181 FERC ¶ 61,036
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 Docket Nos. EL15-3-004

v.

Pacific Gas and Electric Company

Pacific Gas and Electric Company ER15-704-026

ORDER ON REMAND

(Issued October 20, 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 2019 and 2020 that accepted a Pacific Gas and Electric Company (PG&E) 2014 filing pursuant to section 205 of the Federal Power Act (FPA)[2] transitioning certain San Francisco loads to service under PG&E's Wholesale Distribution Tariff (WDT) and denied the City and County of San Francisco's (San Francisco) related 2014 complaint (Grandfathering Orders).[3] At issue on remand is whether a reference to section 212(h)(2) of the FPA[4] in the WDT's customer eligibility provision to determine which customers would be "grandfathered," and thus not

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

[2] 16 U.S.C. § 824d.

[3] The Grandfathering Orders are *City & Cty. of San Francisco v. Pac. Gas & Elec. Co.*, Opinion No. 568, 169 FERC ¶ 61,128 (2019), *order on reh'g*, 171 FERC ¶ 61,196 (2020) (Rehearing Order). As discussed below, Opinion No. 568 addressed an initial decision in these proceedings. *City and Cty. of San Francisco v. Pac. Gas & Elec. Co.*, 157 FERC ¶ 63,021 (2016) (Initial Decision).

[4] 16 U.S.C. § 824k(2).

responsible for demonstrating ownership or control of certain types of facilities, should be construed consistent with Commission precedent interpreting section 212(h)(2).[5] The D.C. Circuit rejected the Commission's argument that section 212(h)(2) precedent was inapposite in the context of section 205 and 206 proceedings because, as the court explained, the WDT itself "expressly references the criteria of section 212(h)(2)."[6]

2. As discussed below, on reexamination of the record and the *Suffolk County* line of precedent interpreting section 212(h)(2)[7] in light of the court's directions on remand, we determine that San Francisco's customer class-based interpretation of the WDT's reference to section 212(h)(2) is consistent with that precedent and applies in this case. Therefore, we conclude that San Francisco's loads within the customer classes served on October 24, 1992, are entitled to grandfathered service under the WDT. Accordingly, we grant the complaint filed by San Francisco and direct PG&E to submit revised WDT provisions, as discussed herein.

I. Background

A. Case History

3. On October 7, 2014, San Francisco filed a complaint against PG&E under FPA sections 206 and 306,[8] alleging that, upon expiration of a 1987 interconnection agreement between the parties (1987 Interconnection Agreement), PG&E would unreasonably deny service to San Francisco under the WDT. On December 23, 2014, PG&E filed, pursuant to section 205, notices of termination relating to the 1987 Interconnection Agreement, which expired by its terms on June 30, 2015, as well as a series of replacement agreements to provide interconnection and wholesale distribution service to San

[5] The D.C. Circuit also vacated and remanded a separate set of Commission Orders in Docket No. EL19-38-000 that denied San Francisco's complaint against PG&E regarding the provision of "primary" voltage service to San Francisco. These orders—termed the "Voltage Orders" by the court—were consolidated with San Francisco's appeal of the Grandfathering Orders. The remanded Voltage Orders will be addressed in a future order.

[6] *San Francisco*, 24 F.4th at 664.

[7] *Suffolk Cty. Elec. Agency I*, 77 FERC ¶ 61,355 (1996) (*Suffolk County I*); *Suffolk Cty. Elec. Agency II*, 96 FERC ¶ 61,349 (2001) (*Suffolk County II*); *Suffolk Cty. Elec. Agency III,* 102 FERC ¶ 63,037 (2003)*; Suffolk Cty. Elec. Agency IV,* Opinion No. 467-A, 108 FERC ¶ 61,173 (2004) (*Suffolk County IV*) (together, *Suffolk County*).

[8] 16 U.S.C. §§ 824e, 825e.

Francisco, including the Service Agreement for Wholesale Distribution Service (WDT SA), effective July 1, 2015.

4. On March 31, 2015, in Docket No. ER13-1188-000, *et seq.*, PG&E filed an uncontested settlement (WDT Settlement) addressing the non-rate terms and conditions associated with PG&E's WDT rate case. As relevant here, pursuant to the WDT Settlement, section 14.2 of the WDT (Intervening Facilities Requirements) was modified to require eligible customers (e.g., San Francisco) seeking service under the WDT "to demonstrate bona fide ownership or control of the Intervening Distribution Facilities" unless they meet "the criteria for grandfathering in [section 212(h)(2)]," in which case the applicant must provide evidence demonstrating that the criteria are met for each point of delivery for which it claims eligibility for grandfathering.[9] The Commission approved the WDT Settlement on July 1, 2015.[10]

5. On March 31, 2015, the Commission set San Francisco's complaint for hearing and settlement judge procedures, accepted and suspended the notices of termination and replacement agreements, and consolidated the proceedings.[11] The Commission subsequently denied San Francisco's request for rehearing but granted PG&E's request for a limited waiver of certain provisions of the WDT and replacement agreements in order to provide certainty to San Francisco that its customers would continue to be served under the WDT without the risk of conversion to PG&E retail service or the burden of demonstrating ownership or control of intervening facilities.[12]

6. On November 15, 2016, following a hearing, the presiding Administrative Law Judge (Presiding Judge) issued the Initial Decision. The Initial Decision, in relevant part, concluded that the Commission's precedent addressing section 212 substantially supported San Francisco's argument that the grandfathering provision under section 212(h)(2)(B) applies to the class of customers, specifically, municipal load customers per San Francisco's obligations under the Raker Act, that were eligible to

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[9] PG&E, WDT, § 14.2 (Intervening Facilities Requirements) (0.0.0). Section 14.2.1 lists required Intervening Distribution Facilities as a Disconnect Switch, a Protective Device, and a Conductor, Wire, or Service Drop. Additionally, a Pole and a Transformer are required in certain circumstances. *Id.*

[10] *Pac. Gas & Elec. Co.*, 152 FERC ¶ 61,010 (2015).

[11] Hearing Order, 150 FERC ¶ 61,255 (2015).

