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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)
And Related Matters.	Application 11-03-015 Application 11-07-020

REPLY BRIEF OF THE COUNTY OF MARIN, COUNTY OF SANTA CRUZ, TOWN OF FAIRFAX, CITY OF MARINA, CITY OF SEASIDE, CITY OF CAPITOLA, CITY OF SANTA CRUZ, TOWN OF ROSS AND THE ALLIANCE FOR HUMAN AND ENVIRONMENTAL HEALTH

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The County of Marin, the Town of Fairfax, the City of Marina, the City of Seaside, the City of Capitola, the City of Santa Cruz, the County of Santa Cruz, and the Town of Ross (collectively the "Local Governments") and the Alliance for Human and Environmental Health (together with the Local Governments the "Joint Parties") respectfully submit this Reply Brief in accordance with the June 8, 2012 "Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase" (the "*Amended Scoping Ruling")*. The Opening Briefs of the utilities did not answer all five questions posed in the *Amended Scoping Ruling*; where there is nothing that requires a reply, this brief will refer to the Joint Parties' Opening Brief rather than repeat it.

I. QUESTION 1: DOES AN OPT-OUT FEE, WHICH IS ASSESSED ON EVERY RESIDENTIAL CUSTOMER WHO ELECTS TO NOT HAVE A WIRELESS SMARTMETER INSTALLED IN HIS/HER LOCATION, VIOLATE THE AMERICANS WITH DISABILITIES ACT OR PUB. UTIL. CODE § 453(B)?

A. The ADA.

The utilities' Opening Briefs miss the boat. They argue that the ADA does not apply to them,[1] but gloss over the fact that Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity," or "be subjected to discrimination by any such entity," such as this Commission.[2]

[1] *See, e.g.*, SCE Brief at 4, and PG&E Brief at 4. SDG&E does not analyze Title II of the ADA.
[2] *See* 42 U.S.C. §§ 12111, 12131.

Accordingly, they did not brief – or apparently contemplate – that the Commission's plans for a smart grid, the SmartMeter program, opt-out tariffs, and (especially) opt-out fees on those affected by those services, programs, and activities might violate Title II. The Joint Parties, facing no arguments necessitating reply, and having filed an Opening Brief that answered these questions, refer the Commission to their Opening Brief.[3] In sum, Title II of the ADA generally requires public entities to ensure that their programs, services and activities are accessible to people with disabilities:

> "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."[4]

The ADA and its supporting regulations require that the standard policy of installing a smart meter be modified, with no charge to the customer. 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.

One case discussed in the Joint Parties' opening brief, *Friedman v. PUC,*[5] a Maine appellate decision from earlier this month, merits a more complete discussion of

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[3] *See, e.g.,* pp. 10-17. The Joint Parties also note that if a state cannot assess a de minimis fee upon disabled persons – $6 biennially – for disabled person parking placards, then the substantially higher monthly opt-out fees proposed here make little sense as a policy matter. Cf. *Dare v. California*, 191 F.3d 1167, 1176 (citing *Duprey v. State of Conn., Dept. of Motor Vehicles*, 28 F.Supp.2d 702, 708 (D.Conn.1998) ("If the DMV wants to pass on the costs of providing placards, rather than absorbing the costs itself, it must pass the cost on to all parkers, and not just those disabled individuals protected by the ADA.").

[4] 28 C.F.R. §35.130(f).

[5] *See* Joint Parties Opening Brief at 10.

the unusual procedural posture of this case as well as the direct relevance of its important holding.

Joint Parties first note that an inaccurate characterization of the *Friedman* case was made in their Opening Brief at page 9 when stating that it "vacated the portion of a Maine PUC decision that imposed fees on customers opting out of the electric utility's SmartMeter program." As the language of *Friedman* quoted immediately thereafter makes clear, that decision vacated the portion of a subsequent Maine PUC decision that dismissed a complaint challenging the lawfulness of fees the prior PUC decision had imposed on customers opting out of the electric utility's SmartMeter program because of the PUC's failure to determine the safety of SmartMeter technology. *Friedman* found that the Maine PUC failed to establish a sufficient legal basis for determining the opt out fees were reasonable, and therefore the validity of the earlier decision has been rejected the Court. As a practical matter, this means the PUC will not be able to find the fees reasonable without first making findings concerning the health and safety implications of the technology. As a consequence of this court decision, the Maine PUC recently commenced an investigation of SmartMeter health and safety issues.[6]

