172 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

City and County of San Francisco Docket No. EL19-38-001

v.

Pacific Gas and Electric Company

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued September 17, 2020)

1. On January 28, 2019, the City and County of San Francisco (San Francisco) filed a complaint (Complaint) pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA)[1] against Pacific Gas and Electric Company (PG&E) alleging that PG&E unreasonably denied service to the San Francisco in violation of its Wholesale Distribution Tariff (WDT), and that it is implementing the WDT in an unjust, unreasonable, and unduly discriminatory manner. On April 16, 2020, the Commission issued an order denying the Complaint.[2]

2. Rehearing has been timely requested of the Complaint Order. Pursuant to *Allegheny Defense Project v. FERC*,[3] San Francisco's rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a)

[1] 16 U.S.C. §§ 824e, 825e, 825h.

[2] *City and Cnty. of San Francisco v. Pac. Gas & Elec. Co.*, 171 FERC ¶ 61,021 (2020) (Complaint Order).

[3] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

of the Federal Power Act (FPA),[4] however, we are modifying the discussion in the Complaint Order and continue to reach the same result in this proceeding, as discussed below.[5]

I. Background

A. Primary and Secondary Service Under the WDT

3. The WDT, which became effective when the California Independent System Operator Corporation (CAISO) assumed operational control of PG&E's transmission facilities on April 1, 1998, contains the rates, terms, and conditions for wholesale distribution service over PG&E's distribution facilities. San Francisco became a WDT customer on July 1, 2015, following the expiration of a bilateral interconnection agreement between PG&E and San Francisco. As relevant here, the WDT provides two different distribution service rates: one rate for interconnection points connected at higher-level "primary voltage," either directly or via dedicated facilities (referred to as primary service); and a second rate for interconnection points connected at a lower "secondary voltage" (referred to as secondary service).[6]

B. The Complaint

4. In its Complaint, San Francisco alleged that PG&E refused to provide it with secondary service for San Francisco's small customers (as well as another form of service, which is termed "primary plus" service).[7] San Francisco alleged that PG&E rejected a substantial portion of San Francisco's applications for secondary service since

[4] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[5] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Complaint Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

[6] Complaint Order, 171 FERC ¶ 61,021 at P 2 (citing Complaint at 8); WDT § 14.2.1.

[7] Complaint Order, 171 FERC ¶ 61,021 at P 3. San Francisco also alleged that under primary plus service, San Francisco would pay the WDT's lower primary service rate, plus cost of ownership charges for any directly assigned facilities owned by PG&E used only to serve San Francisco. San Francisco argued that PG&E has refused to construct or own directly-assigned facilities needed to provide primary plus service. *Id.* P 7.

it began taking service under the WDT on July 1, 2015, including nearly every secondary service application since November 2017 for loads above 75 kW.[8] San Francisco argued that, as a result of PG&E's refusal to provide it with secondary service, San Francisco incurred unnecessary costs and experienced extended delays in receiving WDT service. San Francisco also argued that PG&E's actions violated the FPA and the WDT and were unduly discriminatory and anti-competitive.

C. The Complaint Order

5. In its order denying the Complaint, the Commission found that PG&E had not violated the terms of the WDT and had not unreasonably denied San Francisco wholesale distribution service at secondary voltage levels.[9] The Commission concluded that the record evidence demonstrated that PG&E not only provided secondary service to a number of San Francisco's loads pursuant to the WDT, but also provided variances and accommodations in certain circumstances in connection with loads greater than 75 kW.[10] Having first recognized that primary service is the industry norm for utility-to-utility interconnections, with secondary service being the exception, the Commission concluded that the delays and costs cited by San Francisco in its Complaint were largely a consequence of requesting interconnection for projects with loads greater than what PG&E has normally accepted for secondary service under the WDT.[11] The Commission also was not persuaded by San Francisco's claims that PG&E's treatment of San Francisco was unduly discriminatory or that it violated the filed rate doctrine.[12]

II. Discussion

A. Compliance with Terms and Conditions of the WDT and the Filed Rate Doctrine

1. Rehearing Request

6. San Francisco alleges that the Commission erred in failing to require PG&E to comply with the terms and conditions of the WDT and that its decision is contrary to the filed rate doctrine. According to San Francisco, PG&E informed the Commission that it

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[8] *Id.* P 3.

[9] *Id.* P 35.

[10] *Id.* P 37.

[11] *Id.* PP 37, 39.

