ALJ/LRB/hkr

Mailed 10/22/99

Decision 99-10-058 October 21, 1999

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)

TABLE OF CONTENTS

INTERIM OPINION ON JURISDICTION

I. Summary

The Commission's June 3, 1999 Order of Investigation and Suspension ordered the parties to file briefs primarily on two issues: (1) whether this Commission has jurisdiction over any electric service Pacific Gas and Electric Company (PG&E) provides to the San Francisco Bay Area Rapid Transit District (BART); and (2) if so, the extent of this Commission's jurisdiction vis-à-vis the Federal Energy Regulatory Commission (FERC). The Order further states that if this Commission has jurisdiction over some part of PG&E's service to BART, evidentiary hearings may be held to determine the appropriate rates.

We hold that there is a distribution component included in PG&E's delivery of BART's federal preference power and that this Commission has jurisdiction over the distribution component. We defer to the evidentiary hearing the determination of the specific services and facilities used for local distribution. We also hold that BART is not exempt under Pub. Util. Code §§ 374(b) and 701.8[1] from payment of costs for public purpose programs, nuclear decommissioning, and distribution services and facilities.

We find that an evidentiary hearing is necessary and confirm our findings in the Order of Investigation and Suspension that this proceeding be categorized as a ratesetting investigation. The scope of this proceeding may be further revised after the prehearing conference. PG&E's proposed E-BART tariff, pursuant to stipulation, may go into effect, subject to refund of any duplicative or inappropriate charges as determined after hearing.

---

[1] All statutory citations, unless otherwise stated, are to the Pub. Util. Code.

II. Background

BART purchases federal preference power pursuant to long-term contracts. This power is transmitted and delivered by PG&E to BART's traction power and station and miscellaneous power loads.

From August 1, 1997 through some time in 1998, PG&E delivered BART's federal preference power pursuant to a bilateral contract.[2] On September 24, 1998, FERC approved a PG&E-drafted network transmission service agreement and a network operating agreement (collectively "transmission agreement") governing 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).) The transmission agreement, which was approved pursuant to FERC's open access transmission tariff (OATT) rules, provides for PG&E to receive BART's federal preference power at three locations and to deliver it to PG&E's meters located on BART's various traction, station, and miscellaneous loads pursuant to stated rates and charges.

On December 14, 1998, PG&E filed Advice Letter (AL) 1831-E requesting approval of a new electric tariff schedule (E-BART) that purports to establish rates and charges for the distribution services PG&E provides to BART. BART protested the filing, arguing that only FERC and not this Commission has jurisdiction over PG&E's delivery of its federal preference power, that any rate

---

[2] PG&E and BART make various representations in their briefs regarding the period over which power was delivered pursuant to this contract. They also make other representations regarding prior delivery of BART's federal preference power. However, there is no evidentiary support on this record for further findings. To the extent that such events may be relevant to the rate determination, the parties may provide necessary evidence during the evidentiary hearing.

change could only be submitted through a rate application, and that PG&E's proposed rates were calculated improperly.

Subsequently, BART filed a complaint with FERC alleging that PG&E was improperly imposing state direct access tariff charges on the delivery of its federal preference power in addition to the open access tariff charges contained in the transmission agreement. BART argued that the state charges constitute double-charging because the FERC-approved transmission agreement "already applies to delivery of power from resource to load." (*Order Dismissing Complaint*, 87 FERC ¶ 61,255 at pp. 61,975, 61,976 (1999).) On June 1, 1999, FERC issued an Order rejecting BART's position that FERC has exclusive jurisdiction over the entire transaction between PG&E and BART and dismissing BART's complaint. (*Id.*)[3]

On June 3, 1999, we issued an Order of Investigation and Suspension, converting AL 1831-E into an investigation of the issues raised by the AL and suspending PG&E's proposed tariff for 120 days, pursuant to Pub. Util. Code § 455. We converted the Advice Letter into an investigation because we determined that it raised issues that cannot be properly addressed in an AL filing.

The Order also bifurcated the proceedings to provide for immediate briefing of the jurisdictional issues raised by the AL filing and the protest, specifically requesting that briefs be filed on whether this Commission has jurisdiction over any electric service PG&E provides to BART, and, if so, the extent of this Commission's jurisdiction vis-à-vis FERC.

---

[3] BART has requested rehearing of the Order and on July 27, 1999, FERC granted rehearing for the limited purpose of affording time for consideration of the request.

The Order also asked the parties to address any objections to (1) the categorization of this proceeding as a ratesetting investigation; (2) the determination to hold a hearing for the presentation of facts; and (3) the preliminary scope of the proceeding as described in the Order.

The Order required the filing of concurrent initial briefs on the jurisdictional issues by June 28, 1999 and reply briefs by July 14, 1999. After a short continuance granted by the assigned Administrative Law Judge (ALJ), initial briefs were filed on July 8, 1999 and reply briefs were filed on July 19, 1999.

By stipulation, BART has also agreed that it will not object to the E-BART tariff rates going into effect on the 120th day subject to refund of any duplicative or inappropriate charges as determined by the Commission or agreed by the parties, regardless of whether the Commission has reached a decision on the threshold jurisdictional issues by the 120th day.

III. PG&E's E-BART and E20 Tariffs

PG&E bills customers taking service at similar demands and voltages to BART under its E20 tariff. PG&E now proposes a new tariff for BART, the E-BART tariff. PG&E contends that the rates set forth in the E-BART tariff are taken from its Rate Schedule E20, Rate Schedule S, and Electric Rule 2 and are identical to those applicable for other customers who take service at similar demands and voltages. It is not clear under what tariffs other federal preference customers receive service.

E-BART, as submitted pursuant to AL 1831-E, has two categories of service rates, one for transmission (E-BARTT) and one for secondary transmission (E-BARTS). Each category sets forth separate rates for transmission, distribution, public purpose programs, generation, nuclear decommissioning, and total rates. E-BART also includes charges and credits for delivery of BART's federal preference power, for bundled supplemental power sales, for stand-by services,

and for special facilities. PG&E contends that the only difference in how PG&E proposes to bill BART under E-BART is that it proposes to account for BART deliveries of preference power on an hourly basis to better determine the amount of PG&E supplemental or load following power provided, which PG&E states does not constitute a change to Rate Schedule E20 or any other tariff or rule.

With respect to delivery of BART's federal preference power, PG&E agrees that it will not bill BART for the components of E-BART (as taken from E20) that do not apply to BART by law, including energy (since BART buys federal preference power pursuant to § 701.8), transmission (since it is subject to the FERC-approved transmission agreement), and generation-related transition costs (since BART is exempt from these charges pursuant to § 374(b)).

PG&E claims that BART is subject to the charges for bundled supplemental power sales because these charges do not involve federal preference power and thus are not covered by the FERC-approved transmission agreement. PG&E also contends that BART is subject to charges for stand-by power under Rate Schedule S and special facilities charges that PG&E claims are "distribution facilities" reserved for BART's use, both with respect to federal preference power delivery and supplemental power sales, pursuant to Rule 2. The special facilities charges include charges for the facilities leased to BART (PG&E-owned substations and associated equipment which provide power at the transmission voltage level to BART's traction points of delivery), charges for second distribution sources and services (facilities installed by PG&E for BART's exclusive use and charges for the cost of a reserved portion of second source facilities for distribution stand-by), and charges for transformer backup service (provision of PG&E's non-standard backup transformer at BART's substations.) BART raises issues regarding the appropriateness of the charges for

supplemental power, stand-by power, and special facilities, both on a cost basis and vis-à-vis the costs included in the FERC-approved transmission agreement.

