181 FERC ¶ 61,222
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

City and County of San Francisco v. Pacific Gas and Electric Company — Docket No. EL19-38-002

ORDER ON REMAND AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 15, 2022)

1. On January 25, 2022, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision[1] vacating and remanding Commission orders issued in 2020 denying a complaint filed by the City and County of San Francisco (San Francisco) concerning Pacific Gas and Electric Company's (PG&E) provision of wholesale distribution service to San Francisco (Voltage Orders).[2] At issue on remand is whether PG&E unreasonably denied San Francisco's requests for secondary voltage distribution service (secondary service) for customers requesting service for loads above 75 kilowatts (kW) under the Wholesale Distribution Tariff (WDT).[3] The D.C. Circuit

[1] *City & Cty. of San Francisco v. FERC*, 24 F.4th 652 (D.C. Cir. 2022) (*San Francisco v. FERC*).

[2] The "Voltage Orders" are *City & Cty. of San Francisco v. Pac. Gas & Elec. Co.*, 171 FERC ¶ 61,021 (Order on Complaint), *order denying reh'g*, 172 FERC ¶ 61,237 (2020) (Rehearing Order). The D.C. Circuit also vacated and remanded a separate set of Commission orders that denied San Francisco's complaint against PG&E regarding the denial of grandfathered WDT service to San Francisco customers. These orders—termed the "Grandfathering Orders" by the court—were consolidated with San Francisco's appeal of the Voltage Orders. The remanded Grandfathering Orders were addressed in the Commission's October 20, 2022 order in Docket Nos. EL15-3-004 and ER15-704-026. *City & Cty. of San Francisco v. Pac. Gas & Elec. Co.*, 181 FERC ¶ 61,036 (2022).

[3] Unless otherwise indicated, "WDT" refers to the version of PG&E's Wholesale Distribution Tariff in effect at the time San Francisco's complaint was filed. As discussed below, PG&E submitted proposed revisions to the WDT as part of its 2021 WDT rate case, which, among other things, eliminated secondary service as a service

rejected the Commission's argument that the 75 kW threshold serves as an initial guidepost and is not required to be part of the WDT because, as the court explained, the Commission had not "adequately explained any operational or engineering rationale justifying PG&E's 75 kW 'guidepost.'"[4] The court also found that the "rule of reason" requires the PG&E guidepost[5] to be stated in the WDT.[6]

2. As discussed below, based on reexamination of the record and the court's direction on remand, we determine that PG&E's WDT has not been shown to be just and reasonable, and may be unjust, unreasonable, or unduly discriminatory or preferential. Accordingly, we grant San Francisco's complaint, finding that it has demonstrated that PG&E's criteria for determining whether a WDT customer's point of delivery should be required to take primary service must be part of the WDT. We also find that the complaint raises issues of material fact that cannot be resolved on the existing record and, accordingly, we set this matter for hearing and settlement judge procedures, as discussed herein.

I. Background

A. The Voltage Orders

3. The WDT, which became effective when the California Independent System Operator Corporation 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, and a second rate for interconnection points connected at a lower "secondary voltage."[7] Primary service comes with higher fixed costs, but lower service rates, while secondary service has lower fixed costs, but higher service rates. The WDT also provides for "primary plus service," a hybrid approach that

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category. This filing was accepted, suspended for five months, effective April 15, 2021, and set for hearing and settlement judge procedures in Docket No. ER20-2878-000.

[4] *San Francisco v. FERC*, 24 F.4th at 661.

[5] Throughout these proceedings, the terms "threshold" and "guidepost" are used to describe the kilowatt demarcation between primary service and secondary service.

[6] *San Francisco v. FERC*, 24 F.4th at 661.

