BEFORE THE PUBLIC UTILITIES COMMISSION OF

THE STATE OF CALIFORNIA

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Application of Pacific Gas and Electric Company for Approval of Modifications to its SmartMeter™ Program and Increased Revenue Requirements to Recover the Costs of the Modifications (U39M)	Application 11-03-014 (Filed March 24, 2011)
And Related Matters.	Application 11-03-015 Application 11-07-020

CENTER FOR ACCESSIBLE TECHNOLOGY'S REPLY BRIEF ON LEGAL ISSUES

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I. INTRODUCTION

The Commission is reviewing whether state or federal law constrains its ability to allow energy utilities to charge opt-out fees to customers who want to retain analog meters in their homes for medical reasons.[1] Unsurprisingly, the utilities argue in favor of being able to charge such fees.[2] Other than CforAT's Opening Brief,[3] the parties have provided the Commission with little legal guidance on this issue. However, the minimal briefing provided by the utilities generally argues that neither the ADA nor Section 453(b) of the California Public Utilities Code precludes application of opt-out fees for customers who require analog meters for a medical reason for three reasons:[4] (1) Because potential health impacts of smart meters are not disabilities or medical conditions;[5] (2) Because the ADA does not apply to energy utilities;[6] and (3) Because opt-out fees are not discriminatory since they are assessed against all utility customers who want to opt-out of

[1] In the Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase (Phase 2 Ruling), issued on June 8, 2012, parties were asked to brief questions regarding the applicability of the ADA and Public Utilities Code Sec. 453(b) to the smart meter opt-out fee; the Phase 2 Ruling specifically requested that the parties provide legal and statutory authority in support of their responses. Phase 2 Ruling at pp. 5-6. The Commission also requested briefing on other issues regarding delegation of authority and community opt-outs. The Center for Accessible Technology (CforAT) is not addressing these other issues raised in this round of legal briefing.

[2] Pacific Gas & Electric Company's (U39M) Brief on Questions Presented by Assigned Commissioner's Ruling (PG&E Brief), filed on July 16, 2012, at pp. 4-7; Opening Brief of San Diego Gas & Electric Company (U 902 M) and Southern California Gas Company (U 904 G) (Sempra Brief), filed on July 16, 2012 at pp. 3-9; Southern California Edison Company's (U 338-E) Opening Brief (Edison Brief), filed on July 16, 2012 at pp. 3-6.

[3] Center for Accessible Technology's Revised Opening Brief on Legal Issues (CforAT Opening Brief), filed on July 16, 2012. CforAT's Opening Brief is titled "Revised Opening Brief" because an earlier version was served on the service list, though never filed.

[4] In addition to the three primary reasons, Edison also simply asserts, with no citation to authority, that "opt-out fees do not violate the ADA." Edison Brief at p. 4. In fact, as noted in CforAT's Opening Brief, the regulations implementing both Title II and Title III of the ADA unambiguously prohibit surcharges on costs incurred in order to provide access. 28 C.F.R. §36.301(c) (Title III) and 28 C.F.R. §35.130(f) (Title II).

[5] PG&E Brief at p. 5 (not disability under ADA) and p. 7 (not medical condition under Cal. Pub. Util. Code § 453(b)); Edison Brief at p. 4. The Sempra Utilities do not address the question of whether RF sensitivity can be a disability or medical condition.

[6] PG&E Brief at pp. 4-5; Sempra Brief at pp. 4-5; Edison Brief at p. 4.

use of wireless smart meters, not just those who opt out due to medical reasons.[7] These arguments are incorrect. As set out in detail below, the briefs submitted by the IOUs fail to properly consider the scope of this proceeding and they incorrectly interpret the statutes under review. In addition, they fail to consider other applicable law surrounding the legality of opt-out fees, and they fail to consider the policy basis of non-discrimination that is the cornerstone of the statutes at issue (including Public Utilities Code § 453, which is inarguably applicable to the utilities).

As set forth in CforAT's Opening Brief and addressed in greater detail below, state and federal law require that the standard surcharge for a customer who requests an analog meter be waived if the basis for the request is a disability or medical condition. This obligation binds both the Commission and the regulated utilities. Moreover, the general policy goals of non-discrimination, inclusiveness, and support for the ability of people with disabilities to live independently, should lead the Commission as an independent policy-making entity to adhere to the principle of avoiding surcharges based on accommodations that are necessary for people with disabilities.