IV. Discussion

With respect to the jurisdictional issues, PG&E contends that delivery of BART's federal preference power involves distribution subject to the Commission's jurisdiction, pointing out that FERC has so ruled specifically in this dispute. BART, on the other hand, posits two separate arguments: that this Commission may not approve (1) "any charge for delivery of BART's preference power that is *not* for stranded costs or public benefits unless it is determined that local distribution facilities are used in such deliveries and FERC has concurred in such determinations and has concurred that the allocation of costs is consistent with the principles established by FERC"; and (2) any state-imposed charges for distribution and related services, including stranded costs and benefits, because the Legislature has exempted BART from all such charges pursuant §§ 374(b) and 701.8.

It is important to note that BART's position has changed substantially from that set forth in its protest to AL 1831-E as well as from that pursued in its FERC complaint. Prior to this briefing, BART argued that FERC's transmission jurisdiction extends all the way to PG&E's meters, leaving no facilities for "distribution" within our jurisdiction. It was this argument, for the most part, that drove our decision to seek briefing on the jurisdictional issue before convening an evidentiary hearing.

Now that BART has withdrawn this argument, there is less of a need for the issuance of this order prior to the evidentiary hearing. Nevertheless, we address both jurisdiction as well as the effect of §§ 374(b) and 701.8 on this proceeding.

A. The Commission Has Jurisdiction Over Distribution Services For BART's Federal Preference Power

It is undisputed that this Commission has jurisdiction over local distribution. The Federal Power Act (FPA) expressly leaves to state regulation — and not to FERC — jurisdiction "over the facilities used in local distribution." (§ 201, FPA, 16 U.S.C. § 824(b).) (*See, also, Rehearing of Preferred Policy Decision*, D.97-02-021, *Mimeo.*, at p. 7.) Similarly, FERC has expressly recognized the limitations of its power. (*See, FERC Order No. 888*, App. G, FERC Stats. & Regs. ¶31,036 at pp. 31,969 to 31,970 (1996).)[4]

PG&E delivers BART's federal preference power from three transmission points in California and on the California-Oregon border directly to BART's retail loads. These loads consist of traction power for trains, at high voltage, and station power at lower voltage to supply passenger stations and other locations. Because the power travels through interstate commerce, and because this retail transmission agreement was required by statute (§ 701.8(b)), FERC has ratemaking jurisdiction over the unbundled transmission despite the fact that the power is delivered directly to the end-user, which is a retail transaction, and one previously considered to be within the state's purview. This

---

[4] *Promoting "Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 at 31,781 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12, 274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998). Hereinafter, the decisions are referred to as Order No. 888, Order No. 888-A, Order No. 888-B, and Order No. 888-C, and subsequent history of all Orders is omitted.

transaction is commonly referred to as "retail wheeling in interstate commerce." (*Order No. 888*, FERC Stats. & Regs. ¶ 31,036 at p. 31,966.)

To reconcile these potentially conflicting principles, in *Order No. 888*, FERC ruled that the states retain jurisdiction in every power transaction where the power is provided to the retail customer:

> Even where there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users. (*FERC Order No. 888*, FERC Statutes and Regulations (CCH), Regulations Preambles ¶ 31,036 at p. 31,783 (1996).

With respect to the instant dispute between PG&E and BART, FERC also has ruled that there is a distribution component in PG&E's delivery of BART's federal preference power, confirming once again that local distribution is appropriately regulated by this Commission. In its June 1, 1999 *Order Dismissing Complaint*, FERC explicitly rejected BART's argument that the PG&E tariff we consider herein imposes "improper direct access charges" on the transmission of its federal preference power because "the Service Agreement over which [FERC] has jurisdiction already applies to delivery of power from resource to load." (87 FERC ¶ 61,255, at pp. 61,975, 61,976.) FERC stated:

> It appears to be BART's position here that this Commission has jurisdiction over the entire transaction between PG&E and BART, and that if BART is charged for services under the open access transmission tariff, it cannot be charged for any services under a state-approved tariff. However, as the Commission made clear in Order No. 888, "there is an element of local distribution service in any unbundled retain transaction" and "even where there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users." (Fns. omitted.) (*Id.* at pp. 61,976-61,977.)

Further, FERC specifically deferred to this Commission the determination of appropriate distribution charges:

> Further, the charges that PG&E has assessed BART for local distribution services under its California Commission-approved tariff relate to matters that are subject to the jurisdiction of the California Commission. Therefore, BART should bring to the attention of the California Commission any concerns it may have as to these charges. (*Id.*)[5]

Thus, FERC has determined that there is a distribution component to PG&E's delivery of BART's federal preference power, over which we have jurisdiction. We agree and hold that we have jurisdiction over the distribution component of PG&E's delivery of BART's federal preference power.[6]

Having concluded that the delivery of BART's federal preference power includes a distribution component over which we have jurisdiction, however, does little to resolve the instant dispute. The crux of the dispute relates to the

---

[5] This Order made clear where disputes regarding local distribution charges should be resolved. In a prior case, FERC had implicitly found that BART may be subject to tariffs for local distribution service under this Commission's direct access program. In its September 24 *Order on Compliance Filing Accepting Service Agreements for Filing*, FERC approved PG&E's transmission agreement, rejecting BART's argument that the transmission agreement should not be approved because PG&E will double-charge BART for services under both the OATT and under PG&E's CPUC-jurisdictional direct access tariff, stating that it was "satisfied" that PG&E would not charge BART twice. (84 FERC ¶ 61,307 at pp. 62,402.)

[6] We also reject BART's argument that FERC's determination only relates to stranded costs and benefits and not to distribution charges. While FERC discussed the policy reasons for allowing states to impose charges for stranded costs and benefits, its rulings were not so limited. In fact, the rulings make it clear that there is always a "local distribution *service* element of a retail transaction," (*Order No. 888-B*, FERC Stats. & Regs., ¶ 31, 048 at p. 31,754, *emphasis added*). We have held that distribution services include metering, billing, customer services, and the like. (*See, e.g.*, D.99-06-058.)

identification of the local distribution facilities used in the delivery of such power, the services associated with that delivery, and the appropriateness of the charges imposed for those facilities and services. The determination of these issues, as we discuss further below, requires an evidentiary hearing.

B. Demarcation of Local Distribution Facilities

BART now contends that the determination of whether facilities are used in local distribution in unbundled retail wheeling transactions is a question of fact that is to be decided by FERC on a case-by-case basis. Citing FERC's open access *Order No. 888*, BART points out that there is no bright line test for making this determination and that FERC applies a combination functional-technical test, looking at seven local distribution indicators. (*Order No. 888*, App. G., FERC Stats. & Regs. ¶ 31,036 at p. 31,981.)

Conceding that FERC has stated its intention to defer to the state agency's transmission/distribution demarcation,[7] BART grants that we may make the determination, but argues that we must "apply to FERC seeking a determination of the proper split between FERC-jurisdictional facilities and state-jurisdictional facilities, if any." (BART Opening Brief at p. 7.) Thus, BART

---

[7] FERC stated that:

> [I]n instances of unbundled retail wheeling that occurs as a result of a state retail access program, we will defer to recommendations by state regulatory authorities concerning where to draw the jurisdictional line under the commission's technical test for local distribution facilities, and how to allocate costs for such facilities to be included in rates, provided that such recommendations are consistent with the essential elements of the Final Rule. (*Order No. 888*, FERC Stats. & Regs. ¶ 31, 036. at pp. 31,783-31,784.)

argues that we are without jurisdiction to approve the rates and charges in AL 1831 without FERC's concurrence. BART further argues that FERC, in its prior Orders, including the June 3, *1999 Order Dismissing Complaint*, has neither made such a demarcation nor determined that the classifications or cost allocations are consistent with the principles established in *Order No. 888*.

