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

OPENING BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M) AND SOUTHERN CALIFORNIA GAS COMPANY (U 904 G)

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July 16, 2012

#269348

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I. INTRODUCTION AND BACKGROUND

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission") and the *Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase* (the "Ruling"), dated June 8, 2012, San Diego Gas & Electric Company ("SDG&E") and Southern California Gas Company ("SoCalGas") hereby submit the following brief of the issues posed by the Ruling.[1]

The Ruling sets forth specific questions to be addressed which generally focus on whether 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 are required to have an analog meter for medical reasons.[2] Specifically, parties are requested to brief the following questions:

[1] Ruling by Commissioner Michael R. Peevey is available at http://docs.cpuc.ca.gov/EFILE/RULC/168362.PDF .
[2] Ruling at p. 5.

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

2. Do the Americans with Disabilities Act or Pub. Util. Code § 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?

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?

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?

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?[3]

The Ruling further invites 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?[4]

[3] Ruling at p. 5 – 6.
[4] Ruling at 6.

Below SDG&E and SoCalGas present their brief on the specific questions posed by the Commission.

II.
BRIEF OF ISSUES

Question 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)?*

Response 1: SDG&E's and SoCalGas' answer to this question is "no."

A. Title III Of The Americans With Disabilities Act.

Title III of the ADA generally provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation."[5] (emphasis added). The list of public accommodations includes:

(A) An inn, hotel, motel, or other place of lodging;

(B) A restaurant, bar, or other establishment serving food or drink;

(C) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) An auditorium, convention center, lecture hall, or other place of public gathering;

(E) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

[5] 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201.

(G) A terminal, depot, or other station used for specified public transportation;

(H) A museum, library, gallery, or other place of public display or collection;

(I) A park, zoo, amusement park, or other place of recreation;

(J) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[6]

Although the list of 12 categories identified above is exhaustive, the list of particular facilities identified within each category is not.[7] However, imposition of an opt-out fee as described in the Commission's Phase I decisions in the above captioned proceedings does not violate Title III of ADA for at least three independent reasons.

First, as a coverage matter, Title III does not apply to the operations of a public utility. Congress did not include "public utilities" within the list of 12 categories identified above. It is for this reason that the United States Department of Justice ("DOJ") has opined on at least two occasions that public utilities generally are not covered by the ADA. For example, on March 19, 1996, the DOJ responded to an inquiry by Congressman Clay Shaw Jr. as to whether Title III of the ADA obligated a telephone company to provide its bills in large print or on a computer disk. Reasoning that public

[6] 42 U.S.C. § 12182(7)(A)-(L); 28 C.F.R. § 36.104.
[7] *See* United States Dep't of Justice, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,546, 35,551 (1991) ("Section-By-Section Analysis of Title III").

utilities are not public accommodations, the DOJ said, "no," and directed the Congressman's constituent to the FCC.[8]

The DOJ reached the same conclusion in a January 4, 1994 opinion letter addressed to the Governor of the Commonwealth of the Northern Mariana Islands, opining that "[p]ublic utility companies, including telephone companies, are not generally considered to be places of public accommodations within the meaning of Title III" of the ADA.[9] Copies of both DOJ opinion letters are enclosed as Attachments A and B, respectively.

Second, even if the ADA applied to public utilities as a coverage matter, which it does not, imposition of an opt-out fee would not amount to unlawful discrimination. Title III defines the term "discrimination" to include, among other things, "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying" the public accommodation's goods, services and facilities, unless such criteria can be shown to be necessary for the provision of the goods, services and facilities being offered.[10]

The DOJ's regulations rely on Title III's eligibility criteria prohibition to more specifically provide that covered public accommodations "may not impose 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, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or

[8] DOJ Core Opinion Letter 185 (March 19, 1996).
[9] DOJ Technical Assistance Letter 447 (January 4, 1994).
[10] 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a)).

procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part."[11] However, as the DOJ's Title III Technical Assistance Manual makes clear, this prohibition extends to cases in which a covered public accommodation places "a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses."[12] In this case, the Commission has directed the utilities to impose the opt-out fee equally on all customers regardless of disability status, and not in order to comply with the ADA. Imposition of an opt-out fee in this instance does not amount to discrimination on the basis of disability for this reason.[13]