The end result of a correct application of the laws and the policy principles prohibiting discrimination on the basis of disability/medical condition (in conjunction with the decisions already issued by the Commission to adopt wireless smart meters as the default standard generally and to permit utilities to assess opt-out fees for customers who prefer to retain an analog meter) would be as follows: The default form of service for residential utility customers would include use of a wireless smart meter. Every residential customer has the option of selecting an analog meter rather than a wireless smart meter, and the standard policy is for the utility to charge an opt-out fee to customers who choose to retain an analog meter. However, a customer who can make a

[7] PG&E Brief at p. 6; Sempra Brief at pp. 5-6; Edison Brief at p. 6.

showing in an appropriate forum[8] that he or she requires an analog meter due to a disability or medical condition (not a simple preference) would be entitled to have the standard fee waived.

This result would not be unique; the Commission already ensures that utilities waive otherwise applicable charges when needed to accommodate a customer with a disability. For telecommunications carriers, certain network services such as speed dialing and 3-way calling are generally available to all customers for a fee. These same services, however, are provided to certain customers with disabilities at no charge because they are necessary for these customers to be able to access basic telephone service.[9] The fee is waived for these customers so that they are not denied the ability to use a necessary utility service (basic telecommunications) based on their disability. Similarly, on the energy side, the notion that a person who requires additional service due to a medical condition should not be obligated to pay high rates for amounts of energy usage that are medically necessary is the basis of the medical baseline rate structure.[10] Here, a waiver of the standard opt-out fee for a customer who requires an analog meter due to a medical condition would serve exactly the same function as permitting add-on network services or additional baseline allowances to allow a disabled customer to obtain the equivalent of standard service for a non-disabled customer, and such waivers should be required.

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[8] As noted in its opening brief, CforAT is not taking any position on the nature of what would constitute such a showing or the forum in which such a showing would be made.

[9] *See* Frequently Asked Questions for the Deaf and Disabled Telecommunications Program (DDTP) of the California Public Utilities Commission, including Question 9 regarding Equipment and Services, addressing available network services. The FAQs can be found at http://ddtp.cpuc.ca.gov/faqs.aspx . According to the same FAQ, DDTP is "a program of the California Public Utilities Commission (CPUC), providing Californians who are deaf and disabled with specialized telephone equipment and relay services through the California Telephone Access Program (CTAP) and California Relay Service (CRS), respectively."

[10] *See* Cal. Pub. Util. Code at § 739(c).

II. THE COMMISSION CANNOT FIND THAT RF SENSITIVITY IS NOT A DISABILITY BECAUSE IT HAS EXPRESSLY DECLINED TO ADDRESS THIS ISSUE

The Phase 2 Ruling is clear that this proceeding is not providing a forum to determine potential health impacts of Smart Meters.[11] Parties can argue (and do argue in opening briefs) that the Commission should address this issue directly, but at this time, no record is in place for any decision on this issue. [12] Thus, the utilities are simply wrong to argue that the Commission should issue a finding that RF sensitivity is not a disability or medical condition[13] covered by the laws under review. If the Commission determines that it should address this issue, it would be obligated to initiate either a new proceeding or a new phase in this proceeding that explicitly includes the question of health effects of smart meters in its scope and to develop a complete record (presumably including

[11] Phase 2 Ruling at p. 3 ("Due to the narrow focus of this phase, it would be inappropriate to expand the scope to consider health issues").

[12] While there is no record in this proceeding for the Commission to make any finding on the issue of whether RF sensitivity can be determined to be a disability or medical condition, the Commission should note that this question is the subject of review in other forums. Most recently, the Supreme Judicial Court in Maine ordered the Maine Public Utilities Commission to allow a customer complaint against a regulated utility to go forward (overturning a prior dismissal) in order to resolve health and safety concerns regarding smart meters. *Friedman v. Public Utilities Commission*, 2012 ME 90, issued on July 12, 2012. In that case, the Maine Commission adopted an opt-out option for its smart meter program following customer complaints, but each of the alternatives to smart meters included customer charges. *Friedman* at pp. 2-3. The customers argued that the opt-out fee was improper, and asked the Maine Commission to open an investigation into the health effects of smart meters. *Id.* at p. 4. The Maine Commission dismissed the complaint without a hearing, concluding that the issues raised by complainants had been resolved previously. *Id.* at p. 5. The Court disagreed, finding that the complainants' health and safety concerns had not been adequately addressed in the opt-out orders. *Id.* at pp. 8-11 ("Having never determined whether smart-meter technology is safe, the Commission is in no position to conclude in this proceeding that requiring customers who elect either of the opt-out alternatives to pay a fee is not 'unreasonable or unjustly discriminatory,' 35-A M.R.S. Sec. 1302(1), such that a complaint raising those issues should be summarily dismissed"). In response to the *Friedman* decision, the Maine Public Utilities Commission has now initiated a proceeding to investigate the health and safety effects of smart meters. *See* "Are Smart Meters Hurting Mainers," July 26, 2012, The Portland Press Herald, available at http://www.pressherald.com/news/Maine-PUC-to-investigate-health-and-safety-of-smart-meters.html.

