STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 11, 2002 **Agenda ID #1226**

TO: PARTIES OF RECORD IN CASE 00-05-039

This is the draft decision of Administrative Law Judge Kotz. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Carol Brown
Carol Brown, Interim Chief
Administrative Law Judge

CAB: avs

Decision **DRAFT DECISION OF ALJ KOTZ (Mailed 10/11/2002)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Boston Properties, Inc., Complainant, vs. Pacific Gas and Electric Company, Defendant.	Case 00-05-039 (Filed May 22, 2000)

Goodin MacBride Squeri Ritchie & Day LLP,
by James D. Squeri, Attorney at Law,
for complainant.
Gail L. Slocum and Andrew Niven, Attorneys at Law, for Pacific Gas and Electric Company, defendant.

OPINION ON MOTION TO DISMISS

1. Introduction and Summary

This complaint concerns alleged illegalities by Pacific Gas and Electric Company (PG&E) in serving certain commercial buildings (managed by the complainant, Boston Properties, Inc.) under PG&E's experimental real-time pricing tariff for electricity, Schedule A-RTP. The main allegation is that PG&E failed to change this tariff to implement legislatively-mandated electric rate levels. We conclude that PG&E has validly implemented the legislation insofar

as it relates to Schedule A-RTP. Accordingly, we grant PG&E's motion to dismiss the complaint. This proceeding is closed.

2. Background

The facts material to today's decision are not disputed. The background set forth below is drawn from Boston Properties' amended complaint (December 6, 2000) and the parties' joint case management statement (October 6, 2000, as updated January 22, 2001).

The commercial buildings in question are known as the Embarcadero Center, in San Francisco. They receive electric service from PG&E under five separate accounts. In December 1991, Boston Properties' predecessor-in-interest agreed with PG&E to take service under Schedule A-RTP for one of the five accounts; in August 1994, the predecessor-in-interest agreed with PG&E to take service under Schedule A-RTP for the other four accounts.

Schedule A-RTP is a "real-time pricing" schedule intended to give electricity users hourly price signals that reflect the serving utility's (here, PG&E's) marginal costs. Electric consumers served under Schedule A-RTP may respond to the price signals by modifying their usage patterns, to the extent practicable, in order to reduce their own costs of energy as well as PG&E's system costs. PG&E has offered a Commission-approved real-time pricing program as an experimental service option available to certain commercial electric customers (who would otherwise receive service under Schedule E-19 or E-20) since January 1, 1985. Schedule E-20 is the "otherwise-applicable" or "regular" tariff for the Embarcadero Center buildings; in other words, absent the property manager's election to receive service under Schedule A-RTP, PG&E would have served the buildings under Schedule E-20.

Unlike Schedule E-20, the electric rates under Schedule A-RTP are not a stated cost per kilowatt-hour (kWh). Instead, Schedule A-RTP uses a complex formula for calculating the rates.[1] For present purposes, however, the key term in the formula is the term intended to represent PG&E's hourly cost of electricity. Before electric industry restructuring, PG&E's System Incremental Cost (SIC) was used for this term in the formula. The Commission decided that after restructuring, when the Power Exchange (PX) began operating, SIC should be changed to the day-ahead market-clearing PX price (MCP); among other differences from SIC, the MCP is not limited to generation sources within PG&E's service territory. The Commission ordered this change in Resolution (Res.) E-3510 (December 16, 1997).

Besides creating the PX, California's electric industry restructuring legislation also contained directions regarding electric rates. At issue in this complaint is the following direction:

> The cost recovery plan [required for each electric utility] shall set rates for each customer class, rate schedule, contract, or tariff option at levels equal to the level as shown on electric rate schedules as of June 10, 1996, provided that rates for residential and small customers shall be reduced so that these customers shall receive rate reductions of no less than 10 percent for 1998 continuing through 2002. These rate levels for each customer class, rate schedule, contract, or tariff option shall remain in effect until the earlier of March 31, 2002, or the

[1] In other words, Schedule A-RTP is a variable rate schedule, while Schedule E-20 is a fixed rate schedule. We note that some price components of Schedule A-RTP <u>are</u> fixed in the schedule. For example, there is a demand charge (expressed in dollars per kW), and a customer charge (in dollars per meter per month) that come directly from the otherwise-applicable schedule. However, the energy charge, aside from a small "base rate" component, is entirely variable and unspecified.