PG&E, on the other hand, argues that if such a demarcation is necessary, FERC has already made it by approving the PG&E-BART transmission agreement. Those facilities and charges not covered in the transmission agreement, PG&E contends, by definition, are subject to this Commission's jurisdiction.[8] Further, PG&E argues that state regulators may make the designation and that FERC will grant great deference to those determinations. Finally, PG&E questions the seriousness of BART's argument, pointing out that BART did not make this argument to FERC in the complaint proceeding.

While there is some merit to BART's argument that FERC retains the ultimate say-so over the final technical demarcation of transmission and local distribution facilities, we are not precluded from moving forward to consider PG&E's tariff here. As we discussed above, FERC not only dismissed BART's complaint but expressly referred all issues regarding PG&E's charges for local distribution to us for determination.

Thus it does not appear that FERC wishes to make any further transmission/distribution demarcation in this case. It is also arguable, as PG&E

---

[8] PG&E notes that, in rejecting BART's argument that PG&E was double-charging BART under PG&E's OATT, FERC stated: "We find that PG&E is correctly charging BART the appropriate transmission rate under PG&E's open access tariff for BART's federal preference power." *(Order Dismissing Complaint*, 87 FERC ¶ 61,255 at p. 61,977.)

contends, that by approving the transmission agreement, FERC has de facto determined the transmission/distribution split. However, we do not decide this issue today insofar as a final determination is dependent upon a review and analysis of the FERC-approved transmission tariff, which is appropriately conducted during the evidentiary hearing.[9]

We also note that FERC has issued a ruling setting forth the transmission/distribution demarcation for PG&E's facilities. (*Order Granting Petition for Declaratory Order in Part*, 77 FERC ¶ 61,077 at p. 61,318 (1996).) In that case, FERC approved PG&E's petition for a declaratory order[10] and confirmed its proposed transmission/distribution facilities' delineation, based upon the existing use of such facilities. According to the Order, PG&E's facilities taking power over 60 kV are classified as transmission. (*Id.* at p. 61,325.) Accordingly, we have a basis to begin our review and determination. However, this is another issue we cannot resolve without an evidentiary hearing. We do not know from the face of this Order whether the facilities for which PG&E seeks to charge BART under E-BART were classified in the petition or how they were classified. Nor can we, on this record, determine the voltage of these facilities. Further, we note that the FERC order grants the parties' request for a declaration that facilities may have multiple uses and that the initial classifications of facilities as transmission or local distribution are subject to change as the uses of the facilities change. Accordingly, we find that we should take evidence regarding the proper categorization of these facilities.

---

[9] We are also persuaded by BART's argument that despite its pronouncement, FERC did not examine the charges set forth in the transmission agreement.

[10] This petition was jointly filed by PG&E, San Diego Gas and Electric Company, and Southern California Edison Company.

Further, FERC clearly indicated that it would defer to us on this issue so long as we apply the seven local distribution indicators identified by FERC in *Order No. 888*[11] and any other indicators we find appropriate to this specific determination.[12] (*Order No. 888*, FERC Stats. & Regs., ¶ 31,036 at pp. 31,783-31,784; *Order No. 888-A*, FERC Stats. & Regs. ¶ 31,048 at p. 31,754.) In fact, before it issued its Order approving the California utilities' transmission/distribution demarcation, FERC waited for the CPUC to hold workshops on the utilities' proposed demarcation, took the CPUC's supplemental comments, reiterated the teaching of *Order No. 888*, and then found that:

> Consistent with Order No. 888, we will defer to the California Commission and reaffirm the California Commission's initial determination. Such deference to the California Commission's determination is only for the purpose of determining what facilities are Commission-jurisdictional and what facilities are California Commission-jurisdictional, for purposes of the state's retail access

---

[11] The seven indicators are: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems, it rarely, if ever, flows out; (4) when power enters a local distribution system, it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographical area; (6) meters are based at the transmission/local distribution interface to measure flows into the local distribution system; and (7) local distribution systems will be of reduced voltage. (*Order No. 888*, Appx. G, FERC Stats. & Regs. ¶ 31,036 at p. 31,784.)

[12] FERC also noted that it "will consider jurisdictional recommendations by states that take into account other technical factors that the state believes are appropriate in light of historical uses of particular facilities." (*Id.* at pp. 31,783-31,784.)

initiative. (*Order Granting Petition for Declaratory Order In Part*, 77 FERC ¶ 61,077 at p. 61,325.)

BART contends that PG&E's tariff cannot be implemented until FERC has ruled on the transmission/distribution demarcation. However it cites no authority for this proposition and we find none. We do not construe *Order No. 888* or its successors to mandate such a result. Implementation of our direct access program and FERC's open access program has required continuous close cooperation and coordination between this Commission and FERC. Both this Commission and FERC have followed this policy of "cooperative federalism" (*see*, D.97-05-040, *Mimeo.*, at p. 13) and have deferred to the others' jurisdiction, as appropriate. We will continue this cooperative approach and, as directed by FERC, consider BART's objections to the charges imposed for local distribution. In so doing, we will review the FERC-approved transmission agreement, and, if necessary, identify local distribution facilities utilizing FERC's indicators as set forth in *Order No. 888*.

Finally, we note that BART's argument addresses only the technical demarcation of the interface between transmission and distribution facilities and not the ratemaking treatment of distribution services. To the extent that the charges are for costs incurred in the use of local distribution facilities, such as for second distribution source, transformer back-up service, and leased facilities, the ratemaking treatment will depend upon the appropriate demarcation of the facilities as well as an analysis of the FERC-approved transmission agreement. However, the charges for the distribution component of the tariff may include other costs not specifically related to facilities, such as costs of metering, billing, customer services, and the like. (*See*, D.99-06-058.) As discussed above, FERC has clearly and repeatedly stated that all retail wheeling transmission agreements involve some distribution component for services, which is subject to

state jurisdiction. FERC's ruling arguably permits us to impose charges for such services, if appropriate—over and above charges for stranded costs and benefits—regardless of our demarcation of facilities as transmission or local distribution, perhaps even if we find that no facilities are used for local distribution. The parties have not briefed this issue and we will defer our final determination until after the evidentiary hearing. In any event, an evidentiary hearing will be necessary to determine whether such charges are also included in the FERC-approved transmission agreement.