[12] *Id.* PP 37, 42.

would not accept requests for secondary service for San Francisco loads greater than 75 kW or evaluate such applications according to the procedures contained in the WDT.[13] San Francisco argues that this practice cannot be squared with the terms and conditions of the WDT, which allow a customer such as San Francisco to request secondary service without referencing any specific thresholds.[14] In San Francisco's view, the WDT does not provide PG&E with discretion to refuse to accept or process completed applications for secondary service. San Francisco argues that PG&E's use of an "unwritten 75 kW standard" for refusing to evaluate secondary service applications violates the filed rate doctrine and is inconsistent with Commission precedent.[15] Specifically, San Francisco discusses the Commission's decision in *Cargill Power Mkts LLC v. Pub. Serv. Co. of New Mexico*[16] for the proposition that the "application of unwritten policies that significantly affect the rates, terms, and conditions of service is a violation of the filed rate doctrine."[17]

7. San Francisco also perceives an inconsistency between the Commission's "conclusion that PG&E should determine whether to provide secondary service based on the exigencies of each case" and PG&E's "practice of categorically requiring primary service for loads above 75 kW."[18] San Francisco insists that, rather than evaluating the circumstances of each application, PG&E has imposed an arbitrary requirement that San Francisco must apply for primary service for loads above 75 kW.[19] According to San Francisco, this practice cannot be reconciled with the Commission's determination that PG&E should have discretion to determine the appropriate level of service based on the status and configuration of its existing wholesale distribution system facilities and the nature and location of the interconnection request.[20]

8. San Francisco argues that the plain language of the WDT requires PG&E to evaluate available capacity and requires PG&E to use reasonable efforts to expand its

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[13] Rehearing Request at 8-9 (citing PG&E May 30, 2019 Answer at 30-31).

[14] *Id.* at 9.

[15] *Id.* at 11-12.

[16] 141 FERC ¶ 61,141 (2012) (*Cargill*).

[17] Rehearing Request at 11-13.

[18] *Id.* at 4, Specification of Error 3(a).

[19] *Id.* at 21.

[20] *Id.* (citing Complaint Order, 171 FERC ¶ 61,021 at P 38).

system to accommodate service requests that cannot be served from existing capacity.[21] While acknowledging that PG&E in a few cases has "belatedly relented" by granting certain secondary service applications for loads above 75 kW, San Francisco contends that this "does not cure PG&E's Tariff violations."[22]

2. Commission Determination

9. We continue to find that PG&E has not violated the terms and conditions of the WDT and sustain our finding in the Complaint Order that PG&E has not unreasonably denied San Francisco wholesale distribution at secondary voltage levels. San Francisco references no provision of the WDT requiring PG&E to accept every completed application for secondary service. The availability of secondary service under the WDT does not provide any guarantee that such service will be granted for all loads, particularly since, as the Commission explained in the Complaint Order, primary service is the "industry norm for utility-to utility interconnections, and secondary service is an exception."[23] Therefore, we conclude that PG&E's initial denial of secondary service requests for loads above 75 kW does not violate the WDT.

10. We continue to find that PG&E has discretion to determine whether to provide primary or a secondary service on a case-by-case basis,[24] and we disagree that PG&E's initial denial of secondary service requests for loads above 75 kW is at odds with that discretion. Moreover, we disagree with San Francisco's characterization of PG&E's practice concerning the initial 75 kW threshold as an "unwritten policy" in violation of the filed rate doctrine. Instead, we view the 75 kW threshold as an initial guidepost to San Francisco for circumstances in which primary service should be expected.[25] While

[21] *Id.* (citing WDT §§ 15, 13.2, 13.4).

[22] *Id.* at 14.

[23] Complaint Order, 171 FERC ¶ 61,021 at P 37. Elsewhere in its rehearing request, San Francisco alleges that the Commission's reliance on an "industry norm," while accurate, is irrelevant due to San Francisco's unique physical configuration. Rehearing Request at 30-32. We disagree. The relevance of an industry norm informs expectations as to the entitlement to secondary service under the WDT. As discussed further herein, we continue to find that secondary service is available as an exception to primary service where PG&E exercises its discretion to grant a customer's application.

[24] *Id.* P 38.