[12] *City & Cty. of San Francisco v. Pac. Gas & Elec. Co.*, 151 FERC ¶ 61,274 (2015). The Commission later explained that the waiver ended on June 4, 2020, which was the date of the final Commission order prior to San Francisco's appeal. Rehearing Order, 171 FERC ¶ 61,196 at n.12.

receive wholesale distribution service on October 24, 1992, regardless of where in the City those customers may be located now or in the future.[13]

7. The Commission thereafter issued the Grandfathering Orders, declining to adopt the analysis of the Initial Decision, and concluding that PG&E's filing of the WDT SA was just and reasonable and not unduly discriminatory or preferential. In relevant part, the Commission, in the Grandfathering Orders, found that the *Suffolk County* precedent interpreting section 212(h) was inapplicable because neither PG&E's WDT filing nor San Francisco's complaint was an application under FPA section 210 or 211[14] and, accordingly, the Commission did not interpret or apply the *Suffolk County* precedent to the facts of the case.[15] In Opinion No. 568, the Commission explained that San Francisco's "class of customer" approach would entitle all municipal public purpose load as designated by San Francisco that was eligible to receive wholesale distribution service on October 24, 1992 (i.e., all of San Francisco's distribution loads that took service under the 1987 Interconnection Agreement) to WDT service.[16] Ultimately, the Commission concluded in Opinion No. 568 that PG&E's point of delivery approach to determining which San Francisco customers qualify for service under the WDT was just and reasonable.[17]

8. Following issuance of Opinion No. 568, the Commission addressed discrete issues with respect to the WDT SA and related agreements on compliance. Notably, PG&E proposed to revise certain appendices in the WDT SA to reclassify 687 points of delivery as a result of a prior settlement regarding a metering variance reached among the parties. As a result, 687 points of delivery were recategorized as WDT Qualified Load.[18] The Commission directed PG&E to undertake a data reconciliation process with San Francisco to determine whether and, if so, which, points of delivery should be

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[13] Initial Decision, 157 FERC ¶ 63,021 at P 137.

[14] Section 210 authorizes the Commission, under certain circumstances, to direct interconnection, and applies to both public and non-public utilities. 16 U.S.C. § 824i. Section 211 authorizes the Commission, under certain circumstances, to direct transmission, and applies to both public and non-public utilities. *Id.* § 824j.

[15] Opinion No. 568, 169 FERC ¶ 61,128 at P 67.

[16] *Id.* P 39.

[17] *Id*. P 68. The Grandfathering Orders also addressed other discrete disagreements between the parties that were not the subject of the appeal.

[18] *Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,218, at P 52 (2020).

reclassified as "Muni Load" or "Non-Muni Load" under the WDT SA.[19] PG&E submitted a compliance filing stating that it worked with San Francisco, with the assistance of the Commission's Dispute Resolution Service (DRS), and that the parties reached consensus on reclassifying 53 points of delivery as satisfying the "Muni Load" criteria in the WDT SA.[20] PG&E submitted a subsequent filing that stated that the parties agreed to reclassify 52 points of delivery as WDT Qualified Load under the WDT SA, so long as San Francisco continued to own the buildings and associated equipment in question. PG&E stated that "[t]his variance and accommodation is non-precedential and will not be applied to any other delivery points, including [San Francisco] delivery points that were interconnected under the WDT without Intervening Facilities after July 1, 2015 pursuant to PG&E's Intervening Facilities waiver that [the Commission] approved on June 30, 2015 and that expired on June 4, 2020."[21] PG&E also noted that San Francisco did not agree that these points of delivery required a variance to meet the WDT's intervening facilities requirement, but agreed with PG&E's reclassification of these points in an effort to resolve the dispute. Finally, PG&E explained that the parties continued to disagree about the WDT's intervening facilities requirement and that the proposed reclassification would not prejudice the parties' positions in other proceedings.[22] These uncontested compliance filings were accepted via delegated letter order.[23]

B. Positions of the Parties

9. San Francisco contends that PG&E must provide WDT Qualified service to all of its load that qualifies for grandfathering pursuant to section 212(h), referencing the *Suffolk County* precedent, which it asserts interpreted the eligible customer provision of section 212(h) as "*all potential* retail customers within the class [the municipality] had

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[19] *Id.* PP 45-47. We note that the term "Muni Load" is used to refer to municipal load.

[20] PG&E Compliance Filing, Docket No. ER15-704-019, at 3 (filed Feb. 8, 2021).

[21] PG&E Compliance Filing, Docket No. ER15-704-022, at 3 (filed Mar. 15, 2021).

[22] PG&E stated in this filing that the parties had also determined one additional delivery point satisfied the WDT SA eligibility criteria for "Muni Load."

[23] *Pac. Gas & Elec. Co.*, Docket No. ER15-704-019 (Oct. 15, 2021) (delegated order).

been serving" on October 24, 1992.[24] San Francisco states that it seeks only to grandfather "the same customers and types of customers [San Francisco] has served for decades."[25] According to San Francisco, municipal public purpose load is the class of customers eligible for grandfathering pursuant to *Suffolk County* and, as applied to San Francisco, includes "primarily [c]ity departments and related public entities, commercial and residential customers that provide city services or that have a connection the [c]ity's operations or programs, and [c]ity tenants."[26] For example, San Francisco's appellate brief states that a newly constructed police station would qualify for grandfathered WDT service, as the police department was a customer on October 24, 1992.[27] San Francisco further argues that "the Commission should clarify that as San Francisco's customer base continues naturally to change with time, customers of the types that were eligible for [San Francisco] service in 1992 will continue to be grandfathered, even as customers are added, consolidated, reconfigured, and/or relocated."[28]

10. San Francisco challenged PG&E's proposed "point of delivery" approach, which would provide grandfathered service only to delivery points that were serving San Francisco's municipal load customers on October 24, 1992 and that continued serving municipal load customers on June 30, 2015 under the expiring 1987 Interconnection Agreement.[29] Instead, San Francisco argued that, in light of

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[24] *See* San Francisco Complaint, Docket No. EL15-3-000, at 14-15, 18-20 (filed Oct. 10, 2014) (San Francisco Complaint).

