BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U39M) for Approval of Modifications to its SmartMeter Program and Increased Revenue Requirements to Recover the Costs of the Modifications.	A.11-03-014 (Filed March 24, 2011)
And Related Matters.	A.11-03-015 A.11-07-020

OPENING BRIEF OF UTILITY CONSUMERS' ACTION NETWORK

IN PHASE 2 OF THE AMI OPT-OUT PROCEEDING

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I. Introduction

Pursuant to Rule 13.11 of the California Public Utilities Commission's Rules of Practice and Procedure, the Utility Consumers' Action Network ("UCAN") respectfully submits its Opening Brief in the instant proceeding, A.11-03-015.

In the Assigned Commissioner's Ruling Amending Scope of Proceeding to Add a Second Phase, Commissioner Peevey requested that the parties submit briefs on five questions and to cite specific legal and statutory authority in support of their responses. UCAN's responses to the questions are as follows.

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II.
Questions 1 and 2 - ADA and Section 453(b) Compliance

UCAN does not have expertise in the area of disability rights, and therefore does not comment on this issue.

III.
Question 3 - Delegation of Commission Authority to Local and Community Government

The Commission may not delegate its regulatory authority to local and community governments without enabling legislation. As a regulatory body of constitutional origin, the Commission has only the powers and jurisdiction specifically granted to it by the constitution and legislature.[1] The Commission has several grants of power specifically enumerated in the constitution.[2] All additional authority and jurisdiction held by the Commission comes from the State Legislature, which the constitution grants with uniquely broad authority to define the Commission's powers and jurisdiction. Article 12, Section 5 states:

> The Legislature has plenary power, unlimited by other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

This authority has been interpreted broadly by California Courts – the Legislature may provide the Commission with any additional powers and jurisdiction it chooses, limited only by the requirement that the granted powers be "cognate and germane" to the regulation of public utilities.[3] This authority is held exclusively by the Legislature, and the Commission is not authorized to define its own powers and jurisdiction.

[1] *People By Public Utilities Commission v. City of Fresno* (App. 4 Dist. 1967) 254 Cal.App.2d 76.
[2] California Constitution Article XII, §§ 2, 4, and 6.
[3] *Consumers Lobby Against Monopolies v. PUC* (1979) 25 Cal.3d 891.

Once the Legislature determines that a matter falls within the Commission's jurisdiction, the California Constitution expressly prohibits local governments regulating said matter. Article 12, Section 8 states:

> A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law.

This prohibition has been interpreted broadly, and Courts have consistently invalidated local laws that encroached on the CPUC's authority.[4] This preemption is not limited to cases in which a local law directly conflicts with a CPUC regulation, mere encroachment by a local authority into the CPUC's regulatory sphere is sufficient to invoke the prohibition.[5] As defining the Commission's regulatory sphere is the sole province of the Legislature, a local government that attempts to regulate public utilities violates Article 12, Section 8 even if the local regulation is authorized by the Commission.

The regulation of electric metering falls within the scope of "matters over which the Legislature grants regulatory power to the Commission." Public Utilities Code § 761 grants the Commission jurisdiction to regulate metering:

> 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 proscribe rules for the performance of any service or the furnishing of any commodity of the character

[4] See, e.g., *Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042; *City of Anaheim v. Pacific Bell Telephone Co.* (App. 4 Dist. 2004) 119 Cal.App.4th 836; *Southern Cal. Gas Co. v. City of Vernon* (App. 2 Dist. 1995) 41 Cal.App.4th 209

[5] *San Diego Gas and Electric Co. v. City of Carlsbad* (App. 4 Dist 1998) 64 Cal.App.4th 785.

> 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.

Only the legislature may "delegate" the CPUC's regulatory authority regarding AMI Opt-outs to local governments. The legislature has sole, plenary authority to define the Commission's powers and jurisdiction. Local governments are forbidden from regulating matters that fall under the Commission's jurisdiction, including the regulation of metering. As such, any attempt at delegating CPUC authority regarding AMI opt-out to local governments will fall afoul of the Constitution unless it is specifically authorized by enabling legislation.

IV.
Question 4 - Defining "Community"

The term "community," as used in this context, does not have a single, clear definition under California law. The broad legal definition for "community" is "(1) A neighborhood, vicinity, or locality. (2) A society or group of people with similar rights or interests."[6] This definition appears to be broad enough to include counties, towns and cities, subsidiary districts,[7] unincorporated communities and census designated areas (CDA's), rural regions,[8] homeowners' associations,[9] neighborhood associations organized under California mutual benefit corporation law,[10] and unincorporated community organizations. In other contexts, "community" has been defined at a granular level – Govt. Code Section 65302.10(a)(1) defines "community" as "an inhabited area within a city or county that is comprised of no less than 10 dwellings adjacent or in close proximity to one another."

[6] Black's Law Dictionary (9th ed. 2009), "community"
[7] Govt. Code § 56078
[8] Defined at Cal. Pub. Res. Code § 14488.1(c)
[9] Corporations Code § 1363
[10] Corporations Code § 7110 Et Seq.

For the purposes of defining "community" for community opt-out, the closest parallel is the statutory definition of "community choice aggregator":

> (a) Any city, county, or city and county whose governing board elects to combine the loads of its residents, businesses, and municipal facilities in a communitywide electricity buyers' program.
> (b) Any group of cities, counties, or cities and counties whose governing boards have elected to combine the loads of their programs, through the formation of a joint powers agency established under Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code.[11]

If the Commission chooses to pursue community AMI opt-out, the Commission will likely have to develop its own definition of "community." UCAN proposes that this definition be reached according to three guidelines. First, a "community" must be an entity administered by an official government body. Non-government entities, such as homeowners associations, neighborhood organizations, and the like, are not subject to the same election regulations,[12] open meeting laws,[13] and public records laws[14] as government bodies are, and as such lack the protections necessary to ensure a fair community opt-out process. Second, "community" must be defined at a single, non-overlapping level of government to avoid conflicting opt-out decisions. Third, the definition of "community" should avoid the extremes of granularity (small neighborhoods, subdivisions, etc.) and overbreadth (joint powers agencies). An overly granular definition would raise significant inefficiencies, while larger regional opt-outs would dilute local preferences.

UCAN suggests that the following definition of "community" be adopted:

1. A city, town, or county.

2. A neighborhood, district, unincorporated community, or division of a city, town, or county, provided that the neighborhood, district, unincorporated

[11] Pub. Util. Code § 331.1
[12] Election Code §§ 10101 – 10312.
[13] Brown Open Meetings Act, Govt. Code §§ 54950-54963.
[14] California Public Records Act, Govt. Code § 6250 Et Seq.

community, or division is governed by an elected government body created under state or local law, and is subject to California election, open meeting, and public records laws.

3. A neighborhood, district, unincorporated community, or division of a city, town, or county may only pursue AMI opt-out if the city, town, or county that it is part of chooses to delegate its AMI opt-out right to its divisions.

UCAN notes that, for reasons detailed above, this definition should be contained in an enabling statute approved by the State Legislature, not a Commission decision.

V.
Question 5 -Tax Status of Opt-Out Fees

Opt-out fees, even if imposed as a result of a government-sanctioned community opt-out, would not constitute taxes. A tax is a charge imposed by a government entity for public purposes. Blacks' defines a tax as a "charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue."[15] The definition of tax most commonly referred to by courts – the Cooley definition – describes taxes as "enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs."[16]

A tax is a charge collected under the state or local government's constitutional taxation power.[17] In this regard, taxes are distinguished from regulatory fees, which are collected under the government's police power.

A community opt-out fee collected by an IOU would not constitute a tax. Although the fee would be imposed as a result of local government action, it would not be imposed by the local government. Because the IOU would collect the fee, not the local government, the fee could not be described as being levied "for the support of government and for all public needs."

[15] Blacks Law Dictionary (9th ed. 2009), "tax"
[16] Thomas M. Cooley, The Law of Taxation, Section 1, at 61-63 (Clark A. Nichols ed., 4th ed. 1924).
[17] California Constitution, Article XIII

The regulation of private businesses, including rate-setting, falls within a local government's police power, not its taxation power. Electing to opt-out of AMI, and in exchange accepting an opt-out fee, would be an exercise of police power, not the imposition of a tax.

Respectfully Submitted,

Dated: July 16, 2012

/S/

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