BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

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

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I.

INTRODUCTION

Southern California Edison Company ("SCE") respectfully submits this Reply Brief to respond to the Opening Briefs regarding five legal questions posed in the Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase dated June 8, 2012. To reiterate, SCE's short answers to the five questions are as follows:

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

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

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

   No. Neither the ADA nor Section 453(b) limits the Commission's ability to adopt opt-out fees for residential customers who elect to have an analog meter for medical reasons.

3. **Can the Commission delegate its authority to allow local governments or communities to determine what type of electric or gas meter can be installed within the government or community's defined boundaries? If so, are there any limitations?**

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

4. **How should the term "community" be defined for purposes of allowing an opt-out option?**

   a. **Would the proposed definition require modifications to existing utility tariffs?**

   b. **Would the proposed definition conflict with existing contractual relationships or property rights?**

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

5. **If a local government (town or county) is able to select a community opt-out option on behalf of everyone within its jurisdiction and the opt-out includes an opt-out fee to be paid by those represented by the local government, would this fee constitute a tax?**

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

II.

ARGUMENT

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

An opt-out fee that is assessed on every residential customer who elects not to have a wireless smart meter violates neither the ADA nor Section 453(b). Various parties have assumed that Title III of the ADA applies to public utilities. Various parties have also assumed that radio frequency ("RF") sensitivity is a "disability" or a "medical condition" as defined by the ADA or Section 453(b). These assumptions are erroneous.

1. The ADA does not apply to the operations of a public utility.

Among other parties, Center for Accessible Technology ("CforAT") asks that "customer[s] who cannot tolerate wireless smart meters for medical reasons…be permitted to retain an analog meter without paying an opt-out fee."[1] However, like other parties making the same request, CforAT knowingly bases its entire argument on the faulty assumption that the ADA applies to public utilities. CforAT even openly states it is "[a]ssuming for the sake of this analysis that the ADA applies to the IOUs."[2]

This assumption is wrong.

A public utility is not a "public accommodation" as defined in Title III of the ADA. Public utilities are not included in the statute's long list of categories of public accommodations, and the United States Department of Justice ("DOJ") has issued opinion letters explicitly stating, "The services of public utilities…are not covered by the ADA."[3]

The ADA does not apply to the operations of a public utility.

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1 CforAT Opening Brief at p.3.
2 CforAT Opening Brief at p. 6, fn. 23.
3 DOJ Core Opinion Letter 185 (Mar. 19, 1996); DOJ Technical Assistance Letter 447 (Jan. 4, 1994).

2. RF sensitivity is not a "disability" or "medical condition" as defined by the ADA or Section 453(b).

All parties requesting that opt-out fees not be assessed on customers with RF sensitivity have assumed that RF sensitivity is a "disability" or "medical condition" as defined by the ADA or Section 453(b). It is not.

According to the ADA, the term "disability" means, with respect to an individual, "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[4]

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

> No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of ancestry, medical condition, marital status or change in marital status, occupation, or any characteristic listed or defined in Section 11135 of the Government Code.[5]

Section 11135 of the California Government Code provides that "disability" means any mental or physical disability, as defined in Section 12926.[6] Section 12926 of the California Government Code defines "medical condition," "mental disability," and "physical disability" very specifically.[7]

While parties have referenced Maine decisions,[8] Swedish authorities, and multiple declarations of personal RF sensitivity experiences,[9] no party has cited any case law finding that RF sensitivity is a "disability" or "medical condition" as defined by the ADA or Section 453(b).

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4 42 U.S.C. § 12102(1).

5 Cal. Pub. Util. Code § 453(b).

6 Cal. Gov't Code § 11135(c)(1).

7 Cal. Gov't Code § 12926(i), (j), (*l*).

8 The Maine Commission declined to decide the issue of health and safety. The CPUC, however, in Decision (D.) 10-12-001, considered and rejected petitions challenging the CPUC's Smart Meter program based on concerns over RF emissions. *See* D.10-12-001, p. 14 (Findings of Fact 2 and 3); D.10-12-31, pp. 20-21. The CPUC noted that "the contribution of these smart meters to RFs is exceedingly small relative to the levels the FCC allows and small in comparison to that of many commonly used devices." D.10-12-001, p. 9. Using the

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No such case law exists.[10]

RF sensitivity is not a "disability" or "medical condition" as defined by the ADA or Section 453(b).

B. Neither the ADA nor Section 453(b) limits the Commission's ability to adopt opt-out fees for residential customers who elect to have an analog meter for medical reasons.

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

C. The Commission may not delegate its authority to allow local governments to determine the types of meters to be installed within their defined boundaries.