[25] *Id.* at 19.

[26] *Id.* Similarly, San Francisco requested later in the proceeding to grandfather "[c]ity agencies and related public entities, [c]ity properties and tenants on those properties, and entities providing services on behalf of or in coordination with the [c]ity. *Id.*

[27] Opening Brief of San Francisco, 2020 WL 6118755, at *40.

[28] San Francisco Complaint, at 17–18.

[29] Opinion No. 568, 169 FERC ¶ 61,128 at P 20. PG&E proposed during settlement and hearing procedures to provide WDT-equivalent service to all end-use customers served on June 30, 2015 under the 1987 Interconnection Agreement so long as the end-use customer remained a municipal load customer and continued taking service at the point of delivery. *See* Initial Decision, 157 FERC ¶ 63,021 at PP 57, 66, 85. Under this proposal, any delivery point served on June 30, 2015 where the customer subsequently changes to a non-municipal load customer loses its grandfathered status, and when a municipal load customer moves from a grandfathered delivery point to an

section 212(h)(2), the Commission's orders applying section 212(h)(2) in the *Suffolk County* line of precedent, and its own obligations under the Raker Act,[30] WDT service must be extended to San Francisco municipal load customers, as designated by San Francisco, within the class of customers that were eligible to receive wholesale distribution service on October 24, 1992.[31]

11. In response to San Francisco's complaint, PG&E argued that the WDT SA represents a categorical, "point of delivery" approach to provide distribution service to San Francisco's load. Under the WDT SA, PG&E provides either WDT or "WDT-equivalent" service to San Francisco's approximately 2,000 points of delivery. PG&E asserts that WDT service is available to San Francisco's points of delivery that were in service on October 24, 1992.[32] For loads that initiated service after October 24, 1992, PG&E asserts that it offered WDT-equivalent service, contingent upon owning or controlling relevant intervening facilities.[33] Specifically, PG&E determined that San Francisco's points of delivery initiating service after October 24, 1992 are not WDT eligible but PG&E proposed to provide WDT-equivalent service because they are part of the "class" of customers served as of June 30, 2015, which is the termination date of the 1987 Agreement. The delivery points are assigned to one of five categories.[34] Applying

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existing delivery point that did not previously serve municipal load it would lose that status. *Id.* P 66.

[30] Raker Act of 1913, Pub. L. No. 63-41, 38 Stat. 242. *See infra* § I.D.4 for discussion of the Raker Act.

[31] Opening Brief of San Francisco, 2020 WL 6118755, at *39–*40.

[32] PG&E Answer to San Francisco Complaint, Docket No. EL15-3-000, at 20 (filed Nov. 10, 2014).

[33] *Id.*

[34] The categories include: (1) WDT Qualified Load, which includes WDT service to San Francisco delivery points that meet all WDT requirements, or qualify for grandfathering under section 212(h); (2) non-WDT Qualified Municipal Load, which includes WDT-equivalent service to San Francisco's municipal load delivery points in service as of June 30, 2015; (3) non-WDT Qualified Non-Municipal Load, which includes WDT-equivalent service to San Francisco's non-municipal delivery points in service since 1998 and still in service as of June 30, 2015 under the 1987 Interconnection Agreement; (4) prospective WDT delivery points, which includes provisional WDT-equivalent service to delivery points where San Francisco initiated service after October 24, 1992, and do not serve municipal public purpose end-use customers; and (5) small unmetered loads including WDT-equivalent service to certain San Francisco delivery points that do not meet the requirements for metering under the WDT, such as

these categories, PG&E initially determined that 153 San Francisco end-use customers (about eight percent) were WDT Qualified. PG&E classified the remaining approximately 1,800 points of delivery as "Non-WDT Qualified,"[35] and instead proposed to provide WDT-equivalent service without the need for San Francisco to own or control intervening facilities or WDT-compliant meters so long as: (1) the original delivery point continues to serve the same end-use customer; and (2) the load does not exceed 125% of the customer's average annual load on June 30, 2015.[36]

12. PG&E argues that section 212(h) only obligates it to provide service to San Francisco's points of delivery that were in service on October 24, 1992 and, therefore, it is not obligated to provide grandfathered service for San Francisco's new points of delivery, that is, those where service was initiated after October 24, 1992. According to PG&E, the Commission's precedent in *Suffolk County I* and *II* supports its argument that in order "to serve additional customers that were not receiving 'electric service' 'on' October 24, 1992," San Francisco must install distribution facilities to serve those customers.[37] PG&E contends that San Francisco's points of delivery initiating service after October 24, 1992 are not eligible for grandfathering.[38] PG&E also argues that the grandfathered status of a qualified point of delivery cannot be transferred to another point of delivery. Therefore, PG&E argued that "if a municipal load customer moves from a grandfathered delivery point to a new delivery point/new building, the customer [could not] transfer its grandfathered status."[39] According to PG&E, those customers in service on October 24, 1992 include "governmental departments and

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streetlights, traffic signals, and street furniture. *See City & Cty. of San Francisco v. Pac. Gas & Elec. Co.*, 150 FERC ¶ 61,255, at P 13 (2015) (Hearing Order).

[35] Initial Decision, 157 FERC ¶ 63,021 at P 81 (citing Trial Staff Ex. S-1 at 19:6-13); Opening Brief of San Francisco, 2020 WL 6118755, at *14 (Oct. 16, 2020).

[36] Opinion No. 568, 169 FERC ¶ 61,128 at P 12 n.27. If a San Francisco point of delivery is not covered by one of the five WDT categories, PG&E would terminate distribution service to the point of delivery and transition that point of delivery to PG&E's retail service. *Id.* P 13 (citing WDT SA app. D, § D.1.3(c)).

[37] PG&E Answer to San Francisco Complaint, Docket No. EL15-3-000, at 26, 33 (filed Nov. 10, 2014) (citing *Suffolk County I,* 77 FERC ¶ 61,355; *Suffolk County II,* 96 FERC ¶ 61,349).