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[6] *See*, Notice of Investigation, State Of Maine Public Utilities Commission, Docket No. 2011-262*, ED FRIEDMAN, ET AL, Request for Commission Investigation into , Smart Meters and Smart Meter Opt-Out* , July 24, 2012 ("Accordingly, the Commission hereby initiates an investigation, pursuant to 35-A M.R.S.A. §§ 1302, 1303, into the health and safety issue related to CMP's installation of smart meter technology. We will act pursuant to the general purpose of Maine's utility regulatory system, which states: The basic purpose of this regulatory system is to ensure safe, reasonable and adequate service and to ensure that the rates of public utilities are just and reasonable to customers and public utilities.").

Sections 451 and 543 of the P.U. Code require similar findings by this Commission in Phase 2 prior to finding any opt-out fees just and reasonable, since such findings are essential to any determination that either the ADA or P. U. Code Section 453(b) do or do not preclude the proposed opt-out fees.

B. Section 453.

Section 453 of the P.U. Code applies to the utilities, their equipment, and their charges, as the Joint Parties' Opening Brief demonstrated.[7] This means 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,"[8] one of which is "disability,"[9] defined as "any physiological disease, disorder, [or] condition … that [a]ffects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine [and] [l]imits a major life activity."[10]

The utilities' first response is to claim unconvincingly that "RF sensitivity" is not a disability or medical condition because it is not listed in these statutes.[11] While EMF sensitivity is not mentioned by name, the symptoms and illness associated with the

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[7] *See, e.g.,* pp. 14-17.
[8] P.U. Code § 453 (b).
[9] Govt. Code § 11135.
[10] Govt. Code § 12926(l). *See also In Inv. into Energy and Fuel Requirements of Electric Utilities, Respondents Ordered to Take Certain Conservation Measures and File Reports,* D. No. 81931, 75 CPUC 713, 1973 WL 31828 ("The Public Utilities Code gives this Commission a mandate to take the requisite action to ensure that every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public, without discrimination.").
[11] *See SDG&E Brief* at 7-8, *PG&E Brief* at 6-7, and *SCE Brief* at 5.

condition are.[12] Certainly, a patient suffering from those conditions is entitled to protection under the ADA even if the precise disease etiology is not denominated under the statute.

The record thus far in this proceeding amply demonstrates that the utilities' equipment limits some people's activity because of its effects on bodily systems identified above.[13] EMF sensitivity has been a recognized as major public concern by the ies Commission for many years. Recognizing the scientific uncertainty over the connection between EMF exposures and health effects, the Commission adopted a policy that addresses public concern over EMF with a combination of education, information, and precaution-based approaches. Specifically, Decision 93-11-013 established a precautionary based "no-cost and low-cost" EMF policy for California's regulated electric utilities.

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[12] Just as lupus may not be a listed condition, its attendant illness, joint pain, neurological deficits and the like are covered by the statute.

[13] At page 8 of their Opening Brief Joint Parties described a study co-sponsored by the Commission on the question of EMF exposure, characterizing it as an epidemiological study "done by the California Department of Health Services." The study was, however, released by the California EMF Program, created by Commission Decision 93-11-013 to research and provide education and technical assistance on the possible health effects of exposure to electric and magnetic fields from power lines and other uses of electricity. PG&E has requested that Joint Parties correct the description of the study as an " "epidemiological study." However, an "epidemiologic study" is defined as "A study that compares 2 groups of people who are alike except for one factor, such as exposure to a chemical or the presence of a health effect; the investigators try to determine if any factor is associated with the health effect." (McGraw-Hill Concise Dictionary of Modern Medicine. © 2002 by The McGraw-Hill Companies, Inc.) To the extent material to the issues here, the study speaks for itself as to its proper description, and is any event only one of many such research studies cited in the record of this proceeding. The study can be found at http://www.ehib.org/emf/about.html.

