ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1202

SOUTHERN CALIFORNIA EDISON COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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APRIL 13, 2007
FINAL BRIEF: MAY 18, 2007

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, all parties are presented in Petitioner's brief.

B. Rulings Under Review

1. *Southern California Edison Company*, Order Rejecting Revised Rate Sheets, Docket No. ER05-1357-000, 113 FERC ¶ 61,018 (October 11, 2005) ("Initial Order"), R. 6, JA 142; and

2. *Southern California Edison Company*, Order Denying Rehearing, Docket No. ER05-1357-001, 115 FERC ¶ 61,100 (April 24, 2006) ("Rehearing Order"), R. 10, JA 160.

C. Related Cases

This case has not previously been before this Court. Counsel is not aware of any related case pending in this Court or any other court.

Michael E. Kaufmann
Attorney

May 18, 2007

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

U.S. CONSTITUTION: **PAGE**

COURT CASES:

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

Federal Power Act

TABLE OF AUTHORITIES

STATUTES (continued): **PAGE**

REGULATIONS:

GLOSSARY

Brief or Br.	Opening Brief of Petitioner, Southern California Edison (filed January 19, 2007)
Commission or FERC	Federal Energy Regulatory Commission
Corona	City of Corona
Facilities Agreement	Interconnection Facilities Agreement between the City of Corona and Southern California Edison Company, Service Agreement No. 78 under Edison's Wholesale Distribution Access Tariff, FERC Electric Tariff, First Revised Volume No. 5
FPA	Federal Power Act
Initial Order	*Southern California Edison Company*, Order Rejecting Revised Rate Sheets, Docket No. ER05-1357-000, 113 FERC ¶ 61,018 (October 11, 2005), R. 6, JA 142
Petitioner	Southern California Edison Company ("SCE"or "Edison")
Rate Filing	*Southern California Edison Company*, Docket No. ER05-1357-000 (August 17, 2003), R. 1, JA 97
Rehearing Order	*Southern California Edison Company*, Order Denying Rehearing, Docket No. ER05-1357-001, 115 FERC ¶ 61,100 (April 24, 2006), R. 10, JA 160
SCE or Edison	Petitioner, Southern California Edison Company
Service Agreement	Wholesale electric service contract between Corona and Edison pursuant to Edison's Wholesale Distribution Access Tariff

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether, assuming jurisdiction, the Federal Energy Regulatory Commission ("Commission" or "FERC"), in enforcing the terms of a FERC-jurisdictional contract, reasonably rejected an attempt by Petitioner Southern California Edison Company ("SCE" or "Edison") to collect a true-up payment from the City of Corona ("Corona"), when, through its own inaction, Edison admittedly failed to comply with the contractual deadline for collecting such costs by more than a year and a half.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to review the FERC Orders being challenged here. In addition to satisfying the requirements of § 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Edison must satisfy the requirements of Article III of the United States Constitution. As set forth more fully in Part I. of the Argument, *infra*, Edison lacks standing because its claimed injury is entirely self-inflicted and thus not fairly traceable to the challenged FERC Orders.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns Edison's untimely attempt to revise certain rate sheets to its Interconnection Facilities Agreement ("Facilities Agreement") with Corona. *See* Edison Revised Rate Sheet filing, *Southern California Edison Company*, Docket No. ER05-1357-000 (August 17, 2003) ("Rate Filing"), R. 1, JA 97.[1] In its Rate Filing, Edison proposed to collect additional interconnection "true-up" costs

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

from Corona, almost twenty months after the contractual deadline for collecting those costs had passed. The Commission therefore rejected the filing as inconsistent with the Facilities Agreement. *Southern California Edison Company*, Order Rejecting Revised Rate Sheets, Docket No. ER05-1357-000, 113 FERC ¶ 61,018 (October 11, 2005) ("Initial Order"), R. 6, JA 142; *Southern California Edison Company*, Order Denying Rehearing, Docket No. ER05-1357-001, 115 FERC ¶ 61,100 (April 24, 2006) ("Rehearing Order"), R. 10, JA 160.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, affords the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. § 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and division between federal and state regulatory authority under the FPA). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

To enable such FERC review, the FPA requires every public utility to file with the Commission "schedules showing all [jurisdictional] rates and charges . . .

together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." FPA § 205(c), 16 U.S.C. § 824d(c); *see* 18 C.F.R. § 35.1 (2006) (filing obligations). Thereafter, "no change shall be made . . . in any such rates, charges . . . or contract relating thereto, except after sixty days' notice to the Commission and the public" from the filing of the "new schedules." FPA § 205(d), 16 U.S.C. § 824d(d); *see* 18 C.F.R. § 35.13 (2006) (filing of changes in rate schedules).