The Commission may not delegate its authority to allow local governments to determine the types of meters to be installed within their defined boundaries. Article XII, Section 3 of the California Constitution grants Legislature control over the Commission's regulation of public

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FCC's determination of the applicable standards for RF emissions, the Commission evaluated these petitions and rejected them. *Id.*

9 EMF Safety Network ("EMF") attaches to its Opening Brief over two dozen personal declarations from persons attesting to their electrosensitivity. EMF warns of "the ubiquitous nature of wireless exposure in our current society" and "increased…exposures to radiofrequency radiation in the home through the voluntary use of wireless devices." *See* EMF Opening Brief at p. 4. No declarants rule out other non-smart-meter wireless devices from contributing to their electrosensitivity.

10 EMF references the small claims matter, *Kyle v. Southern California Edison*, Case No. 30-2011-00513876-SC-SC-CJC (Feb. 12, 2012). *See* EMF Opening Brief at pp. 10-11. The small claims court made no ruling regarding RF sensitivity, any disability, or any medical condition. The small claims minute order simply stated that SCE could either pay Kyle $2500 in damages plus $50 in costs or replace Kyle's smart meter with the same type of meter previously in place at his residence.

utilities,[11] and Article XII, Section 8 of the California Constitution specifically provides, "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."[12] "As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated…in the absence of statutory authorization."[13]

The County of Marin, *et al.* ("Marin") acknowledges that such delegation is improper but posits that a "community opt-out" would not be in violation because it would be similar to the "cooperation and coordination" on cell tower siting issues authorized by the Commission under General Order ("G.O.") 159-A or the Community Choice Aggregation ("CCA") program.[14]

Marin is mistaken. A local government may not veto a utility's siting decision under G.O. 159-A, which upholds the Commission's full authority to preempt the local government if the local government's acts conflict with Commission's goals or statewide interests. In contrast, the "community opt-out" sought by Marin and other parties would deprive the Commission of the authority to preempt the local government's opt-out decisions.[15] The proposed community opt-out is not analogous to CCA either. A law was enacted to delegate authority to local governments to establish CCAs as an express exception to the Commission's otherwise exclusive authority over utility matters and services.[16]

Here, delegation of authority to local governments to determine the types of meters to be installed would, at the very least, impede the Commission's ability to regulate these meters and would require statutory authorization.

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[11] California Constitution, Art. XII, § 3.
[12] California Constitution, Art. XII, § 8.
[13] *California Sch. Employees Ass'n v. Personnel Comm'n*, 3 Cal. 3d 139, 144 (1970).
[14] Marin Opening Brief, pp. 18- 23.
[15] *Id.* at pp. 19- 20, fn. 47; p. 21, fn. 50.
[16] Cal. Pub. Util. Code § 366.2.

D. Community opt-out negates the right of the individual to choose smart metering.

As discussed above, community opt-out is impermissible because the Commission may not delegate its authority to another entity to determine the types of meters to be installed. Any type of community opt-out would conflict with existing utility tariffs, contractual relationships, and property rights. SCE's service and relationship is directly with the individual customer.[17]

Community opt-out negates the right of individual customers to choose smart metering. Each customer funds its fair share of costs associated with smart meters and has the right to enjoy smart metering benefits, such as access to dynamic pricing and demand response programs and near real-time consumption data. Opting out of smart metering requires each customer to bear additional costs, and the decision to opt out and bear these additional costs should be the individual's choice.

The Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase dated June 8, 2012 invited intervenors advocating adoption of a community opt-out option to include testimony on the following, assuming that a community opt-out option is adopted:

1. What requirements and procedures should the Commission establish to ensure that a community has properly elected to opt-out? Should there be an appeals process before the Commission if a customer within the community's boundaries challenges the determination?
2. How will a community electing to opt-out accommodate residential customers who wish to retain their smart meters (*i.e.*, not opt-out) and commercial customers within its boundaries?

No party submitted any such testimony. No party has proposed any solution for individual customers who have a right to retain their very useful smart meters and a right not to pay fees for

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

relinquishing smart metering. A community has no authority to decide that all of its residents should incur additional costs and lose the benefits of smart metering.

E. An opt-out fee to be paid by those represented by a local government is unlikely to constitute a tax.

Because opt-out fees are legitimate regulatory fees to allow SCE to recover its costs, an opt-out fee to be paid by those represented by a local government is unlikely to constitute a tax. A regulatory fee is not a tax if it is (1) charged in connection with regulatory activities, (2) does not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged, and (3) is not levied for unrelated revenue purposes.[18] Opt-out fees will be charged in connection with regulatory activities, do not exceed the reasonable cost of providing services necessary to opting out of smart metering, and are not levied for unrelated revenue purposes. Accordingly, opt-out fees are unlikely to constitute a tax.

III.

CONCLUSION

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

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[18] *Sinclair Paint Co. v. State Board of Equalization*, 15 Cal. 4th 866, 876 (1997).

Respectfully submitted,

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