[13] The term "medical condition," used in Cal. Pub. Util. Code § 453(b) is separate from the term "disability" as defined in the ADA and in the state statutes referenced in the PU Code. It would appear from basic principles of statutory construction that a person who does not have a disability under relevant state or federal law may still have a medical condition that entitles them to protection under Section 453(b). However, CforAT has not been able to locate any authority on the extent to which the definition of a "medical condition" may differ from the definition of "disability" under state or federal law.

evidentiary hearings) before making any determination on the issue. Until such a record is developed, any arguments that RF sensitivity is not a disability or medical condition must fail.

III. UTILITY SERVICE MUST BE ACCESSIBLE

A. The ADA Requires That Opt-Out Fees Be Waived for Disabled Customers

1. Applicability of Title III to Electric Service, While Uncertain, Favors Accessibility

The utilities assert that the ADA does not apply to them, as though this were established in a definitive way; in fact, as set out in CforAT's Opening Brief,[14] the applicability of the ADA to energy utilities is uncertain, but authority leans toward finding an obligation to provide access. [15] The strongest authority supporting the utilities' argument comes in the form of two guidance letters from the U.S. Department of Justice regarding telephone companies, which are attached to Sempra's Opening Brief. While relevant, these letters are not conclusive.[16] The letters were both generated in the mid-1990s, and thus predate more recent and substantial developments in the interpretation of the ADA regarding services that are provided outside of a physical facility. As set out in CforAT's Opening Brief, in parallel with the developing importance of internet-based services that operate in cyberspace rather than in physical structures, the application of the ADA has been trending toward accessibility requirements that are not tied to tangible places. This trend in expanded accessibility obligations should be extended to a facility

[14] CforAT Opening Brief at pp. 6-9.

[15] There is no doubt that utilities are not completely exempt from the ADA; at minimum, they are obligated to provide access to people with disabilities at physical facilities that they own and/or operate where customers may receive service. Such facilities would be "service establishments" covered by Title III of the ADA. *See* CforAT Opening Brief at p. 7 (citing 42 U.S.C. Sec. 12181(7)(f)); *see also* the Technical Assistance Letter dated January 4, 1994 (Attachment B to Sempra's Opening Brief) ("if the utility maintains a customer service office which customers visit to open accounts or pay bills, this office would be a 'service establishment' that is covered as a 'place of public accommodation' under title III").

[16] On its face, the Technical Assistance Letter dated January 4, 1994 (Attachment B to Sempra's Opening Brief) notes that it "does not constitute a legal interpretation of the application of the statute and it is not binding on the department."

such as a wireless smart meter that is controlled by the utility but located at a customer's home.

The applicability of the ADA to services provided at a customer's home is also a developing issue in the courts, but new authority is moving in the direction of applying accessibility requirements. While it is true that Congress' concern when the ADA was passed in 1990 was to ensure that people with disabilities would be able to participate in community life outside of the home, the changes in society since then have brought increasing levels of activity and commerce within the home. As noted in CforAT's Opening Brief, the ADA's legislative history notes that the scope of Title III is to be liberally construed so that people with disabilities have broad access to goods and services.[17] Services delivered in the home and non-tangible services, including entertainment services,[18] internet-based learning and high-stakes testing functions, insurance coverage,[19] and other items that are not tied to a physical facility have been found to be covered by the ADA. As the law has evolved to recognize the need for accessible services delivered outside of physical establishments, the applicability of Title III to utilities (beyond physical facilities operated by such utilities and open to the public) has become more clear.

2. The Utilities Failed to Address the Applicability of Title II of the ADA to the Commission.

The question of the Commission's obligations under the ADA is separate from the obligations of the utilities. While this issue was raised in the Phase 2 Ruling,[20] no party

[17] S.Rep. No. 116, 101st Cong. 1st Sess. 59 (1989): *see also* CforAT Opening Brief at pp. 8-9.

[18] *National Assn. of the Deaf et al. v. Netflix, Inc.,* __ F.Supp. 2d __, 2012 WL 2343666 (D. Mass. June 12, 2012).