> date on which the commission-authorized costs for utility-generated assets and obligations have been fully recovered. (Pub. Util. Code § 368(a).)[2]

Where a tariff states specific electric rates in cents per kWh, implementation of § 368(a) is straightforward. Where a tariff, such as Schedule A-RTP, states electric rates in terms of several variables, implementation of § 368(a) is less clear.[3] Neither on June 10, 1996, nor on any other date, do fixed dollar "rate levels" for electricity appear on Schedule A-RTP or the contracts that customers sign in order to take service under that schedule. By nature and design, Schedule A-RTP is an inherently variable hourly rate, unlike any of PG&E's other rates.

In response to § 368(a), PG&E made only one change to Schedule A-RTP, substituting MCP for SIC in the pricing formula pursuant to Res. E-3510, as mentioned above.

3. Basis of this Complaint

The threshold issue is whether Schedule A-RTP, with the limited change made to that schedule following enactment of § 368(a), complies with the constraints on electric rates that § 368(a) imposes. The parties agree that the threshold issue is a pure question of law (based upon interpretation of AB 1890 and Commission decisions implementing AB 1890).

If PG&E prevails on the threshold issue, then Boston Properties concedes the case would be over. On the other hand, if Boston Properties prevails on that issue, we would then have to resolve many additional issues (*e.g.*, how to

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[2] Statutory citations in today's decision are to the Pub. Util. Code. Section 368(a) is part of Assembly Bill (AB) 1890, Chapter 854 of Stats. 1996, effective September 24, 1996.

[3] We note, however, that the present case is the only one filed at the Commission regarding PG&E's implementation of § 368(a) in relation to its Schedule A-RTP.

construct a "rate level" for Schedule A-RTP where no such level was stated), presenting mixed questions of fact and law. Because we hold that, at all times relevant to this case, Schedule A-RTP complied with § 368(a), we need not detail these additional issues.

4. Discussion

4.1 Overview of Analysis

Section 368(a) requires us to set rate levels as "as shown on electric rate schedules as of June 10, 1996 . . . ." (Emphasis added.) Rate levels for electricity, which we along with the parties construe to mean cents per kWh, were never "shown" in Schedule A-RTP. Thus, we read § 368(a) as applying, literally, only to those tariffs that set rates in cents per kWh, and not to Schedule A-RTP, under which electric rates vary according to a formula. However, pursuant to § 368(a), we have set the rates for PG&E's Schedule E-20, which is the otherwise-applicable schedule to which Boston Properties, like other customers that had elected service under Schedule A-RTP, had the option to switch in order to get the rate security provided by § 368(a).[4] Because Boston Properties had a fixed rate alternative to continuing to receive service under Schedule A-RTP, Boston Properties may not complain that we ought to have re-designed Schedule A-RTP to create either fixed or capped rate levels.

Indeed, we had only two logical ways to implement § 368(a) with respect to a variable rate schedule such as Schedule A-RTP: We could set rate

[4] For some Schedule A-RTP customers, the otherwise-applicable schedule is Schedule E-19. This fact is not material to our analysis or outcome, however, as we also set rate levels for Schedule E-19, as directed by § 368(a).

levels for the otherwise-applicable schedules, which we did; or we could abolish the variable rate schedule. Had we done the latter, Boston Properties would have become a Schedule E-20 customer, just as if it had opted to switch to that schedule. But neither of these two ways to implement § 368 (a) would have rewritten Schedule A-RTP, as this complaint would have us do.

In short, Boston Properties has not shown any legal error in our implementation of § 368(a) with respect to Schedule A-RTP.[5] We dismiss its complaint accordingly.

4.2 The Commission's Electric Industry Restructuring Decisions

Implementing AB 1890 was an enormous task, raising a horde of issues. Considering the size of the task, we are not surprised to find that no Commission decision squarely addresses the issue of how the Legislature's direction to "set rates . . . at [1996] levels" should apply to a variable rate schedule.