[25] *See* PG&E May 30, 2019 Answer, Hailemichael Decl. ¶ 21 ("[I]f the requested load exceeds 75 kW, PG&E informs [San Francisco] that it will need to take primary service.").

this threshold serves as a means of setting expectations for WDT customers,[26] it does not result in a categorical denial of secondary service. To the contrary, the record includes documentation of multiple occasions where PG&E granted requests for secondary service under the WDT (or provided other accommodations) for San Francisco loads that have exceeded 75 kW.[27] Accordingly, PG&E is not adhering to any "unwritten policy," and we therefore disagree with San Francisco that the situation here is at odds with the Commission's findings in *Cargill.*[28]

B. Undue Discrimination

1. Rehearing Request

11. San Francisco argues that PG&E's "refusal to accept and evaluate" San Francisco's applications for secondary service is contrary to PG&E's treatment of other WDT

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[26] Given these expectations, we conclude that the delays cited in San Francisco's Complaint are an unsurprising consequence of San Francisco's insistence on secondary service for loads above 75 kW. Therefore, we disagree that the Commission erred in finding San Francisco responsible for delays. *See* Rehearing Request at 26, Specification of Error 3(d). As the Commission noted in the Complaint Order, "it is reasonable that secondary service requests [for larger loads] may lead to further negotiations and, consequently, delay." Complaint Order, 171 FERC ¶ 61,021 at P 39.

[27] Complaint Order, 171 FERC ¶ 61,021 at P 37 (citing PG&E Answer at 13-14 (chart detailing where PG&E has provided secondary service and low-side metering for a number of San Francisco interconnections that were greater than 75 kW)). Contrary to San Francisco's arguments elsewhere in its rehearing request, this record evidence also includes examples of variances and accommodations that occurred after November 2017. *See* Rehearing Request at 26 (alleging that the Commission erred in relying on examples of PG&E providing secondary service and other accommodations prior to November 2017).

[28] We also disagree that the Complaint Order is at odds with the Commission's recent decision in *Pacific Gas & Electric Co.*, 171 FERC ¶ 61,014 (2020), as San Francisco argues in its rehearing request. *See* Rehearing Request at 14. That case involved a WDT dispute concerning Reserved Capacity, which is defined under § 2.34 of the WDT as "[t]he maximum amount of capacity and energy that the Distribution Provider agrees to transmit for the Distribution Customer over the Distribution Provider's Distribution System between the Point(s) of Receipt and the Point(s) of Delivery under this Tariff." The outcome of that proceeding has no bearing on the instant case, where the dispute is specific to primary and secondary service requests without any discussion of Reserved Capacity.

customers and to PG&E's own use of its distribution system.[29] Consequently, San Francisco maintains that PG&E's administration of the WDT with respect to San Francisco is unduly discriminatory and violates the principle of comparability.[30] According to San Francisco, PG&E "does not appear to have required" either Western Area Power Administration (Western) or Water Resources Pooling Authority (Pooling Authority) to apply for primary service for all loads above 75 kW.[31] San Francisco also states that PG&E's treatment of San Francisco's applications for secondary service is "dramatically different" from how PG&E uses its distribution system to serve itself because, instead of a 75 kW threshold, PG&E requires primary interconnections for service to its own retail customers only for loads above 3,000 kW.[32]

2. Commission Determination

12. We are unpersuaded by San Francisco's rehearing arguments on this issue and sustain the Commission's finding that, based on the record, PG&E has not treated San Francisco in an unduly discriminatory manner.[33] San Francisco cites Western and Pooling Authority as two customers who have received secondary service for loads above 75 kW. In the Complaint Order, the Commission found that San Francisco failed to demonstrate that San Francisco and its customers are similarly situated to Western because Western's service resulted from a settlement,[34] while noting that Pooling Authority – which also receives WDT service as part of a settlement – "has not been

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[29] Rehearing Request at 15.

[30] *Id.* (citing 16 U.S.C. § 824e(a); *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, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *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), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) (summarizing the Commission's comparability standard)).

[31] *Id.* at 16.

[32] *Id.* at 19.

[33] Complaint Order, 171 FERC ¶ 61,021 at PP 35, 40, 42 n.90.

[34] *Id.* P 42.

found to be an eligible WDT customer."[35] Even putting aside the settlement agreements, San Francisco's argument fails because it rests on the inaccurate premise that PG&E requires San Francisco to take primary service for loads larger than 75 kW but does not impose this same requirement on Western.[36] As discussed in the Complaint Order and above, the record contains examples where San Francisco has in fact received secondary service for loads above 75 kW, as may also be the case for Western and Pooling Authority. As such, San Francisco has failed to demonstrate that there is, in fact, discriminatory treatment.