B. The Facilities Agreement

Corona, a municipal utility, purchases certain wholesale electric services from Edison under the Edison Wholesale Distribution Access Tariff, pursuant to a Service Agreement accepted by the Commission.[2] Corona Protest at 2-3, R. 3, JA 118-19. In order to access this electric power, Corona's electric utility system was interconnected to Edison's electric distribution system pursuant to the Facilities Agreement. *Id.* at 3, JA 119. The Facilities Agreement between Edison and Corona was filed with the Commission on January 31, 2003 (*see Southern California Edison Company*, Docket No. ER03-477-000 (January 31, 2003), JA 9) and accepted by the Commission on March 24, 2003 (*see* Delegated Letter Order Accepting Filing, JA 77).

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[2] *See Southern California Edison Co.*, Docket No. ER04-1235-000 (Sept. 21, 2004), JA 79; Letter Order Accepting Southern California Edison's Filing of a Service Agreement for Wholesale Distribution Tariff (Nov. 19, 2004), JA 95.

The Facilities Agreement specifies the terms and conditions for Edison to install and maintain the interconnection facilities and for Corona to pay for such facilities that were necessary to interconnect Edison's distribution system to Corona's wholesale distribution load. Initial Order at P 2, JA 142; Rehearing Order at P 2, JA 160. As provided for in the Facilities Agreement, Corona paid $36,089 to Edison for the estimated interconnection costs plus an additional $18,152.37 for the Income Tax Component of Contribution. Initial Order at P 2, JA 142; Facilities Agreement filing letter at 3, JA 11; *see also* Facilities Agreement Section 13.1.2, and Exhibits B and C, JA 65-66, 75 and 76. In accordance with the Facilities Agreement, this one-time payment of $54,241.37 was based on a cost estimate provided by Edison. *Id.* at Section 13.1.2, JA 65-66; Initial Order at P 2, JA 142; Rehearing Order at P 2, JA 160. Corona continues to pay Edison for the power it uses under the terms of its Service Agreement, as well as a monthly interconnection service charge under the terms of the Facilities Agreement. Initial Order at P 11, JA 144; *see generally Southern California Edison Company*, Docket No. ER03-477-000 (January 31, 2003), JA 9.

i. The Contract Cost True-Up Provision

If the actual costs of the interconnection facilities proved to be more than the estimated costs paid by Corona, the Facilities Agreement placed a reasonable twelve month time limit on Edison during which it could calculate these actual

costs and invoice Corona for the difference (the "true-up"). Initial Order at P 2, JA 142; Rehearing Order at P 2 & n. 2, JA 160-61; *see also* Rate Filing cover letter at 1, R. 1, JA 97. The actual contract provision states:

> Within twelve (12) months following the Interconnection Facilities In-Service Date, the Distribution System Facilities In-Service Date, or the in-service date of any Capital additions, as the case may be, SCE shall determine the actual recorded Interconnection Facilities Cost, Distribution System Facilities Cost or Capital Additions Cost, including the Associated One-Time Cost and ITTC, and provide Corona with a final invoice.

