

Decision 00-10-015 October 5, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Investigation and Suspension  
on the Commission's Own Motion of the Tariff  
Filed by Advice Letter No. 1831-E of Pacific Gas  
and Electric Company.

(I&S)  
Case 99-06-002  
(Filed June 3, 1999)

**O P I N I O N**

**I. Summary**

In this decision, we approve the settlement agreement between Pacific Gas and Electric Company (PG&E) and the San Francisco Bay Area Rapid Transit District (BART) pursuant to Rule 51 of the Commission's Rules of Practice and Procedure.<sup>1</sup> The agreement fully resolves PG&E's Advice Letter (AL) 1831-E, which was converted to Investigation and Suspension (I&S) Case No. 99-06-002. The settlement agreement was entered into on June 21, 2000 and is uncontested.

We approve the Settlement Agreement as being reasonable in light of the whole record, consistent with the law, and in the public interest. This decision is effective today and the proceedings are closed.

**II. Background and Procedural History**

BART purchases federal preference power pursuant to long-term contracts. PG&E transmits and delivers this power to BART's traction, station,

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<sup>1</sup> All references to the rules are to the Commission's Rules of Practice and Procedure found in Title 20 of the California Code of Regulations.

and miscellaneous loads. Prior to July 1, 1998, PG&E delivered this power to BART pursuant to a bilateral contract. On September 24, 1998, the Federal Energy Regulatory Commission (FERC) approved a PG&E-drafted network transmission service agreement and a network operating agreement (collectively transmission agreement) under PG&E's Open Access Transmission Tariff (OATT). The FERC-approved transmission agreement governs the transmission of BART's federal preference power. (*Order on Compliance Filing Accepting Service Agreements for Filing*, 84 FERC ¶ 61,307 at p. 62,400 (1998).)

Since the prior contract expired on July 1, 1998, PG&E and BART have disagreed about the extent of the Commission's jurisdiction over delivery of BART's federal preference power and the charges appropriately levied for distribution services outside of the OATT. On December 14, 1998, PG&E filed AL 1831-E designed to fix a rate schedule (E-BART) for distribution services PG&E provides to BART. The proposed E-BART rates and charges were derived from PG&E's filed E-20 rate schedule.

BART protested the AL, contending that the Commission does not have jurisdiction over the delivery of its federal preference power, that any rate changes could only be submitted through a rate application, and that PG&E's proposed rates were duplicative of rates contained in its FERC-approved transmission agreement or otherwise improper. Since July 1, 1998, BART has not paid for charges it contended either do not apply (nuclear decommissioning and public purpose program charges) or were for services charged under the FERC-approved transmission agreement (charges for standby service that PG&E billed under Rate Schedule S and charges for back-up transformer service and second feeds to BART's station and miscellaneous loads billed by PG&E under Electric Rule 2).

BART also filed a complaint with the FERC alleging that PG&E's attempt to impose state direct access tariff charges on the delivery of its federal preference power was improper since the FERC has exclusive jurisdiction over the delivery of this power from resource to load. On June 1, 1999, the FERC issued an order dismissing BART's complaint. (*Order Dismissing Complaint*, 87 FERC ¶61,255 (1999).)

On June 3, 1999, we ordered an investigation into the reasonableness of rate schedule E-BART, suspending PG&E's proposed tariff for 120 days pursuant to Pub. Util. Code §455,<sup>2</sup> and converting the AL into this I&S proceeding. We bifurcated the proceeding to provide for immediate briefing of the jurisdictional and legal issues and a subsequent evidentiary hearing process should we find Commission jurisdiction over the dispute. BART stipulated to the tariff rates going into effect on the 120<sup>th</sup> day subject to refund if appropriate after a final decision is rendered or an agreement is reached.

PG&E and BART filed concurrent opening and reply briefs on the jurisdictional and legal issues in July of 1999, and, on October 22, 1999, we issued an interim decision holding that: 1) there is a distribution component included in PG&E's delivery of BART's federal preference power; 2) the Commission has jurisdiction over the distribution component; and 3) BART must pay costs for public purpose programs, nuclear decommissioning, and distribution services and facilities because it is not exempt from such payments under § 374(b) or § 708.1. (D. 99-10-058.) We also found that an evidentiary hearing was necessary and directed that further proceedings be conducted.

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<sup>2</sup> All statutory citations, unless otherwise stated, are to the Public Utilities Code.

A prehearing conference was held on December 13, 1999. At that time, Administrative Law Judge (ALJ) Bytof encouraged the parties to mediate their dispute with an ALJ as a mediator. ALJ Ryerson was selected by the parties to mediate the dispute. PG&E and BART reached an agreement in principle during the mediation, and, on March 10, 2000, submitted a letter of understanding outlining the proposed agreement. The ALJ cancelled the evidentiary hearing and, at the parties' request, gave the parties time to continue their negotiation over the details of the agreement.

On June 21, 2000, after the exchange of numerous drafts and six all-day negotiation sessions, PG&E and BART filed this settlement agreement, which resolves the disputed jurisdictional issues regarding charges for PG&E's distribution services for BART, provides for past and future payments for distribution, public purpose programs, and nuclear decommissioning charges, and governs the charges for such services until 2016. The parties represent that they negotiated this agreement giving consideration to BART's statutory entitlements under §§ 374(b) and 701.8, the OATT's billing methodology, and the unique nature of BART's past arrangements with PG&E. The settlement agreement describes in detail the terms reached.

### **III. The Proposed Settlement Agreement**

#### **A. Summary of the Agreement**

Sections 1 and 2 identify the parties involved in the settlement, and definitions of terms, respectively.

Section 3 addresses the treatment that is to be provided to PG&E's tariffs on file with the Commission while the settlement agreement is pending approval.

Section 4 states that all services provided under the agreement are subject to the jurisdiction of the Commission and may be changed or modified by the Commission in the exercise of its jurisdiction.

Section 5 describes the obligations binding PG&E under the agreement. Section 5.d., which addresses Traction Power line extensions, acknowledges the special payment arrangement required for BART billing. BART will not be required to make payments until the work for which BART is being invoiced is completed. Section 5.e., which addresses Station and Miscellaneous Power, identifies the same payment arrangement and, unless otherwise directed by BART, provides that there shall be a second feed for each such location. Section 5.f. references PG&E's obligation to lease substations and other related facilities at traction locations to BART pursuant to § 701.8(d). In addition, Section 5.h. describes PG&E's obligation to provide BART with detailed breakdowns and computations of all charges billed to BART.

Section 6 identifies BART's obligations under the agreement. Section 6.a. provides that BART shall make available space on its facilities for protective relays and other related equipment that must be installed by PG&E. Sections 6.b. and 6.i. provide language that limits the scope of the agreement. Section 6.b. excludes services or new charges not stipulated in the agreement, restricting therefore, any rates or charges applicable thereto. Section 6.i. stipulates that the terms and conditions for the delivery by PG&E of nonfederal preference power from a third party are not covered under the agreement and require additional negotiation. Section 6.i. further stipulates that the parties have no understanding or agreement with respect to the delivery to BART of power that does not pass through PG&E's facilities. Section 6.c. focuses on BART's obligation to fulfill its required Rule 2 responsibilities for protection equipment. Section 6.d. requires

BART to reimburse PG&E for payments necessary to obtain easements and rights of ways on private property unless BART elects to obtain any such rights of way itself, provided that BART coordinate any land right acquisitions with PG&E. Section 6.j. provides a payment plan in the event of future disputed charges and requires that, if an agreement is not reached within sixty (60) days, any disputed charges will be deposited with the CPUC or its designated holder of escrow.

Section 7 specifies the applicable tariffs and delineates the methodology for computing the charges under the applicable tariffs. Generally, delivery of BART's federal preference power and supplemental power is subject to the distribution, public purpose, and nuclear decommissioning components of the E-20T, E-20S, and E-20P rate schedules and any successors. Charges for § 701.8(d) facilities, transformer back-up services, and costs are also specified. The billing requirements correspond to the requirements used under the FERC-approved transmission agreement.

Section 8 reflects the settlement of billing disputes between PG&E and BART for the period prior to October 1, 1999, including claims of metering and/or billing errors. Under the settlement agreement, BART is to pay PG&E \$2.71 million for all obligations through September 30, 1999 and PG&E will re-bill BART for services provided beginning on October 1, 1999 based on the terms of the agreement, accounting for any payments already made for services. (8.c.)

Section 9 outlines parallel operation with relation to BART's use of generating units or other sources of supply not delivered through PG&E's system. Any other such sources of supply may not be used in parallel with PG&E's system unless so authorized by PG&E.

Section 11 stipulates the term and termination provisions. The agreement is to have effect from thirty (30) days after Commission approval to December 31, 2016. Section 11.d. affords PG&E the right to terminate the Agreement if BART bypasses PG&E's facilities by a direct connection to a third party where such direct connection displaces the power that PG&E is then currently supplying, or has been requested to supply in writing, or if BART is providing power to third parties other than concessionaires located on BART owned station property.

Sections 12 and 13 define the general terms and the signature clause, respectively.

**B. Proposed Settlement is Reasonable in Light of the Whole Record, Consistent With Law, and in the Public Interest**

Rule 51.1(e) requires that we find that a settlement is "reasonable in light of the whole record, consistent with the law, and in the public interest" in order to approve it. As discussed more fully below, we find that this settlement is reasonable in light of the whole record, consistent with the law, and in the public interest. In addition, the agreement meets the Commission's procedural requirements, as delineated in Rule 51.

**1. The Settlement Agreement is Reasonable in Light of the Whole Record**

In *Re San Diego Gas & Electric Company* ((1992) D.92-12-019; 46 CPUC 2d 538), we refined our policy toward settlements by adopting additional criteria by which to evaluate all-party settlements. Satisfaction of these criteria, in effect, creates a rebuttable presumption of the reasonableness of the settlement. Since this is an all-party settlement, we examine the agreement to determine whether: (1) it commands the unanimous sponsorship of all active parties to the instant

proceeding; (2) the sponsoring parties are fairly reflective of the affected interests; (3) no term contravenes statutory provisions or prior Commission decisions; and, (4) “the settlement conveys to the Commission sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests.” (*Id.* at pp. 50-51.)

BART and PG&E are the only parties in this proceeding and both unequivocally support the agreement, which is particularly indicative of the reasonableness of the agreement given the lengthy and contentious nature of the parties’ disagreements over the appropriate charges for delivery of BART’s federal preference power. No party or other entity has opposed the agreement. BART and PG&E reflect the affected interests as they constitute the reason for the agreement’s existence; BART also represents the interests of its riders while PG&E represents the interests of its shareholders and the interests of all ratepayers to the extent that it has espoused the necessity of holding BART to an obligation to share in the costs of funding public purpose programs and nuclear decommissioning.

We have found no terms in the agreement that contravene any statutory provisions or prior Commission decisions. The jurisdictional issues regarding the application of Commission-regulated tariffs to PG&E’s delivery of BART’s federal preference power and supplemental power, were addressed and extensively briefed prior to issuance of D.99-08-058 and the agreement is consistent with that decision. Finally, the content of the settlement agreement is specific and sufficiently informative to allow us to conduct future regulatory review as necessary. Thus, the agreement is reasonable in light of the whole record.

**2. The Settlement Agreement is Consistent with the Law**

The agreement is consistent with the interpretation of §§ 374(b) and 701.8 set forth in D.99-10-058. The agreement provides that BART will continue to have the benefit of coincidental and conjunctive billing as mandated under § 701.8. In addition, the agreement recognizes BART's continuing exemption from Competition Transition Charges (CTC) with respect to the delivery of federal preference power, as required by § 701.8. The Commission, therefore, finds no legal impediment to adopting this agreement.

**3. The Settlement Agreement is in the Public Interest**

The settlement agreement taken as a whole is in the public interest. The agreement resolves years of contentious, costly, and disruptive litigation between BART and PG&E, in multiple forums, over PG&E's obligations to deliver BART's federal preference power and BART's obligations to pay for the services rendered. The agreement acknowledges the Commission's jurisdiction over the distribution component of the electric service and satisfies the state's interest in providing for the recovery of stranded costs and benefits by appropriately requiring payment of the public purpose and nuclear decommissioning charges.

The agreement also is consistent with PG&E's OATT tariff and appropriately distinguishes between services subject to regulation by FERC under the OATT and those subject to regulation by the Commission. Because the agreement is comprehensive and long-term (running through 2016) and specifically identifies the facilities and services covered by PG&E's state tariffs, identifies the applicable rate schedules, and provides detailed methodologies for

determining other charges, this agreement will minimize future disputes between the parties over application of the rate schedules.

Further, the agreement retains many of the same terms and conditions as the prior contract, and appropriately makes power delivery subject to the distribution, public purpose programs, and nuclear decommissioning components of PG&E's E-20 rate schedule, which is generally applicable to large commercial and industrial customers. Finally, the public interest is served by the agreement to resolve future disputes without resorting to litigation.

Under the foregoing circumstances, we hold that the agreement is reasonable in light of the whole record, consistent with law, and in the public interest. The settlement agreement is approved.<sup>3</sup>

#### **IV. Waiver of Comment Period**

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

#### **Findings of Fact**

1. As provided in Exhibit A, BART and PG&E have reached a settlement on all issues in this proceeding.
2. No party opposes the settlement agreement.
3. The settlement agreement is comprehensive, resolves the disputed jurisdictional issues regarding charges for PG&E's distribution services for BART, provides for past and future payments for distribution, public purpose

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<sup>3</sup> Because the settlement agreement provides for the application of PG&E's E-20 rate schedule, we reject the E-BART tariff attached to AL 1831-E.

programs, and nuclear decommissioning charges, and governs the charges for such services through 2016.

4. The settlement agreement provides for the application of PG&E's E-20 rate schedule to the delivery of BART's federal preference power and supplemental power.

5. The settlement agreement provides for a mutually acceptable outcome between the parties, thereby avoiding time, expense, and the uncertainty of litigation on all the issues raised in AL 1831-E and in I&S C.99-06-002.

### **Conclusions of Law**

1. The settlement agreement reached between BART and PG&E conforms to Article 13.5 in that it is reasonable in light of the whole record, is consistent with the law, and is in the public interest, and meets the all-party settlement criteria set forth in D.92-12-019.

2. The settlement agreement should be adopted and the motion for approval of the settlement should be granted.

3. The E-BART tariff attached to AL 1831-E is rejected.

4. This order should take effect today to allow the settlement expedient implementation.

## **O R D E R**

### **IT IS ORDERED** that:

1. The settlement agreement between Pacific Gas and Electric Company and the San Francisco Bay Area Rapid Transit District (BART) is approved.

2. The motion for approval of the settlement agreement is granted.
3. The E-BART tariff attached to Advice Letter 1831-E is rejected.
4. Investigation and Suspension Case 99-06-002 is closed.

This order is effective today.

Dated October 5, 2000, at San Francisco, California.

LORETTA M. LYNCH  
President  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
RICHARD A. BILAS  
CARL W. WOOD  
Commissioners