In 2006, the Commission completed its review and update of its EMF Policy in Decision 06-01-042. This decision reaffirmed the finding that while state and federal public health regulatory agencies have not established a direct link between exposure to EMF and human health effects, and the policy direction that (1) use of numeric exposure limits was not appropriate in setting utility design guidelines to address EMF and (2) existing "no-cost and low-cost" precautionary-based EMF policy should be continued for proposed electrical facilities.

The Commission-mandated funding for research for the California EMF research program in 1998 resulted in the publication of Levallois' seminal California study, Study of Self-Reported Hypersensitivity to Electromagnetic Fields in California. The Levallois study found that approximately 3% of respondents reported EMF sensitivity.[14] Moreover, as recently restated by the American Academy of Environmental Medicine in their July 12, 2012 statement urging accommodation for EMF sensitivity, this condition can cause or exacerbate a host of medical conditions which impair major life activities.[15] According to the AAEM statement, these conditions include but are not limited to:

1. Neurological conditions such as parenthesis, somnolence, cephalgia, dizziness, unconsciousness, depression;
2. Musculoskeletal effects including pain, muscle tightness, spasm, fibrillation;
3. Heart disease and vascular effects including arrhythmia, tachycardia, flushing, edema;
4. Pulmonary conditions including chest tightness, dyspnea, decreased pulmonary function;

[14] *See* Environmental Health Perspectives, August 2002, Volume 110, Supplement 4, page 619.
[15] The AAEM statement is found at: http://aaemonline.org/AAEMEMFmedicalconditions.pdf.

5. Gastrointestinal conditions including nausea, belching;
6. Ocular (burning);
7. Oral (pressure in ears, tooth pain);
8. Dermal (itching, burning, pain);
9. Autonomic nervous system dysfunction (dysautonomia).

The AAEM concluded its position by stating that "...because Smart Meters produce radiofrequency emissions, it is recommended that patients with the above conditions be accommodated." Certainly these circumstances fit the statutory definitions above.

II. 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?

The utilities also contend an opt-out fee is not discriminatory, because all who elect the option – not merely the disabled or those who have a medical condition – must pay the fee. This argument overlooks two things. First, while without medical conditions like those described above may choose to opt out for some reason, opting out is a necessity for other persons. Second, the statutory language applies to not just the fee, but also the utilities' equipment involved. Because the equipment "disadvantages" persons with a medical condition or disability, exempting those persons from paying a fee in order to attempt to remedy this disadvantage may be the only way that the smart grid program as a whole could survive under Section 453.[16] In this

[16] Requiring opt-out customers to provide the Commission or an investor-owned utility with private medical records would be an unduly onerous exercise. Many electromagnetically sensitive customers also may not have a formal medical diagnosis or may have medical conditions, such as compromised immune systems from cancer

analysis, the question remains, even absent a fee, if the wireless mesh network EMF emissions surrounding and impacting an individual opting out continue to limit his or her major life activities. A similar analysis would apply under the ADA.

For example, if the State of California were to create and administer a program under which persons could disperse hazardous chemicals into the air which spread beyond his or her property, but a neighbor could be excluded from this program by paying a fee, the irrationality is obvious. If the government administered program affects the individual in a manner precluded by the ADA or Section 453, an opt out fee would not address the fundamental problem.

III. QUESTION 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 Opening Briefs of the Utilities engage in lengthy discussions of the California Constitution and statutes which establish, in their view, the inability of the Commission to delegate any of its authority to regulate them to a third party, such as a local government or other "community." The dissertations, however, are all premised on an unstated and unrecognized assumption which makes most of these legal summaries entirely irrelevant. Namely, that any community opt-out plan must of necessity constitute a delegation of Commission authority. However, if the Commission's adoption of a community opt-out plan as urged by Joint Parties and others is *not* a "delegation" of the

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treatments and other conditions, for which they have been informally advised to avoid EMF exposure.

Commission's jurisdiction, then it does not matter in this proceeding whether the Commission can delegate its jurisdiction or not. If anything, these legal discussions are potentially useful background information for the parties and the Commission in order to ensure that any community opt-out plan it does adopt reflects its retention of ultimate jurisdiction to the extent mandated by law.

