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 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

James M. Tobin
Jose Guzman
August Stofferahn
Tobin Law Group, a Professional Corporation
1100 Mar West Street, Suite D
Tiburon, CA 94920
Telephone: 415-732-1700
Facsimile: 415-704-8919
Email: jim@tobinlaw.us
Email: joe@tobinlaw.us
Email: august@tobinlaw.us

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Attorneys for Joint Parties

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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 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*"), which identified five legal issues which would be decided on the basis of written briefs.[1] The Commission Decision on these issues will be issued prior to the final Decision in this proceeding on the broader scope of issues identified in the *Amended Scoping Ruling*.[2]

I. INTRODUCTION

The Local Governments have been actively involved in these SmartMeter proceedings since shortly after the filing of the Protest to PG&E's SmartMeter Opt-out Plan Application by the County of Marin and Town of Fairfax in April of 2011.[3] The Protest included as Attachment B Ordinances and Resolutions adopted by 11 counties and municipalities establishing temporary moratoriums on the installation of

[1] *Amended Scoping Ruling* at 5-6.

[2] *Id.* at 4-5.

[3] *See* A.11-03-014, Protest of The Town of Fairfax, California, The Alliance for Human and Environmental Health and County of Marin, California, filed April 25, 2011 (the "Protest"). The term "SmartMeter," although assertedly trademarked by PG&E to describe a particular device or service, is used generically in this brief and by the public generally to refer to the wireless mesh network-based digital meters being deployed all three Utilities, as well as the related data collection units, transmitting repeaters and similar facilities constituting the wireless mesh radio networks used to collect customer data.

SmartMeters relying on wireless mesh radio network transmissions to deliver customer usage data to PG&E, pending review of their impact on public health and safety and compliance with existing franchise agreements and other governing authorities. In addition, the Protest urged that a community opt-out right be established in addition to individual customer rights, based on the election by PG&E to utilize wireless mesh radio network technology, which by its very nature affects the entire community.[4]

Since the filing of the Protest, numerous other local governments in California have expressed concern about the impact on their communities of the rapidly escalating installation of these devices. These local governments have been estimated to represent over 3.8 million California residents.[5]

From the outset, PG&E, SCE and SDG&E (the "Utilities") have ignored the requests of local governments that these lawfully enacted ordinances be complied with, and their concerns addressed. Instead, relying on unsupported claims of preemption of jurisdiction by the Commission, the Utilities have essentially steamrolled over local government concerns, knowing that most local governments simply don't have the resources to engage in extended and complex litigation with these large corporations.

The Commission, however, starting with its Decision 12-02-014[6] establishing the requirements for PG&E's SmartMeter opt-out program, and continuing in its later

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[4] *Id.* at 7-14.

[5] *See, e.g.,* <http://stopsmartmeters.org/how-you-can-stop-smart-meters/sample-letter-to-local-government/ca-local-governments-on-board/>.

[6] D.12-02-014, Decision Modifying Pacific Gas And Electric Company's SmartMeter Program To Include An Opt-Out Option, *Application of Pacific Gas and Electric Company for Approval of Modifications to its SmartMeter™ Program and Increased*

decisions applying the essential principles of the *PG&E Decision* to SCE[7] and SDG&E,[8] has recognized the need to address a range of problems with deployment by the Utilities of the SmartMeter wireless mesh networks. These decisions have required the establishment of opt-out plans that must include making available alternative non–wireless meters, compliance with consumer notice requirements, and that the opt-out costs proposed by the Utilities be materially reduced on an interim basis.[9] The Commission has further established this Phase 2 proceeding to explore the numerous fundamental cost issues associated with these opt-out programs, as well as the feasibility of implementation of community opt-out programs as the Local Governments have consistently proposed.

With respect to the cost issues designated for investigation in Phase 2, the Commission's decisions have explicitly pointed out that the Commission has made no

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Revenue Requirements to Recover the Costs of the Modifications (U39M), A.11-03-014 (Feb. 1, 2012) (*"PG&E Decision*").

[7] D.12-04-018, Decision Modifying Decision 08-09-039 And Adopting An Opt-Out Program For Southern California Edison Company's Edison Smartconnect Program, *Application of Consumers Power Alliance, Public Citizen, Coalition of Energy Users, Eagle Forum of California, Neighborhood Defense League of California, Santa Barbara Tea Party, Concerned Citizens of La Quinta, Citizens Review Association, Palm Springs Patriots Coalition Desert Valley Tea Party, Menifee Tea Party - Hemet Tea Party – Temecula Tea Party, Rove Enterprises, Inc., Schooner Enterprises, Inc., Eagle Forum of San Diego, Southern Californians For Wired Solutions To Smart Meters, and Burbank Action For Modification of D.08-09-039 and A Commission Order Requiring Southern California Edison Company (U338E) To File An Application For Approval of A Smart Meter Opt-Out Plan*, A.11-07-020 (Apr. 19, 2012) (*"SCE Decision*").

[8] D.12-04-019, Decision Modifying Decision 07-04-043 And Adopting An Opt-Out Program For San Diego Gas & Electric Company, *Application of Utility Consumers' Action Network for Modification of Decision 07-04-043 so as to Not Force Residential Customers to Use SmartMeters.,* A.11-03-015 (Apr. 19, 2012) *("SDG&E Decision").*

[9] *See, e.g., PG&E Decision* at 33-35, 39-41.

determination that any of the billions of dollars expended by the Utilities in these SmartMeter deployment projects have constituted reasonable and prudent expenditures to be included in any Utility rate base and recovered from customers.[10] To the extent any of these expenditures are eventually found qualified to be included in a Utility rate base, the Commission has also not determined how any such amounts should be "socialized" as between all ratepayers or some subset thereof. Finally, the Commission has not determined the permanent rate structure that should be applied to these opt-out programs, or the nature of any exemptions or waivers that might apply to such rates.