Third, and finally, Title III does not prohibit imposition of surcharges in all cases. As noted above, such surcharges may be imposed when "necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered."[14] In this instance, the subject opt-out fees are necessary for the provision of services requested by individual opt-out customers, including installation of a traditional electrical meter, and costs the utilities will incur by employing meter readers who must visit individual opt-out residences to determine the amount of power utilized during each billing period.[15]

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[11] 28 C.F.R. § 36.301(c).
[12] Department of Justice, Title III Technical Assistance Manual, § III-4.1400 at 22.
[13] *See* Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 49 (2d Cir.2002) (to establish a disparate treatment claim under the ADA, the plaintiff "must present evidence that animus against the protected group was a significant factor in the position taken" by Defendants); Section-By-Section Analysis of Title III, 56 Fed. Reg. at 35,564 (the DOJ's regulations are "intended only to prohibit charges for measures necessary to achieve compliance with the ADA").
[14] 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a).
[15] *See* Easley by Easley v. Snider, 36 F.3d 297, 303 (3d Cir. 1994) ("the joinder of this requirement cannot be attributable to discrimination, rather, it is 'necessary for the provision of the . . . program or activity being offered'").

B. Public Utility Code Section 453.

California Public Utilities Code Section 453, subdivision (b) provides in relevant part as follows:

> "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."[16]

Moreover, "Disability" is one of the protected characteristics listed in Government Code Section 11135.[17] Hence, as is relevant to these proceedings, Public Utilities Code Section 453 prohibits covered public utilities from treating persons differently on the basis of disability.[18] Furthermore, "[i]n alleging discrimination under . . . § 453, complainant must show not simply that different allocations apply to different groups of customers, but rather that the process is unreasonable or unfair. Discrimination forbidden by the statute 'must be undue, taking into consideration all of the surrounding facts and circumstances.'"[19]

Under these standards, imposition of uniformly-applied opt-out fees should not run afoul of Section 453(b) for the same reason that imposition of such fees does not run afoul of the ADA. SDG&E and SoCalGas do not propose to impose opt-out fees solely on individuals with disabilities or other covered medical conditions. Instead, we propose to impose the opt-out fee on all customers regardless of their disability status. In addition, SDG&E and SoCalGas propose to impose opt-out fees not to defray the expenses of

[16] Cal. Pub. Util. Code § 453 (b).
[17] *See* Cal. Gov't Code § 11135 (prohibiting discrimination on the basis listed in Section 453, as well as on the basis of "race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability") (emphasis added).
[18] *See* California Portland Cement Co. v. Public Utilities Comm'n, 49 Cal.2d 171, 175 (1957); *see also* Muse Cordero Chen, Inc. v. Pacific Bell, 1990 Cal. PUC LEXIS 958, 15 (Cal. PUC 1990).
[19] Wannenmacher v. Del Oro Water Company, 1993 Cal. PUC LEXIS 620 (Cal. PUC 1993).

complying with Section 453's mandate against discrimination. Instead, we propose to assess opt-out fees to defray extra costs associated with respect to installation and servicing of analog electric meters and gas modules. In brief, SDG&E and SoCalGas are not aware of any facts suggesting that imposition of uniformly-applied opt-out fees is unreasonable, unfair or undue.

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?*

Response 2: The response of SDG&E and SoCalGas to this question flows from our response to Question 1 *supra*.

To the extent that the Commission asks whether a public utility could choose to impose opt-out fees with respect to individuals who opt out for medical reasons, but choose not to impose opt-out fees with respect to individuals who opt out for other reasons, the answer most likely is "no". As explained above, Section 453 expressly prohibits covered public utilities from discriminating on the basis of medical condition and disability.[20]

Assuming that it applies at all, and assuming that individuals with alleged "medical conditions" qualify as "qualified individuals with disabilities," it is clear that Title III's eligibility criteria standard quoted above would prohibit imposition of opt-out fees solely on individuals or groups of individuals with disabilities. In addition, selective imposition of opt-out fees would not be "necessary," at least to the extent that the fees

[20] *See* Application of PT&T, 1979 Cal. PUC LEXIS 826, 222 (Cal. PUC 1979) (denying telephone company's application for rate increase, ordering a reduction, and noting that telephone company needed to provide the same but no greater service to disabled as it did to non-disabled individuals); Muse Cordero Chen, Inc. v. Pacific Bell, 1990 Cal. PUC LEXIS 958, 15 (Cal. PUC 1990) (excluding project bids from non-Asian businesses violated Section 453).

would only be charged for individuals who opt out for medical reasons, but would not be charged for individuals who opt out for other reasons.