[38] Opinion No. 568, 169 FERC ¶ 61,128 at P 20.

[39] *Id.*

agencies, public housing tenants, municipal transportation systems, police stations, fire departments, public schools, city parks and public libraries."[40]

C. D.C. Circuit Remand and Vacatur

13. San Francisco appealed the Grandfathering Orders to the D.C. Circuit. The court held that the Grandfathering Orders were arbitrary and capricious because they "do not acknowledge the conflicts between PG&E's definition of 'municipal load' and [the Commission's] own precedent interpreting section 212(h)(2) criteria."[41] The D.C. Circuit rejected the Commission's argument that section 212(h) precedent was inapposite because it was only interpreting PG&E's WDT in the context of section 205 and 206 proceedings, as the WDT itself "expressly references the criteria of section 212(h)(2)."[42]

14. The court found that the Commission failed to provide a reasoned analysis to support departing from its section 212(h) precedent. Specifically, the court stated that, in declining to interpret section 212(h) in the Grandfathering Orders, the Commission failed to explain why that section should have one interpretation in proceedings under sections 205 and 206, and another in proceedings under sections 210 and 211.[43] Similarly, the court faulted the Commission for failing to address the inconsistency between PG&E's definition of "municipal load"—which includes only delivery points that actually received service on October 24, 1992—and *Suffolk County*, in which the Commission interpreted the grandfathering clause of section 212(h) as covering the entire "class of customers" that were eligible to receive service on that date.

15. Finally, the court concluded its remand with an overarching criticism of the Grandfathering and Voltage Orders, opining that they present a pattern of inattentiveness by the Commission because they fail to protect San Francisco's customers from potential anticompetitive effects of PG&E's administration of its WDT. In its conclusion, the court stated:

> More than a century ago, Congress authorized the Hetch Hetchy System not only to provide San Francisco with a source of cheap power but also to ensure competition in its retail power market. Faced with claims that PG&E was frustrating that competition by treating its own retail service

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[40] *Id.*

[41] *San Francisco*, 24 F.4th at 665.

[42] *Id.* at 664.

[43] *Id.* at 664-65.

> preferentially and refusing service for customers San Francisco had served for decades, the Commission fell short of meeting its "duty" to ensure that rules or practices affecting wholesale rates are "just and reasonable."[44]

D. Relevant Authorities and Related Agreements and Proceedings

1. Sections 210, 211, and 212 of the FPA

16. The Energy Policy Act of 1992 amended sections 210, 211, and 212 of the FPA, enhancing the Commission's authority to order transmitting utilities to interconnect competing electric supplies and wheel power for third parties. Section 210 authorizes the Commission, under certain circumstances, to direct interconnection, and applies to both public and non-public utilities, unlike sections 205 and 206. Section 211 authorizes the Commission, under certain circumstances, to direct transmission, and applies to both public and non-public utilities, unlike sections 205 and 206. Section 212 contains further limitations on the Commission's authority under sections 210 and 211.

2. Section 212(h)

17. Section 212(h) prohibits mandatory retail wheeling and sham wholesale transactions. The prohibition clause of section 212(h)(2) states: "No order issued under this Act shall be conditioned upon or require the transmission of electric energy: (1) directly to an ultimate consumer; or (2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer." However, section 212(h)(2) provides exemptions from the prohibition if the entity selling the electric energy at retail is a political subdivision of a State and the seller "was providing electric service to such ultimate consumer on [October 24, 1992], or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer." Although PG&E and San Francisco agree that PG&E is bound by section 212(h)(2) as a result of the reference to this provision in the WDT, they do not agree about the scope of that section.[45]

3. *Suffolk County*

18. *Suffolk County* is a series of four Commission orders addressing the request of the Suffolk County Electrical Agency (Suffolk), pursuant to sections 211 and 212, for transmission service from Long Island Power Authority (LIPA). Suffolk was providing electric service to its residential, commercial, and industrial customers on October 24,

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[44] *Id.* at 665 (citing *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 277 (2016)).

[45] *San Francisco*, 24 F.4th at 662.

1992.[46] The D.C. Circuit in *San Francisco* relied on *Suffolk County* in its ruling, stating that "[u]nder the Commission's Section 212(h) precedent, the [WDT]'s grandfathering clause covers 'the class of customers eligible to receive service on October 24, 1992.'"[47]

19. In *Suffolk County I*, the Commission reviewed Suffolk's section 211 and 212 filings, and distinguished between "grandfather" prong of section 212(h)(2)(B) and the requirement that the utility own and operate transmission and distribution facilities.[48] The Commission found that "the reference in 212(h)(2)(B) 'to such ultimate consumers' indicates that the grandfather provision applies only to Suffolk's customers being served, or who were eligible to receive service, on October 24, 1992."[49]

20. In *Suffolk County II*, the Commission expanded on the eligibility requirement under the grandfathering prong, finding that interpreting section 212(h)(2)(B) to apply only to those customers that actually received service "is incorrect, and too narrow a definition."[50] Instead, the Commission found that, "for grandfathering purposes, we interpret 'customers eligible to receive service' as the *class* of customers eligible to receive service."[51] Therefore, the class of customers eligible for grandfathering included all Suffolk residential and economic development customers "pursuant to a Lease and Operating Agreement" between Suffolk and Long Island Lighting Company (LILCO) on October 24, 1992.[52]

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[46] San Francisco Complaint, at 18.

[47] *San Francisco*, 24 F.4th at 665 (quoting *Suffolk County II*, 96 FERC ¶ 61,349 at 62,301).

[48] *Suffolk County I*, 77 FERC at 62,549 ("On its face, the statute requires the applicant for Commission-ordered transmission service to demonstrate that it has satisfied the 'grandfather' prong of section 212(h)(2)(B) or it would utilize transmission or distribution facilities that it owns or controls to deliver all of the electric energy transmitted to the ultimate consumers.").

[49] *Id.* at 62,550. The Commission noted that this treatment was consistent with the Commission's treatment of this issue in *City of Palm Springs, Cal.*, 76 FERC ¶ 61,127, at 61,701 & n.6 (1996).

[50] *Suffolk County II*, 96 FERC at 62,301.

[51] *Id.* (emphasis in original).

[52] *Suffolk County I*, 77 FERC at 62,544.

21. In *Suffolk County IV*—the final order in the *Suffolk County* series of cases that represents the Commission's definitive conclusion in that matter by directing LILCO to provide the requested transmission service to Suffolk—the Commission explained the application of the grandfathering provision of section 211:

> [W]hen Congress enacted section 212(h) of the FPA, to prohibit mandatory retail wheeling and sham wholesale transactions, Congress explicitly exempted entities who were providing retail service on the date this section was enacted (i.e., October 24, 1992). Therefore, because Suffolk *was* providing retail service on that date, we found that Suffolk was grandfathered and entitled to obtain a transmission order under section 211 to serve *all* potential retail customers within the class it had been serving. And this grandfathering continues today, even though Suffolk's contract with [New York Power Authority] has expired; Suffolk had a pre-existing relationship (that competed with [Long Island Lighting Company]) with retail customers, so that Suffolk would not be utilizing section 211 to practice a "subterfuge" to "divert retail customers away from LILCO."[53]

4. The Raker Act

22. The Raker Act provides that San Francisco "shall develop and use hydroelectric power for the use of its people."[54] The Raker Act does not define municipal public purpose, municipal load, or municipal public purpose load. And section 9(*l*) of the Raker Act makes only a passing reference to municipal public purpose in connection to when San Francisco shall supply electricity to its neighboring irrigation districts.

23. Although the Raker Act does not define "municipal public purpose" or similar terms, the Supreme Court analyzed the Raker Act's legislative history in *United States v. City and County of San Francisco* and found:

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[53] *Suffolk County IV*, 108 FERC ¶ 61,173 at P 19 (emphasis in original) (citing *Suffolk County I*, 77 FERC at 62,549); *see also U.S. DOE – W. Area Power Admin.*, 95 FERC ¶ 61,382, at 62,419 (2001) (citing *Suffolk County I* to find that section 212(h) did not preclude an applicant from increasing the 4 MW of power it was serving on October 24, 1992 to 60 MW, because it did not matter how much of the customer's load the seller had been serving on October 24, 1992 to meet the grandfathering section 212(h)(2) exemption).

[54] Pub. L. No. 63-41 § 9(m), 38 Stat. 242.

> Congress clearly intended to require—as a condition of its grant—sale and distribution of Hetch-Hetchy power exclusively by San Francisco and municipal agencies directly to *consumers* in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company.[55]

5. 1987 Interconnection Agreement

24. The 1987 Interconnection Agreement required PG&E to provide San Francisco "[p]ower and other services as required and requested by [San Francisco] to meet its Municipal Load."[56] The 1987 Interconnection Agreement defines "Municipal Load" as "[p]ower required for [San Francisco]'s municipal public purposes pursuant to the Raker Act, *as may be designated by [San Francisco]*, both inside and outside of [San Francisco]. For purposes of this Agreement, such load shall not include load served by [San Francisco] as resale load."[57] The 1987 Interconnection Agreement also provided a hierarchy of end-use customers that San Francisco served, with Municipal Load entitled to priority over firm obligations to the Modesto and Turlock Irrigation Districts (Irrigation Districts) and excess energy served in a set of residual categories.[58] Under the 1987 Interconnection Agreement, PG&E provided wholesale distribution service to San Francisco's load without the need for San Francisco to own or control intervening facilities at each delivery point.

25. The 1987 Interconnection Agreement placed certain limitations on the load San Francisco could serve, including firm priority loads and non-firm loads. Priority loads, section 2.7.1 (Hetch Hetchy Firm Resource), included the loads of the Irrigation Districts and San Francisco municipal public purpose load. Following these priority loads, section 2.7.2 (Hetch Hetchy Nonfirm Resource) listed several categories of load that San Francisco served with Hetch Hetchy power on a non-firm basis in order of priority: (1) airport tenants and districts; (2) the Riverbank Army Ammunition Plant in Riverbank, California; (3) other sales of excess energy; (4) assigned customers; and (5) a deferred delivery account. Furthermore, section 7.1 of the 1987 Interconnection Agreement explained the process for assigning certain PG&E customers to San Francisco

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[55] *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 25 (1940).

[56] 1987 Interconnection Agreement at § 2.1.

[57] *Id.* § 1.43 (emphasis added).

[58] *Id.* § 2.7.

for the purposes of "utilizing all of the energy generated by [Hetch Hetchy] in a manner consistent with the provisions of the Raker Act."

6. WDT and WDT SA

26. In 2013, San Francisco submitted to PG&E an application for WDT service for all customers served under the expiring 1987 Interconnection Agreement. San Francisco sought to continue service for its approximately 2,000 metered connections in addition to its unmetered connections for some 40,000 small unmetered loads.[59] San Francisco argued that all the points of delivery were eligible for grandfathered service under section 212(h), which also made them eligible for service pursuant to WDT section 14.2. PG&E's disagreement with San Francisco regarding its obligations pursuant to WDT section 14.2 form the basis for the San Francisco complaint that initiated the underlying proceeding.[60] Section 14.2 of the WDT states:

> All Eligible Customers shall be required to demonstrate bona fide ownership or control of the Intervening Distribution Facilities listed in Section 14.2.1, except in the case where an Eligible Customer meets the criteria for grandfathering in 16 USC § 824k(h)(2) ("Grandfathering") or obtains a variance in accordance with Section 14.2.1. To the extent that an Eligible Customer intends to invoke this Grandfathering provision, the Eligible Customer must do so as part of its Application and at that time must provide evidence demonstrating that, for each Point of Delivery for which it claims eligibility for Grandfathering, the criteria of 16 USC § 824k(h)(2) are met. An applicant may demonstrate bona fide ownership or control of Intervening Facilities as provided for in Sections 14.2.2 and 14.2.3.

27. PG&E has continued to propose changes to the WDT, and San Francisco has challenged those changes in several proceedings. On September 15, 2020, in Docket No. ER20-2878-000, PG&E filed its 2021 WDT, which included transitioning to a formula rate, as well as other revisions, including removing the WDT's reference to section 212(h). Contemporaneously, PG&E submitted filings to amend and align the

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[59] San Francisco Complaint, at 12 n.50 (citing PG&E Transmittal, Docket No. ER05-1190-000, at 6 (filed July 1, 2005)). These small municipal loads include streetlights, traffic signals, and street furniture.

[60] *Id.* The Commission approved an uncontested settlement that addressed certain issues associated with PG&E's WDT rate case. *Pac. Gas & Elec. Co.*, 152 FERC ¶ 61,010.

terms proposed in the 2021 WDT proceeding with the WDT service agreements of its six wholesale load distribution customers, including San Francisco. With respect to the WDT SA, PG&E explained that, due to the revised terms set forth in the WDT and the nature of the legacy unmetered secondary voltage service PG&E was providing San Francisco as an accommodation, unmetered loads would become ineligible for continued wholesale service under the revised WDT. The Commission accepted the proposed revisions to the WDT and WDT service agreements, including the formula rate, suspended them for five months, to become effective on April 15, 2021, and set the matter for hearing and settlement.[61]

28. Additionally, on August 20, 2021, in Docket No. TX21-4-000, San Francisco filed an application under sections 210, 211, 212, and 213, requesting that the Commission direct PG&E to continue providing WDT service to San Francisco's unmetered loads after January 31, 2022, the date when PG&E's proposal under Docket No. ER20-2878-000 would end WDT service to all unmetered secondary load. That proceeding is pending before the Commission.

29. Subsequently, PG&E submitted section 205 filings in Docket Nos. ER22-619-000 and ER22-620-000 to: (1) terminate Appendix E of its WDT SA (reflecting service to small unmetered street load); and (2) add proposed Appendix G to the WDT SA, to serve certain non-streetlight unmetered loads on an interim basis until such time as those loads can be transitioned to PG&E's retail tariff. The Commission accepted these filings,

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[61] *Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,140 (2020). PG&E filed two uncontested partial settlements in Docket No. ER20-2878, largely resolving the rate-related issues. The Commission approved both partial settlements, most recently on June 2, 2022. *Pac. Gas & Elec. Co.*, 176 FERC ¶ 61,012 (2021); *Pac. Gas & Elec. Co.*, 179 FERC ¶ 61,167 (2022). The second partial settlement carves out the issues relevant here as topics that should be addressed at hearing. PG&E Offer of Partial Settlement and Stipulation at § 2.3.8, Docket No. ER20-2878-013 (filed Mar. 31, 2022). On August 5, 2022, the parties filed a stipulation concerning PG&E's proposed revisions to the 2021 WDT with respect to section 212(h)(2). The stipulation explains that, because this issue is legal, rather than factual, the parties agree not to submit testimony on that matter, and that PG&E will file within 45 days of an order on remand in this proceeding either: "(i) a compliance filing, if necessary, to modify the WDT to explicitly offer service at points of delivery that satisfy the grandfathering criteria of FPA section 212(h)(2), consistent with the Commission's remand order in Docket No. EL15-3, et al.; or (ii) a filing explaining why such a compliance filing is not necessary, unless the Parties agree that a compliance filing is not necessary." *Joint Motion to File Executed Stipulation of the City & Cty. of San Francisco & Pac. Gas & Elec. Co.*, Docket No. ER20-2878-015, et al., at 3 (filed Aug. 5, 2022). The parties also state that PG&E will make a subsequent filing if the remand order is modified on rehearing or appeal. *Id.* at 4.

suspended them for five months, and set them for hearing and settlement procedures.[62] The five-month suspension period expired on July 11, 2022. On April 13, 2022, PG&E and San Francisco notified the presiding judge in those proceedings that they had engaged the services of the DRS concerning consolidating the filings with Docket No. ER20-2878-000, *et seq.*, resolving the related issues together at a later time, and entering into an interim arrangement that would "avoid the harms" if the filings were implemented in July 2022.[63] On June 3, 2022, PG&E submitted revisions to Appendix G that implemented the interim arrangement by maintaining the status quo between PG&E and San Francisco pending the outcome of the hearing and settlement judge procedures.[64] The Commission accepted that filing, effective July 12, 2022, subject to refund, and set it for hearing and settlement judge procedures.[65]

II. Discussion

30. 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 determine that the Commission's *Suffolk County* precedent applies to the WDT's reference to section 212(h)(2). Second, we find that San Francisco's loads that are included in the class of customers that were served on October 24, 1992 are entitled to grandfathered service under the WDT. Finally, we conclude that, for such loads, San Francisco does not need to demonstrate bona fide ownership or control of intervening facilities. We therefore grant San Francisco's complaint in Docket No. EL15-3-000, *et seq.* and direct PG&E to submit a compliance filing within 60 days of the date of this order to modify the WDT SA appendices to ensure that all of San Francisco's municipal points of delivery and customer specifications are reclassified as WDT Qualified.

31. The Commission initially found that its precedent regarding section 212(h)(2) was inapplicable to the instant proceeding because this was not a "section 212 case," and therefore did not squarely address the *Suffolk County* precedent relied upon by San Francisco. The D.C. Circuit held that this determination was arbitrary and capricious because section 14.2 of the WDT expressly references the criteria of that statutory

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[62] *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,074 (2022). On March 30, 2022, the Chief Judge established a Track II hearing schedule. *Pac. Gas & Elec. Co.*, 178 FERC ¶ 63,022 (2022).

[63] *See* Transcript of Pre-Hearing Conference at 9--10, Docket Nos. ER22-619-001, ER22-620-001 (April 13, 2022).

[64] *See* PG&E Transmittal Letter, Docket No. ER22-2022-000 (filed June 3, 2022).

[65] *Pac. Gas & Elec. Co.*, 180 FERC ¶ 61,072 (2022).

provision.[66] As discussed above, section 14.2 of the WDT predicates wholesale distribution service on the ability "to demonstrate bona fide ownership or control of the Intervening Distribution Facilities" unless end-use customers meet "the criteria for grandfathering in [section 212(h)(2)]." That is, section 14.2 of the WDT provides that a customer is eligible for wholesale distribution service if the customer is eligible for grandfathering under section 212(h)(2) and at the time of its application, the customer "provide[s] evidence demonstrating that, for each Point of Delivery for which it claims eligibility for Grandfathering, the criteria of [section 212(h)(2)] are met." If the customer can make this showing, PG&E is required to provide WDT service pursuant to the terms of section 14.2, regardless of whether the eligible customer owns or controls the intervening facilities.

32. Because the Grandfathering Orders did not interpret section 212(h), we must undertake that task on remand in light of the D.C. Circuit's opinion.[67] We start with the language of section 14.2 of the WDT, which addresses customer eligibility. Section 14.2 of the WDT incorporates section 212(h)(2) in the context of determining whether a wholesale distribution customer must demonstrate bona fide ownership and control over the "Intervening Distribution Facilities." This provision of the WDT expressly references the criteria of section 212(h)(2) to determine the universe of eligible customers that are grandfathered and thus are not required to demonstrate ownership or control of intervening facilities.[68] Other than requiring San Francisco to demonstrate that each point of delivery is eligible for grandfathering, section 14.2 contains no restrictions on grandfathering other than the criteria set forth in section 212(h)(2).

33. Next, we must determine what eligible customers are grandfathered, i.e., we must determine what the reference to section 212(h) in section 14.2 of the WDT means. As the

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[66] As noted above, the WDT at issue in this proceeding was superseded by the 2021 WDT, which does not include a reference to section 212(h). While the 2021 WDT became effective in April 2021, it is currently the subject of ongoing hearing procedures in Docket No. ER20-2878-000, *et seq.* Accordingly, this order applies only to the period between July 1, 2015 and the effective date of the 2021 WDT. *Compare* WDT, § 14.2 (0.0.0) (predicating wholesale distribution service on the ability "to demonstrate bona fide ownership or control of Intervening Facilities" unless end-use customers meet "the criteria for grandfathering in [section 212(h)(2)]"), *with* WDT, § 12.2 (1.0.0) ("All Eligible Customers shall be required to demonstrate bona fide ownership or control of the Intervening Distribution Facilities . . . .").

[67] *See San Francisco*, 24 F.4th at 664.

[68] *Id.* at 663.

D.C. Circuit explained,[69] the Commission has already interpreted the criteria of section 212(h)(2) in *Suffolk County*, and we follow the Commission's *Suffolk County* reasoning here.[70] Section 212(h)(2) sets forth criteria by which entities may be exempted from the prohibition on retail wheeling. First, the entity must be a state political subdivision or other qualifying entity listed in section 212(h)(2)(A); San Francisco unquestionably meets this criterion (and there has been no argument to the contrary in this proceeding). Second, the entity must have been "providing electric service to such ultimate consumer on [October 24, 1992]." As discussed in section I.D.3, the Commission in *Suffolk County* interpreted this provision to include not only the customers Suffolk was actually serving on October 24, 1992, but also "*all potential* retail customers within the class it had been serving."[71]

34. Further, as also explained above, the Commission in *Suffolk County II* acknowledged that section 212(h)(2) is not limited in time. The Commission in *Suffolk County II* stated that "we do not believe Congress would intend a grandfathering provision to apply to individual retail customers because surely, in the almost nine years since on October 24, 1992, some residential customers have died or moved out, while new residential customers have moved into (or within) the service area."[72] Limiting the grandfathering provision to customers actually receiving service on October 24, 1992 would thus be "unfair to individual retail customers."[73] Therefore, it was the Commission's interpretation then, as it is now, that the eligibility provision of section 212(h)(2)(B) applies prospectively to the entire class of customers eligible to receive service.

35. Applying the *Suffolk County* precedent to the instant proceeding, we conclude that the class of customers San Francisco was serving on October 24, 1992, delineates the group of customers that meet the criteria for grandfathering under section 212(h) and the WDT. This interpretation is required by the *Suffolk County* cases' determination that section 212(h)(2) is based on a customer class-based approach, rather than an individual point of delivery approach.

36. The application of section 212(h) that PG&E asked the Commission to adopt, where customers existing on October 24, 1992 are eligible for WDT service and those

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[69] *Id.* at 665.

[70] *See Suffolk County IV*, 108 FERC ¶ 61,173 at P 19.

[71] *Id.*

[72] *Suffolk County II*, 96 FERC at 62,301.

[73] *Id.*

who initiate service thereafter are relegated to WDT-equivalent service "is too narrow a definition; 'eligible to receive service' does not mean 'actually received service.'"[74] Accordingly, we no longer find that PG&E's point of delivery approach reflected in the WDT SA is just and reasonable, because that approach is at odds with the customer class approach embodied in *Suffolk County*.

37. Further, we agree with San Francisco that Commission precedent did not limit grandfathering to a fixed location or amount of electricity demand. In *Suffolk County II*, the Commission recognized that, "since October 24, 1992, some residential customers have died or moved out, while new residential customers have moved into (or within) the service area. LILCO's interpretation [that grandfathering applies to individual retail customers], in addition to being impossible to implement, would be unfair to individual retail customers."[75] Additionally, in *U.S. DOE – Western Area Power Administration*, the Commission found that section 212(h) did not preclude an applicant from increasing by several fold the amount of electricity it was serving on October 24, 1992, because the quantity of customer load the seller had been serving on October 24, 1992 has no bearing on the criteria in section 212(h)(2).[76] Accordingly, we find that PG&E must extend WDT Qualified service to: (1) all end-use customers served by San Francisco as of October 24, 1992; and (2) all customers that belong to that same class of customers, even at points of service that were initiated after October 24, 1992 and that increased demand as compared to October 24, 1992.

38. Having established that section 14.2 of the WDT incorporates section 212(h)(2) and the Commission's *Suffolk County* precedent, we turn to the issue of defining the universe of grandfathered customers. While we do not address here whether each specific San Francisco point of delivery is part of a customer class that was served on October 24, 1992 (which we require PG&E to provide in the compliance filing ordered herein), the 1987 Interconnection Agreement is instructive in understanding which of San Francisco's customers are grandfathered. As noted above, the 1987 Interconnection Agreement grouped the end-use customers into categories, including San Francisco's Municipal Load, which received priority service, followed by Firm Obligations to the Irrigation Districts[77] and a set of residual categories entitled "Hetch Hetchy Nonfirm

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[74] *Id.*

[75] *Id.*

[76] *See U.S. DOE – W. Area Power Admin.*, 95 FERC ¶ 61,382, at 62,419 (2001) (citing *Suffolk County I,* 77 FERC ¶ 61,355).

[77] 1987 Interconnection Agreement § 2.7.1.

Resources."[78] These end-use customers served pursuant to the 1987 Interconnection Agreement define the universe of potential covered customers. In *Suffolk County*, Suffolk was the entity serving the class of customers it defined as its residential customers.[79] Here, San Francisco characterizes this class as "municipal public purpose load," which it describes as "[c]ity agencies and related public entities, [c]ity properties and tenants on those properties, and entities providing services on behalf of or in coordination with the [c]ity."[80]

39. San Francisco endeavors to serve customers listed in Exhibit F of its complaint, which encompass the following groups into the class: Residential, Commercial Building, Other Commercial, Industry, Other Industry, Agriculture, Water Pumping, and Street, Outdoor, Traffic Control.[81] Because San Francisco served those categories of customers on October 24, 1992, under the 1987 Interconnection Agreement, they delineate the class eligible to receive grandfathered service.[82] We note that the use of the term "municipal" is immaterial to the application of the Commission's *Suffolk County* precedent in light of the WDT's reference to section 212(h) to determine what customers are eligible for grandfathering.[83] Consistent with our determinations herein, we agree with

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[78] *Id.* § 2.7.2 ("As of the Effective Date of this Agreement, Excess Energy shall serve the following loads in order of priority; FIRST: Airport Tenants and Districts, SECOND: Riverbank, THIRD: Other sales of Excess Energy, FOURTH: Assigned Customers, FIFTH: Deferred Delivery Account."). The 1987 Interconnection Agreement defines "Excess Energy" as "Electric energy generated by City Plants that is in excess of Supported Firm Energy." *Id.* § 1.21. As also noted above, the 1987 Interconnection Agreement includes other provisions addressing the service to the residual categories.

[79] *Suffolk County I*, 77 FERC at 62,544.

[80] Initial Decision, 157 FERC ¶ 63,021 at P 141 (citing Reply Brief of San Francisco, Docket No. EL15-3-002, at 12–13 (filed July 13, 2016)).

[81] Opening Brief of San Francisco, 2020 WL 6118755, Ex. F Table of California Energy Commission Customer Classes Served by the San Francisco Public Utilities Commission on October 24, 1992.

[82] *See* San Francisco Complaint, Ex. F Table of California Energy Commission Customer Classes Served by the San Francisco Public Utilities Commission in October 1992.

[83] Similarly, the meaning of "municipal public purpose" as used in the Raker Act has no bearing on the application of *Suffolk County* precedent to this case because we are focused on interpreting the WDT and its reference to FPA section 212(h). However, we note that section 9(*l*) of the Raker Act includes the proviso that San Francisco "may

San Francisco's argument that "as San Francisco's customer base continues naturally to change with time, customers of the types that were eligible for [c]ity service in 1992 will continue to be grandfathered, even as customers are added, consolidated, reconfigured, and/or relocated."[84]

40. San Francisco and PG&E have disputed whether "municipal public purpose load" includes private entities. San Francisco defined these customers as including: (1) city-owned properties and tenants of those properties; and (2) entities providing services on behalf of or in coordination with the city.[85] As San Francisco explained, these are the "same types of customers it has always served in order to support the same key [c]ity functions it served and supported in 1992 and for decades before."[86] These private entities were served on October 24, 1992, and were specifically included in the 1987 Interconnection Agreement as a separate category of end-use customers.[87] Similarly, we find that small unmetered loads were served on October 24, 1992. Accordingly, we conclude that the categories of private entities and small unmetered loads meet the criteria for grandfathered service under the WDT.[88]

41. Finally, as noted above, we direct PG&E to submit a compliance filing, within 60 days of the date of this order, to revise the WDT SA appendices to reflect WDT Qualified service to: (1) all end-use customers served by San Francisco as of October 24, 1992; and (2) all customers belonging to that same class of customers, even at points of service initiated after October 24, 1992, and at those with higher demand as compared to October 24, 1992. We encourage PG&E to work with San Francisco to ensure that all

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dispose of any excess electrical energy for commercial purposes." Therefore, the Raker Act does not restrict what retail customers San Francisco may serve under a reasonable interpretation of the statute. Accordingly, the Raker Act does not limit the class of customers that would be grandfathered under the WDT.

[84] San Francisco Complaint, at 17-18. We note that, at present, San Francisco Public Utilities Commission customers amount to less than 20% of load within San Francisco. *See* Opening Brief of San Francisco, 2020 WL 6118755, at *6.

[85] Opening Brief of San Francisco, 2020 WL 6118755, at *50; San Francisco Complaint, at 19-20.

[86] San Francisco Complaint, at 20.

[87] Opening Brief of San Francisco, 2020 WL 6118755, Ex. F, Table of California Energy Commission Customer Classes Served by the San Francisco Public Utilities Commission on October 24, 1992.

[88] San Francisco Complaint, at 19.

points of delivery that should be considered WDT Qualified under this order are reflected in the WDT SA appendices. We remind the parties that, to the extent there are disagreements in this process, they can avail themselves of the services of DRS.[89]

The Commission orders:

(A) The complaint is hereby granted, as discussed in the body of this order.

(B) PG&E is hereby directed to submit a compliance filing to revise the WDT SA appendices within 60 days of the issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

[89] We reiterate that the remand by its terms applies to the period beginning July 1, 2015 and ending April 15, 2021.

Document Content(s)