[19] *See Carparts Distribution Ctr. Inc. v. Automotive Wholesalers Assoc. of New England, Inc.,* 37 F.3d 12 (1st Cir. 1994) (Title III of ADA applies to self-insurance medical benefit plan of automotive parts wholesale distributor).

[20] Question 2 of the Phase 2 Ruling asks: "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?" Phase 2 Ruling at p. 6 (emphasis added).

except CforAT addressed the issue squarely in opening briefs. As set forth in CforAT's Opening Brief, it is beyond dispute that the Commission is a public entity subject to Title II of the ADA, including the requirement that that it is prohibited from placing a surcharge on people with disabilities to cover the costs of accessibility measures.[21] Public entities are obligated to avoid discrimination in all of their programs, services and activities, which encompass everything that the public entity does.[22] The Commission is charged with setting just and reasonable rates, and with ensuring the provision of safe and convenient utility services and facilities for customers.[23] In its actions to implement these obligations, it may not apply surcharges to people with disabilities.[24] As set forth in CforAT's Opening Brief and in greater detail below, the fact that any customer may select an analog meter for a fee does not prevent the fee from being an impermissible surcharge when assessed against a person with a disability. The Commission may not, through its rulings, prevent a customer from having access to safe energy service and facilities, and may not assess a surcharge to cover the costs of providing access to a disabled customer. Thus, under Title II of the ADA, the Commission must provide for a

[21] CforAT Opening Brief at pp. 5-6, 9-11 (citing to 28 C.F.R. Sec. 130(f)).

[22] *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002). While Title II on its face applies to public entities, it should be noted that the California Supreme Court has found that regulated utilities in this state are more like public entities than private businesses. *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 469-70 (1979) ("In California a public utility is in many respects more akin to a governmental entity than to a purely private employer. In this state, the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and in the utility's day-to-day activities. Moreover, the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation." (internal citations omitted)). While this does not automatically subject regulated utilities to the provisions of Title II of the ADA, it provides another basis to stringently apply state non-discrimination laws to utilities.

[23] Cal. Pub. Util. Code § 451 ("Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public").

[24] 28 C.F.R. Sec. 35.130(f). In addition to the prohibition on surcharges, the obligation to provide safe services and facilities could potentially require an inquiry into whether smart meters are, in fact, safe. *See Friedman* at pp. 6-11.

waiver of the opt-out fee for a customer who cannot access energy services using a wireless smart meter due to a disability.

B. Public Utilities Code Section 453 Prohibits Any Discriminatory Treatment of Disabled Customers

As noted in CforAT's Opening Brief, the Commission has previously relied on Public Utilities Code Section 453[25] to enforce various accessibility obligations for regulated utilities.[26] This is consistent with the long history of this statute, which broadly requires regulated utilities to avoid discriminatory conduct. In *Gay Law Students,* the California Supreme Court traced this obligation, now enshrined in the Public Utilities Code, through its common law history and back to the "royal privilege" doctrine which placed various obligations on holders of monopoly power to avoid exercising power arbitrarily, and concluded that the Legislature enacted a specific and comprehensive statutory provision to prohibit discrimination by any public utility.[27] In fact, the broad obligation that Section 453 places on utilities to avoid discrimination of any sort should be sufficient, in and of itself, to ensure that people who can demonstrate that they need an analog meter based on a medical condition receive a waiver of any opt-out fee that is generally in place. The IOUs are "endowed by the state with a legally enforceable monopoly and authorized by the state to charge rates which guarantee [them] a reasonable rate of return," allowing them to wield "enormous control over activities and individuals which fall within [their] realm, free from many of both the checks and

[25] The Phase 2 Ruling and CforAT's Opening Brief both focus on §453(b) of the Public Utilities Code. While this provision, which directly prohibits a utility from charging a customer different rates due to medical condition or disability, should on its own prohibit use of a surcharge, the Commission should also consider §453(a) of the Public Utilities Code, which prohibits all forms of prejudice by public utilities. The California Supreme Court traces the history of this broad prohibition against discrimination of any sort all the way back to a statutory prohibition against "unjust discrimination passed in 1878 in an act to regulate railroad companies, and continuing through the present as a far-reaching prohibition on all discrimination by regulated utilities, written in "the broadest possible language." *Gay Law Students Assn. v. Pac. Tel & Tel Co.*, 24 Cal. 3d at 478-480.

[26] CforAT Opening Brief at pp. 14-16.

[27] *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d at 476.

hazards encountered by a competitive enterprise."[28] Tied to these powers comes an obligation to ensure that a customer is not burdened by excess charges that cannot be avoided when a customer needs a standard feature of utility service to be modified due to a disability or medical condition.