To the extent that the Commission asks whether a public utility can enforce a uniformly-applied policy of imposing opt-out fees on all individuals who choose to opt out, even though the utility knows that particular individuals do so for medical reasons, the answer most likely is "yes".

As explained above, Section 453 expressly prohibits covered public utilities from discriminating on the basis of medical condition and disability. A uniform policy imposing opt-out fees on all customers who opt out does not discriminate on the basis of medical condition or disability, and does not appear to be unreasonable, unfair or undue. The result should not change solely because the utility learns that a particular customer opts out for medical reasons.

The same is true of Title III, assuming for sake of this analysis that it applies at all.

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?*

Response 3: The answer to this question is "no." SDG&E's and SoCalGas' view is that the Commission's authority preempts local governments or communities from the exercise of discretionary actions that would prevent or substantially impede the installation of electric or gas metering equipment. In addition, the powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in

the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization.[21]

The Commission's authority over public utilities arises from the state Constitution and is enumerated in detail in the California Public Utilities Code and related case law. The following attempts to identify the complex maze of constitutional provisions, statutes and court opinions that must be considered in determining the scope of Commission's jurisdiction and preemption of local laws.

C. State Law Preemption of Local Law

The California Supreme Court identified the basic tenets of preemption in Sherwin –Williams Co. v. City of Los Angeles.[22]

> "Under article XI, section 7 of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, and other ordinances and regulations not in conflict with [state] laws." "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." "A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by [state] law, either expressly or by legislative implication.'" Local legislation is 'duplicative' of [state] law when it is coextensive therewith. Similarly, local legislation is 'contradictory' to [state] law when it is inimical thereto. Finally, local legislation enters an area that is 'fully occupied' by [state] law when the Legislature has expressly manifested its intent to 'fully occupy' the area, or when it has impliedly done so… ."

D. Constitutional and Statutory Authority

We next turn to the jurisdiction given to the Commission as well as local governmental entities to determine the areas in which each may legitimately regulate and, thereby, determine which areas of regulation would be clearly preempted.

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[21] Bagley v. City of Manhattan Beach (1976) 18 Cal.3d 22, 24; California School Employees Association v. Personnel Commission (1970) 3 Cal.3d 139, 144; Schecter v. County of Los Angeles (1968) 258 Cal.App.2d 391, 396; see also, D.02-02-049, D.11-12-035, D.09-12-015and D.06-01-024.

[22] 4 Cal. 4th 893, 897-98 (1993).

First, California Constitution, article XII, section 8 establishes, in pertinent part, the permissible scope of local regulation in the utility context:

> "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the commission… ."

Regulation of public utilities by the Commission is generally authorized by Public Utilities Code Section 701:

> "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."

> Further, Public Utilities Code Section 768 provides that:

> "The commission may, after a hearing, require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public. The commission may prescribe, among other things, the installation, use maintenance, and operation of appropriate safety or other devices or appliances, … . The commission may establish uniform or other standards of construction and equipment, and require the performance of any other act with the health or safety of its employees, passengers, customers, or the public may demand… ."

As stated above, local governments retain certain police powers which are bestowed by California Constitution, Article XI, Section 7:

> "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

The Public Utilities Code recognizes these powers in its Section 2902 which states that notwithstanding comprehensive statewide utility regulation, certain existing municipal powers are retained by municipalities. "This chapter shall not be construed to authorize any municipal corporation to surrender to the [PUC] its powers of control to supervise and regulate the relationship between a public utility and the general public in

matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation."

Thus, local governments have certain powers but only to the extent those powers do not conflict with general law. Moreover, the Legislature has granted the Commission authority over a public utility's infrastructure, including the installation of electric or gas metering equipment.

Public Utilities Code Section 761 provides that:

> Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

Public utilities are different than most other business entities because, in large part, they are the sole providers of services essential for public health and safety across wide-ranging service territories crossing dozens of municipalities and multiple counties. Accordingly, the California Constitution and legislature has designated the Commission as having exclusive jurisdiction over utility matters because the construction, design, operation and maintenance of public utilities are matters of state-wide concern.