The decision most closely on point is Res. E-3510. There we change the Schedule A-RTP formula such that MCP replaced SIC concurrent with commencement of operations by the PX. PG&E and Boston Properties debate the significance of this change, which was actually proposed (as PG&E noted) by a Schedule A-RTP customer. On the one hand, the change seems to have been

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[5] PG&E asserts that Boston Properties' electric bills for the period relevant to this complaint would have been higher than they were under Schedule A-RTP if the Embarcadero Center buildings had been receiving service under Schedule E-20. It is not material to today's decision whether Boston Properties realized net benefits under Schedule A-RTP, as PG&E asserts. We note, however, that Schedule A-RTP customers were able to calculate such benefits, since their bills from PG&E showed the difference between the real-time prices they actually paid in comparison to the prices they would have paid under their "regular" rate schedule. *See* discussion, below, of billing practices under Schedule A-RTP.

driven less by § 368(a) than by the basic alteration made by the PX to how PG&E obtained electricity. On the other hand, we clearly intended, in Res. E-3510 and the various decisions preceding it, to make all necessary changes, including rate changes, preliminary to functioning of the new industry structure. On this line of reasoning, which PG&E urges, our failure to order other changes to Schedule A-RTP must mean that we considered § 368(a) not to require other changes to the schedule, and that the schedule's pricing formula (aside from the adoption of MCP) was essentially "frozen" by Res. E-3510, in compliance with at least the spirit of § 368(a).

The problem with PG&E's line of reasoning is that we find no language in Res. E-3510 to support the notion that we thereby froze the Schedule A-RTP formula. This lack does not strengthen Boston Properties' position, however. Boston Properties argues that the Commission was compelled by § 368(a) to completely change the nature of Schedule A-RTP, such that its variable pricing formula would operate subject to a "cap" (ceiling) on rates, or not at all. Res. E-3510 is fundamentally at odds with that argument. Thus, there is merit to PG&E's claim that, in violation of § 1709, this complaint constitutes a collateral attack on Res. E-3510 and various restructuring decisions leading up to it.

Even if the complaint were not barred as a collateral attack, we would nevertheless dismiss the complaint because of the faultiness of Boston Properties' reading of § 368(a), to which we now turn.

4.3 The Meaning of Section 368(a)

Boston Properties' theories in this matter evolved considerably between its original (May 22, 2000) and amended (December 6, 2000) complaints. Along the way, it discovered that it had misquoted § 368(a). The error is significant: Boston Properties had understood and asserted that the statute requires rate

levels "not greater than" those shown in rate schedules as of June 10, 1996, when the statute actually requires rate levels "equal to" those shown on that date. The error probably contributed to the debate between PG&E and Boston Properties over whether § 368(a) mandates a rate "freeze" (PG&E) or a "cap" beneath which the rate in Schedule A-RTP could vary (Boston Properties).

We agree with PG&E that the "equal to" phrase actually used in § 368(a) means a rate freeze, not a rate cap. But even if Boston Properties were to further amend its complaint to espouse some methodology for freezing the Schedule A-RTP formula at a constant rate level, we would still dismiss the complaint. The reason for dismissal is that the express language of § 368(a) plainly states the rate levels to be frozen would be those actually "shown" in the relevant schedule as of June 10, 1996. The energy component of Schedule A-RTP contained no such levels on that date (or at any other time). No construction of § 368(a) would authorize us to now import a rate level into Schedule A-RTP.

We also agree with PG&E that we should impute to the Legislature the knowledge that some variable rate schedules, such as Schedule A-RTP, have existed for a considerable time (Schedule A-RTP goes back to 1985). Since § 368(a) does not expressly require the abolition of variable rate schedules, we prefer a construction of the statute that allows continuation of such schedules to a construction that abolishes them by implication. As we next discuss, we hold that setting rate levels for the otherwise-applicable schedules (those under which Schedule A-RTP customers would otherwise receive electric service) satisfies both the letter and the spirit of § 368(a).

4.4 The Relationship Between Schedule A-RTP and Schedule E-20

Schedule A-RTP and the otherwise-applicable schedules (for present purposes, Schedule E-20) are related logically and by express terms of the tariffs,

in ways that amply support our holding that the setting of rate levels for Schedule E-20 satisfies the requirements of § 368(a) with respect to Schedule A-RTP. To understand this relationship, we examine below various provisions of the Schedule A-RTP tariff and associated service agreements.