13. San Francisco's argument concerning PG&E's treatment of PG&E's own retail customers is similarly unpersuasive. While acknowledging the finding from the Complaint Order[37] that PG&E's retail rules do not apply to WDT service,[38] San Francisco maintains that "this does not mean that this evidence of disparate treatment is irrelevant to San Francisco's claim of undue discrimination."[39] San Francisco's mere assertion of relevance, without more, is not sufficient to satisfy San Francisco's section 206 burden of proof on the undue discrimination claim, and San Francisco has not explained why it would be appropriate and feasible to extend PG&E's retail tariff requirements to the WDT.

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[35] *Id.* nn.79 & 94.

[36] Rehearing Request at 17. Specifically, San Francisco states that "PG&E has not identified—and the Order does not point to—any operational differences between San Francisco and Western (or the Pooling Authority) that would make it appropriate for PG&E to require San Francisco to take secondary service for loads larger than 75 kW, but not impose this same requirement on Western." *Id*. We presume that the reference to "secondary service" in this context was a typographical error and that San Francisco was referring instead to the requirement to take primary service for loads larger than 75 kW.

[37] Complaint Order, 171 FERC ¶ 61,021 at P 38 ("Although San Francisco suggests that PG&E could accommodate secondary service for loads of up to 3,000 kW, as it does for retail customers under Electric Rule No. 2 in its retail tariff, we find that Electric Rule No. 2 is a retail-level standard that is not necessarily congruent with the requirements of interconnecting wholesale customers such as San Francisco").

[38] Rehearing Request at 19 ("As the Order recognizes, San Francisco is not claiming that PG&E's retail rules apply to WDT service.").

[39] *Id.*

C. Anti-Competitive Effects

1. Rehearing Request

14. San Francisco argues that the Commission "entirely fail[ed] to address" the allegedly anti-competitive effects resulting from PG&E's administration of the WDT.[40] San Francisco asserts that Congress intended for the Commission to consider and regulate anti-competitive actions, adding that the courts have found that under section 205 and 206 of the FPA, the Commission has an obligation to consider anti-competitive effects.[41] Noting that San Francisco and PG&E have overlapping service territories and compete to serve retail customers within that area, San Francisco maintains that "anti-competitive concerns are at the heart of this case."[42] San Francisco characterizes PG&E's "insistence on primary service" as an "anti-competitive attempt to use its position as administrator of an open access tariff to make it impossible for San Francisco to provide service even to City departments—let alone to compete with PG&E for private customers on a level playing field."[43]

2. Commission Determination

15. Contrary to San Francisco's argument on rehearing, the Commission evaluated and dismissed San Francisco's allegations of specific anti-competitive behavior on the part of PG&E.[44] Furthermore, as San Francisco notes in its rehearing request, the WDT, when properly implemented, "should alleviate concerns about PG&E's dual role as both a competitor of San Francisco and a provider of wholesale distribution service to San Francisco, by defining the rates, terms, and conditions for nondiscriminatory access to PG&E's distribution facilities."[45] Given the Commission's finding in the Complaint

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[40] *Id.* at 35.

[41] *Id.* (citing *Gulf States Utils,* 411 U.S. 747, 758-59 (1973)).

[42] *Id.* at 36.

[43] *Id.* at 4.

[44] Complaint Order, 171 FERC ¶ 61,021 at P 40 ("with respect to San Francisco's argument that it lost a retail customer to PG&E as a result of PG&E's delays, we find that PG&E's response that some San Francisco customers have taken retail temporary construction power service under PG&E's retail tariff is reasonable and does not show that San Francisco 'lost' a customer to PG&E").

[45] Rehearing Request at 36.

Order, as sustained here on rehearing, that PG&E has properly implemented its WDT, we find that San Francisco's allegations of anti-competitive harm are without merit.

D. Request for Evidentiary Hearing

16. San Francisco urges the Commission to set this proceeding for hearing to further develop the record and resolve genuine issues of material fact. However, San Francisco fails to identify any particular factual issues that require further development other than its assertion that "the Commission ignored the most important piece of evidence in this case: PG&E's admission that it simply refuses to accept or process San Francisco's application for secondary service. . ." We address this issue above in full and disagree that there are any outstanding issues of material fact that would warrant an evidentiary hearing. Moreover, we note that the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion.[46]

The Commission orders:

In response to San Francisco's request for rehearing, the Complaint Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[46] *Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C. Cir. 2010) (choice to hold an evidentiary hearing is generally discretionary); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (evidentiary hearing not required where disputed issues may be adequately resolved on the written record); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (mere allegations of disputed fact are insufficient to mandate a hearing).