With respect to the community opt-out issues designated for Phase 2, the Commission has not yet established the definition of a "community" that should be used in connection with these community opt-out rights, as well as several other implementation issues identified in the *Amended Scoping Ruling.*

The Joint Parties address below those legal issues identified for resolution through briefs in the *Amended Scoping Ruling.*

[10] *See, e.g., PG&E Decision* at 33, n. 58 ("Authorization of a memorandum account does not necessarily mean that the Commission has decided that the types of costs to be recorded in the account should be recoverable in addition to rates that have been otherwise authorized, e.g., in a general rate case. Instead, t*he utility shall bear the burden when it requests recovery of the recorded costs, to show that separate recovery of the types of costs recorded in the account is appropriate, that the utility acted prudently when it incurred these costs and that the level of costs is reasonable.* Thus, PG&E is reminded that just because the Commission has authorized these memorandum accounts does not mean that recovery of costs in the memorandum accounts from ratepayers is appropriate.") (Emphasis supplied).

II. 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)?

The correct answer to this question is integrally related to the answer to Question 2, concerning whether these statutes limit the Commission's ability to impose an opt-out fee on persons opting out for medical or disability reasons. If subscribers with disabilities under the ADA, or a qualifying medical condition under Public Utilities Code § 453(b) ("§ 453(b)"), can be lawfully exempted from any such fee, then the applicability of the fee to other customers would not in and of itself violate the ADA or § 453(b). However, as discussed below, the feasibility of such an exemption without inherent violation of the privacy rights of affected individuals is, at best, problematic. In the absence of a lawful exemption from such fees for qualified disabled persons or persons with a medical condition, both statutes would be violated by opt-out fees.

A. The Commission Has Long Acknowledged And Acted Upon Public Concerns About The Health Impacts Of EMF But Never Found the Utilities' Wireless Mesh Networks or SmartMeters To Be Safe

The SmartMeter program has generated unprecedented public concern about the health impacts of the planned deployment of millions of devices which will expose Californians to a cumulatively immeasurable amount of pulsed electro-magnetic and RF signals. Scores of witnesses have come forth to describe their personal concerns about the program's effect on their own health and decry this development in formal filings and public hearings before the Commission. As set forth below, the concern over the health impacts of EMF is not new or unique to the SmartMeter program. In fact, it has been a documented public health concern known to the Commission for decades. As noted by

a unanimous California Supreme Court in *San Diego Gas and Electric Co. v. Superior Court* in 1996, the Commission:

> "has broad authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public, and if so, to prescribe corrective measures and order them into effect. Every public utility is required to furnish and maintain such "service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." (§ 451, italics added.) The Legislature has vested the commission with both general and specific powers to ensure that public utilities comply with that mandate." [11]

That electric and magnetic fields ("EMF")[12] are a recognized public health concern is evidenced by the fact that the Commission has long exercised regulatory authority over various forms of EMF generated by electrical utility generating and transmission equipment. Prior to 1988 the Commission had addressed the issue of the potential public health effects of such fields only on a case-by-case basis.[13] In 1988, however, the Legislature initiated a broad inquiry into the subject. It found, inter alia, that "A number of scientific studies are beginning to indicate that electromagnetic fields associated with electrical utility facilities may present a significant cancer risk."[14] The Legislature then declared its intent to determine by further research "whether exposure to electromagnetic fields caused by electrical utility generating and transmission

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[11] *San Diego Gas and Electric Co. v. Superior Court,* 13 Cal. 4th 893, 923 (1996).

[12] *See,* notes 16 and 17*, infra.*

[13] *See, e.g*., *San Diego Gas & Electric Co.,* Cal. P.U.C. Dec. No. 93785 (1981).

[14] *San Diego Gas & Electric Co. v. Superior Court* 13 Cal. 4th 893 (1996) citing *Stats. 1988, ch. 1551, § 1, subd. (a)(2), p. 5565.*

facilities presents an unreasonable cancer risk, and whether legislation is needed to reduce that risk."[15]

In 1991, the Commission appointed an advisory panel to study this issue (the "Consensus Group") which issued its report to the Commission in 1992.[16] After hearings concerning the Consensus Group report and EMF studies released subsequent to that report, the Commission issued its Interim Opinion[17] declaring that "By this order we are taking interim steps to address electric and magnetic fields (EMF) related to electric utility facilities and power lines."[18] The Commission found that "the body of scientific evidence continues to evolve."[19] It recognized, however, that "public concern and scientific uncertainty remain" regarding the potential health effects of such fields.[20] Citing its constitutional authority to make rules for the utilities it regulates[21] and the statutory requirement that utilities provide service and facilities necessary to promote the health and safety of their customers, employees, and the public,[22] the

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[15] *San Diego Gas and Electric,* 13 Cal. 4th at 926.

[16] Report by Cal. EMF Consensus Group to P.U.C., Issues and Recommendations for Interim Response and Policy Addressing Power Frequency Electric and Magnetic Fields (1992) ("Consensus Group Report") I.91-01-012.