Facilities Agreement at Section 13.1.8, JA 66; Rehearing Order at P 9, JA 163.

ii. Through Its Inaction, Edison Failed To Meet The Deadline

As Edison admits, the facilities at issue had an in-service date of January 4, 2003. Br. at 8; Initial Order at PP 5, 6, 9, JA 143, 144; Rehearing Order at P 3, JA 161; Edison Answer at 3-4, R. 5, JA 135-36. Thus, under the Facilities Agreement, the deadline by which Edison was required to bill Corona for any cost overages expired on January 4, 2004. *Id.* This contract deadline notwithstanding, Edison never sent a final invoice to Corona.[3] Instead, on August 17, 2005 (nearly thirty-two months after the in-service date and nearly twenty months after the true-up deadline had passed), Edison submitted the "final invoice" in the form of its

[3] On May 7, 2004, Edison did send a letter to Corona indicating that there were cost overruns, but the Commission determined that this letter did not qualify as an invoice, and furthermore, was received sixteen months after the in-service date (four months beyond the true-up deadline). Initial Order at P 5, 10, JA 143, 144; Rehearing Order at P 3, JA 161; Corona Protest at 4, JA 120.

Rate Filing seeking to revise the rate sheets associated with the Facilities Agreement. Initial Order at PP 5, 9, JA 143, 144; Rehearing Order at PP 2, 3, JA 160, 161; *see generally* Rate Filing, R. 1, JA 97.

C. Edison's Rate Filing

Through its Rate Filing, Edison sought to collect an additional $17,957.13 from Corona, which Edison stated was the amount by which the actual facility costs exceeded the estimated costs that Corona already had paid. Initial Order at PP 3, 7, JA 142, 143; Rehearing Order at P 2, JA 160; *see generally* Rate Filing, R. 1, JA 97.[4]

D. Edison Admits It Failed To Comply With The Contract

"SCE [does] not deny that it breached the agreement." Br. at 9-10. Despite this admission, Edison nevertheless asked the Commission to accept the proposed rate sheet revisions and to overlook what Edison described as an "administrative billing oversight." Edison Answer at 3-4, R. 5, JA 135-36; Rehearing Request, R. 8 at 2, JA 147; Br. at 8; Initial Order at P 6, JA 143; Rehearing Order at P 4, JA 161.

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[4] The revised rate sheets would also increase the monthly interconnection facilities charges to reflect the use of the higher actual interconnection cost rather than the estimated amount. Initial Order at P 3, JA 142-43, *see also* Rate Filing, JA 97.

E. The Commission's Orders

The Commission rejected Edison's revised rate sheets as contrary to the Facilities Agreement. Initial Order at PP 9-10 and Ordering Paragraph, JA 144 and 145. Edison requested rehearing. Rehearing Request, R. 8, JA 146. The Commission then denied the request, finding: (1) the Commission was bound to enforce the Facilities Agreement as it was written by the parties; (2) Edison failed to meet the contract's true-up deadline; and (3) the Rate Filing was therefore inconsistent with the Facilities Agreement. Rehearing Order at PP 8-12 and Ordering Paragraph, JA 162-164 and 165. This petition for review followed.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review this case. Edison lacks standing because its claimed injury is entirely self-inflicted and thus not fairly traceable to the challenged Commission Orders.

Assuming jurisdiction, the Commission reasonably held that Edison could not collect a true-up payment from Corona when the previously-accepted agreement between them said Edison could not, and the Commission was bound to enforce the contract's terms. Moreover, the Commission properly reviewed (and rejected) Edison's rate filing under the FPA and Commission precedent. Even though the contract allowed Edison to *seek* approval for later rate changes, neither the contract nor the FPA assured approval of the requested change when the filing was inconsistent with the terms of the contract.

Edison admitted that it failed to meet the contract deadline; therefore, the Commission found that it would not be just and reasonable to allow Edison to collect a true-up payment under the dictates of the FPA and Commission precedent. The Commission also reasonably decided that California breach of contract law is inapplicable to this FERC rate filing dispute. Finally, the Commission's rejection of the Rate Filing did not constitute an improper "forfeiture" or an excessive penalty.

ARGUMENT

I. THE COURT HAS NO SUBJECT MATTER JURISDICTION OVER EDISON'S PETITION

A. Edison Lacks Standing Because It Cannot Show A "Causal Connection" Between Its Claimed Injury And The Challenged Agency Action

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2002) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" for standing requires the petitioner to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997). Edison's appeal fails the "causal connection" requirement because it alone is responsible for its injury.

B. Edison's Alleged Injury Is Self-Inflicted

Edison cannot demonstrate the requisite "causal connection" between the FERC Orders and its alleged injury. An injury, for purposes of Article III standing, must be "fairly . . . trace[able] to the challenged action . . . ." *Lujan*, 504 U.S. at 560 (alterations in original). Standing cannot be based on an injury that is "entirely self-inflicted." *Brotherhood of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006).

In *Brotherhood*, the petitioner union challenged an agency's determination that a railroad's acquisition of track was *exempted* from the authorization process required by one statutory provision, rather than *excepted* from the agency's authority under another statutory provision. *See* 457 F.3d at 26-27. Because the union's collective bargaining agreement with the railroad applied to *excepted* transactions but not to *exempted* ones, the agency's decision meant the union was not entitled to bargain. *Id.* at 26. This Court, however, rejected the union's claim of standing on that basis: "This injury was not in any meaningful way 'caused' by the Board . . . . [H]ad the Union not traded away its right to bargain over the effects of exempted transactions, it would have no interest" in the agency's determination. *Id.* at 28. Thus, the Court held that "[t]he harm suffered, 'insofar as it is incurred voluntarily,' is simply not 'fairly . . . trace[able]' to the challenged

action of the agency." *Id.* at 29 (citation omitted).[5]

Likewise, Edison's professed injury here — its inability to collect trued-up facilities charges from Corona — is wholly of its own making. Edison contends that, "[t]he Commission's decisions thus have the effect of allowing Corona to use the Interconnection Facilities at a reduced charge for the life of the facilities." *See* Br. at 11-12. However, it was not the Commission's actions that led to this result; rather, Edison "slept on its rights" and failed to avail itself of the opportunity to collect those true-up charges pursuant to the terms of its own contract. Initial Order at PP 9-10, JA 144; Rehearing Order PP 9, 12, JA 163, 164.

Thus, Edison's alleged injury was entirely avoidable. As discussed *supra,* under the terms of the Facilities Agreement, Edison had a full twelve months to submit a final invoice to Corona in order to preserve its right to recover the true-up costs from Corona. Moreover, Edison admitted that it had "finalized its internal true-up of costs in December 2003." Br. at 8. Thus, Edison had the knowledge,

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[5] *See also Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (rejecting plaintiff states' standing to challenge defendant states' tax on income of nonresident employees; diminution of taxes paid to plaintiff states was "self-inflicted" by their decisions to credit resident taxpayers for income taxes paid to other states); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (trade organization lacked standing to challenge agency decision allowing its members' competitors to use less expensive methods of disposing hazardous waste; even if members were "forced" by competitive pressures to use methods exposing them to environmental cleanup liability, injury would be self-inflicted and not caused by agency action).

opportunity and ability to comply with the requirements of the contract in a timely fashion. Yet, through its own admitted error and oversight, Edison failed to submit this invoice in a timely manner as the contract required. The letter Edison sent Corona in May 2004, four months after the deadline and fifteen months before the Rate Filing, demonstrated that Edison was aware that there were cost overruns and that it had not yet billed Corona. Initial Order at P 10, JA 144. Instead, Edison waited nearly twenty months after the contract deadline expired (nearly thirty-two months from the in-service date) to submit its Rate Filing in an attempt to recover the true-up costs.

Under these circumstances, Edison cannot "be heard to complain about damage inflicted by its own hand." *Pennsylvania*, 426 U.S. at 664. Its asserted injury was "entirely self-inflicted" and cannot support its claim of standing.

II. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance

of the evidence.'" *Florida Municipal*, 315 F.3d at 365 (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

In reviewing the Commissions interpretation of filed agreements, the Court employs a familiar two-step analysis. *See Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498-499 (D.C. Cir. 2003) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135-36 (D.C. Cir. 1991) (*Chevron* deference applies to agency interpretation of agency-approved contract); also citing *Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1435 (D.C. Cir. 1996) (same)). Applying this analysis the Court first considers *de novo* whether the contract unambiguously addresses the matter at issue. "If so, the language of the agreement controls for we 'must give effect to the unambiguously expressed intent of' the parties." *Ameren,* 330 F.3d at 498 (citing *Chevron*, 467 U.S. at 843). If the contract is ambiguous, however, the Court then examines the Commission's interpretation of that agreement '"under the deferential 'reasonable' standard."' 330 F.3d at 498 (citing *Cajun*, 924 F.2d at 1136).

Similarly, the Court affords deference to the Commission's reasonable interpretation of its tariffs on file, "even where the issue simply involves the proper construction of language." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (internal citation and quotation marks omitted). *See also*

Natural Gas Clearinghouse v. FERC, 965 F.2d 1066, 1070 (D.C. Cir. 1992); *Long Island Lighting Co. v. FERC*, 20 F.3d 494, 497 (D.C. Cir. 1994).

As explained below, the Commission's rejection of the Rate Filing, based on the language of the Facilities Agreement and Edison's admitted failure to preserve its contractual opportunity to collect true-up costs in a timely manner, was reasonable, responsive to the arguments of the various parties, and supported by substantial evidence in the record.

III. THE COMMISSION REASONABLY REJECTED THE RATE FILING AS CONTRARY TO THE CONTRACT

A. The Commission Was Bound To Enforce The Contract As Written

i. The Parties Were Entitled To The Benefit Of Their Bargain

As the Commission noted, "[t]his case involves a simple question: whether Edison can collect a true-up payment from Corona when the contract between them says it cannot." Rehearing Order at P 8, JA 162. Corona and Edison were free to make any contractual arrangement they chose. *Id.* Here, the parties included the Section 13.1.8 true-up provision in the Facilities Agreement to protect both parties; it was designed to ensure that Edison received timely payment of actual costs or, conversely, that Corona received reimbursement of overcharges (if any), while also providing finality with respect to the financial obligations of both parties. *See* Corona Protest at 4-5, R. 3, JA 120-121; Initial Order at PP 5, 9, JA 143, 144. Edison's late Rate Filing would remove this aspect of finality that the

parties included in the Facilities Agreement and that the Commission previously accepted. *See* Initial Order at P 9, JA 144.

ii. Edison Admits The Commission Was Bound To Enforce The Contract Under The FPA And Commission Precedent

Once the Facilities Agreement was filed and accepted under FPA § 205, both parties could expect the Commission to respect and enforce the terms of the contract. Rehearing Order at P 8, JA 162. As the Commission stated, "the contract between the parties governs the legality of Edison's rate filing." *Id.* & n.6, JA 162. (citing *Richmond Power and Light v. FERC*, 481 F. 490, 493 (D.C. Cir. 1973)). Edison admits as much now: "SCE agrees with the Commission that the legality of the rate filing should be governed by the terms of the Agreement." Br. at 3. "SCE agrees that the Commission has an obligation to enforce the Agreement . . . ." Br. at 15.

The Commission explained, consistent with 50 years of precedent on regulatory respect for contracts, that "[r]ate filings consistent with the contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." Rehearing Order at P 8 & n.7, JA 162 (citing court cases). Since the untimely Rate Filing was plainly inconsistent with the Facilities Agreement, the Commission was well within its discretion to reject it.

iii. A Contract Clause Allowing The Filing Of A Proposed Rate Change Does Not Guarantee Approval Of Such A Change

In its brief, Edison argues that Section 18.2 of the Facilities Agreement permitted Edison to unilaterally apply for a rate change. However, regardless of such a contractual right to file, the Commission remained obligated under the FPA to ensure that the filed rates are just and reasonable. Thus, while the Facilities Agreement permitted Edison to *seek* approval for a unilateral change to the previously-approved contract, the inclusion of that clause in no way restricted the Commission's obligations under the FPA or guaranteed that that Edison's application ultimately would be approved. Thus, under the FPA and Commission practice, the Commission was bound to enforce the parties' agreement. Rehearing Order at P 8 & n.8, JA 162 (citing FERC cases).

Interconnection agreements are not excepted from the Commission's practice. *Id.* at P 9, JA 163. The Commission noted that interconnection and facility service agreements like the one in this case are regularly filed with and reviewed by the Commission, and these agreements commonly include provisions requiring timely billing if actual costs of interconnection facilities exceed estimated costs. *Id.* The Facilities Agreement is unremarkable in this respect and Edison is not deserving of special exception from the Commission's normal practice.

B. Edison Admittedly Failed To Meet The Contract Deadline

As set forth more fully in Part I.B. of the Argument, *supra*, Edison admittedly failed to invoice Corona for the additional costs within the twelve months following the in-service date, as it was required to do by the contract. Consequently, Edison abdicated its rights and forfeited its ability to collect the additional costs:

> There is an obligation for a regulated company "to include the costs in its cost-of-service for ratemaking purposes as soon after their incurrence as possible, in order that a decision could be made whether the current body of ratepayers should be charged for their recovery. A regulated company is not permitted to 'sit' on costs, delaying their inclusion in the claimed cost-of-service, until it believes the time is auspicious to seek their recovery."

Rehearing Order at P 9 & n.9, JA 163 (quoting *Virginia Electric and Power Company*, 15 FERC ¶ 61,052 at 61,113 (1981)). Here, contractual language established a condition precedent for Edison to recover true-up costs, but Edison failed to meet that condition precedent. Rehearing Order at P 9, JA 163.

A utility is not guaranteed that it will recover all its costs regardless of its own administrative error. Rehearing Order at P 9 & n.10, JA 163 (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1180-81 & n.3 (D.C. Cir. 1987) (en banc) (it is well-established that while regulated companies must have a reasonable opportunity to recover their costs, they enjoy no guarantee that they will necessarily do so)).

Thus, given Edison's inaction, the Commission reasonably rejected the Rate Filing as inconsistent with the previously-approved Facilities Agreement.

C. The Commission Properly Applied The FPA's Just And Reasonable Standard

Edison alleges that "[t]he Commission's decisions thus have the effect of allowing Corona to use the Interconnection Facilities at a reduced charge for the life of the facilities." *See* Br. at 11-12. However, as the Commission fully explained, "although SCE will not be fully reimbursed, there is nothing unfair about this result." Initial Order at P 10, JA 144. Since Edison "slept on its rights and thus forfeited the additional payment under the contract . . . denying SCE the additional interconnection cost does not *unjustly* enrich Corona, because SCE failed to comply with the contract." *Id.* (emphasis in original). To the contrary, "[i]t would be unjust and unreasonable to permit SCE to recover these costs 20 months after the deadline and 16 months after it knew it missed the contractually required deadline." *Id.*, *see also* Rehearing Order at P 5, JA 161. In contrast, Corona upheld its end of the bargain; it paid (and continues to pay) for its service in accordance with the contract:

> Finally, as specified in the contract, SCE is providing interconnection service, for which Corona is paying; Corona is not requesting to be excused from performance under the contract. Whether or not Corona is required to pay these additional interconnection costs does not alter the service provided or received. Under the contract, Corona timely paid the estimated interconnection costs as requested by SCE, and SCE failed to provide Corona with an invoice within the time

provided for in the contract.

Initial Order at P 11, JA 144, *see also* Rehearing Order at P 11, JA 164.

D. The Commission Properly Applied Federal Law And Commission Precedent

Much of Edison's argument rests on the proposition that, had it applied California breach of contract law to this case, the Commission would have reached a different result. *See* Br. at 12, 15-23; Rehearing Request, R. 8 at 3, 5, 8-10, JA 148, 150, 153-55; Initial Order at PP 6, 7, JA 143; Rehearing Order at P 6, JA 161-62. Edison argues that its breach of the Facilities Agreement was not "material" under California law and, therefore, Corona cannot rescind the contract. *Id.* As the Commission explained in its orders, however, Edison's reliance on California contract law is misplaced and improperly focuses on Edison's desired outcome, instead of FERC's responsibilities under the FPA. *See* Rehearing Order at P 10, JA 163-64.

First and foremost, this was not a breach of contract case, which could have been brought in state court where state law would have governed; rather, it was a filing Edison made to amend rate sheets before the Commission. Rehearing Order at P 10, JA 163-64. As such, the case involved the Commission's interpretation of a previously-approved jurisdictional agreement that contained rates, terms and conditions of service by a jurisdictional public utility. *Id*. Thus, review of the Rate Filing was properly conducted subject to the provisions of FPA and Commission

precedent. *Id.* Indeed, Section 23 of the Facilities Agreement supports this view, in that it specifically provides that the agreement "shall be governed by, and construed in accordance with, the laws of the state of California, *except as otherwise provided by federal law*." Facilities Agreement, Section 23, JA 71; Rehearing Order at PP 6 & n. 3, 10, JA 161; 163-64 (emphasis added).

Moreover, the issue before the Commission was not whether the contract was breached; indeed, Corona does not wish to rescind the contract or collect damages from Edison. Rehearing Order at P 11, JA 164. Instead, the only issue was whether Edison's Rate Filing was just and reasonable under the FPA and Commission precedent, where the contract specifically provided that Edison could not collect a true-up payment unless it billed Corona by the contract deadline, and, through Edison's lack of diligence, it let that deadline lapse. *See id.* The Commission, therefore, reasonably rejected Edison's tardy Rate Filing as inconsistent with the Facilities Agreement.

E. There Was No "Forfeiture"

Next, Edison argues that "forfeiture is an improper remedy" under both California and federal law. Br. at 20. For the reasons stated *supra*, the Commission correctly applied federal, as opposed to California law. Moreover, the California cases cited by Edison (*id.*) are inapposite in any event. These cases address either statutory forfeitures or instances were one party to a lawsuit sought

complete abrogation of the other party's contract rights. Neither applies to the circumstances in this case.

To be sure, the Commission concluded that, having slept on its rights, Edison "forfeited" its right to collect true-up costs from Corona. *See* Initial Order at PP 5, 10, JA 143, 144; Rehearing Order at PP 3, 7, JA 161, 162. This is not to say, however, that the Commission instituted a statutory "forfeiture" action against Edison, or that the Commission forced Edison to forfeit all benefit of the Facilities agreement. To the contrary, the Facilities Agreement is still in force, Corona still pays for its service and facilities under its agreements with Edison, and the only contract right that was "forfeited" was the one Edison let lapse through its own failure to preserve it in a timely fashion.

The one federal case Edison cites (Br. at 20 & n.39) is also inapposite. Petitioner cites *Alexander v. United States*, 509 U.S. 544, 563 (1993), for the proposition that "forfeiture remedies and penalties are the subject of historic disfavor in our country." First, as previously mentioned, this was not a forfeiture proceeding. Second, the cited passage was taken from one of the dissenting opinions where the majority had, in fact, upheld the constitutionality of the forfeiture provision at issue. Finally, *Alexander* dealt with forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq*., and has no relevance to this case whatever.

F. The Commission's "Penalty" Was Not Excessive

Finally, Edison argues that the appropriate remedy for Edison's "billing oversight" is for Edison to forego the time value of the money during the period Edison failed to bill, not for Corona "to be completely relieved of its payment obligation." Br. at 9; *see also id.* at 22-26; Edison Answer at 4-6, R. 5, JA 136-38; Rehearing Request at 7-8, R. 8, JA 152-53. The principal authority Edison relies upon (*see* Rehearing Request at 7 & n.7, R. 8, JA 152; Br. at 25-26) is *Carolina Power & Light Company*, 87 FERC ¶ 61,083 (1999). As the Commission explained, however, this case (and others like it) are inapplicable to this dispute:

> However, that precedent involves a different situation. In those cases [*Carolina Power & Light Company* and others cited by SCE], a utility had collected rates without prior Commission approval, as [FPA] section 205 requires, and the issue was what remedy to impose for this violation of the statute. Those cases impose a remedy that is designed to ensure that rates and contracts are timely filed with the Commission; they do not involve what we have here, namely, a filing to collect a true-up charge that is not within the deadline established under the terms of the agreement between the parties.

Rehearing Order at P 12, JA 164 (footnote omitted).[6]

Therefore, Edison's proposed "time value" remedy is inapplicable. Edison's loss is of its own making – the Commission reasonably enforced Edison's contract with Corona and reasonably rejected Edison's untimely Rate Filing.

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[6] In its brief, Edison concedes the limited usefulness of this line of cases, admitting, "the facts in *Carolina Power* are not exactly the same as the facts in the instant case. . . ." Br. at 26.

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied on the merits and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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