



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

OPENING BRIEF OF CENTER FOR ELECTROSMOG PREVENTION ON SMART METER OPT OUT RESTRICTIONS IMPOSED BY AMERICANS WITH DISABILITIES ACT OR CALIFORNIA PUBLIC UTILITIES CODE 453(B)

Pursuant to Rule 13.11 of the California Public Utilities Commission (CPUC or Commission) Rules of Practice and Procedure, the Center for Electrosmog Prevention (CEP) is filing this opening brief pursuant to the schedule set by Assigned Commissioner’s “Ruling Amending Scope of Proceeding to Add a Second Phase” issued on June 8, 2012, and the extension provided by the assigned Administrative Law Judge on June 27, 2012. The issues addressed by this brief include the Americans with Disabilities Act (ADA) or California Public Utilities code 453(b) (Section 453) limitations on Opt-out Fees and the CPUC's ability to adopt Opt-Out fees for residential customers with a disability and/or a medical condition who need an analog meter for related reasons.

The opt-out is out of compliance with (violates) both ADA and Section 453 of the California Public Utilities Code, as well as additional discrimination laws, as there is no provision for disabled people, or those with medical conditions, to provide reasonable modifications in policies, practices, and procedures as accommodations for provisions of equal services without charging them for it¹. This would be similar to denying a person in a wheelchair any access to services, with the exception of a "for-fee ramp" that people would use for "any reason or no reason at all".

¹ Decision Numbers: [D1204019](#), [D1204018](#), [D1202014](#)

The CPUC cannot order opt-out fees and charges without adding free access to opting out as well as any other needed modifications in policies, practices, and procedures to accommodate disabled individuals and those with medical conditions, as the CPUC must be in compliance with the ADA, Section 453, the CA Public Utility Code, and other discrimination laws as a state agency. The Investor Owned Utilities (IOU)s must also comply with the ADA, Section 453, the CA Public Utility Code, and all federal and state discrimination laws, as California corporations providing public utilities and quite notably, with federal funding. CEP further asserts that CA Public Utility Code Section 453 forbids prejudice and disadvantage, which these opt-out fees clearly violate for the non-disabled as well as the disabled. CEP calls for the solution to be no opt-out fees or extra costs with an analog opt-out for any customers indefinitely, which is what the state of Vermont has successfully instituted. Further, CEP calls for any additional modifications to meet the needs of disabled individuals, such as the establishment of a "zone of safety".

It is imperative to note that state immunity², in terms of liability, is specifically unavailable for these types of violations. Further, CA Government Code Section 12948 states: "It is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 of the Civil Code." CEP asserts that the CPUC may appear to be violating Section 51 by refusing to acknowledge and take into consideration health and medical conditions or disabilities which may impact reasons to opt-out.

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)?

CEP believes that people who are disabled within the meaning of the ADA³ are protected by the ADA from being adversely affected by CPUC orders if those orders prevent the disabled

² 28 CFR 35.178

³ Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. 28 CFR 35.104

from having equal access to public services⁴. Imposing an opt-out fee on every residential customer includes imposing an opt-out fee on disabled people who either cannot afford the fee and must suffer the impact of no accommodation, or have no choice but to pay the fee in order to participate, in public services, or be completely unable to receive those services⁵. They would then have to go without utility services entirely, and in some cases, that may mean living outside of any building with a smart meter (homelessness). Surcharges (fees) are not allowed to be charged for non-discriminatory participation of disabled individuals⁶.

CEP asserts that the ADA is pertinent to opting out of smart utility meters located via an easement onto private homes. The CPUC, allegedly in accordance with SB17, now chaptered into the CA Public Utilities Code Section 8360 - 8369, has authorized regulated utility companies to install wireless smart meters in place of traditional electromechanical analog meters in most residences and businesses in California. The utility meter is not part of the residence but is property owned by the utility company, authorized, ordered, and regulated by the CPUC as part of a public utility service, as a device required to access and participate in the use of public utilities (commodities) such as gas or electricity⁷.

Issues addressed in this brief include: Does Title II of the ADA cover electric, gas, (or other) utility services to private residences? An August 2, 2010, letter from CPUC Chief Counsel to City of Fairfax states that meters are part of the utility distribution network⁸ and subject to CPUC regulations not municipalities'. See California Constitution Article 12, section 8 (regulation of utilities by CPUC) and D.06-07-027 (CPUC Decision authorizing advanced metering) and PU code section 761 (CPUC authority to correct problems) and 701⁹.

⁴ 28 CFR 35.130

⁵ complaints have been filed at CPUC

⁶ (f) 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. § 35.130, ADA Subpart B, General Prohibitions Against Discrimination

⁷ CA Public Utility Code Section 216

⁸ California Public Utilities Code Section 217

⁹ The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. CA PUC Section 701

So the meter emitting the wireless signal is part of a state-regulated service selling a commodity to the public, owned by the independently operated utility, not part of the residence. CEP believes this means that the CPUC must follow the mandate¹⁰ of the ADA related to disabled persons who reside in California residences and may wish to opt-out. The opt-out must be provided free to these disabled persons.

Section 453 (b) states that "No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of ... medical condition ... or any characteristic listed or defined in Section 11135 of the Government Code¹¹ [which states "(c)(1) As used in this section, "disability" means any mental or physical disability, as defined in Section 12926".]. Also, Section 453 provides that no utility shall require different rates or deposits from a person because of a medical condition (or other named characteristic or disability).

Thus, disabled persons and those with medical conditions may not be charged for accommodating their disability and or medical condition or choosing to opt-out due to a medical condition or disabling condition, as set forth in the ADA and California Utility Code 453.

Avoidance of smart meter RF emissions may be undesirable in association with particular disabilities or medical conditions by physicians or individuals for a variety of reasons.

A recent letter to the CPUC and a position paper by the American Academy of Environmental Medicine (AAEM)¹² discusses harmful effects from smart meters and recommends a moratorium on smart meter use.

The American Academy of Environmental Medicine, a prominent, highly regarded, authoritative international association, established for over fifty years, with thousands of physician members, has called for "immediate caution regarding smart meter installations. Citing

¹⁰ "Public entity means—

(1) Any State or local government;
(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and” 28 CFR 35.104

¹¹ (b) With respect to **discrimination** on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions. (c) (1) As used in this section, "disability" means any mental or physical disability as defined in Section 12926

¹² <http://aaemonline.org/pressadvisoryemf.pdf>

several peer-reviewed scientific studies, the AAEM concludes that “significant harmful biological effects occur from non-thermal RF exposure” showing causality (April, 2012). The AAEM also expresses concern regarding significant EMF, ELF, and RF fields on human health.

The impact of these biological and/or health effects may be considered pertinent to a disability within the meaning of the ADA or a medical condition per 453b, or other applicable discrimination laws.

AAEM calls for:

- Immediate caution regarding “Smart Meter” installation due to potentially harmful RF exposure
- Accommodation for health considerations regarding EMF and RF exposure, including exposure to wireless “Smart Meter” technology”, amongst other conclusions.¹³

AAEM has also directly warned CPUC Commissioners about smart meter environmental hazards and public health risks in a resolution and letter dated January 19, 2012:

"Dear [CPUC] Commissioners:

The Board of the American Academy of Environmental Medicine opposes the installation of wireless “smart meters” in homes and schools based on a scientific assessment of the current medical literature (references available on request). Chronic exposure to wireless radiofrequency radiation is a preventable environmental hazard that is sufficiently well documented to warrant immediate preventative public health action.

As representatives of physician specialists in the field of environmental medicine, we have an obligation to urge precaution when sufficient scientific and medical evidence suggests health risks which can potentially affect large populations. The literature raises serious concern regarding the levels of radio frequency (RF – 3 KHz – 300 GHz) or extremely low frequency (ELF – 0- 300 Hz) exposures produced by “smart meters” to warrant an immediate and complete moratorium on their use and deployment until further study can be performed. ”¹⁴

CA Public Utilities Code Section 453 further states, in Sections (a) and (c):

(a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

¹³ AAEM Press Release, April 12, 2012 <http://aaemonline.org/pressadvisoryemf.pdf>

¹⁴ <http://www.scribd.com/doc/79470430/AAEM-Resolution>

... (c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. ¹⁵(California Public Utilities Code Section 453)

These costs and fees prejudice and provide prejudice and unfair advantage against non-disabled utility customers who cannot afford the fees and extra costs, as these costs constitute a disincentive to obtain an analog meter / opt-out option, which may be desired for reasons for the protection of health, property, safety and security, rights assured by numerous state and federal laws. These fees and costs are unreasonable

Americans with Disabilities Act - Title II and III

42 USC 12132 in Title II of the ADA, provides protection for disabled persons for public services furnished by governmental entities (state and local governments) (Title II, §§ 12131-12165). Electric utility service is considered to be within that class of public services (CA PUC 216).