C. Sections 374(b) and 701.8 Do Not Exempt BART From Charges For Distribution Facilities and Services, Including Public Purpose Programs And Nuclear Decommission Costs

BART appears to concede that FERC permits states to impose charges for potentially stranded costs and public benefit programs on the delivery of power through FERC-jurisdictional retail wheeling arrangements. Indeed, in holding that there must always be a local distribution component subject to the state's jurisdiction, FERC recognized that this jurisdiction was important to ensure that "customers have no incentive to structure a purchase so as to avoid using identifiable local distribution facilities in order to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits." (*Order No. 888*, FERC Stats. & Regs. ¶ 31,036 at p. 31,783.) FERC also specifically noted the importance of state jurisdiction over potentially stranded public purpose programs, stating that "through their jurisdiction over retail delivery services, states have authority not only to assess retail stranded costs but also to assess charges for so-called stranded benefits, such as low-income assistance and demand-side management." (*Id.*)

Nevertheless, BART contends that California has chosen not to impose these charges, or any other distribution service or facilities charges, on BART in order to promote the reduction of automobile traffic in the San Francisco Bay Area. BART argues that it is exempt from certain of those charges pursuant to § 374(b) and others pursuant to § 701.8. BART points out that all the local distribution and facilities charges set forth in the E-BART tariff, including charges for public purpose programs and nuclear decommissioning, are taken from tariffs PG&E filed pursuant to the § 368 requirement that the utilities file unbundled tariffs to implement the direct access program. Thus, BART concludes that charges proposed in the E-BART tariff are prohibited under § 701.8(e) as "regulations, orders, or tariffs that implement direct transactions."[13]

PG&E argues that § 374(b) specifically exempts BART from payment of specified stranded costs, reflected in the competition transition charge, and not from payment of stranded "benefits." PG&E further argues that § 701.8(e) exempts BART from complying with direct access requirements, including obtaining an electric service provider (ESP) and purchasing all of its power from a third party or from PG&E. However, PG&E argues, neither § 374(b) nor § 701.8(e) was intended to exempt BART from charges imposed for public purpose programs, nuclear decommissioning, or distribution facilities or

---

[13] BART's briefs are not clear on the scope of its argument. At one point, BART argues that § 374(b) and § 701.8 exempt BART from charges imposed for stranded costs and benefits, including nuclear decommissioning and public purpose programs. Later, BART argues that the Commission is precluded by statute from "approving charges not related to costs of local distribution," which it identifies as "local distribution facilities charges." Still later, BART argues that it is exempt from the "distribution delivery charge." We address BART's arguments from the broadest possible perspective.

services, and, were we to so hold, we would be engaging in cost-shifting contrary to the legislative intent behind the enactment of § 701.8(e).

First, we note that this issue is not one of jurisdiction. On the contrary, issues related to the interpretation and application of California law regulating utilities operating within California is one clearly within our purview. Nevertheless, because the issue was raised and fully briefed, and because if BART's argument were to prevail, it could dispose of the case, we address it here. For the reasons that follow, we hold that BART is not exempt *per se* from charges for public purpose programs, nuclear decommissioning, or distribution facilities and services.

1. Section 374(b)

Section 374(b), enacted as a part of electric restructuring, provides, in relevant part:

> To give the full effect to the legislative intent in enacting Section 701.8, the costs provided in Sections 367, 368, 375, and 376 shall not apply to load served by preference power purchased from a federal power marketing agency, or its successor, pursuant to Section 701.8 as it existed on January 1, 1996, provided the power is used solely for the customer's own systems load and not for sale. (Assembly Bill (AB) 1890; Stats. 1996, Ch. 854.)

Section 701.8(b), enacted in 1995, requires electric utilities regulated by the Commission who own and operate transmission and distribution facilities that deliver electricity to BART to use those facilities to deliver BART's federal preference power. The legislative intent referred to in § 374(b) was expressed in a preamble to § 701.8, as follows:

> The Legislature hereby finds and declares that the use of the San Francisco Bay Area Rapid Transit District (BART District) systems should be encouraged as a means of

> reducing automobile use, energy use, air pollution, and road and highway congestion. The Legislature further finds and declares that the cost of electricity is a major portion of the cost of operating the BART District's systems, and that decreases in electricity costs can enable lower transit fares which can encourage use of the transit system, while increases in electricity costs can cause higher transit fares which can discourage use. (Senate Bill 184; Stats. 1995, Ch. 681.)

Thus, § 374(b) was enacted to relieve BART, when its federal preference power is delivered by the utility, from payment of specified costs associated with electric restructuring that are borne by all other utility customers. Those costs are specifically delineated: uneconomic costs for generation-related assets imposed by § 367 and employee-related transition costs imposed by § 375. BART is also exempt from two other provisions specifically related to recovery of these transition costs: the cost recovery plans for stranded assets' transition costs set forth in § 368 and the extended cost recovery period for displaced transition costs under § 376.

Recovery of costs for nuclear decommissioning and public purpose programs are set forth in §§ 379, 381, and 382. Section 379 provides for the recovery of nuclear decommissioning costs as a nonbypassable charge; § 381 requires electrical corporations to identify a separate rate component to collect revenues to fund programs that enhance system reliability and provide in-state benefits, as a nonbypassable element of the local distribution service, collected on the basis of usage;"[14] and § 382 provides for the funding of programs provided to

---

[14] The programs include (1) cost-effective energy efficiency and conservation activities, (2) public interest research and development not adequately provided by competitive and regulated markets, and (3) in-state operation and development of existing and new and emerging renewable resource technologies, with certain limitations.

low-income electricity customers, including energy efficient services (LIEE) and the California Alternative Rates for Energy (CARE).

When construing a statute, our goal is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.) When the statutory language is unambiguous, we determine this intent from the plain meaning of the language itself. (*Carlton Browne & Co. v. Superior Court* (1989) 210 Cal.App.3d 35, 40; *People v. Superior Court (Price)* (1984) 150 Cal.App.3d 486, 488.)

Section 374(b), by its plain language, does not exempt BART from costs provided by §§ 379, 381, or 382. Nor do §§ 367, 368, 375, or 376 relate to costs for nuclear decommissioning and public purpose programs; these statutes, on their face, provide for the recovery of specified transition costs related to uneconomic generation-related assets. BART is not exempted from the payment of these costs under § 374(b).

Further, § 374(b) cannot be reasonably construed to exempt BART from payment of these costs. In this case we are also guided by the rule of statutory construction that a statute should be construed with reference to the entire statutory system of which it forms a part in such a way that harmony may be achieved among the parts. (*Stafford v. Los Angeles etc. Retirement Board* (1954) 42 Cal.2d 795, 799; *Select Base Materials, supra*, at p. 645.) Also, exceptions to statutes are narrowly construed (*see, e.g., City of National City v. Fritz* (1949) 33 Cal.2d 635-636) and, where exceptions are specified," other exceptions are not to be implied or presumed." (*Mutual Life Insurance Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 410.)

In this case, we must construe §374 within the context of AB 1890 and the intent of electrical restructuring, as set forth in Div. I, Part I, Chpt. 2.3 of

the Pub. Util. Code. Sections 379, 381, and 382 were added to the Pub. Util. Code at the same time as § 374(b)—all as a part of AB 1890. They impose nonbypassable charges on all electric customers, regardless of whether they take services in a bundled or unbundled manner. On their face, they provide for no exceptions to this general rule, not even for BART. Because neither these statutes nor § 374(b) contain an explicit exemption for BART, it is clear that the Legislature did *not* intend to exempt BART from costs for nuclear decommissioning or for these specific public interest programs,[15] but only from the specific costs referenced in § 374(b).

It is unclear on this record whether PG&E's proposed E-BART tariff includes charges for other programs that might be characterized as "public purpose." We defer further consideration pending analysis of the tariff at the evidentiary hearing.

Similarly, § 374(b), on its face, does not exempt BART from payment of costs for distribution services or facilities. Nor do §§ 367, 368, 375, or 376 relate to costs for distribution services or facilities. Again, these statutes, on their face, provide for the recovery of specified transition costs related to uneconomic generation-related assets.

2. Section 701.8

While § 374(b) on its own does not exempt BART from payment of distribution charges and charges for nuclear decommissioning and public purpose programs, BART contends that the addition of § 701.8(e), which was

---

[15] We also note that § 379 specifically provides that nuclear decommissioning costs "shall not be part of the costs described in Sections 367, 368, 375, and 376," the specific costs from which BART is exempt. This further demonstrates the Legislature's intent *not* to exempt BART from payment of nuclear decommissioning costs.

effective on January 1, 1999, further expands BART's cost exemption. Section 701.8(e) provides as follows:

> When the BART District elects to have delivered pursuant to subdivision (b), preference power purchased from a federal power marketing agency, or its successor, neither Sections 365 and 366, and any commission regulations, orders, or tariffs, that implement direct transactions, are applicable, nor is the BART District an electricity supplier. Neither the commission, nor any electric utility that delivers the federal power to the BART District, shall require that an electricity supplier be designated as a condition of the delivery of that power.