[7] PG&E, WDT, § 11 Service Availability (0.0.0).

offers the secondary service rate plus cost of ownership charges for direct assignment facilities.[8]

4. On January 28, 2019, San Francisco filed a complaint in Docket No. EL19-38-000 pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA).[9] San Francisco alleged that since it became a WDT customer in 2015, PG&E has refused to provide San Francisco secondary and primary plus service to small loads at new interconnection points, forcing those customers to take on more financially burdensome primary service instead. San Francisco alleged that PG&E denied secondary and primary plus service to San Francisco's new and modified delivery points unless the total electricity load was less than 75 kW—a threshold not stated in the WDT—while simultaneously granting secondary service to much larger loads for its own retail customers and other wholesale customers, such as Western Area Power Administration (Western).[10] San Francisco argued that PG&E's denial of secondary service for relatively small loads above 75 kW lacked any technical, safety, or reliability justification.[11]

5. San Francisco also alleged that PG&E's repeated initial denials of secondary service, unreasonable metering and switchgear requirements, and lengthy site-specific negotiations "imposed undue burdens and costs on San Francisco," all of which San Francisco argued are improper obstacles to it taking WDT service.[12] Even where secondary service may have been inappropriate, San Francisco argued that it should have been offered primary plus service, which San Francisco asserts PG&E provides to other WDT customers.[13] San Francisco requested that the Commission order PG&E to: (1) end its improper categorical denial of secondary service to loads above 75 kW, and (2) refund the excess costs San Francisco incurred to comply with improper requirements that PG&E imposed as a condition of receiving service.[14]

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[8] San Francisco Complaint, Ex. 1 (Declaration of Barbara Hale) at 3.

[9] 16 U.S.C. §§ 824e, 825e, 825h.

[10] *San Francisco v. FERC*, 24 F.4th at 656; San Francisco Complaint at 10, 21, Ex. 2 (Maslowski Declaration) at 27.

[11] San Francisco Complaint at 11.

[12] *San Francisco v. FERC*, 24 F.4th at 656 (citing San Francisco Complaint at 31-32).

[13] *Id.* (citing San Francisco Complaint at 16).

[14] San Francisco Complaint at 33-37.

6. PG&E filed an answer, arguing that the premise of San Francisco's complaint was based on incorrect facts and ignored technical, safety, reliability, and operational concerns that PG&E as the service provider must consider.[15] PG&E argued that San Francisco, as the distribution customer, was attempting to dictate the level of service to its loads, which PG&E said was "absurd" because PG&E must retain the discretion to determine what level of service is both appropriate and available, based upon the status and configuration of its existing distribution system facilities and the nature and location of the interconnection request.[16] PG&E explained that it believed that a wholesale electric utility like San Francisco should take wholesale service at primary voltage unless there is a reason that it is not possible or practicable.[17] In support, PG&E stated that the industry standard for utility-to-utility interconnection is at primary voltage. PG&E countered that it has tried to accommodate San Francisco's numerous requests for interconnection under the WDT in accordance with San Francisco's preferences.[18] However, PG&E asserted that the focus should not be on what type of service San Francisco prefers, but on whether PG&E's implementation of the terms of the WDT are just and reasonable and not unduly discriminatory.

7. The Commission denied San Francisco's complaint, first noting that the industry standard for utility-to-utility interconnections was primary service, not secondary service.[19] Further, the Commission found that PG&E, as the distribution service provider, should retain discretion to determine the appropriate service level for customers to ensure the safety and reliability of the distribution system.[20] Among other things, the Commission concluded that PG&E's unwritten 75 kW threshold did not need to be part of the WDT under the rule of reason, and noted that PG&E had applied the 75 kW threshold flexibly to San Francisco's benefit in many cases.[21] The Commission also distinguished PG&E's treatment of San Francisco with its treatment of Western, noting that PG&E and Western had entered into a settlement agreement under which PG&E

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[15] PG&E Answer at 5, 15-17.

[16] *Id.* at 6.

[17] *Id.* at 8.

[18] *Id.* at 15.

[19] Order on Complaint, 171 FERC ¶ 61,021 at P 37.

[20] *Id.* P 38.

[21] *Id.* P 43 & n.96.

would provide Western with secondary service, whereas PG&E and San Francisco had no such agreement.[22]

8. Thereafter, the Commission denied San Francisco's request for rehearing, concluding that PG&E had not violated the terms and conditions of the WDT and that PG&E has discretion to determine whether to provide primary or secondary service on a case-by-case basis.[23] The Commission also rejected San Francisco's arguments that PG&E treated it in an unduly discriminatory manner. The Commission concluded that the record contained examples where San Francisco had received secondary service for loads above 75 kW, contrary to San Francisco's assertions that PG&E was denying such service to San Francisco, but granting it to other customers.[24] Finally, the Commission disagreed with San Francisco's argument that it was subject to anti-competitive effects resulting from PG&E's improper administration of the WDT. The Commission ruled that PG&E had properly implemented the WDT and, therefore, found no merit to San Francisco's allegations of anti-competitive harm.[25]

B. D.C. Circuit Remand and Vacatur

9. San Francisco appealed the Voltage Orders to the D.C. Circuit, which held that the Voltage Orders were arbitrary and capricious because the Commission had failed to engage in reasoned and principled decision-making, providing only '"passing reference to relevant factors' such as safety and reliability, without a deeper examination of 'the challenges for PG&E . . . with respect to San Francisco's requests for secondary service.'"[26] The court also concluded that the Commission did not provide sufficient justification for why San Francisco should be held to industry norms for the use of

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[22] *Id.* P 42. The court in *San Francisco v. FERC* concluded that the Commission appropriately distinguished San Francisco's situation from Western's situation, pointing to the Commission's explanation that Western was provided secondary service pursuant to the terms of a settlement agreement. *San Francisco v. FERC*, 24 F.4th at 659.

[23] Rehearing Order, 172 FERC ¶ 61,237 at PP 9-10.

[24] *Id*. P 12.

[25] *Id*. P 15.

[26] *San Francisco v. FERC*, 24 F.4th at 658 (quoting *Mo. Pub. Serv. Comm'n v. FERC*, 234 F.3d. 36, 41 (D.C. Cir. 2000)).

primary voltage for utility-to-utility interconnection when San Francisco's geographic configuration differs from that of other utilities.[27]

10. In response to San Francisco's contention that the Commission had not adequately met its mandate to prevent undue discrimination with respect to retail service, the court concluded that the Commission had not met its burden of reasoned decision-making, observing that PG&E had provided temporary retail construction power service to San Francisco's customers as the parties were negotiating wholesale service.[28] The court also held that the Commission failed to adequately explain why San Francisco is not similarly situated to PG&E retail customers that receive secondary service, stating that the Commission's explanation that there may be differences between wholesale and retail customers warranting different voltage levels was insufficient.[29]

11. The court also held that PG&E's unofficial 75 kW threshold for secondary service violated the filed rate doctrine.[30] The court explained that even if 75 kW is a guidepost, "that kind of numerical threshold is the type of requirement that the 'rule of reason' requires be stated in the [WDT], as a numerical threshold is 'realistically susceptible of specification,'"[31] and that "PG&E's policy significantly 'affect[s] rates and service' because it affects which voltage level San Francisco may receive, and different voltages have different rates."[32] While the court acknowledged that primary voltage may be the industry norm for utility-to-utility interconnections, and that PG&E should have discretion to provide secondary service on a case-by case basis, the court concluded that the Commission did not explain why these factors exempt the voltage guidepost from specification in the WDT under the "rule of reason."[33] The court held that the Commission had not adequately explained any operational or engineering rationale to justify PG&E's guidepost nor why that guidepost did not need to be in the filed WDT.

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[27] *Id.*

[28] *Id.* at 660.

[29] *Id.* at 659.

[30] *Id.* at 661.

[31] *Id.* (quoting *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007)).

[32] *Id.* (quoting *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d at 811).

[33] *Id.*

The court vacated the Voltage Orders and remanded this matter to the Commission for further proceedings.[34]

C. WDT Proceeding in Docket No. ER20-2878

12. In the 2021 WDT rate case, PG&E proposed to migrate its ratemaking approach from a stated rate to a formula rate. PG&E also proposed additional revisions to its WDT to limit new wholesale distribution service to primary voltage only[35] and proposed revisions to each service agreement under the WDT. San Francisco objected to the limitation in the revised WDT, arguing that the limitation would impede the deployment of distributed energy resources and asserting that PG&E had not demonstrated any safety or reliability risks arising from providing secondary voltage distribution service. The Commission accepted and suspended for five months PG&E's proposed formula rate and revisions to the WDT, effective April 15, 2021, subject to refund, and established hearing and settlement judge procedures.[36] PG&E subsequently filed, and the Commission approved, two uncontested settlements resolving certain rate-related issues.[37] The second partial settlement provided that unresolved issues, including the elimination of secondary service and the treatment of "legacy" secondary points of delivery, would be addressed at hearing.[38] The hearing is ongoing.

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[34] *Id.* at 661.

[35] Section 1.2 (Applicability) of the WDT was revised to state:

> No new Distribution Service or Distribution Service to additional Point(s) of Receipt or Delivery will be provided at secondary voltage under this Tariff. However, existing Points of Receipt and Points of Delivery that were receiving wholesale distribution service at secondary voltage on the day prior to the Effective Date of this Tariff (Legacy Secondary) can continue to receive secondary voltage service provided that there is no change to such service as described in Section 10.1.1.

[36] *Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,140 (2020).

[37] *Pac. Gas & Elec. Co.*, 176 FERC ¶ 61,012 (2021); *Pac. Gas & Elec. Co.*, 179 FERC ¶ 61,167 (2022).

[38] PG&E Offer of Partial Settlement and Stipulation, Docket No. ER20-2878-013 at § 2.3 (filed Mar. 31, 2022).

II. Discussion

13. As discussed below, on reexamination of the record and relevant Commission precedent in light of the D.C. Circuit's directions on remand, we reach the following conclusions. First, we find that PG&E's application of an unofficial and unwritten 75 kW threshold for providing secondary service for San Francisco customers violates the filed rate doctrine, and that the criteria by which PG&E determines service level must be included in its WDT. Second, we conclude that there is insufficient support in the record for the Commission to find that a 75 kW threshold is just and reasonable and not unduly discriminatory or preferential, and that the record needs to be further developed to determine the just and reasonable and not unduly discriminatory or preferential criteria for determining when primary service is required under the WDT. We therefore grant San Francisco's complaint and set this matter for hearing and settlement judge procedures.

14. The filed-rate doctrine states that "utilities are forbidden to charge any rate other than the one on file with the Commission,"[39] and extends to utility practices that affect rates and service.[40] Relatedly, the rule of reason requires public utilities to file for Commission approval "practices that affect rates and service significantly, that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous."[41] The Commission had previously determined that the 75 kW threshold did not need to be included in the WDT because the Commission viewed the threshold as an "initial guidepost for which primary service can be expected," noting that the record includes documentation of multiple occasions where PG&E granted requests for secondary service exceeding 75 kW.[42] The D.C. Circuit rejected that argument, concluding that even as a "guidepost" the 75 kW threshold is "the kind of numerical threshold that the 'rule of reason' requires to be stated in the [WDT]."[43] Given the court's direction on remand, we find that under the rule of reason PG&E must include in the WDT the thresholds and other criteria used to determine whether a customer receives primary, primary plus, or secondary service.

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[39] *West Deptford Energy LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014).

[40] *San Francisco v. FERC*, 24 F.4th at 661.

[41] *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d at 811 (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)).

[42] Rehearing Order, 172 FERC ¶ 61,237 at P 10.

[43] *San Francisco v. FERC*, 24 F.4th at 661.

15. We also find that the existing record does not show that PG&E's 75 kW guidepost is a just and reasonable and not unduly discriminatory or preferential threshold for determining which points of delivery should receive primary service and which should receive secondary service or primary plus service under the WDT. For example, while we recognize that the WDT serves a different purpose and applies to different customers than PG&E's retail tariff, and while that retail tariff is not subject to the Commission's jurisdiction, PG&E has not sufficiently explained why the 3,000 kW threshold it applies in the retail context is not appropriate for determining the type of wholesale distribution service available to a point of delivery under the WDT. Even if a 3,000 kW threshold is not the appropriate threshold for determining the type of wholesale distribution service available to a point of delivery under the WDT, the record does not indicate why there is such a significant gap between the 3,000 kW threshold that PG&E uses for its own retail customers and the 75 kW guidepost it applies in the WDT context.