In their opening briefs, the utilities do not acknowledge the broad reach of the Public Utilities Code's prohibition on discrimination, and instead (as noted above) they try to make a narrow argument that Section 453(b) does not prohibit an opt-out charge because RF sensitivity is not a medical condition and because the opt-out charge is applied to all customers, not just those who require an analog meter due to a medical condition.

In response to the first argument, as set forth above, this proceeding is not an appropriate forum for the Commission to make a determination as to whether RF sensitivity is a disability or medical condition, as the Phase 2 Ruling expressly declines to address the issue. In response to the second argument, the question of whether broad applicability of an opt-out fee prevents it from serving as an illegal surcharge when assessed on a person with a disability or medical condition is addressed in detail below. Overall, however, the utilities fail to address the true reach of Section 453, which is intended to ensure that customers of a utility, who have no option of seeking service elsewhere, are not denied any benefits of service, including access to safe service, based on any immutable characteristic. Consistent with other anti-discrimination laws, the broad sweep of Section 453 should require a waiver of generally applicable surcharges when a utility customer can demonstrate that a modification of standard service is needed in order to obtain safe and effective access to utility facilities and services due to a disability or medical condition.

[28] *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.,* 24 Cal. 3d at 476.

C. Other Laws and Public Policy Goals Demands Accessible Utility Service

While the utilities only address the specific statutes identified in the Phase 2 Ruling, CforAT establishes in its opening brief that the Unruh Civil Rights Act, California's primary non-discrimination statute, clearly applies to the utilities and prohibits surcharges for providing needed accommodations.[29] Similarly, Section 504 of the Rehabilitation Act of 1973 prohibits discrimination, including surcharges, by any entity that receives federal funds, including SDG&E and potentially the other IOUs.[30] Finally, the clear policy basis behind the ADA, the Rehab Act and the Unruh Act is to ensure that people with disabilities are protected from discriminatory activity that prevents them from integrating fully into their communities and living independently, while the policy basis behind Section 453 of the Public Utilities Code is to ensure that all utility customers are treated fairly in all aspects of their dealings with an entity that "is capable of wielding enormous control over activities and individuals which fall within its realm."[31] As an independent policy-making entity, the Commission should ensure that its decision is aligned with that of state and federal legislators who require accessibility in the delivery of goods and services to people with disabilities, including disabled utility customers, even separate from its statutory obligations.

IV. UTILITY ASSESSEMENT OF OPT-OUT FEES TO NON-DISABLED CUSTOMERS DOES NOT SAVE THE SURCHARGE FOR PEOPLE FACING HEALTH IMPACTS

Notwithstanding the argument of the utilities, the fact that any customer may opt out of having a wireless smart meter by paying an opt-out fee does not automatically allow the fee to be assessed on customers who require an analog meter due to a disability or medical condition. As noted in CforAT's Opening Brief, the standard policy, as

[29] CforAT Opening Brief at pp. 12-14.

[30] CforAT Opening Brief at pp. 16-18.

[31] *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.,* 24 Cal. 3d at 476.

permitted by the Commission in the Opt-Out Decisions and enacted by the IOUs, is to give customers a choice of accepting a wireless smart meter or paying an opt-out fee. In this scenario, customers who simply prefer analog meters are not similarly situated to those who require an analog meter due to a medical condition.[32]

If a customer's decision is based solely on personal preference, the customer can weigh the options and choose whether to spend extra money on an analog meter or whether to avoid the additional cost by forgoing the preferred form of service. If the customer forgoes his or her preference and accepts the standard meter, he or she saves money; if the customer pursues his or her preference, he or she absorbs an additional expense. In either case, the customer receives safe and adequate service, and is not disadvantaged due to any immutable characteristic.

In contrast, a customer who requires an analog meter due to a medical condition or disability, and can demonstrate this need via a proper showing in an appropriate forum, does not receive acceptable service from a wireless smart meter. The same default arrangement of a wireless smart meter or an opt-out fee forces the customer to choose between receiving necessary utility service via a device that aggravates a disability or medical condition, or paying a surcharge that cannot be avoided in order to obtain safe and adequate service. In such a case, the utility's standard policy of providing a choice between smart meter service and an extra fee (and the Commission's order authorizing the utility to create such a policy) must be modified. If a wireless smart meter cannot be tolerated by the customer, the alternative option of an analog meter must be provided at no additional cost to the customer to avoid having the fee serve as an illegal surcharge.

V. CONCLUSION

For the foregoing reasons, and the reasons set forth in CforAT's Opening Brief, 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

[32] *See* CforAT Opening Brief at pp. 15-16.

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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