> "[T]he control of these aspects of [public utilities] is not a municipal affair subject to a checkboard of regulations by local government. 'Neither the public nor the service corporation could tolerate as many standards and

> policies as there were towns, cities, or boroughs through which they operated… ."[23]
>
> "The Commission's jurisdiction is necessary to ensure that decisions made on the basis of strictly local concerns do not impede or impair the placement of facilities necessary for the rational development of a statewide utility system."[24]

E. Summary

The installation of Advanced Metering Infrastructure (AMI) technology is an important component of California's and the Commission's long term goals to develop more efficient delivery of electricity and gas as well as improved customer-side management that will enable greater conservation and efficiency. The Commission has exclusive jurisdiction over the regulation of public utilities. This authority extends to a public utility's infrastructure, such as the installation of gas and electric meters. SDG&E's Smart Meters and SoCalGas' Advanced Meters are the most integral component of their Commission approved AMI programs.[25] Accordingly, this Commission cannot legally delegate 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 because it cannot delegate its responsibility to make fundamental policy decisions pertaining to recoverable costs, program rules, regulations and policies.[26] Even if the Commission had not expressly exercised its regulatory power to determine what type of electric or gas meters can be installed by public utilities within

[23] 64 Cal. App. 4th at 798, citing Los Angeles Ry. Corp. v. Los Angeles, 16 Cal. 2d 779, 787 (1940).
[24] 64 Cal. App. 4th at 799.
[25] D.07-04-043 and D.10-04-027
[26] D.11-12-035.

State boundaries, the power still resides in the Commission, not a local entity, due to the essential nature of the Commission approved AMI programs.

Question 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?

Response 4: SDG&E's and SoCalGas' view is that the term "community" cannot be rationally defined or legally quantified to allow for a permissible opt-out option because the manner in which those associated costs are allocated to all payers must bear a fair and reasonable relationship to the individual payer's burdens on, or benefits received from, the governmental activity. Here the proposed community opt-out option circumvents individual choice on its most basic level, and would extract certain property rights and monetary demands by the government from an individual or entity, with no apparent benefit to every payer, and without balance of relationship between perceived risk and perceived benefit.

a. Yes. Existing utility tariffs would require modifications to implement the proposed community opt-out changes.

b. Yes. A "community" opt-out option would likely require that the government impose additional requirements and restrictions on existing property rights to prevent another from performing an otherwise lawful activity. Existing utility tariffs are built upon the bedrock legal principles of individual freedom to contract and consumer choice among reasonably available options.

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?*

Response 5: Based upon the limited facts outlined by the Ruling's hypothetical situation, SDG&E and SoCalGas believe the local government imposed community opt-out option and fee would most likely constitute a tax. Proposition 26 defines a "tax" as any levy, any exaction and certain charges imposed in a state statute or by a local government that result in a taxpayer paying a higher tax. Exactions, levies, and charges mean the following:

- **Exaction.** A monetary demand by the government from an individual or entity, with no benefit to the payer. An exaction is more forceful than a tax levy or a charge.
- **Levy.** A levy includes a new tax or tax increase – including but not limited to the personal income, corporate, sales and use, or excise tax – as defined by the Sinclair Paint decision.[27]
- **Charge.** A monetary demand by the government from an individual or entity for a service, an intangible benefit, or a good or product provided to the payer of the charge. A charge will not necessarily be compulsory, since not all individuals or entities desire or need a particular service, benefit or good/ product. While a charge does not always have a consistent label, most are labeled as either a "fee" or a "charge."

All state levies, exactions, and charges require approval of two-thirds of the Legislature, unless they satisfy one of the exceptions. Locally imposed levies, certain charges and exactions that will be used for specific purposes are subject to two-thirds approval by the local electorate. However, general purpose levies, certain general purpose charges, and general purpose exactions can be approved by a majority vote of the public.

Since presumably not every individual within the local government's jurisdiction and non-voluntary community opt-out area will benefit, this is not a true regulatory charge or a reasonable charge imposed for a specific government service benefitting the

[27] Sinclair Paint Company v. State Board of Equalization, 15 Cal. 4th 866 (1997).

payer. Thus, based solely on the hypothetical situation presented, this fee would constitute a tax.

Moreover, State and local governments must be able to demonstrate through a preponderance of the evidence that any charge is reasonable. A charge is reasonable if it does not exceed the necessary cost of the governmental activity and if the cost allocated to the payer bears a fair or reasonable relationship to the payer's burden and/or benefits. Furthermore for such opt-out charges to be permissible the benefit must accrue to the payer only, and cannot exceed the reasonable costs to the government of providing the benefit or privilege.

III.
CONCLUSION

For the reasons set forth herein, the Commission should adopt opt-out policy measures in accordance with the above.

Respectfully submitted this 16th day of July, 2012.

By /s/ Allen K. Trial
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SOUTHERN CALIFORNIA GAS COMPANY

Attachment A

March 19, 1996 Opinion Letter

185

II-1.1000
II-1.2000 March 19, 1996

The Honorable E. Clay Shaw, Jr.
U.S. House of Representatives
2267 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Shaw:

This letter responds to your inquiry on behalf of your constituent, Mr. XXXXXXXXXXXXXX, who asks whether the Americans with Disabilities Act (ADA) requires a local telephone company to provide the option of receiving telephone bills in large print or on computer disk or tape. Please excuse our delay in responding.

The ADA prohibits discrimination on the basis of disability by State and local government entities and in places of public accommodation and commercial facilities. The services of public utilities such as telephone companies generally are not covered by the ADA. If Mr. XXXXXXX wishes to register a complaint with the Federal Communications Commission, he can reach their office of complaints and enforcement at (202) 632-7553 (voice) or (202) 418-0485 (TTY).

We hope this information is helpful to you in responding to your constituent.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

cc: Records, Chrono, Wodatch, McDowney, Milton, FOIA
n:\udd\milton\congress\pubutil.sha\sc. young-parran

Attachment B

January 4, 1994, Opinion Letter

JAN 4 1994

Mr. Thomas J. Camacho
Office of the Governor
Commonwealth of the Northern Mariana Islands
Developmental Disabilities Planning Office
P.O. Box 2565
Saipan, MP 96950

Dear Mr. Camacho:

This is in response to your inquiry regarding the Americans With Disabilities Act (ADA).

The ADA authorizes the Department of Justice to provide technical assistance to individuals and entities that are subject to the Act. This letter provides informal guidance to assist you in understanding the ADA accessibility standards. However, this technical assistance does not constitute a legal interpretation of the application of the statute and it is not binding on the Department.

Your first two inquiries concern whether it is appropriate for an advocacy agency of a local government that is funded entirely by federal funds through the Administration on Developmental Disabilities Act to write a "premonition" letter on behalf of a complainant. We presume this type of letter would be one in which you advise the owner or operator of a facility that he is possibly in violation of the ADA. Your federal funding agency should be consulted to determine whether activities of this type are permitted.

Even if the funding agency permits this type of activity, the ADA itself does not authorize the State or Commonwealth officials to enforce the ADA. However, if the Commonwealth agency is simply representing complainants in the same manner in which a private attorney might do so, the ADA does permit such activity. Individuals have the right to enforce both titles II and III of the ADA through private civil actions.

The complainants directly or through your agency may also file complaints with the Department of Justice. Complaints

cc: Records, Chrono, Wodatch, Magagna, Johansen, MAF, FOIA
udd\johansen\camacho.ltr

01-02870

regarding title III entities should be forwarded to this office at the address on the letterhead. Complaints regarding title II entities should be submitted on the enclosed form and mailed to

the address indicated. ADA enforcement is handled by the Civil Rights Division in Washington rather than by the local United States Attorneys.

Your third question seeks information on how to deal with a telephone company's failure to implement a relay service operation as required by title IV of the ADA. The Federal Communications Commission (FCC) is the agency responsible for enforcing title IV. You should write to the FCC at 1919 M Street, N.W., Washington, D.C. 20554, or call at (202) 632-7260.

Finally, you inquire whether a telephone company is a place of public accommodation providing sales and services and, consequently, whether the phone company must provide TDD/TTY equipment in the same circumstances in which it makes voice equipment available to other users. Public utility companies, including telephone companies, are not generally considered to be places of public accommodations within the meaning of title III. However, 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.

Similarly, if the telephone company operates a retail establishment where it sells telephone equipment, such a facility would be a "sales or rental establishment" that is covered by title III as a place of public accommodation. Title III, however, does not require public accommodations to alter their inventory to include accessible or special goods designed for individuals with disabilities. A public accommodation must special order accessible goods if, in the normal course of its operation, it makes special orders for unstocked goods and the special goods can be obtained from a supplier with whom the public accommodation customarily does business.

I have enclosed copies of the Department's Technical Assistance Manuals for titles II and III. We hope this information is helpful to you.

Sincerely,

John L. Wodatch
Chief
Public Access Section

Enclosures
01-02871