16. At the same time, it is not clear that a kW threshold by itself is sufficient – or even necessary – to determine whether a particular point of delivery should be served using primary, secondary, or primary plus service. For example, it is unclear whether specified reliability, safety, or operational criteria should be considered by themselves or in conjunction with a kW threshold to determine the appropriate type of service for a delivery point under the WDT, or whether different kW thresholds or criteria should be considered for different types of points of delivery, depending on location, electric topology, or the criticality of the load.

17. For these reasons, we find that San Francisco has demonstrated that the WDT must include the specific criteria that PG&E uses to determine whether a wholesale distribution service customer is eligible to receive primary, primary plus, or secondary service at a requested point of delivery. We also find that the complaint raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. As discussed above, we find that these issues of material fact include the specification of the criteria, including any voltage thresholds, that PG&E uses to determine the appropriate type of wholesale distribution service for a requested point of delivery under the WDT. In addition, the hearing should explore what specific San Francisco points of delivery, if any, that were provided primary service should have been provided secondary service or primary plus service during the locked-in period from the date of the complaint until the revised WDT became effective, as well as the appropriate amount of refunds owed to San Francisco as a result.[44]

[44] As noted above, PG&E filed revisions to the WDT eliminating secondary service as a service category, which the Commission accepted and suspended effective April 15, 2021, pending the outcome of ongoing hearing and settlement procedures in Docket No. ER20-2878. The provisions of the WDT at issue in this matter are thus no

18. While we are setting these matters for a trial-type evidentiary hearing,[45] we encourage efforts to reach settlement before hearing procedures commence. To aid settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[46] If parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.[47] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide additional time to continue settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

19. Section 206(b) of the FPA provides that upon the filing of a complaint, the Commission must establish a refund effective date that is no earlier than the date of the complaint and no later than five months subsequent to the date of the complaint. In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we do so here as well.[48] That date is January 28, 2019, the date of the complaint.[49]

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longer in effect. Accordingly, the hearing and settlement judge procedures ordered herein will address the locked-in period from January 28, 2019, the date of the complaint, until April 15, 2021.

[45] Trial Staff is a participant in the hearing and settlement judge procedures. *See* 18 C.F.R. § 385.102(b), (c) (2021).

[46] 18 C.F.R. § 385.603.

[47] If parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience. (https://www.ferc.gov/available-settlement-judges).

[48] *See, e.g.*, *Idaho Power Co*., 145 FERC ¶ 61,122 (2013); *Canal Elec. Co*., 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

[49] In its complaint, San Francisco invokes FPA section 309, which does not contain the time limits imposed in section 206, in support of its argument that PG&E should be "required to refund the excess costs [San Francisco] has incurred to comply with the improper interconnection, metering, and switchgear requirements that PG&E

20. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. As we are setting the section 206 proceeding in Docket No. EL19-38-002 for hearing and settlement procedures, we expect that, if the proceeding does not settle, we would be able to render a decision within eight months of the date of filing of briefs opposing exceptions to the Initial Decision. Thus, if the Presiding Judge were to issue an Initial Decision by October 31, 2023, we expect that, if the proceeding does not settle, we would be able to render a decision by August 31, 2024.

The Commission orders:

(A) San Francisco's complaint is hereby granted, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the issues identified in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2021), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within 45 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(D) Within 60 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide participants with additional time to continue their settlement discussions, if appropriate, or assign this

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imposed as a condition of San Francisco receiving service." San Francisco Complaint at 36. We are not persuaded to depart in this proceeding from the Commission's usual practice of establishing a refund effective date at the earliest date permissible under section 206(b).

case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of participants' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 45 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426, or remotely (by telephone or electronically), as appropriate. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The refund effective date established pursuant to section 206(b) of the FPA is January 28, 2019, as discussed in the body of this order.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

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