42 USC 12132 is the federal statute most likely to address the issue of the-opt out fee:

"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. § 12132

Title II of the ADA, in the definition section, states that "public entity" includes "any State or local government," and "any department, agency, [or] special purpose district." §§12131 (1) (A), (B) The same section defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

Section 504 of the Rehabilitation Act of 1973 provides protection from discrimination based on disability to individuals receiving program benefits and services from all organizations that received financial assistance from federal sources, in addition to educational and workplace applications.

¹⁵ California Public Utilities Code Section 453 <http://law.onecle.com/california/utilities/453.html>

"RIGHTS UNDER SECTION 504 OF THE REHABILITATION ACT¹⁶

Section 504 of the Rehabilitation Act of 1973 is a national law that protects qualified individuals from discrimination based on their disability. The nondiscrimination requirements of the law apply to employers and organizations that receive financial assistance from any Federal department or agency, including the U.S. Department of Health and Human Services (DHHS). ...

Section 504 forbids organizations and employers from excluding or denying individuals with disabilities an equal opportunity to receive program benefits and services. It defines the rights of individuals with disabilities to participate in, and have access to, program benefits and services.

Who Is Protected from Discrimination?

Section 504 protects qualified individuals with disabilities. Under this law, individuals with disabilities are defined as persons with a physical or mental impairment which substantially limits one or more major life activities. People who have a history of, or who are regarded as having a physical or mental impairment that substantially limits one or more major life activities, are also covered. Major life activities include caring for one's self, walking, seeing, hearing, speaking, breathing, working, performing manual tasks, and learning. Some examples of impairments which may substantially limit major life activities, even with the help of medication or aids/devices, are: AIDS, alcoholism, blindness or visual impairment, cancer, deafness or hearing impairment, diabetes, drug addiction, heart disease, and mental illness."

Utilities such as SDG&E, SCE, and PG&E, which received **federal Stimulus Act funding** for the smart meters and smart grid from opt-out fees are subject to Title 10 of the Energy Act¹⁷. These utilities, by charging fees, may violate section 504 of the Rehabilitation Act of 1973, as amended, Pub. L. 93–112; the Age Discrimination Act of 1975, Pub. L. 94–135, discriminating on the basis of handicap, or age, being excluded from participation in and denied the benefits of, subjected to discrimination under and thus, the CPUC and utilities are subject to a formal complaint with the US DOE and US DOJ. Under the terms of Title 10, those found to

¹⁶ <http://www.hhs.gov/ocr/civilrights/resources/factsheets/504.pdf>

¹⁷ 10 C.F.R. PART 1040—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OR ACTIVITIES, Title 10 - Energy <http://law.justia.com/cfr/title10/10-4.0.3.5.19.html#10:4.0.3.5.19.4.114.2>

violate these discrimination laws may have financial assistance terminated and other sanctions applied.¹⁸

From the list of "Nondiscrimination in Federally Assisted Programs"

Assurances in the Application for Federal Assistance SF-424, the laws included in Federal Assurances that were agreed to and signed by SDG&E, for instance:

The Civil Rights Act of 1964 (Public Law 88-352); Section 16 of the Federal Energy Admin Act of 1974 (Pub.L. 93-275); Section 401 of the Energy Reorganization Act of 1974 (Pub. L 93-438); Title IX of the Educational Amendments of 1972, as amended PL 92-318; PL 93-568; PL 94-482; Section 504 of the Rehabilitation Act of 1973 (PL 93-112), the Age Discrimination Act of 1975 (PL 94-135); Title VIII of the Civil Rights Act of 1968 (PL 90-284); the Dept of Energy Organization Act of 1977 (PL 95-91); and the Energy Conservation and Production Act of 1976, as amended (PL 94-385); and Title 10. Code of Federal Regulations Part 1040. In accordance with the above laws and regulations issued pursuant thereto, the Applicant agrees to assure that no person in the United States shall, on the ground of race, color, national origin, sex, age, or disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity in which the Applicant receives Federal assistance from the Department of Energy.¹⁹

The required nexus between the ADA and the other discrimination laws as stated in the application above is found in the SDG&E project objectives as follows, as an example. Each of the IOU's received similar US DOE financial assistance (grants) for their smart grid projects.

