more sophisticated, state-wide demand response capability, which would, in turn, enhance electric system reliability, reduce power purchase and individual consumer costs, and reduce the emission of greenhouse gases.

As part of your due diligence, I would ask that your office and the Town's legal counsel carefully consider the legal issues associated with the proposed ordinance.

Please feel free to contact me if you have any questions.

Thank you very much for your attention to this matter.

Sincerely,

Frank Lindh

Frank R. Lindh, General Counsel
Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102

(415) 703-2015
frl@cpuc.ca.gov

cc: Jim Karpiak, Town Counsel for the Town of Fairfax
Paul Clanon, Executive Director, CPUC

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

September 22, 2010

Mr. Robert M. Brown
Community Development Director
City of San Rafael
1400 Fifth Avenue, P.O. Box 151560
San Rafael, CA 94901

Re: Question regarding the permitting of repeater antennas

Dear Mr. Brown,

I am responding to an e-mail you sent to me on August 17, 2010, in which you inquired about the scope of the City of San Rafael's authority to grant permits to Pacific Gas and Electric Company (PG&E) for the installation of repeater antennas in connection with PG&E's Advanced Meter Infrastructure (AMI) deployment. Specifically, you asked whether San Rafael has been preempted by the Commission from exercising any jurisdiction over the siting of repeater antennas. You referenced a letter that I sent to the Town of Fairfax addressing the Commission's exclusive jurisdiction over the regulation of public utilities.

It is my opinion that the conclusions of the Fairfax letter are applicable to the permitting of repeater antennas, because the antennas are a necessary component of the AMI program that the Commission has authorized PG&E to construct.

The Commission's decision approving PG&E's AMI program specifically referenced the communications equipment necessary to operate the system. In particular, in its decision authorizing PG&E to implement the AMI project (Decision No. 06-07-027), the Commission approved "metering and communications infrastructure as well as the related computerized systems and software."

Thus, it is our view that the Commission's decision authorizing the AMI program preempts the authority of a municipality to exercise any discretionary authority over the installation of the repeater antennas. Nevertheless, we hope and expect that PG&E will cooperate with the City of San Rafael with respect to the locations for such equipment.

Please do not hesitate to contact me with any further questions or concerns. I can be reached by telephone at (415) 703-2015, or by e-mail at frl@cpuc.ca.gov.

Thank you for your inquiry.

Very truly yours,

Frank R. Lindh
General Counsel

c: Paul Clanon, CPUC Executive Director