The tariff's "Applicability" provision reads as follows:

> Under Schedule A-RTP, the rate paid by the customer can change hourly, thus reflecting PG&E's continually changing costs of producing electricity.
>
> This is an experimental schedule and shall remain in effect until cancelled by the California Public Utilities Commission. PG&E is studying "real-time pricing" as an alternative to traditional time-of-use rates. Customers will be asked to participate in the experiment solely at the option of PG&E. Eligible for consideration are those customers whose maximum billing demand exceeds 499 kW for three consecutive months. Schedule A-RTP is limited to 50 customers.

Customers also receive "a statement showing the real-time prices in effect each hour and how much energy the customer used each hour."

Both before and after creation of the PX, Schedule A-RTP also provided for advance communication of real-time prices to the customer:

> Prior to 4:00 p.m. each day PG&E informs Schedule A-RTP customers what hourly real-time prices will be in effect from midnight to midnight the following day. The real-time prices change each hour, on the hour. In addition, PG&E reserves the right to update any or all of these prices after the initial 4:00 p.m. notification. The number of updates is limited to a maximum of 70 hours per year. Any such update will be provided to the participants no later than one hour prior to the applicable time frame.

We have already noted that the customer charge under Schedule A-RTP derives from the otherwise-applicable schedules (*see* note 1 above); similarly, the

monthly billing, at least for those customers receiving bundled service from PG&E, is performed as if the customers were still on Schedule E-19 or E-20. In particular, the "difference between the amount due under the [otherwise-applicable] schedule and the amount due under real-time pricing appears on the customer's bill as a credit or debit."[6]

Schedule A-RTP requires that the customer sign an "electric service agreement" to take service under that schedule. Either PG&E or the customer may terminate the agreement by giving notice 30 days before the end of the contract period, but that period otherwise renews automatically for successive one-year terms.

The electric service agreement for Schedule A-RTP is a PG&E form with a few blanks to be filled in by PG&E and the customer. As relevant here, the agreements for all five Embarcadero Center accounts are identical, aside from different start dates. Among other things, the agreements incorporate and attach Schedule A-RTP, and contain the following provisions:

> 8. The initial term of this agreement shall be for a period of one (1) year from the date Real-Time Pricing service is first made available to the customer as established in PG&E's records. PG&E shall advise the customer in writing of the effective commencement date of the initial one (1) year term. This agreement shall continue thereafter for successive terms of one (1) year, provided, however, that either party shall have the right to terminate this agreement at the expiration of the initial one (1) year term or any subsequent one (1) year term

[6] A direct access customer under Schedule A-RTP receives a bill calculated as for a bundled service customer, but the direct access customer gets a credit for the PX component.

> by giving the other party written notice of termination at least thirty (30) days prior to such termination date.
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> 10. This contract shall be subject to all of PG&E's applicable tariff schedules on file with and authorized by the Commission and shall at all times be subject to such changes or modifications as the Commission may direct in the exercise of its jurisdiction.

From the above summary of tariff provisions and the related standard form agreement, we easily see that Schedule A-RTP is unusual. Unlike most tariffed services, it is optional and terminable, as to both the utility and the customer. By its express terms, it is experimental, and as such it is open only to large electric customers, and then only up to a maximum of 50 customers, who are eligible to participate "solely at the option of PG&E." The service which participating customers are entitled to receive at all times is not under Schedule A-RTP but rather under the otherwise-applicable tariff, *i.e.*, Schedule E-19 or (in the case of Boston Properties' Embarcadero Center buildings) Schedule E-20. Finally, and most tellingly for purposes of today's decision, "Monthly bills are calculated as if the customers were still on their regular rate schedule (E-19 or E-20)" and the bills also state the "difference between the amount due under the regular rate schedule and the amount due under real-time pricing . . . "

Our review of Schedule A-RTP reveals a clear pattern that is dispositive of this complaint. The pattern shows that the relevant "rate level" for a Schedule A-RTP customer is the rate level stated in Schedule E-19 or Schedule E-20, whichever is the otherwise-applicable schedule for that customer. Given this pattern, the rate level to be "set" pursuant to § 368(a) for Schedule A-RTP is not a rate within Schedule A-RTP but rather the rates shown in the

otherwise-applicable schedules, to which real-time prices are compared and to which the Schedule A-RTP customer may decide to switch.

Setting the rate levels in the otherwise-applicable schedules is actually what the Commission did.[7] In doing so, the Commission both continued the real-time price signals which Schedule A-RTP is designed to give and modified the rate levels, consistent with § 368(a), to which Schedule A-RTP customers compare the price signals they receive.

The fundamental premise of this complaint is that the requirements of § 368(a) were never properly implemented for Schedule A-RTP. We find, to the contrary, that in setting rate levels for the otherwise-applicable schedules, we accomplished everything we needed to do under that statute for purposes of Schedule A-RTP. Thus, the complaint must be dismissed.

5. Procedural Matters

We initially categorized this complaint as adjudicatory; we also expected it to go to hearing. We confirm the category but find that an evidentiary hearing is not needed in order to resolve the complaint. Because we have decided to dismiss the complaint, a scoping memo is not necessary.

The draft decision of the assigned Administrative Law Judge (ALJ) was served on the parties and made available for public review and comment, as required by § 311(g)(1).

6. Assignment of Proceeding

Commissioner Geoffrey F. Brown is the Assigned Commissioner and ALJ Steven Kotz is the assigned ALJ for this proceeding.

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[7] Regarding commencement of the freeze for PG&E's rates generally, *see* D.96-12-077, 70 CPUC2d 207, 220.

Findings of Fact

1. Schedule A-RTP is a "real-time" schedule intended to give electricity users hourly prices signals that reflect PG&E's marginal costs. The schedule is available to a limited number of PG&E's large electric customers who would otherwise receive service under Schedule E-19 or E-20; the latter is the "regular" or "otherwise-applicable" tariff for the Embarcadero Center buildings that are currently managed by Boston Properties and that are the subject of this proceeding.

2. Electric rates under Schedule A-RTP are variable, unlike Schedule E-19 or E-20, which contain rate levels expressed as cents per kWh.

3. In response to § 368(a), enacted in 1996 by AB 1890, PG&E set rate levels for many schedules (including E-19 and E-20) but made only one change to Schedule A-RTP, substituting MCP for SIC in the pricing formula pursuant to Res. E-3510.

4. Had Boston Properties desired to get the rate security provided by § 368(a), Boston Properties could have switched the Embarcadero Center buildings to the otherwise-applicable schedule.

5. The Commission's purpose in Res. E-3510 and the various decisions preceding it was to make all necessary changes, including rate changes, preliminary to the functioning of the new electric industry structure.

Conclusions of Law

1. Read literally, § 368(a) applies only to those tariffs that set rates in cents per kWh, and not to Schedule A-RTP, under which electric rates vary according to a formula.

2. Boston Properties, like other customers that had elected service under Schedule A-RTP, had the option to switch to the otherwise-applicable schedule.

3. Boston Properties' complaint, insofar as it would require the Commission to change Res. E-3510 and the various decisions preceding it, constitutes a collateral attach on those orders, in violation of § 1709.

4. Section 368(a) mandates a rate freeze, and not a cap beneath which the rate in Schedule A-RTP could vary.

5. The creation of a price cap for Schedule A-RTP would violate § 368(a).

6. Freezing the electric rate under Schedule A-RTP at a specific cents per kWh level would be totally at odds with the purpose of that schedule.

7. The Commission, in construing § 368(a), should impute to the Legislature the knowledge that some variable rate schedules, such as Schedule A-RTP, have existed for a considerable time.

8. The rate level to be "set" pursuant to § 368(a) for Schedule A-RTP is not a rate within Schedule A-RTP but rather the rates "shown" in the otherwise-applicable schedules. In setting rate levels for the otherwise-applicable schedules, the Commission accomplished everything it needed to do under § 368(a) for purposes of Schedule A-RTP.

9. No hearing is needed in order to resolve this complaint, nor is a scoping memo necessary.

10. To promptly resolve the uncertainties raised by this complaint, today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint of Boston Properties, Inc., against Pacific Gas and Electric Company is dismissed.

2. Case 00-05-039 is closed.

3. This order is effective today.

   Dated _____, at San Francisco, California.