[17] *Re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities*, 52 Cal.P.U.C.2d 1, 7 (1993).

[18] *Id.* at p. 5 (citations omitted). Consistent with this decision and the purpose of § 451, this brief includes within the scope of "EMF" not only the radiofrequency (RF) emissions of SmartMeters sending or receiving data from the utility, but also the electric, magnetic and high frequency (RF) fields created in electric wiring systems by the SmartMeter facilities, as documented in the Phase I record in A. 11-03-014.

[19] *Id.* at p. 8.

[20] *Id.*

[21] Cal. Const., art. XII, § 6.

Commission concluded that "it is reasonable to establish an EMF policy for electric utility facilities and power lines."[23]

The Commission has also co-sponsored research into the question of EMF exposure. An epidemiological study done by the California Department of Health Services found that approximately 3% of Californians report that they are EMF sensitive.[24]

The concern about the health impacts of EMF exposure has continued in the intervening years since that study, as is documented in great detail in the record of Phase 1 of A.11-03-014[25] and A.11-07-020.[26] On May 31, 2011, for example, the World Health Organization's International Agency for Research on Cancer reclassified EMF as "possibly carcinogenic to humans".[27]

Despite the decades of awareness of this issue, the Commission has not yet explored the extent to which the current body of scientific knowledge concerning this issue has evolved, and directly relevant to this question, has never determined that the

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[22] Pub. Util. Code § 451.

[23] *Electric and Magnetic Fields*, (supra), 52 Cal.P.U.C.2d at p. 8

[24] *See* "Mobility Device Use in the United States," University of California, San Francisco Disability Statistics Center ("*DHS Report*"), available at <http://dsc.ucsf.edu/publication.php?pub_id=2&section_id=4>.

[25] *See, e.g*., A.11-03-014, Ecological Options Network Protest (Apr.) 25. 2011.

[26] *See* A.11-07-020, Application of Consumers Power Alliance, et al., at 11, n. 13 (Jul. 25, 2011).

[27] *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans*, Volume 102: Non-Ionizing Radiation, Part II: Radiofrequency Electromagnetic Fields [Includes Mobile Telephones, Microwaves and Radar] (May 2011), available at <http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(11)70147-4/fulltext#article_upsell>.

Utilities' wireless mesh radio networks and SmartMeters promote the safety, health, comfort, and convenience of its patrons, employees, and the public as required by P.U. Code § 451. The failure to do so is a material omission of statutory enforcement, and independently undermines the likelihood that opt-out rates will be ultimately upheld. This is dramatically illustrated by the Supreme Judicial Court of Maine's recent decision in *Friedman v. PUC,* decided July 12, 2012.[28] In that case the Court vacated the portion of a Maine PUC decision that imposed fees on customers opting out of the electric utility's SmartMeter program, stating:

> The Commission's previous decisions demonstrate that it may have *considered*, to a limited extent, the health and safety issues Friedman raised, but it did not *resolve* those issues. Because the Commission explicitly declined to make determinations on the merits of the health and safety concerns raised by the complainants in the Opt-Out Investigation, the Commission's decision in this proceeding to treat those issues as "resolved" by that prior investigation was in error. Having never determined whether smart-meter technology is safe, the Commission is in no position to conclude in this proceeding that requiring customers who elect either of the opt-out alternatives to pay a fee is not "unreasonable or unjustly discriminatory," 35-A M.R.S. § 1302(1), such that a complaint raising those issues should be summarily dismissed.[29]

The governing statute in Maine is similar to California's § 451 in that it provides that "one of the [Maine] Commission's core regulatory responsibilities is to ensure that public utilities provide "safe, reasonable and adequate service" to customers.""[30] It

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[28] *Ed Friedman, et al. v. Public Utilities Commission et al.,* Decision 2012 ME 90, 2012 WL 2849603 ("*Friedman v. PUC").*

[29] *Id*. at 11.

[30] *Id*. at 6, citing 35-A M.R.S. § 101: "The purpose of this Title is to ensure that there is a regulatory system for public utilities in the State that is consistent with the public interest and with other requirements of law and to provide for reasonable licensing requirements for competitive electricity providers. *The basic purpose of this regulatory system is to*

should be noted, however, that § 451 contains a more explicit reference to need for the "instrumentalities, equipment, and facilities" of the Utilities involved in this proceeding to "promote the safety, health, comfort, and convenience of its patrons, employees, and the public." The Commission should not avoid this question any longer

In any event, *Friedman v. PUC* illustrates that the core issue here is whether the Commission can lawfully require a customer to pay a fee to avoid having Utility equipment installed on their property that has not been found safe by the Commission, and that has an effect on their medical condition or limits a major life activity, and under such circumstances find such a fee to be reasonable and non-discriminatory.

B. An Opt-Out Fee Applicable to the Wireless SmartMeters Being Deployed by the Utilities Violates the Americans with Disabilities Act

Any fee imposed to opt-out of the installation of a wireless mesh network-based SmartMeter violates Title II of the Americans with Disabilities Act ("ADA")[31] if the fee is mandatory to a qualified individual with a disability in order for the individual to avoid physical or mental impairment that substantially limits one or more of his or her major life activities.

The ADA recognizes and protects the civil rights of people with disabilities.[32] Congress enacted Title II of the ADA against a backdrop of pervasive unequal treatment

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ensure safe, reasonable and adequate service and to ensure that the rates of public utilities are just and reasonable to customers and public utilities." (Emphasis supplied.)