Sections 365 and 366, the two statutes referenced in § 701.8(e), provide for the implementation of the direct access program, including the establishment of the Independent System Operator and Power Exchange. The issue BART raises here concerns the phrase "commission . . . tariffs that implement direct transactions."

a) E-BART is Not A Tariff That Implements Direct Transactions

BART contends that the charges for "local distribution facilities," the "distribution delivery service charge," and the nonbypassable charges for nuclear decommissioning and public purpose programs contained in the E-BART tariff, are all taken from tariffs that PG&E filed pursuant to the Commission's requirement in § 368 that utilities file unbundled tariffs to implement the direct access program. BART construes the tariffs containing the unbundled charges to be "tariffs that implement direct transactions," which, it argues, may not be imposed on BART under § 701.8(e).

BART's argument is misguided and based upon an unsupportable premise. Section 701.8(e) by its plain language exempts BART

from tariffs that implement direct *transactions*. It does not purport to exempt BART from all tariffs that have been filed and approved as a result of the electrical restructuring process. The fact that the charges on the E-BART tariff may be taken from tariffs that PG&E filed pursuant to the Commission's requirement in § 368 that utilities file unbundled tariffs to implement the direct access program does not make the E-BART tariff one that implements "direct transactions."

Further, under no reasonable construction could one conclude that the E-BART tariff, or for that matter, PG&E's general E20 tariff (from which E-BART charges were purportedly taken), are tariffs that implement "direct transactions." "Direct transaction" is a term of art used throughout the statutes that comprise our electrical restructuring effort, as set forth in Section I, Part I, Chapter 2.3 of the Pub. Util. Code. It is also specifically defined in § 331(c) of the statute, as a:

> contract between any one or more electric generators, marketers, or brokers of electric power and one or more retail customers providing for the purchase and sale of electric power or any ancillary services.

"Direct transaction" is also referred to in other parts of the statute, in essentially the same way. For example, § 365(b)(1) authorizes:

> direct transactions between electricity suppliers and end use customers, subject to implementation of the nonbypassable charge referred to in sections 367 to 376 inclusive.

Further, § 366(a) provides that:

> [t]he commission shall take actions as needed to facilitate direct transactions between electricity suppliers and end use customers.

Thus, direct transactions are those between energy suppliers and end users. We have discussed "direct transactions" similarly in other cases, e.g., in reviewing requirements for energy service providers (ESPs) (D.99-05-034) and in construing the competition transition charge obligations of cogenerators who may use a utility's standby power. (D.98-12-067.) Since this term is used repeatedly in the statutes implementing electrical restructuring, it should be construed the same in all cases. (*See, e.g., ICC Industries, Inc., v. United States* (Fed. Cir. 1987) 812 F.2d 694, 700; *Dept. of Revenue of Oregon v. ACF Industries, Inc.* (1994) 510 U.S. 332, 342; *National Wildlife Federation v. Gorsuch* (D.C. Cir. 1982) 693 F.2d 156.)

Section 701.8(e)'s use of the phrase "tariffs that implement direct transactions" must be construed consistent with this definition. They are tariffs that implement a "contract between any one or more electric generators, marketers, or brokers of electric power and one or more retail customers providing for the purchase and sale of electric power or any ancillary services." The E20 tariff—and the E-BART tariff to the extent that it is taken from the general E20 tariff — cannot reasonably be construed to implement a contract between an energy supplier and the end user. On the contrary, these general tariffs apply to all customers, regardless of whether they engage in direct transactions.[16]

---

[16] BART's argument starts with the premise that tariffs filed pursuant to § 368 are prohibited under § 701.8(e). This argument is fallacious. Section 374(b) exempts BART from the application of § 368, that is, from the utilities' plans for the recovery of uneconomic costs of the utility's generation-related assets identified in §367. As we discussed, *supra*, § 374(b) did not exempt BART from charges for nuclear decommissioning and public purpose programs. Since the specific statute setting forth BART's exemption from § 368 — § 374(b)—did not do so, BART's argument that § 701.8(e) can be interpreted to do so is baseless.

b) The Legislature Did Not Intend To Exempt BART From Distribution-Related Costs

As we have stated herein, we are bound to construe § 701.8(e) in the first instance in accordance with its plain meaning, which we have done. Nevertheless, BART ascribes to the term "tariffs implementing direct transactions" in § 701.8(e) a much broader meaning. If this language could be viewed as "susceptible to more than one reasonable interpretation," we would "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.) Assuming arguendo that "tariffs implementing direct transaction" requires more than application of the plain meaning rule, the statutory scheme as a whole, the events that led up to enactment of § 701.8(e), and the legislative history, support our determination.

(1) BART Must Pay For Cost of Service

Stripped to its bare bones, BART's contention here seems to be that it does not have to pay for services received and facilities used in the delivery of its federal preference power. It would have us believe that the Legislature required PG&E to deliver this power -- as it did in § 701.8(b) -- but then later -- in enacting § 701.8(e) -- determined that PG&E should provide this service to BART free of charge. It is not surprising that BART has cited no authority -- cases, statutes, legislative history, or other source -- to support such a radical proposition. Surely if the Legislature had intended to grant BART such a gift it would have made its intention to do so explicitly instead of requiring any reviewing body to construe this general language in § 701.8(e) in such a broad and counter-intuitive manner.

BART's argument is not reasonable. Before electrical services were unbundled, BART, like every other customer, paid PG&E for bundled services, including generation, distribution, transmission, and other charges. BART alleges that these charges were paid pursuant to a contract that was subject to FERC jurisdiction. Nevertheless, the regulatory schemes governing generation, distribution, and transmission of energy have changed, both at the state and federal levels. As we stated earlier, now that the charges are unbundled, we have jurisdiction over the distribution component and FERC has jurisdiction over the transmission component. Because BART purchases its energy pursuant to its federal preference power contracts, it is not required to pay charges for generation. However, BART remains responsible for payment of distribution costs if it uses distribution services or facilities. As we said in our unbundling decision (D.97-08-056), costs are allocated by services. Thus, distribution customers pay distribution costs and generation customers pay generation costs. (*Mimeo.*, at p. 8.) These charges predated the implementation of the direct access program; pursuant to § 368, the charges were merely separated out by function so that customers who purchase energy elsewhere can pay only for the distribution services (and related programs) provided by the utilities. It strains credibility to assert that § 701.8(e) exempts BART from these preexisting distribution charges that are based on the cost of providing service. As we discussed earlier, the real issue in this case concerns the interrelationship of the charges set forth in BART's FERC-approved contract and the charges set forth in E-BART, which we are prepared to address after evidentiary hearing, not this frivolous argument.