From Recovery.gov, Federal Stimulus Funds received from US DOE (by SDG&E):

"San Diego Gas & Electric

11 Awards

Award #	Type	Quarter	Awarded	Received	Role
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¹⁸ 10 C.F.R. PART 1041—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF ENERGY

Title 10 - Energy <http://law.justia.com/cfr/title10/10-4.0.3.5.20.html#10:4.0.3.5.20.0.124.18>

¹⁹ p. 8 of 109 (List of "Nondiscrimination in Federally Assisted Programs" Assurances)

San Diego Gas & Electric Company

OE0000371 Grant 2012, Q1 \$28,115,052 \$4,995,020 Prime
SAN DIEGO GAS & ELECTRIC COMPANY (description of project)

This project will implement an advanced wireless communication system which will allow SDG&E to monitor, communicate with and control transmission and distribution equipment, thus accelerating deployment of smart grid applications and devices. Total Federal amount of ARRA expenditures was corrected on this report. Amounts not part of cost share were inadvertently included in the total on previous reports but the amount is correct as of this report.

DE-FC26-08NT02870 Grant 2012, Q1 \$6,177,811 \$502,309 Prime

SAN DIEGO GAS & ELECTRIC COMPANY The Recipient shall conduct a pilot scale "proof-of-concept" test of how advanced GridWise information-based technologies and distributed energy resources (DER) may increase asset utilization and reliability of the power grid in support of the national agenda. Establish a microgrid demonstration at an existing substation, hereafter referred to as the "Borrego Springs Substation" to prove the effectiveness of integrating multiple DER technologies, energy storage, feeder automation system technologies, and outage management systems with advanced controls and communication systems, for the purposes of improving stability and effecting feeder/substation capacity in normal and outage / event conditions. "20

CEP asserts that **age discrimination** may be occurring when fees are charged to avoid RF/EMF emissions as older citizens are more likely to have medical conditions that preclude exposure to RF radiation, such as, but not limited to, neurological or cardiac conditions, metal implants that can attract and become antennae for RF radiation, and interference with pacemakers and other medical devices. In addition, seniors have less income as a group and have less ability to pay extra fees and costs. Lastly, seniors have an increased need to heat and cool their homes with changes in temperature, and extra costs and fees cause them to be less able to

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<http://www.recovery.gov/Transparency/RecipientReportedData/Pages/RecipientAwardsList.aspx?duns=006911457>

do so, impacting their safety and health. Forcing seniors to choose between radiation exposure and fees is discrimination.

On redress for violations of § 12132's discrimination prohibition, Congress referred to remedies available under § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, 29 U. S. C. § 794a. See § 203, as set forth in 42 U. S. C. § 12133 ("The remedies, procedures, and rights set forth in [§ 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").²¹ CEP believes that these are the remedies that an aggrieved ratepayer will use to challenge the CPUC imposition of fees and charges for opt-out.

The United States Attorney General issued Title II regulations, see 28 CFR pt. 35 (2010), including called the "integration regulation," it reads:

"A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d) (2010).

Another regulation requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," unless those modifications would entail a "fundamental alteration"; called here the "reasonable-modifications regulation," it provides:

"(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b) (7) (2010)

28 CFR part 35 does not mention electric, gas, or water utility services as being protected but does not exclude it either. However, the August 2, 2010, CPUC letter to the City of Fairfax completes the reference showing that although the ADA does not apply to private residences, it does apply to the utility interconnections between the private residence and the utility company distribution facilities.

²¹ Section 505 of the Rehabilitation Act incorporates the remedies, rights, and procedures set forth in Title VI of the Civil Rights Act of 1964 for violations of § 504 of the Rehabilitation Act. See 29 U. S. C. § 794a(a)(2). Title VI, in turn, directs each federal department authorized to extend financial assistance to any department or agency of a State to issue rules and regulations consistent with achievement of the objectives of the statute authorizing financial assistance. See 78 Stat. 252, 42 U. S. C. § 2000d-1. Compliance with such requirements may be effected by the termination or denial of federal funds, or "by any other means authorized by law." *Ibid.* Remedies both at law and in equity are available for violations of the statute. See § 2000d-7(a) (2).