[31] 42 U.S.C. § 12131 *et seq.*

[32] 42 U.S.C. § 12101 *et seq.*

in the administration of state services and programs, including systematic deprivations of fundamental rights."[33]

Title II prohibits the exclusion from participation of, the denial of benefits to, or discrimination against any qualified person with a disability in the services, programs, or activities of a public entity.[34] Title II applies to "anything a public entity does."[35] An act violates Title II when it has "the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability."[36]

The Title II prohibition has been interpreted to apply to a state or city program that appears to affect all citizens similarly—but in fact adversely affects the disabled. *Heather K. v. City of Mallard*[37] holds that the city's regulation of open burning constituted a program, service or activity under Title II of the ADA, which could not lawfully be operated discriminatorily to injure a child with severe respiratory and cardiac conditions. The court followed *Crowder v. Kitagawa*[38] holding that Congress intended to prohibit both outright discrimination and "those forms of discrimination which deny disabled persons public services disproportionately due to their disability."[39]

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[33] *Tennessee v. Lane,* 541 U.S. 509, 524 (2004).

[34] 42 U.S.C. § 12132.

[35] 28 C.F.R. § 35, App. B 41 at 660.

[36] 28 C.F.R. § 35.130(b)(3)(i). *See Patton v. TIC United Corp.,* 77 F. 3d 1235, 1245 (10th Cir. 1996) (noting violation occurs "regardless of whether the entity intended to discriminate against the disabled person").

[37] *Heather K. v. City of Mallard,* 946 F.Supp.1373 (N.D. Iowa 1996).

[38] *Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996).*

[39] *Heather K.,* 946 F.Supp. at 1386, *quoting from Crowder,* 81 F.3d at 1484.

The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual.[40] Under the ADA a "qualified individual with a disability" means "an individual with a disability who, 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."[41] In other words, as applicable here, a person with a disability qualified to be a customer of a Utility.

Titles II and III of the ADA require, among other things, that newly constructed and altered State and local government facilities, places of public accommodation, and commercial facilities be readily accessible to and usable by individuals with disabilities. The ADA designates the Architectural and Transportation Barriers Compliance Board ("Access Board") as the agency responsible for developing minimum accessibility

[40] 42 U.S.C. § 12102(1)(A).

[41] 42 U.S.C. § 12131(2). The Commission's *PG&E, SCE, and SDG&E Decisions*, as well as its actions in Phase 2, constitute programs designed, mandated, implemented and enforced by the Commission. ("Second, the regulation of open burning discriminates against persons who have disabilities like Heather K.'s, because the open burning permitted has a disparately greater negative impact upon such persons. On this alternative ground, that the regulation of open burning is itself a program, service, activity, or benefit provided by the City, the City's motion for summary judgment on its lack of legal liability under Title II of the ADA should also be denied." *Heather K.,* 946 F.Supp. at 1387.)

guidelines to ensure that new construction and alterations of facilities covered by titles II and III of the ADA are readily accessible to and usable by individuals with disabilities.[42]

In issuing its final accessibility guidelines for new construction and alterations of recreation facilities covered by the Americans with Disabilities Act, the Access Board found as follows:

> "The Board recognizes that multiple chemical sensitivities and electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities."[43]

The Commission has received public testimony and formal pleadings during Phase 1 of this proceeding demonstrating that Utility customers suffer significant impairment of one or more of their major life functions due to EMF sensitivity, including seizures, episodic malignant hypertension, heart arrhythmias, severe insomnia, intractable tinnitus, muscle spasms and twitching, migraine headaches, and neuropathy. Hence, individuals with significant or recurrent EMF-induced or exacerbated symptoms qualify for reasonable accommodation under the ADA, when EMF exposure of such individuals interferes with major life functions, such as neurologic function or other major life functions.

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[42] The Access Board is an independent federal agency established by section 502 of the Rehabilitation Act whose primary mission is to promote accessibility for individuals with disabilities. 36 C.F.R. Part 1191, Appendix A.

[43] *See* 36 C.F.R. Part 1191[Docket No. 98–5] RIN 3014–AA16. Following its recognition of EMF sensitivity and its declaration of commitment to attend to the needs of the EMF sensitive, the Access Board contracted the National Institute of Building Sciences (NIBS) to examine how to accommodate the needs of the EMF sensitive in federally funded buildings. In 2005 the NIBS issued a report making further recommendations.

In the instant case, the Commission has directed that significant upfront and monthly fees be charged on an interim basis, and is exploring the imposition of such fees on a permanent basis, for anyone that elects to opt-out of the SmartMeter program or to retain his or her existing analog meter. While such a program appears superficially to affect all citizens equally because it imposes the fees on all those who *elect* to opt-out, it imposes a *mandatory* fee on those with an EMF sensitivity disability who *must* opt-out to avoid interference with major life functions. In essence, ratepayers who have such a condition are burdened with a fee which is wholly and inescapably related to and caused by the fact of their disability, and unavoidable for that same reason. This is particularly troubling when it is unlikely that paying these fees will in most instances actually eliminate the problem if EMF transmissions from surrounding wireless mesh facilities continue to cover the customer's premises.

C. An Opt-Out Fee Applicable to the Wireless SmartMeters Being Deployed by the Utilities Violates California Public Utility Code §453(b)

California Public Utility Code § 453(b) states in relevant 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.*"

California Government Code § 11135 states in relevant part:

> 11135. (a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or *disability*, be unlawfully denied full and equal access to the benefits of, or *be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any*

state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

(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 federal 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.[44]

California Government Code § 12926(l) states in relevant part:

(l) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects 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.