(2) BART Has Not Been Explicitly Exempted From Nuclear Decommissioning and Public Purpose Programs

BART's argument that it is somehow exempt from nuclear decommissioning and public purpose programs pursuant to § 701.8(e) similarly fails because it ignores the entire electric restructuring statutory scheme. As we discussed earlier, nuclear decommissioning charges (§ 379) and public purpose programs (§§ 381 and 382) were enacted pursuant to AB 1890, at the same time as § 374(b). Thus, if the Legislature had intended to exempt BART from these charges, it presumably would have done so at that time.[17]

It is a well-established rule of statutory construction that a specific provision relating to a particular subject will take precedence over a more general provision, even if that general provision could be construed broadly to include the subject. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577; *Rose v. State of California* (1942) 19 Cal.2d 713, 723-724.) Further, the Legislature must be deemed to have knowledge of these specific statutes when it enacted § 701.8(e). (*See, e.g., Scott Co. v. Workers' Comp. Appeals Bd.* (1983) 139 Cal.App.3d 98, 105.) Both the exemptions set forth in § 374(b) and the §§ 379, 381, and 382 requirements that all customers pay the nuclear decommissioning and public purpose charges, on a nonbypassable basis, are specific statutes. Thus, without an affirmative indication from the Legislature that it intended at this later date to override these clear statutory

---

[17] As we discuss further below , these charges did not flow from the Commission's subsequent Direct Access Implementation decision (D.97-10-087), which was the impetus for the enactment of § 701.8(e).

provisions, the broad and non-specific language of § 701.8(e), a general statute, cannot reasonably be construed to exempt BART from payment of these specific charges.[18]

(3) Extra-Legislative History of § 701.8(e) Identifies the Tariffs From Which BART is Exempt

In 1997, the Commission proceeded to implement the direct access program, which, pursuant to AB 1890, authorized the direct transactions between ESPs and end users. In so doing, we adopted a series of direct access policies and rules. In D.97-05-040, we required the utility distribution companies (UDCs) to prepare and file direct access implementation plans (DAIPs) and pro forma direct access tariffs and service agreements. The DAIPs, direct access tariffs, and energy service provider (ESP) service agreements were reviewed and approved in D.97-10-087. The UDCs' direct access tariff, as approved, was attached to D.97-10-087 as Exhibit A; the ESP agreement was attached as Exhibit B. The direct access tariff and service agreement describes the terms and conditions by which market participants will be allowed to participate in direct access, including the direct access service election process—through use of direct action service requests (DASRs)—billing options, rules governing credit, collections, and metering, procedures for aggregation, and service fees.

---

[18] The Legislature has also demonstrated its intent that everyone contribute to public purpose programs. For example, § 385(a) requires local publicly owned electric utilities—who are not subject to Commission jurisdiction—to "establish a nonbypassable, usage based charge on local distribution service . . . to fund investment of the utility and other parties" in the public interest programs provided for in §§ 381 and 382.

BART participated in the direct access implementation proceeding that resulted in D.97-10-087. At that time, PG&E advised the Commission that BART would receive delivery of its federal preference power purchases under the same direct access service terms and conditions as other retail customers, e.g., subject to the direct access tariff (Appendix A) and the ESP service agreement (Appendix B). BART contended that subjecting it to PG&E's direct access tariffs was improper under §§ 701.8 and 374(b). Thus, BART recommended that the Commission exempt its federal power purchases from PG&E's direct access tariffs. After reviewing §§ 701.8 and 374(b), we concluded that BART was subject to all the requirements of direct access for delivery of its federal preference power. We stated that we sympathized with BART's need to minimize its electricity costs and its argument that "no ESP or scheduling coordinator should be required" and indicated that if BART could effectuate a change in legislation, we might reconsider our decision. (D.97-10-087, *Mimeo.*, at pp. 62-63. *See, also*, Conclusions of Law 45 and 46 at p. 79.)

BART took us up on our offer and sponsored new legislation. SB 1838, which added subsections (e) and (f) to §701.8, was introduced on February 19, 1998, was chaptered on July 21, 1998 (Stats. 1998, Ch. 206) and became effective on January 1, 1999.

Thus, § 701.8(e) was added after the Commission found that BART was not exempt from the direct access DAIPs, which required it to either become an ESP or engage an ESP in order to obtain delivery of its federal preference power, or from the pro forma tariffs attached as Appendix A, which set forth the procedures for ESPs and specified relations with the Power Exchange and Independent System Operator. Section 701.8(e) mirrors the concerns BART had with D.97-10-087 and exempts BART from (1) having to

become an ESP; or (2) having to obtain an ESP; and (3) complying with the direct access tariffs approved to regulate the affairs between the utilities and the ESPs.

The direct access tariff approved in D.97-10-087 is the tariff to which BART objected. The application of this tariff, together with the requirement that BART become an ESP or engage an ESP to access its federal preference power, formed the impetus for BART's subsequent sponsorship of SB 1838. This tariff is specifically a tariff that regulates PG&E's arrangements with the ESPs. It clearly is a tariff that "implements direct transactions," as "direct transaction" is defined in § 331(c). It is also reasonably construed as the type of tariff from which BART is exempt, as contemplated by SB 1838. PG&E's specific tariff—from that approved generically in D.97-10-087—is now filed in PG&E Rule 22.[19] BART is exempt from PG&E Rule 22 and direct access-related rate schedules.

(4) The Legislative History of § 701.8(e) Shows Intent To Exempt BART Only From ESP-Related Requirements

Statements in a report of a legislative committee concerning the object and purpose of a statutory proposal that parallel a reasonable interpretation of the proposal should be followed. (*Beltone Electronics Corp. v. Superior Court* (1978) 87 Cal.App.3d 452, 455, n.2.) In this case, the analyses of both the Senate and Assembly committees that considered SB 1838 provide insight into its intent.

---

[19] The tariffs have been further revised to reflect actual rate schedules, e.g., PG&E's Schedule E-Credit-Revenue Cycle Services Credits, Schedule E-DASR-Direct Access Services Requests Fees, Schedule E-ESP-Services to Energy Service Providers, and Schedule ESPNDSF-Energy Service Provider Non-discretionary Service Fees.

The Senate Bill Analysis provided to the Senate Committee on Energy, Utilities and Communications and to the Senate Rules Committee reviewed the events the led to the sponsorship of this bill, noted the impact on BART of our decision (D.97-10-087) requiring BART to use our "direct access regime" to access its federal preference power, and found:

> As promulgated, CPUC direct access rules would have increased BART's costs to receive federal power. Since ESPs cannot market federal preference power, BART would have been forced to become an ESP. All ESPs must contractually agree to assume utilities' traditional energy-related responsibilities (and liabilities). While these may be a reasonable imposition upon profit-making ventures, they constitute a costly burden on a public agency that only wishes to continue to receive its federal preference power without incurring unnecessary additional expenses. Recently, the Federal Energy Regulatory Commission (FERC) required PG&E to treat BART as a wholesale customer with a pre-existing right to transmission via PG&E. This ruling appears to dispose of the dispute over transmission but still leaves BART subject to any direct access-related distribution charges for its preference power under the CPUC direct access regime. *This bill exempts BART preference power from statutes and CPUC regulations that govern direct access transactions.* (John Rozsa, SB 1838 Analysis, hearing Date April 14, 1998. *See, also,* Senate Floor Analysis, 4/28/98.) *(emphasis added.)*

Similarly, the Assembly Committee on Appropriations described the issue SB 1838 addresses, as follows:

> BART, as a "preference entity", can buy and receive relatively inexpensive hydropower from the federal Central Valley Project (CVP). SB 184 (Kopp) - Chapter 681, Statutes of 1995 enables BART to gain

> access to federal preference power in any quantity at any BART location. Under the state's new electric power market deregulation process, BART must use the PUC's direct access regime to access federal preference power. This would increase BART's costs of buying and receiving federal power because the district would be required to meet costly administrative and regulatory responsibilities even though it does not resell any of this federal power. The PUC encourages BART to seek legislative relief so that the district is not subject to direct access regulations and can continue to purchase its power at relatively low cost from the CVP or any other source the district deems cost effective. (Assembly Committee on Appropriations, Date of Hearing, 7/1/98.)