The Opening Brief of the Joint Parties demonstrated that there is not any necessary delegation of its authority if the Commission adopts a community opt-out plan consistent with their recommendations. This is exemplified by G. O. 159-A, where the Commission established a process to work collaboratively with local governments to allow local governments to establish conditions or restrictions on the construction of wireless cellular facilities within their jurisdiction, pursuant to applicable local zoning, planning, and public health and safety ordinances. Under G.O. 159-A, the Commission retains the ultimate jurisdiction to override or even preempt such local jurisdictions if a cellular utility demonstrates that the local government is preempting or impeding a statewide policy of the Commission.[17] Similarly, public utilities must obtain local government authorizations or permits to utilize public rights of way for constructing utility

[17] *See*, Opening Brief at 22-23. Despite its position to the contrary, D.05-01-055, cited by PG&E at page 9 of its Opening Brief, confirms position of the Joint Parties. As PG&E quotes from that decision: "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*..," (emphasis added.). The Commission obviously made no such finding when adopting G.O. 159-A.

facilities, based on existing franchise agreements.[18] In all of these examples local government decisions limit the location, design, and some technical requirements of "the particular equipment and facilities, such as metering equipment, used by a public utility to serve its customers."[19] But in none of them has the Commission engaged in an improper delegation of authority because it has not "…'surrendered' control and/or delegated its power to make fundamental policy or final discretionary decisions."[20]

The relevant standard for determining whether exercise by a local government of its lawful police powers over matters of public health and safety by requiring public utility compliance with local ordinances is whether such compliance would "prevent or substantially impede" implementation of a statewide policy, as Joint Parties have argued[21] and SDG&E and SoCalGas have agreed.[22]

If the Commission adopts a community opt-out plan as urged by Joint Parties, and establishes its structure, terms and conditions, and includes retention by the Commission of its jurisdiction to oversee its implementation, it is not possible to argue that actions of local governments or other "communities" defined and restrained by the Commission decision would constitute a "surrender" or a delegation of that jurisdiction.

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[18] *See*, Protest of A.11-03-014 filed by the County of Marin, Town of Fairfax, *et. al.* on April 25, 2011, at pages 7-14.
[19] PG&E Opening Brief at 10, when arguing such decisions cannot be delegated.
[20] Joint Parties Opening Brief at 22, citing D.11-04-035.
[21] *See, Id*.
[22] *See*, Opening Brief of SDG&E and SoCalGas at 9, which wrongly concludes that this standard invalidates any community opt-out plan.

IV. QUESTION 4: HOW SHOULD THE TERM "COMMUNITY" BE DEFINED FOR PURPOSES OF ALLOWING AN OPT-OUT OPTION?

The utilities generally take the position that since the Commission cannot delegate its authority, and since they assume without any basis that such a delegation is an essential component of a community opt-out plan, the proper definition of a community can be ignored.

However, the Commission has already determined that "Further, as proposed by CPA, this phase [2] shall consider whether to allow the opt-out option to be exercised by local communities and governments and, if so, whether the costs for a community exercising the opt-out option would differ from an individual customer exercising the opt-out option."[23] The Commission has also already determined that "Consideration of a "community" opt-out option shall include issues presented by residents living in multi-family dwelling units, where large numbers of wireless smart meters are located closely together."[24] It is thus unarguable that the term "community" should be defined in Phase 2 to include these entities at a minimum.[25]

Regarding Question 4 (a), the Opening Brief of the Joint Parties explained that changes to the utility tariffs have already been required in order to implement the Phase 1 decisions approving opt-out plans, and that similar implementing tariff changes would be required to implement any community opt-out plans developed in Phase 2, noting

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[23] D.12-04-018 at 19. See also, D.12-02-014 at 21 ("Consequently, we find that further consideration of whether to allow a community opt-out option should be included in the second phase of this proceeding.")

[24] *Id*. at 19, note 45.