The public policy stated by the United States Supreme Court is that the ADA is intended to eliminate discrimination against disabled individuals.

“The statute as a whole is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b) (1)²²
Olmstead v. LC, 527 US 581, 590 - Supreme Court 1999

Title III of the Americans with Disabilities Act provides for protection against discrimination by those private corporations who provide Public Accommodations (Sales or Rentals Establishments), or residential facilities with places of public accommodation on the premises (device accessing public utilities on premises of residence). Although title III does not apply to strictly residential facilities, it covers places of public accommodation within residential facilities, including services. Additionally, a public utility be considered a Commercial Facility under Title III, with the upgrade considered a renovation that must be made accessible by the disabled.²³

California Public Utility Code section 453 (b)

“The Supreme Court has called section 453, subdivision (a), an "explicit statutory prohibition of discrimination by a public utility" (Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 475 [156 Cal.Rptr. 14, 595 P.2d 592].) Although the statute does not use the term "discrimination," its import is clear: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage." (Pub. Util. Code, § 453, subd. (a).) This broad language prohibits many forms of arbitrary discrimination, including rate discrimination (e.g., United States Steel Corp. v. Public Utilities

²² The ADA defines "disability," "with respect to an individual," as
"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
"(B) a record of such an impairment; or
"(C) being regarded as having such an impairment." § 12102(2). There is a dispute about whether people who are adversely affected by smart meters are disabled within the meaning of the ADA.

²³ Americans with Disabilities Act ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities, <http://www.ada.gov/taman3.html>

Com. (1981) 29 Cal.3d 603, 610-611 [175 Cal.Rptr. 169, 629 P.2d 1381]) and discrimination in hiring (see *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, supra, 24 Cal.3d at pp. 475-486). [Andersen v. Pac. Bell, 204 Cal. App. 3d 277 \(Cal. App. 6th Dist. 1988\)](#)

This means that ratepayers who require an opt-out because of a medical condition should not have to pay fees, charges or higher rates than ratepayers who do not have those medical conditions.

The California Unruh Civil Rights Act (California Civil Code section 51) is also applicable because it prohibits arbitrary discrimination based on disability²⁴. The meaning of the Unruh Civil Rights Act is that discrimination arbitrarily imposed on persons with a disability is prohibited.

CEP asserts that the Unruh Civil Rights Act is important to consider because persons with a medical condition requesting an analog meter because of that medical condition can easily be accommodated. D.12-04-019 states on page 15 that a purpose of the smart grid and smart meters is:

In determining the best opt-out option to be adopted, we must balance the concerns expressed by customers against California's overall energy policy. As such, we believe that while residential customers should have the option to opt-out of receiving a wireless smart meter, this option should not impede state energy objectives. The ability to collect interval energy consumption data is a key component to attaining California's overall energy objectives, including matching customer demand with procurement of generation resources.

²⁴ Unruh Civil Rights Act (CC § 51) This sort of discrimination is not arbitrary because it is based on a compelling societal interest and does not violate the act. *Koire v. Metro Car Wash* (1985) 40 Cal 3d 24, 219 Cal Rptr 133, 707 P2d 195, 1985 Cal LEXIS 394.

The Unruh Civil Rights Act (CC § 51, prohibiting arbitrary discrimination by business establishments) is to be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice. As with all statutes, it must be construed in the light of the legislative purpose and design. In enforcing the command of a statute, both the policy expressed in its terms and the object implicit in its history and background should be recognized. *Rotary Club of Duarte v. Board of Directors* (1986, Cal App 2d Dist) 178 Cal App 3d 1035, 224 Cal Rptr 213, 1986 Cal App LEXIS 2722, aff'd (1987) 481 US 537, 107 S Ct 1940, 95 L Ed 2d 474, 1987 US LEXIS 5218.

(CC § 51, prohibiting arbitrary discrimination by business establishments). *Rotary Club of Duarte v. Board of Directors* (1986, Cal App 2d Dist) 178 Cal App 3d 1035, 224 Cal Rptr 213, 1986 Cal App LEXIS 2722, aff'd (1987) 481 US 537, 107 S Ct 1940, 95 L Ed 2d 474, 1987 US LEXIS 5218.

California's energy objectives clearly do not take precedence over existing Constitutional, civil rights and/or disability laws²⁵. This determination of California's energy objectives does not mean that wireless smart meters must be placed on each residence in order for the electrical grid to function. For example, data request responses by SCE, SDG&E, and PG&E to questions submitted and answered during Rulemaking 10-05-006 indicate that these regulated utility companies do not anticipate any adverse effects on their operations caused by ratepayers opting out from using smart meters. Even if this wasn't so, disability discrimination, prejudice and disadvantage is not intended to be tolerated in Federal and California law.

Therefore CEP concludes that the solution is to immediately institute a no-fee electromechanical analog opt-out for every Californian, with a zone of safety available for those who request it on the basis of disability or medical condition, and that the CPUC and utilities ultimately removes all wireless smart meters in the near future.

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 ADA and/or Section 453 limit the Commission's ability to adopt opt-out fees for all customers, including persons who are disabled by the definition of the ADA and for persons with medical conditions and other named characteristics by the definitions used by Section 453. Section 453 does not allow any citizens, disabled or not, to be subjected to prejudice or disadvantage, and paying an opt-out fee is prejudicial and is a disadvantage, economically. Title II of the ADA does provide protection for disabled persons from discrimination by state and local authorities in the provision of public services and this could be interpreted as an ADA prohibition. This interpretation would prohibit the CPUC from imposing fees on persons with a disability requiring the persons to have analog utility meters on their residences. Title III of the ADA may also apply, to prohibit the utilities from charging fees for disabled persons. Further, other discrimination laws, such as those named above in question #1, are applicable to the CPUC as a California state government agency.

²⁵ CA Civil Code 52.1

The United States Department of Justice is enforcing the ADA. A recent enforcement action²⁶ imposed a settlement of \$10,250,000 for an accessibility fund to provide retrofits at properties and a \$250,000 civil penalty. This is the largest civil penalty the Justice Department has obtained in any Fair Housing Act case.

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?

It is the position of CEP that exposure of the general public, those with certain medical conditions, and disabled persons to involuntary exposure RF radiation (whether from a primary location or secondary location or in public places) is a violation of state and federal laws, cited in #1 and 2, above. The Commission is given broad jurisdiction, under the law, to regulate and institute safe utility practices. Local communities should be allowed to designate the type of non-RF emitting meters they would like to have in place, with reliable safety assurances in place. Since there have been many safety issues brought up by independent experts, making decisions on the side of precautionary approaches and safety is most desirable. Exploration of non-RF options and inexpensive, non-wireless means to read electromechanical analog meters should be made immediately, to resolve the smart meter problems for everyone.

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

Community should be defined as any residential, geographical, social, or commercial aggregate involving multiple housing of any amount such as, but not limited to: multi-family housing like duplexes, multi-plexes, apartments, condos, townhomes, intentional or residential communities, dormitories, subdivisions, streets, sections of streets, section of neighborhood, neighborhoods, municipalities, towns, cities, counties (or portions thereof, unincorporated municipalities, other geographical, social, or political subdivisions of the state, or even, the entire state.

²⁶ <http://www.justice.gov/opa/pr/2012/June/12-crt-802.html>

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

CEP requests a workshop to consider this question, with information to be provided on existing tariffs and possible future applications defined as they apply to the current opt-out decision. Proposed and existing applicable tariff charges should be provided in simple, plain English. Those opting out should not be subjected to higher rates, which also might be considered to constitute additional discrimination. Incentive to saving energy may come from tiered rating (as we now have) and increased consumer conservation education.

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

CEP requests a workshop to consider this question, with information to be provided on existing contractual relationships or property rights defined as they apply to current utility services. It is CEP's position that original utility easements, right-of-ways, and property rights are currently being violated because the utilities are exceeding the scope of the original agreements, by installing the equivalent of a cell tower and/or a communications and control radio device on every residence, without compensation or permission, using every square inch of land for their communications related to corporate, billing, and electrical use. Property owners should not be subjected to the trespass of RF radiation on their properties from neighboring meters.

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?

CEP maintains that opt-out fees are illegal under state and federal law. No opt-out fees of any kind should be charged. CEP offers no opinion as to whether this fee would constitute a tax.

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?

CEP respectfully suggests a workshop would be most helpful on this topic.

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?

CEP respectfully suggests a workshop would be most helpful on this topic.

_____/S/

July 5, 2012

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