(B) Limits a major life activity.

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[44] Note also that Gov. Code § 12926.1 provides: “The Legislature finds and declares as follows:

(a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.

As these provisions of the Public Utility Code and Government Code make explicitly clear, California law provides even broader protections to persons with disabilities than the ADA. Since the Commission has issued decisions authorizing deployment of the Utilities' wireless mesh network and SmartMeters, has issued decisions mandating the terms and conditions of an opt-out plan for each of the Utilities, and is continuing in this Phase 2 proceeding to ultimately determine the rates to be charged by each Utility and other provisions of its opt-out program, these SmartMeter deployment and opt-out programs are unarguably administered by the Commission.

As a result, the opt-out plans must comply with § 453(b) and the other provisions of California law referenced therein, as well as other applicable legal requirements including P.U. Code § 451, supra. To do so, the opt-out plans must both (1) require that the physical networking requirements of the plan in fact do not authorize a Utility to construct, maintain, or operate any network facilities that have the effect of prejudicing or disadvantaging any person with a mental or physical disability; and (2) not establish any fees which, unless paid by a person with a disability, subject that person to limitation of a major life activity.

III. 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?

As set forth above, the Commission, the Architectural and Transportation Barriers Compliance Board and the California Department of Health Services have all recognized that EMF sensitivity is a medical condition of public concern. The DHS study

requested by the Commission itself estimates that 3% of Californians have the condition, a percentage which exceeds the percentage of working age adults who require mobility assistance devices.[45]

Hence, there are a significant number of California residents who would be forced to pay an opt-out fee because of their medical condition or disability to protect themselves from the limitation of a major life activity and other deleterious consequences of the EMF fields created by SmartMeters. The Commission is prohibited from imposing a fee on Utility customers who elect to retain their analog meters because they have an EMF sensitivity disability or who believe it is in their best medical interests to do so. A fee that is on the surface "optional" for any Utility customer nevertheless disproportionately affects, "mandatory", and is de facto to disabled persons who, because of their disability, will be forced to accept limits of a major life activity if the fee is not paid.

As a practical matter, it would be a gross and unlawful violation of privacy for the Commission, or a Utility, to require ratepayers to disclose confidential medical conditions or to provide detailed medical background information in order to avoid paying an opt-out fee. Any lawful qualification process would have to be structured to avoid such problems. Absent process not causing these problems, opt-out fees cannot pass muster under either the ADA or § 453(b).

[45] *See DHS Report.*

IV. 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?

No delegation of Commission authority to local governments is required or sought by the Local Governments in the case of the possible community opt-out provisions within the scope of Phase 2. The Commission can and should work cooperatively with local governments or other entities that may obtain community opt-out rights, as discussed below, as it has often done in analogous situations. In any event, the Commission will retain its broad jurisdiction over any such community opt-out program.

At the outset, the Commission will be authorizing the terms and conditions of any community opt-out plan, as well as its implementation process. As it has already done in the decisions mandating opt-out plans, the Commission will establish the framework of the community opt out plan including the definition of community, notice requirements, any applicable rates and charges, and other components of the community opt out program. As it has done with the general Utility opt-out programs and numerous similar situations, the Commission can require the Utility to file implementing tariffs for the community opt-out problem and possibly exercise of such rights, and these tariffs will be subject to s appropriate Commission review. The Commission can also exercise oversight over such community opt-outs in subsequent rate or enforcement proceedings or such other proceedings as the Commission should elect.

The fact that a local government may be involved in determining the nature of utility facilities to be deployed in its jurisdiction does not require or imply the delegation of authority by the Commission.[46] General Order 159-A, which governs the process for approving transmitting sites for cellular carriers, provides a relevant and workable framework demonstrating this approach. Under G.O. 159–A, the Commission acknowledges that the public interest can be served by the involvement of local governments in decisions concerning construction of cellular radio transmitting facilities. The Commission establishes a framework whereby local governments play a significant role in determining the location and design of cellular wireless transmitting equipment within their jurisdictions, while retaining the ultimate authority to ensure implementation of statewide policies. The General Order states:

> The Commission acknowledges that local citizens and local government are often in a better position than the Commission to measure local impact and to identify alternative sites. Accordingly, the Commission will generally defer to local governments to regulate the location and design of cell sites and MTSOs including a) the issuance of land use approvals; b) acting as Lead Agency for purposes of satisfying the CEQA and c) the satisfaction of noticing procedures for both land use approvals and CEQA procedures.
>
> However, in so doing, the Commission shall retain its right to preempt a local government determination on siting when there is a

[46] At the outset, local governments have the historic right to impose conditions on utilities as a part of the authority given to them under local franchise agreements. Both Marin and Fairfax have franchise agreements with PG&E. For example, the Fairfax franchise was granted under the Franchise Act of 1937, codified as P. U. Code § 6201 et seq. Under § 6203: "The legislative body may in such a franchise impose such other and additional terms and conditions not in conflict with this chapter, whether governmental or contractual in character, as in the judgment of the legislative body are to the public interest." A more recent statute, P.U. Code § 7101.1 provides that: "... nothing in this section shall add or subtract from any existing authority with respect to the imposition of fees by municipalities."

> clear conflict with the Commission's goals and/or statewide interests. In those instances, the cellular service provider shall have the burden of demonstrating that accommodating local government's requirements for any specific site would unduly frustrate the Commission's goals or statewide interests. Further, local government and citizens shall have an opportunity to protest a request for preemption and to present their positions. If a cellular service provider establishes that an action by local government unduly frustrates the Commission's objectives, then the Commission may preempt a local government pursuant to the Commission's authority under the California Constitution, Article XII, section 8.[47]

There is no reason why a similar framework for implementation of community opt-outs cannot be developed here. The structure adopted in General Order 159-A does not involve a delegation of Commission authority. Instead, it recognizes the responsibilities of and contributions that can be made by local governments, and also retains the Commission's ultimate authority to ensure our implementation of statewide objectives. When combined with the Commission's existing tariff approval process, which could even apply to each community opt-out exercise because of unique terms and conditions related to that community, a practical implementation framework can surely be developed.

Similarly, the Commission's implementation of the Community Choice Aggregation ("CCA") program also provides a highly relevant example of how local government involvement in establishing significant aspects of the type of electric service provided to citizens within their jurisdictions can be implemented and not equate to a

[47] General Order 159-A, at 3-4, Section II.B "Deference to Local Government." Amongst the statewide interests expressed in the P.U. Code, which the Commission is responsible to enforce, is § 451's requirement that every public utility provide "instrumentalities, equipment, and facilities…as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

delegation of Commission authority, and is also instructive as to how problems with the opt-out fees proposed by the Utilities should be avoided in this proceeding.

Under the CCA program, the decision to form or join a CCA entity is made on a local government basis by counties or municipalities, and applies to all electric utility customers in that jurisdiction. As a result, each customer then pays the CCA entity for its electric power procurement costs, while the utility continues to provide delivery and billing and other services to the customers of the CCA.[48] The electric utility is required to file tariffs implementing the CCA service arrangement.[49]

Notably, the CCA program provides each individual resident within a jurisdiction that has made a CCA election the right to individually opt out of the CCA election and continue as a customer of the utility for that service. The CCA program establishes requirements for implementation of this process by the utility and CCA. A similar structure can be established for the community opt-out rights subject to this proceeding, as long as the purpose of the community opt-out election is not undermined.[50]

Of equal significance, neither the initial CCA election to opt out of the utility procurement service, nor any individual election to opt back into utility procurement

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[48] *See* D.04-12-046, Order Resolving Phase 1 Issues on Pricing and Costs Attributable to Community Choice Aggregators and Related Matters*, Order Instituting Rulemaking to Implement Portions of AB 117 Concerning Community Choice Aggregation (*Dec. 16, 2004); and D.05-12-041, Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters, *Order Instituting Rulemaking to Implement Portions of AB 117 Concerning Community Choice Aggregation* (Dec. 15, 2005).

[49] *See, e.g.,* PG&E Advice Letter No. 2784-E-A, Electric Rule No. 23, Community Choice Aggregation Service.

[50] For example, an individual could not be served by a wireless mesh-based meter or other form of meter causing similar EMF problems for community residents.

service during the implementation process, is subject to any fee by the utility to the customer. Numerous charges by the utility to the CCAs, based on a concept of "ratepayer indifference" to the loss of CCA procurement volumes, are implemented, but significant utility costs related to the CCA program are also allocated to ratepayers generally, and community residents are not made to pay an "opt-out of CCA" fee.

The circumstances, such as the utility service and functions involved, differ between the CCA program and the opt-out programs under consideration here. However, the overall regulatory framework established in the CCA program demonstrates that a community opt-out process can be feasibly established, and does not involve delegation of Commission authority when properly structured. As the Commission recently reiterated in denying an argument by PG&E that a portion of the CCA program involved an unlawful delegation of Commission authority:

> We previously explained that: "Generally, an improper delegation of authority will be found where a government entity has 'surrendered' control and/or delegated its power to make fundamental policy or final discretionary decisions." (Order Modifying Decision (D.) 10-12-016, and Denying Rehearing, as Modified [D.11-04-035](2011) ___ Cal.P.U.C.3d ___, at p. 6 (slip op.).)[51]

No such improper delegation is required to implement the community opt-out rights as sought here by the Local Governments and AHEH. As the G.O. 159-A and CCA regulatory frameworks demonstrate, the Commission has retained its power to make fundamental policy and final discretionary decisions while authorizing significant local government involvement concerning utility wireless digital radio transmitting

[51] Decision 12-07-023, Order Modifying Decision (D.) 10-05-050, and Denying Rehearing of Decision, as Modified at 18, *Order Instituting Rulemaking to Implement Portions of AB 117 Concerning Community Choice Aggregation* (Jul. 12, 2012).

equipment, and can do so with respect to a community opt out program established in Phase 2.

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

When determining the proper definition of "community" for purposes of an opt-out plan, it is essential to bear in mind the fundamental underlying reason why a community opt-out plan is being proposed by the Joint Parties. The interest of local governments in supporting the availability of such a plan rests, in the end, on the unilateral choice of the utilities to adopt and deploy a wireless mesh transmission network that by its very nature imposes its environmental impact not only on the individual subscriber, but on all surrounding subscribers. As these radio transmissions "bounce" from wireless meter to wireless meter until they reach the utility, this impact of each meter is not relegated solely to those meters nearby, but affects residents throughout broad geographic territories.

Many individual subscribers may not be aware that they are affected by these wireless transmission networks, but many individual subscribers are immediately conscious of being materially and detrimentally affected by them. It is because the affected residents brought their concerns to their local government officials, and these concerns were heard, that when the Protest was filed 26 local jurisdictions had passed ordinances or resolutions seeking delays in further deployment pending review of the

public health and safety implications. Subsequently, many other local jurisdictions have now enacted similar ordinances or resolutions.[52]

As expressed in the Protest, local governments strongly believe that they possess the constitutional and statutory rights and obligations to protect the public health and safety of their constituents, and that the Utilities have deployed the wireless mesh SmartMeter networks in derogation of such jurisdiction. It is worth noting that few if any other electric utility deployment programs in California have engendered such widespread local government opposition. But in the end, these ordinances and resolutions would never have come to exist but for the wireless digital mesh radio transmission networks involved here.

Therefore, the fundamental logic underlying the proper definition of a "community" for purposes of implementing a community opt-out plan must be based on recognizing the purpose of the program, and creating sufficient flexibility so as to provide a framework for protecting as much of the public as possible.

The Joint Parties believe that the term "community" in this context should include any California local government body duly established by the California Constitution or statute, including counties, cities, and towns, and possessing the requisite authority to take action to exercise such a community opt-out right.

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[52] None of the Local Governments have committed to exercising a community opt-out right, since any such decision would depend upon the precise financial and other terms and conditions of any such right. The Local Governments have strongly supported the position that individual residents should be afforded this option and should not be financially penalized for exercising it, and that the basic constitutional and statutory police powers of the Local Governments must be respected, including a determination to exercise a community opt-out if established by the Commission and deemed to be in the best interests of the public in that jurisdiction.

In circumstances analogous in many respects to the community opt-out issue in the current proceeding, the Commission has addressed similar issues with respect to community choice aggregators ("CCAs"). In that context, § 331.1(a) of the PU Code defines a community choice aggregator to include "any city, county, or city and county whose governing board elects to combine the loads of its residences, businesses, and municipal facilities in a community-wide electric buyers program." Subsection (b) of § 331.1 allows these entities to combine to form a joint powers agency for the same purpose. Similarly, all such local government entities should be recognized as communities here.

However, the definition of "community" should not be limited in this context solely to local government bodies. Again based fundamentally upon the nature of the technology selected by the utilities, members of the public subjected to some of the most extreme levels of exposure to mesh wireless network emissions can be found in multiple dwelling units ("MDUs") where large numbers of transmitting meters are located in very close proximity to each other, for example on a common wall of an apartment building. In these circumstances, several of the MDU residents can be very close to perhaps 20 or 30 wireless meters. For this reason, the definition of community should include such circumstances where there is an entity or contractual or other legal authority to act on behalf of all residents of the MDU. For example, a high-rise condominium building will have a Board of Directors or similar entity authorized in the documents establishing the condominium owners' rights and obligations. Such entities exercise control over numerous aspects of condominium administration, pursuant to

decision-making procedures outlined in their formation documents. In order to protect the health and safety of all condominium residents, such a governing body should be recognized as a "community" for purposes of exercising community opt-out rights as developed in this proceeding.

There are several variations on the non – governmental entities that should also be considered as communities for this purpose such as, for example, residential communities with homeowners associations exercising authority similar to that to a condominium board of directors, or "gated" communities such as retirement communities. The Commission should not be required to make the legal determination of a given entity's authority to exercise a community opt-out under this program. That issue should be determined as set forth in the entity's applicable formative documents, and any disputes should be resolved pursuant to those documents or recourse to the appropriate judicial forum.

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

Any form of community opt-out rights established in this proceeding will require modifications to existing utility tariffs, which did not currently include any such rights. However, this does not present any roadblocks to successful implementation of community opt-out rights. The three Phase 1 decisions in this proceeding, which established individual opt out rights, each required that the utility promptly file advice letters implementing the provisions of those decisions.[53] Similarly, the Commission's decisions in the CCA proceedings also required the filing of utility advice letters

[53] *See PG&E Decision* at 39, Ordering Paragraph 2.

implementing that program. At an appropriate time during this Phase 2, the Commission should establish a procedure, such as the workshop, to develop necessary tariff changes, as well as implementation procedures and guidelines.

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

The above proposed definitions of communities eligible to effectuate a community opt-out would not of necessity conflict with any existing contractual relationships or property rights. Any such consequence can be avoided by Commission guidelines prescribing the scope of the community opt-out rights.

For example, the Joint Parties support a requirement that the community opt-out plan include provisions that would permit any individual customer subject to a community opt-out to "opt-out of the opt-out" and remain a subscriber for the utility time of day service offering. However, this could not be accomplished through use of a wireless mesh radio network SmartMeter. Testimony in this proceeding will demonstrate that there are numerous alternative methodologies by which customer electric usage can be communicated to the utility. Many such alternatives are in use today, and more are being developed. Because of the underlying fundamental reason for the community opt-out plan in the first place, any such alternative data communication devices must not undermine its fundamental purpose.

In this regard, the CCA program again provides a relevant analogy. Under that program, the Commission has established the right of individual residents of jurisdictions that have formed a CCA to individually elect to continue to receive bundled

service from the utility. The Commission, and the utility tariffs, have established detailed customer notice requirements at various time periods in the process.

MDUs present unique issues which should be explored further in testimony. For example, occupants and owners of rental units likely have materially different rights and obligations than owners of condominiums. However, in general, similar principles should govern the right of such residents to individually return to bundled utility services.

VI. 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?

As set forth hereinabove, both the ADA and § 453(b) prohibit the imposition of a fee to opt-out of the SmartMeter program that is applied to qualified individuals with disabilities affected by SmartMeters or a medical condition under § 453(b). Assuming that such a fee could be lawfully established, it is clear that it is not a tax.

The proper starting point for determining whether a local government action has imposed a tax is the nature of the legislative action taken by the local government and whether the constitutional basis for that action is the police power or taxing power of the local government.

Any local government may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.[54] The term "police power" refers to the power of a government to adopt regulations designed

[54] Cal. Const. art. XI, § 7.

to promote the public convenience or the general prosperity, including regulations designed to promote the public health, the public morals, or the public safety.[55]

The legislative scope of a local government acting pursuant to its police power within the jurisdiction of the local government, is as broad as that of the state legislature, subject only to limitations of general state law,[56] and is not narrowly construed.[57]

A local government's police power is different than its taxing power, the power to generate revenue for public purposes, such as local government functions,[58] rather than in return for a specific benefit conferred or privilege granted, such as a building permit.[59] The power to impose regulatory fees is not dependent on a legislatively authorized taxing power but exists pursuant to the police power.[60]

Any local government legislative enactment intended to promote public health and safety is an exercise of the government's constitutional police power and not an

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[55] *Chicago, B. & O. Railway Co. v. Illinois*, 200 U.S. 561, 592 (1906).

[56] *Candid Enterprises, Inc. v. Grossmont Union High School District,* 39 Cal. 3d 878, 885, 218 Cal. Rptr. 303 (1985); *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 140, 130 Cal. Rptr. 465 (1976); *Carlin v. City of Palm Springs,* 14 Cal. App. 3d 706, 711-12, 92 Cal. Rptr. 535 (1971).

[57] The police power "is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modem life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power'...."*Miller v. Board of Public Works,* 195 Cal. 477, 485, 234 P. 381 (1925).

[58] *City of Madera v. Black,* 181 Cal. 306, 310, 184 P. 397 (1919); *Perry v. Washington,* 20 Cal. 318, 350 (1862).

[59] *See Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal. 4th 218, 240.

[60] *Mills v. County of Trinity,* 108 Cal. App. 3d 656, 662, 166 Cal. Rptr. 674 (1980).

exercise of its taxing power. An exercise of a community opt-out right by a local government would meet all the criteria for legislation sanctioned by its police power authority, and meet none of the criteria for an exercise of its taxing authority.

First of all, the local government is not imposing the fee; the utility, acting under authority conferred upon it by the State acting through the Commission, is imposing the fee. Secondly, the fees are not being imposed for public purposes of the local jurisdiction, but pursuant to a Commission decision and presumably a Utility tariff establishing the opt-out plan adopted by the Commission. Thus, the revenues generated by an opt-out fee are not a monetary exaction by the local government intended to raise revenue to underwrite the costs of its operations, and therefore the local government's legislative action in opting out cannot be construed as an exercise of its constitutional taxing authority, even though the action may result in its citizens paying a state-based fee to a privately owned corporation.

Further, under Proposition 218 both a "general tax and a "special tax" are deposited into either the general fund or a special fund under the control of the taxing authority.[61] Assuming that the legislative body of a local government did vote to opt-out of the wireless SmartMeter program and Utility charges were imposed, the fees would not be deposited into either the general fund or the special fund of that local government, but into the revenue account of the Utility.

Hence, while a community opt-out election could, if the Commission chose to require it, result in payment of charges to a Utility, these charges would not constitute a

[61] *See* Cal. Const., art. XIII C, sections 1(a) and 1(d). *See also Coleman v. Santa Clara County* (1998) 64 Cal. App. 4th. 662.

tax by the local government, which made the community opt-out election pursuant to its police powers.

VII. CONCLUSION

For the reasons set forth above, the Commission must recognize the complex problems that have resulted from deployment by the Utilities of SmartMeters relying on wireless mesh transmission systems for communication of customer data. The Commission has permitted, but has not mandated, that the Utilities do so, and has not determined that any of the expenditures involved have been reasonable or prudently incurred. The Utilities took these actions despite mounting concerns, including formal enactments by local governments seeking to review the health, safety, privacy, and other troubling implications of this technology choice, and rising public concerns.

In establishing the opt-out plans required of the Utilities, the Commission has begun the process of trying to implement - after the fact - the legally mandated protections for members of the public, disabled and not disabled, required as a result of wireless mesh network-based SmartMeter deployment by the Utilities, and their refusal to work cooperatively with the local governments to address the concerns of their citizens.

The Commission should establish opt-out rights for the “communities” described above, and ensure that local governments are provided appropriate roles in exercising such rights. The Commission, when exploring the rate structure for both individual and community opt-out rights in Phase 2, must ensure that the requirements of the ADA and § 253 (b) are stringently complied with, fully reflect the intention of California’s statutes

to aggressively protect disabled citizens, and are consistent with the police powers of local governments to protect the health and safety of their citizens.

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Respectfully submitted,

By: /s/ James M. Tobin

James M. Tobin
Jose Guzman
August Stofferahn
Tobin Law Group, a Professional Corporation
1100 Mar West Street, Suite D
Tiburon, CA 94920
Telephone: 415-732-1700
Facsimile: 415-704-8919
Email: jim@tobinlaw.us
Email: joe@tobinlaw.us
Email: august@tobinlaw.us

Attorneys for Joint Parties