[25] As discussed in the Joint Parties Opening Brief at 25-26, multifamily dwelling units include differing legal structures, such as condominiums, co-ops, gated communities, and others, and the distinctions should be recognized.

that review of these tariffs would in fact demonstrate the Commission's continuing jurisdiction over the programs.[26]

Unable to fight the obvious, PG&E instead attacks a non-existent issue never raised by Joint Parties, asserting that any such plan would undermine the fundamental one to one relationship between the utility and its customer. Like delegation of Commission authority, no such change in any customer relationship is necessary or should be assumed, although progressive alternatives serving the public interest should not be precluded from consideration.

First of all, it is the non-mandated choice of the utilities to deploy their wireless mesh radio network technology that is at the core of this proceeding.[27] It is common knowledge, which will be demonstrated on the Phase 2 record, that there are numerous alternative technologies and manners of reporting usage data to the utilities without the use of the wireless mesh network configuration. Joint Parties expect that any community opt plan approved by the Commission will provide each consumer the right to obtain time of day metering and data communication capabilities essentially equal to, if not less susceptible to data hacking and security risks, that the wireless mesh radio network.[28] Thus, any customer desiring time of day service would simply not be

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[26] Joint Parties Opening Brief at 20.

[27] *Compare* Public Utility Code section 745:

(d) On and after January 1, 2014, the Commission shall only approve an electrical corporation's use of default time-variant pricing in a manner consistent with the other provisions of this part, if all of the following conditions have been met:

(1) Residential customers have the option to not receive service pursuant to time-variant pricing and incur no additional charges as a result of the exercise of that option.

[28] It is not clear why "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

provided that service by means of a wireless mesh network form of data communication, because his or her community had determined that the pervasive effects of the wireless mesh on the whole community were not ameliorated by a single customer opt-outs. For that matter, the record is not clear at this point if a community opt-out need include time of day metering devices *per se*, or could include only their form of data communication and requirements for technical specifications removing other harmful EMF effects of the specific equipment now being deployed.

Such community decisions are entirely consistent with the G.O 159-A model, under which some local communities require that wireless transmitting facilities be located in certain specified locations meeting strict zoning requirements, and other communities do not. Such requirements affect the type of equipment the cellular carrier can install under the applicable conditions. Similarly, some local governments require utilities to install underground facilities, and others do not. Utilities serving all of these locations adjust their equipment deployment to be consistent with local requirements, and can approach the Commission for relief if any such local constraints prevent or impede statewide programs.

None of these programs have required the utility to cease providing service to individual customers desiring their service. As with the individual opt-out rights

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"community opt-out" area who wish to keep or use a wireless meter that the locality has banned," (PG&E Opening Brief at 14) if the customer had available a reasonably priced meter using an alternative communications technology. This PG&E concern is based on a fundamental confusion between a meter capable of time of day data collection and a "wireless meter." The former need not be the latter; the wireless mesh network is not essential to "smart metering."

established in the Phase 1 proceedings, the utility tariffs would be amended to reflect the terms and conditions of that service in community opt-out circumstances.

V. QUESTION 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 utilities' Opening Briefs in this proceeding equivocate (and disagree) on the answer to this question.[29] The Opening Brief of Joint Parties clearly delineates the distinction between a tax and a fee.[30] This a matter of particular competence of local governments, which deal with this issue on a repeated basis. Any challenge to a local government's exercise of a community opt-out right through adoption of an ordinance or other appropriate action would be subject to judicial challenge on the question of whether it constituted a tax without following legally mandated procedures. This is true just as local government decisions made pursuant to G.O. 159-A are routinely challenged in court by cellular utilities pursuing specific locations for new facilities.

[29] *See, e.g.*, PG&E Opening Brief at 14-15, SDG&E/SCG Opening Brief at 14-16.
[30] Joint Parties Opening Brief at 28-31.

VI. CONCLUSION

For the reasons set forth above and in their Opening Brief, Joint Parties urge the Commission to resolve the legal questions set forth in the *Amended Scoping Ruling* as Joint Parties demonstrate will comply with the ADA and P. U. Code Sections 453(b) and 451, and promote the health and safety of utility customers and the public.

Dated: July 30, 2012, at Tiburon, California.

Respectfully submitted,

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