This legislative history is persuasive evidence that the Legislature intended to exempt BART from the requirement that it use the Commission's "direct access regime" to access its federal preference power, that is, that it become an ESP,[20] with the attendant administrative and regulatory charges and costs associated with implementing direct access, as reflected in regulations, orders, or tariffs that implement the relationship between the utilities and ESPs.[21] The overriding concern was that BART not be required to jump through further hoops, with the attendant costs, simply to access its federal

---

[20] Or that BART be required to engage an ESP, if the rules changed and ESPs were permitted to market federal preference power.

[21] Our conclusion is also supported by PG&E's and BART's prior actions. In D.99-02-058, we dismissed a BART's complaint alleging that PG&E had unlawfully threatened to cease delivery of its federal preference power upon expiration of its transmission service agreement unless BART executed an ESP agreement. We dismissed the complaint because PG&E had agreed to continue the transmission agreement until execution of the FERC-ordered contract.

preference power. The bill recognizes that while BART contracts with an alternative energy source, this is not a direct transaction for purposes of this Commission's direct access rules. Thus, it is apparent that the Legislature intended that BART continue to receive delivery of its federal preference power in the same manner as it would have prior to implementation of the direct access rules governing direct transactions.

We find no evidence, however, that the Legislature in enacting § 701.8(e) intended to expand the statutory exemptions to relieve BART from all charges for nuclear decommissioning, public purpose programs, or distribution services and facilities.[22] On the contrary, the legislative history further affirmatively mandates against such an interpretation. The Senate's SB 1838 analysis also unequivocally states that:

> [n]o CTC costs are affected by this bill nor is there any cost shifting.

Were we to adopt BART's construction of this statute to exempt it from costs for nuclear decommissioning, public purpose programs, distribution services and facilities, there would be cost shifting in contravention of the legislative intent behind § 701.8(e). We also note that § 374(b) recognized and provided for cost-shifting of specific transition costs. Section 701.8(e) cannot reasonably be interpreted to shift costs *sub rosa* to a greater extent than § 374(b) did explicitly.

---

[22] We also note that the Senate's SB 1838 analysis also states that the bill was supported not only by BART but also by PG&E. It is not credible that PG&E would support a bill that would exempt BART from any payment of distribution charges for delivery of its federal preference power.

In sum, we hold that the most reasonable interpretation of the phrase "tariffs that implement direct transactions" in § 701.8(e), when reviewing the statute as a whole, and to effectuate the legislative intent, is that it exempts BART from complying with the direct access tariffs that govern the relationship between the utilities and the ESPs. It does not exempt BART from charges set forth on the utilities' generally applicable tariffs -- those that apply to all customers, regardless of whether they purchase their energy from PG&E or engage in a direct transaction -- despite the fact that those tariffs have been filed by the utilities as a part of our electric restructuring program. Thus, BART is not exempt from charges for nuclear decommissioning, public purpose programs, and local distribution service and facilities.[23]

V. An Evidentiary Hearing Is Necessary

As we said in the Order of Investigation and Suspension:

> BART's protest claims PG&E's proposed rates contain double counting, charges for services not performed, and violated P.U. Code Sections 374(b) and 701.8(f). *(Stet.)* Evidentiary hearings will be required to determine the appropriate cost basis and rate design for the services in questions if we determine we have jurisdiction. (*Mimeo.*, at p. 3.)

We reaffirm our conclusion. The crux of the dispute relates to the identification of the local distribution facilities used in the delivery of BART's federal preference power, the services associated with that delivery, and the appropriateness of the charges imposed for those facilities and services. We also

---

[23] We cannot determine on this record whether any charges in the E-BART tariff for distribution services and facilities include charges for direct transactions. We will seek further argument, and, if necessary, evidence, from the parties during the evidentiary phase of this proceeding on this limited issue, if appropriate.

have found that we need to take evidence regarding the proper categorization of PG&E's facilities, using FERC's seven local distribution indicators and the nature of the distribution services provided. We must also review the FERC-approved transmission agreement to determine the relationship of the rates contained therein to the rates set forth in E-BART. As BART has indicated, there may also be issues with respect to the provision of stand-by power and supplemental power. These are factual matters that cannot be determined without an evidentiary hearing.

PG&E contends that since E-BART simply compiles charges found in PG&E's otherwise applicable tariffs and since its advice filing is not a rate increase (per our June 3, 1999 Order), an evidentiary hearing is not necessary. PG&E argues that if the Commission adopts different, lower charges for BART, BART would be treated differently from other customers receiving the same service, and that other rate-payers will have to make up the difference through an extension of the rate freeze or through higher distribution rates after the rate freeze ends. We do not find PG&E's argument persuasive. As we have said throughout this Interim Opinion, distribution charges imposed pursuant to E-BART must be examined in the context of PG&E's FERC-approved agreement. While FERC has stated that the charges set forth in that agreement are appropriate, there is no evidence that FERC has reviewed the cost basis for the charges set forth in the agreement, let alone whether PG&E seeks to double collect for these same costs in distribution rates. Further, we have questions regarding the application of some of the E-BART charges, e.g., the facilities charges, to facilities that have been used by BART for many years. These are rate issues that cannot be determined without an evidentiary hearing.

VI. Other Procedural Matters

A. E-BART Tariff May Go Into Effect Subject to Refund

We will allow the E-BART tariff to go into effect, subject to refund, on October 1, 1999, the end of the current 120-day suspension period. We note that BART has stipulated that it will not object to the E-BART tariff going into effect on October 1, 1999, subject to refund. Further, we find that this is a reasonable accommodation in this case because it in effect subjects BART to a procedure similar to our normal rate dispute procedure, where we require a ratepayer disputing a bill to pay the disputed amount into an escrow account pending decision. It is also evident that BART will suffer no irreparable harm as a result of our Order.

While we are processing this case pursuant to § 455, and will allow the E-BART tariff to go into effect, subject to refund, we will not preclude BART, at the evidentiary hearing, from presenting evidence that the E-BART rates, in application, result in a rate increase. While we found that the proposed rates "do not appear to be an increase over PG&E's otherwise applicable PUC-filed tariff rates (e.g., Schedule E-20)" (*Order of Investigation and Suspension, Mimeo.*, at p. 3), we cannot definitively determine whether the application of this tariff to BART will have the effect of increasing its rates without an evidentiary hearing.

B. Categorization and Scope

No party raised issue with the categorization as a ratesetting investigation, pursuant to Rule 6(c) of the Commission's Rules of Practice and Procedure. This categorization is affirmed.

The Order of Investigation and Suspension identified the issues to be determined in this proceeding as (1) whether we have jurisdiction over PG&E's service to BART; (2) if we have jurisdiction, the charges we have jurisdiction

over; and (3) whether PG&E's proposed rates contain double-counting, charges for services not performed, or violate Pub. Util. Code §§ 374(b) and 701.8(f). PG&E now asks that we expand the scope to include as an issue the determination of what CPUC tariffs have been applicable to BART since June 30, 1998. PG&E contends that after the previous service agreement expired on June 30, 1998, BART became subject to its general tariffs and that we should find that those general tariffs (Rate Schedule E20, Rate Schedule S, and Electric Rule 2) have been in effect and continue to be in effect until a new tariff is approved. This issue is reasonably related to the issues defined in the Order of Investigation and Suspension and discussed above, and will be added to the preliminary scope of this proceeding. We may also revise the scope, as necessary, at the prehearing conference.

VII. Comments on Draft Decision

The draft decision of Administrative Law Judge Linda R. Bytof in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. BART filed comments on October 12, 1999 and PG&E filed reply comments on October 18, 1999. BART's comments assert that the proposed Interim Opinion makes several legal and factual errors. PG&E's comments refute BART's comments and recommend that the proposed Interim Opinion be adopted as written.

We have reviewed BART's comments and decline to make any major substantive changes. Many of BART's comments reargue positions that were not adopted in the Interim Opinion and, accordingly, pursuant to Rule 77.3, are accorded no weight. Other comments do not challenge our decision but merely argue BART's position with respect to legal issues reserved for later determination and with respect to our prospective ratemaking determination, which BART concedes will be made after evidentiary hearing. BART's

comments also frequently assert factual matters that are not presently contained in our evidentiary record. If relevant to the issues reserved for the final decision, BART should provide evidence to support its allegations at the evidentiary hearing. Further, our interpretation of §§ 374(b) and 701.8 is not dependent on our reading of BART's arguments or on the historical BART/PG&E relationship with respect to federal preference power. However, if facts emerge at the evidentiary hearing which affect our decision on this issue, if appropriate, we may reconsider it.

We also have made several language clarifications and edits in response to the comments.

Findings of Fact

1. PG&E receives BART's federal preference power at three locations and delivers it to BART's traction power and station and miscellaneous power loads, as required by § 701.8(b).

2. From August 1, 1997 through some time in 1998, PG&E delivered BART's federal preference power pursuant to bilateral contract.

3. On September 24, 1998, FERC approved PG&E's transmission service agreement and network operating agreement governing the transmission of BART's federal preference power. The agreements provide for PG&E to receive power at three locations and to deliver it to PG&E's meters located on BART's various traction, station, and miscellaneous loads pursuant to stated rates and charges.

4. On December 14, 1998, PG&E filed Advice Letter 1831-E requesting approval of a new electric tariff schedule (E-BART) purporting to establish rates and charges for the distribution services provided to BART, which was protested by BART.

5. Subsequently, BART filed a complaint with FERC alleging that PG&E was improperly imposing state direct access tariff charges on the delivery of its federal preference power, which was governed by the FERC-approved transmission agreement.

6. On June 1, 1999, FERC dismissed BART's complaint rejecting BART's position that FERC has exclusive jurisdiction over the transaction between PG&E and BART.

7. On June 3, 1999, the Commission issued an Order of Investigation and Suspension, converting AL 1831-E into an investigation of the issues raised by the AL and suspending the E-BART tariff for 120 days pursuant to § 455.

8. The Commission's June 3, 1999 Order bifurcated the proceedings and ordered the parties to file briefs addressing whether this Commission has jurisdiction over any electric service PG&E provides to BART, and if so, the extent of this Commission's jurisdiction vis-à-vis FERC.

9. By stipulation, BART has agreed that it will not object to the E-BART tariff going into effect on the 120th day subject to refund of any duplicative or inappropriate charges.

10. The E-BART tariff sets forth separate rates for transmission, distribution, public purpose programs, generation, nuclear decommissioning, and total rates, as well as charges and credits for delivery of BART's federal preference power, for bundled supplemental power sales, for stand-by services, and for special facilities. PG&E seeks to impose on BART for delivery of its federal preference power, charges for distribution, public purpose programs, nuclear decommissioning, stand-by services, and special facilities. PG&E also seeks to impose on BART charges for supplemental power sales.

11. PG&E contends that the E-BART rates are taken from PG&E's Rate Schedule E20, Rate Schedule S, and Electric Rule 2 and are identical to those applicable for other customers who take service at similar demands and voltages.

12. FERC has ruled that the states retain jurisdiction in every power transaction where the power is provided to the retail customer, even where there are no identifiable local distribution facilities.

13. FERC has ruled that there is a distribution component in PG&E's delivery of BART's federal preference power over which this Commission has jurisdiction.

14. FERC will defer to the state's recommendation regarding the technical demarcation between transmission and local distribution.

15. FERC has expressly referred to this Commission all issues regarding PG&E's charges for local distribution.

16. A determination of the transmission/distribution demarcation cannot be made without reviewing the FERC-approved transmission agreement.

17. FERC has previously approved the transmission/distribution demarcation for PG&E's facilities.

18. We cannot determine whether FERC classified the PG&E facilities used by BART as transmission or distribution when it approved PG&E's transmission/distribution demarcation or the nature of the classification, if one was made, without an evidentiary hearing.

19. FERC has held that states have the authority to assess retail stranded costs and charges for stranded benefits, such as public purpose programs, through their jurisdiction over retail delivery services.

20. It is unclear on this record whether E-BART includes charges for programs that might be characterized as "public purpose," other than those provided for in

§§ 381 and 382. We defer further consideration pending analysis of the tariff at the evidentiary hearing.

21. The E-BART and E20 tariffs are not tariffs that implement direct transactions.

22. An evidentiary hearing is necessary to identify the local distribution facilities used in the delivery of BART federal preference power, the services associated with that delivery, and the appropriateness of charges imposed under E-BART for those facilities and services, including the appropriate cost basis and rate design. An evidentiary hearing may also consider the appropriateness of the tariff charges as they relate to the provision of supplemental, non-federal preference power.

23. BART has stipulated that it will not object to the E-BART tariff going into effect on October 1, 1999, subject to refund. This is a reasonable accommodation in this case because it in effect subjects BART to our normal rate dispute procedure and BART will suffer no irreparable harm as a result.

24. BART is not precluded from presenting evidence that the E-BART rates as applied may result in a rate increase.

Conclusions of Law

1. This Commission has jurisdiction over local distribution.

2. FERC has jurisdiction over ratemaking for unbundled retail transmission, a transaction referred to as "retail wheeling in interstate commerce."

3. FERC has jurisdiction over ratemaking for the unbundled transmission by PG&E of BART's federal preference power.

4. This Commission has jurisdiction over the local distribution component in PG&E's delivery of BART's federal preference power.

5. This Commission may review the FERC-approved transmission agreement and if necessary, identify local distribution facilities utilizing FERC's local

distribution indicators and other factors, as appropriate, as set forth in *Order No. 888*.

6. This Commission has jurisdiction to assess retail stranded costs and charges for stranded benefits, such as public purpose programs.

7. BART is exempt from transition costs for uneconomic generation-related assets and employee-related transition costs and related recovery plans under §374(b).

8. Section 374(b) does not exempt BART from costs for nuclear decommissioning required by § 379 or from charges for public purpose programs required by §§ 381 and 382.

9. Section 374(b) does not exempt BART from charges for distribution services and facilities.

10. Section 701.8(e) does not exempt BART from costs for nuclear decommissioning required by § 379 or from charges for public purpose programs required by §§ 381 and 382.

11. Section 701.8(e) does not exempt BART from charges for distribution services and facilities.

INTERIM ORDER

IT IS ORDERED that:

1. This case is categorized as a ratesetting investigation, pursuant to Rule 6(c).

2. The preliminary scoping is affirmed, with the addition of Pacific Gas and Electric Company's issue regarding the determination of what tariffs have been applicable to Bay Area Rapid Transit District (BART), if any, since June 30, 1999. Scope may be further revised at the prehearing conference.

3. A prehearing conference will be scheduled to set further proceedings in this matter, including an evidentiary hearing.

4. The E-BART tariff may go into effect on October 1, 1999, subject to refund of any duplicative or inappropriate charges.

This order is effective today.

Dated October 21, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners