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Decision 99-02-058 February 18, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

San Francisco Bay Area Rapid Transit Complainant, vs. Pacific Gas and Electric Company Defendant.	Case 97-12-045 (Filed December 24, 1997)

OPINION

The Complaint

The San Francisco Bay Area Rapid Transit District (BART) complains that defendant Pacific Gas and Electric Company (PG&E) unlawfully threatens to cease delivery of over 85% of BART's electric service upon the expiration of its transmission service agreement on December 31, 1997 unless BART executes an Energy Service Provider (ESP) agreement. BART alleges by signing the ESP agreement, it will relinquish its exemption from certain electric restructuring costs provided in Public Utilities (Pub. Util.) Code § 374(b) by agreeing to accept PG&E's direct access tariff rates and changes. BART also alleges if it signs an ESP agreement, it will forfeit its contractual right pursuant to Pub. Util. Code § 701.8[1] to use federal preference power and unlawfully accept costs included in PG&E's

[1] Subsequent to the filing of this complaint, the Legislature amended this statute to add § 701.8(e) which exempts BART from D.97-10-087, effective January 1, 1999.

bundled service. BART alleges PG&E's Advice Letter 1615-E, which requests approval of its direct access tariff, has not yet been approved by this Commission; therefore, PG&E has provided no notice or showing of reasonable rates required by Pub. Util. Code §§ 454 and 455. BART has filed a timely protest to this advice letter.

BART contends its transmission service contract does not expire on December 31, 1997, but under its express language, expires on the first day of the month following the availability of direct access, if the tariffs are approved by this Commission and the Independent System Operator (ISO) is functioning.[2]

BART requests that this Commission order PG&E to continue its 1997 contract with BART until the parties can execute a new contract based upon the revised direct access rates and charges that comply with electric restructuring requirements in Pub. Util. Code §§ 374(b) and 701.8.

The Answer

PG&E contends the complaint is a collateral attack on Decision (D.) 97-10-087 which resolved the issues BART now raises. PG&E also contends that the right to transmission service is terminated under the terms of the 1997 agreement and BART is violating that agreement by insisting that it is entitled to continuing services under the agreement.

PG&E contends it offered to amend the preferred ESP agreement to acknowledge that through participation in direct access, BART does not lose its statutory rights provided by Pub. Util. Code §§ 701.8 or 374(b) or waive any right to challenge before this Commission or the Federal Energy Regulatory Commission (FERC) the inapplicability of the direct access program to BART.

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[2] The ISO began operation on March 31, 1998; however, PG&E's Advice Letter 1615-E, the direct access advice letter, is still pending.

PG&E contends that BART's rights under its transmission arrangements, including claims related to PG&E's open access transmission tariff, are the subject of a pending complaint by BART at FERC. PG&E contends that FERC has jurisdiction over this issue.

PG&E alleges BART's complaint is defective because the verification is dated six days after the complaint was filed. PG&E also alleges the complaint is vague and the basis of its allegations is unclear.

Motion to Dismiss

PG&E moves to dismiss the complaint for several reasons. PG&E contends the Commission has concluded in D.97-10-087 that BART is subject to the Commission's direct access requirements for delivery of federal preference power. PG&E asserts BART's request to exclude electric restructuring costs provided in Pub. Util. Code §§ 367, 375, and 376 is a collateral attack on the Commission's conclusion in D.97-10-087 that BART is subject to direct access rules. PG&E points out that any ESP agreement cannot override statutory provisions and that the preferred agreement binds the parties to abide by applicable law and Commission requirements. Thus, PG&E contends, it must observe any exemptions from charges to which BART is entitled and BART must comply with Commission-ordered direct access requirements for delivery of federal preference power.

PG&E contends it has offered to amend its ESP agreement to specifically guarantee BART's statutory rights under Pub. Util. Code §§ 374(b) and 701.8 and rights to appeal Commission and FERC decisions. Therefore, PG&E contends it has not breached its 1997 service agreement since the agreement itself prohibits BART from arguing for continued service after its termination.

PG&E asserts FERC, not this Commission, has jurisdiction over claims related to PG&E's open access transmission tariff and BART's complaint regarding these issues is pending.

Lastly, PG&E contends the complaint is procedurally defective.

Discussion

In D.97-10-087, we resolved the issue of the applicability of direct access rules to BART:

> "BART contends that PG&E's DAIP [direct access implementation plan] and its pro-forma tariffs and service agreement is in conflict with PU Code Sections 701.8 and 374(b). BART states that it has been informed by PG&E that BART will be subject to the direct access requirements. BART recommends that the Commission exempt its federal power purchases from PG&E's direct access tariffs.
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> "PG&E contends that there is nothing in PU Code Section 701.8(b) that states BART should not be subject to the direct access rules. PG&E asserts that once direct access begins, BART will receive delivery of its preference power purchases under the same direct access service terms and conditions as other retail customers.
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> "Normally, the Commission does not issue decisions in response to requests for declaratory relief. BART's comments essentially ask the Commission to decide that the rules regarding direct access do not apply to BART. Since the start of direct access is only two months away, it is important that BART receive some indication of what is likely to happen to its preference power purchases on January 1, 1998 so that it can take the appropriate steps.
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> "From our review of PU Code Sections 701.8 and 374(b), as well as a review of other provisions of AB 1890, it is apparent that the Legislature did not intend to exempt BART from the applicable direct access rules. PU Code Section 701.8 became effective on January 1, 1996. That section does not contain any exemptions from direct access. Instead, PU [Code] 701.8(b) imposes an obligation on the electric utility to use its transmission and distribution facilities to

> deliver BART's federal preference power. When the Legislature enacted the provisions of AB 1890, the Legislature obviously knew of the existence of PU Code Section 701.8 because PU Code Section 374 was one of AB 1890's provisions. PU Code Section 374(b) specifically addressed PU Code Sections 367, 368, 375, and 376. There are no other provisions in AB 1890 which exempt BART from the direct access rules. Accordingly, we refuse to adopt BART's recommendation that we exclude it from PG&E's direct access rules.
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> "We sympathize with the points that BART has raised about minimizing its electricity costs, and that no ESP or scheduling coordinator should be required. If BART can effectuate a change in legislation, or find some federal authority for exempting its federal preference power from this state's direct access rules, then we might be in a position to reconsider our position. However, given the wording of PU Code Section 374(b) we cannot reach any other conclusion today but to state that the direct access rules shall apply to BART." (D.97-10-087, pp. 63-64.)

In the above decision, we addressed BART's challenge to the applicability of the direct access tariff, as well as the accompanying contracts. The complaint appears to now separately challenge these contracts.

Any challenge to our prior decision that BART has timely raised in an application for rehearing will be resolved in that forum and is not an appropriate subject for a complaint.

PG&E has offered to BART terms contained an ESP agreement authorized by this Commission and has offered to expressly provide in the agreement BART's rights under statutory law and rights to appeal direct access decisions by this Commission and FERC. BART has not responded to this offer.

BART indicates it has timely protested PG&E's direct access tariff advice letter. Therefore, any challenges to this tariff will be resolved in the Advice Letter proceeding.

On April 6, 1998, BART informed the Commission that PG&E has agreed to deliver BART's federal preference power under the 1997 agreement until

May 1, 1998 and that the 1997 transmission agreement should continue until FERC's March 20, 1998 order is implemented. On that date, FERC directed PG&E in BART's complaint, Docket No. EL98-10-000, to file a long-term network transmission agreement for service to BART under PG&E's open access transmission tariff. (82 FERC 61, 282.)

BART contends the FERC ruling in its complaint is positive but does not make moot the complaint in this proceeding. We disagree. FERC has now ordered PG&E to have in place a network transmission agreement to provide the delivery of electric service to BART's facilities which is effective March 25, 1998. PG&E has agreed to continue the 1997 transmission agreement until this occurs. Therefore, there is no longer a dispute or need for relief from this Commission. Thus, BART fails to state a cause of action for relief from this Commission. This is a complaint proceeding, not challenging the reasonableness of rates or charges, so this decision is issued in an "adjudicatory proceeding" as defined in Pub. Util. Code § 1757.1.

The draft decision of ALJ Bennett in this matter was mailed to the parties in acordance with Pub. Util. Code Section 311(g)(1) and Rule 77.1 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. BART alleges that PG&E unlawfully requests execution of an ESP agreement in which it will allegedly relinquish its exemption from certain electric restructuring costs provided in Pub. Util. Code §§ 374(b) and 701.8.

2. BART also contends its transmission service contract does not expire on December 31, 1997. BART alleges this contract expires one month after the start of the Independent System Operator.

3. BART requests an order requiring PG&E to continue its 1997 contract until the parties can execute a new contract based upon revised direct access rates and charges that comply with Pub. Util. Code §§ 374(b) and 701.8.

4. PG&E alleges the complaint is a collateral attack on D. 97-10-087 which makes BART subject to direct access charges. PG&E also alleges the 1997 transmission contract prohibits BART from insisting it is entitled to continued service under its terms.

5. PG&E offered to amend the preferred ESP contract to reserve BART's statutory rights under §§ 374(b) and 701.8 and its right to challenge the application of the direct access program to BART before this Commission and the FERC.

6. Simultaneous with the complaint in this proceeding, BART filed a complaint with FERC. In that complaint, on March 20, 1998, FERC ordered PG&E to file a long-term network transmission agreement for service to BART under PG&E's open access transmission tariff which is effective March 25, 1998.

7. PG&E has agreed to continue the 1997 transmission agreement until the FERC-ordered contract is executed.

Conclusions of Law

1. D.97-10-087 concluded that BART is subject to PG&E's direct access tariff and accompanying contracts for service.

2. On March 20, 1998 FERC ordered PG&E to execute with BART an agreement which is effective March 25, 1998 for long-term network transmission service.

3. Complainant fails to state a cause of action upon which relief may be granted.

ORDER

IT IS ORDERED that the complainant in this proceeding is dismissed and this case is closed.

This order is effective today.

Dated February 18, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners