

126 FERC ¶ 61,057  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Southern California Edison Co.

Docket No. ER05-1357-002

ORDER ON REMAND

(Issued January 21, 2009)

1. In response to Southern California Edison Company's (SoCal Edison) petition for review of the Commission's orders issued earlier in this proceeding,<sup>1</sup> the United States Court of Appeals for the District of Columbia Circuit remanded this case back to the Commission for further consideration.<sup>2</sup> At issue is a provision of an Interconnection Facilities Agreement (Facilities Agreement) between the City of Corona (Corona) and SoCal Edison that requires SoCal Edison to determine actual costs for the interconnection facilities and provide Corona with a final invoice within twelve months. The Circuit Court directed the Commission to determine whether SoCal Edison's twelve-month deadline to provide an invoice to Corona is a condition precedent under California law to Corona's obligation to pay for actual costs that were greater than estimated costs. As discussed below, we find that, under California law, although SoCal Edison's failure to provide the invoice within the twelve-month deadline was a breach of the Facilities Agreement, the deadline was not a condition precedent nor was SoCal Edison's failure to meet the deadline a material breach of the Facilities Agreement. We therefore accept the revised tariff sheets for filing.

**I. Background**

2. The Facilities Agreement specifies the terms and conditions for the installation and maintenance of facilities necessary to interconnect SoCal Edison's distribution system to Corona's wholesale distribution load. Under the Facilities Agreement, Corona

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<sup>1</sup> *Southern California Edison Co.*, 113 FERC ¶ 61,018 (2005) (Order Rejecting Revised Rate Sheets), *order on reh'g*, 115 FERC ¶ 61,100 (2006)

<sup>2</sup> *Southern California Edison Co. v. FERC*, 502 F.3d 176 (D.C. Cir. 2007) (Remand Order).

was to pay the cost of the facilities based on SoCal Edison's best estimate of those costs. Within twelve months of the in-service date of the facilities, SoCal Edison was to determine the actual costs and bill Corona if the estimated costs were less than the actual costs (a cost true-up).<sup>3</sup> The Facilities Agreement includes a choice of law clause, which states that "[e]xcept as otherwise provided by federal law, this Agreement shall be governed by and construed in accordance with, the laws of the state of California."<sup>4</sup>

3. The facilities went into service on January 4, 2003, so, under the Facilities Agreement, SoCal Edison was due to bill Corona for any cost overages, or reimburse Corona for any excess payment, by January 4, 2004. However, SoCal Edison did not do so. On August 17, 2005, SoCal Edison made a true-up filing under SoCal Edison's Wholesale Distribution Access Tariff to collect from Corona \$17,957.13, which is the amount by which the actual facilities costs exceeded the estimated costs. Corona requested that the Commission reject SoCal Edison's filing, arguing that SoCal Edison had failed to provide a final invoice within the twelve-month deadline, as required by the Facilities Agreement. Corona argued that since SoCal Edison did not comply with the Facilities Agreement, it had forfeited its ability to seek additional cost recovery from Corona.

4. Among its arguments, SoCal Edison argued that the Facilities Agreement requires that California law be applied and that under California law, Corona's protest failed a contractual analysis. SoCal Edison argued that, under California law, only a *material* breach of contract by one party gives the other party the right to refuse further performance of the contract.<sup>5</sup> SoCal Edison contended, and Corona did not dispute, that it had substantially performed its obligations under the Facilities Agreement. Moreover, SoCal Edison argued that since there is no "time is of the essence" provision in the Facilities Agreement, the late invoice is not a material breach. Finally, SoCal Edison argued that even if Corona could rescind the Facilities Agreement on the basis that SoCal Edison's breach is material, it cannot continue to take service under the Facilities Agreement and the Service Agreement (which terminates upon termination of the Facilities Agreement) if it rejects the Facilities Agreement.<sup>6</sup>

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<sup>3</sup> Facilities Agreement section 13.1.8.

<sup>4</sup> *Id.* section 23.

<sup>5</sup> *Citing Axis Petroleum Co. v. Taylor*, 42 Cal. App. 2d 389, 397 (1941)(*Axis*).

<sup>6</sup> *Citing Jozovich v Central Cal. Berry Growers Assoc.*, 183 Cal. App. 2d 216, 229 (1960) ("In the case of breach of contract he may treat the agreement as alive and effective, suing for damages for breach, or he may assume the contract dead and proceed to obtain restitution.").

5. In its Order Rejecting Revised Rate Sheets, the Commission rejected SoCal Edison's argument that it should apply California law. The Commission found that SoCal Edison's filing was inconsistent with the contract, and therefore, impermissible.<sup>7</sup> The Commission reasoned that the twelve-month deadline protects both parties, ensuring that Corona receives timely notice of any cost overruns and that SoCal Edison has an opportunity to be reimbursed. The Commission stated that since SoCal Edison failed to comply with the contract, denying SoCal Edison the additional interconnection cost did not unjustly enrich Corona.<sup>8</sup>

6. SoCal Edison sought rehearing, arguing that the Commission had failed to provide sufficient rationale for excusing Corona from paying the actual costs of the interconnection facilities. SoCal Edison argued, among other things, that under the choice of law provision, the Commission should have analyzed the Facilities Agreement under California law. The Commission denied rehearing, and SoCal Edison filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit.

7. The Circuit Court found that the Commission erred in not applying California law to determine the rights and responsibilities of the parties.<sup>9</sup> The court found that the Commission appeared to have chosen to apply federal law over California law simply because the agreement was filed with the Commission, without identifying any difference between federal and California law to justify doing so. The court found that the Commission had accepted the Facilities Agreement as filed, with the choice of law provision. It further found that accepting the Commission's choice of law argument would permit the Commission to disregard a choice of law provision in any Commission-approved contract. Accordingly, the court directed the Commission to enforce the choice of law provision and determine under California law whether the twelve-month deadline to provide an invoice to Corona is a "condition precedent" to Corona's obligation to pay the actual costs of the interconnection facilities in excess of SoCal Edison's estimate.

## **II. Discussion**

8. Under California law, a condition precedent is an act that must be performed or an uncertain event that must occur before some right or duty becomes binding.<sup>10</sup> In a bilateral contract, a condition precedent is a condition that must be satisfied before the

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<sup>7</sup> Order Rejecting Revised Rate Sheets, 113 FERC ¶ 61,018 at P 9.

<sup>8</sup> *Id.* P 10.

<sup>9</sup> Remand Order, 502 F.3d 176 at 181.

<sup>10</sup> Cal. Civ. Code § 1436, 1437 (2008).

promisor's duty of performance arises.<sup>11</sup> The California courts have said that "provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction."<sup>12</sup> California courts must construe promises in a bilateral contract as mutually dependent and concurrent whenever possible, i.e., in the absence of plain language requiring a contrary interpretation.<sup>13</sup> Unlike a condition precedent, which must occur before a subsequent obligation arises, promises that are mutually dependent and concurrent establish obligations on both sides of a contract that exist regardless of the timing of performance of either promise.<sup>14</sup>

9. In *Rubin*, the California Supreme Court found that a defendant's obligation to record a tract map was a condition precedent to a plaintiff's obligation to pay a deposit, including a deed of trust, to purchase real property.<sup>15</sup> The California Supreme Court reasoned that the plaintiff was unable to execute a deed of trust as promised until the defendants had recorded the tract map.<sup>16</sup> The California Supreme Court pointed to language in the sale contract stating that the escrow was "subject to" the subdivision of the property.<sup>17</sup> Accordingly, the court found that until the subdivision was completed by recordation of the tract map, the plaintiff was not obliged to perform his part of the contract.<sup>18</sup> Similarly, in *Sosin v. Richardson*, a California court of appeals found provisions of a repurchase agreement to be a condition precedent where the contract clearly stated that the defendant's duty to repurchase real property would arise only upon the occurrence of two events.<sup>19</sup> The court of appeals considered language in the contract stating that one party's duty to perform would arise only "in the event of" the other's performance.<sup>20</sup>

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<sup>11</sup> *Sosin v. Richardson*, 210 Cal.App.2d 258, 264 (1962) (*Sosin*).

<sup>12</sup> *Rubin v. Fuchs*, 1 Cal.3d 50, 53 (1969) (*Rubin*).

<sup>13</sup> Cal. Civ. Code § 1437; *Rubin*, 1 Cal. 3d at 54.

<sup>14</sup> 1 Cal.3d at 54.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 55.

<sup>19</sup> 210 Cal.App.2d at 264.

<sup>20</sup> *Id.*

10. Language crafting conditions precedent often includes dates or deadlines. In *Consolidated World Investments*, a California court of appeals found that a deadline of 60 days for one party to close escrow on a real estate contract was a condition precedent to the other party's duty to perform.<sup>21</sup> Similarly, in a case involving a dispute over the payment of benefits accrued by an employee within one year of employment, a California court of appeals found that an employee's anniversary with the company satisfied the condition precedent for that employee to receive benefits.<sup>22</sup> California courts have also recognized good health periods as valid conditions precedents to the effectiveness of health insurance policies.<sup>23</sup>

11. A deadline is part of a condition precedent where time is of the essence.<sup>24</sup> Time is of the essence when it clearly appears from the terms of the contract that the parties intended it to be of the essence.<sup>25</sup> In other words, time is of the essence "if prompt performance is, by the express language of the contract or by its very nature, a vital matter."<sup>26</sup> Time is not of the essence just because a date is mentioned before which something should be done.<sup>27</sup> Where the language of a contract is ambiguous, California courts will find that time is of the essence if the delay caused any damage that cannot be estimated or compensated.<sup>28</sup> Section 1492 of the California civil code provides: "Where delay in performance is capable of exact and entire compensation, and time has not been declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due."

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<sup>21</sup> *Consolidated World Investments, Inc. v. Lido Preferred Ltd.*, 9 Cal.App. 4th 373, 380 (1992) (*Consolidated World Investments*).

<sup>22</sup> *Berardi v. General Motors Corp.*, 143 Cal.App. 3d Supp. 7, 9 (1983).

<sup>23</sup> *Lunardi v. Great-West Life Assurance Co.*, 44 Cal.App. 4th 807,820 (1995).

<sup>24</sup> *Consolidated World Investments*, 9 Cal.App. 4th 373 at 381; *see also, Henck v. Lake Hemet Water Co.*, 9 Cal. 2d 136, 143 (1937) (*Henck*).

<sup>25</sup> *Henck*, 9 Cal. 2d at 143.

<sup>26</sup> *Johnson v. Alexander*, 63 Cal.App.3d 806, 813 (1976) (citing *Henck*, 9 Cal.2d at 143).

<sup>27</sup> Cal Civ. Code § 1492; *Miller v. Cox*, 96 Cal. 339, 344 (1892)(*Miller*); *Katemis v. Westerlind*, 120 Cal.App.2d 537, 543 (1953).

<sup>28</sup> *Henck*, 9 Cal.2d at 144.

12. Under the Facilities Agreement, SoCal Edison committed to prepare a cost true-up and to provide Corona with a final true-up invoice within twelve months of either the in-service date of the interconnection facilities or the in-service date of any capital additions, as the case may be. If the estimated costs were less than actual costs, SoCal Edison would issue an invoice to collect additional funds from Corona. If the estimated costs were greater than actual costs, SoCal Edison would issue an invoice reflecting a reimbursement to be made to Corona. But if the estimated costs matched the actual costs, SoCal Edison had no obligation to prepare an invoice.

13. Like the plaintiffs in *Rubin*, Corona's duty to pay for costs greater than SoCal Edison's estimate would arise only upon the delivery of a final invoice from SoCal Edison. Thus, the delivery of the invoice was a condition precedent to Corona's duty to pay for costs greater than estimated.<sup>29</sup> But deadlines are not necessarily a part of conditions precedent and so we must consider whether the twelve-month deadline for the true-up invoice is of the essence to the agreement. Although SoCal Edison committed to prepare and deliver the true-up invoice within twelve months of an in-service date, that does not mean that time is of essence to the agreement.<sup>30</sup> In fact, the contract does not even imply any consequences if the true-up invoice is late. We therefore must determine whether SoCal Edison's delay in delivering the invoice caused any damage to Corona that cannot be estimated or compensated.<sup>31</sup> We find that Corona suffered no harm as a result of the delay. In fact, Corona continued to take service under the Facilities Agreement. In light of these circumstances, we find that the twelve-month deadline is not a condition precedent to Corona's duty to pay actual costs in excess of the estimate.

14. Although the twelve-month deadline is not a condition precedent, SoCal Edison breached the Facilities Agreement by failing to provide the invoice within twelve months. As noted by SoCal Edison, however, only a *material* breach of contract by one party gives the other party the right to refuse further performance of the contract.<sup>32</sup> Under California law, a delay in performance is not a material breach unless time is of the essence.<sup>33</sup> Having found that the date of delivery of the true-up invoice is not of the

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<sup>29</sup> See *Sosin*, 210 Cal.App.2d at 264.

<sup>30</sup> See *Miller*, 96 Cal. at 344.

<sup>31</sup> See *Henck*, 9 Cal.2d at 144.

<sup>32</sup> *Axis*, 42 Cal. App. 2d at 397

<sup>33</sup> *Johnson v. Alexander*, 63 Cal.App.3d 806, 813 (1976) (citing *Henck v. Lake Hemet Water Co.*, 9 Cal.2d 136, 143, 69 P.2d 849, 852 (1937)).

essence to this contract, we find that SoCal Edison's delay is not a material breach of the Facilities Agreement.

15. The Commission finds that, under California law, SoCal Edison is entitled to recover the actual costs of construction of the interconnection facilities in excess of the estimate. SoCal Edison chose to recover this sum by revising its rates charged to Corona and asked the Commission to make the revised rate sheets effective October 16, 2005, 60 days after their filing. In light of our determinations above, we accept the revised tariff sheets effective October 16, 2005.

The Commission orders:

SoCal Edison's revised rate sheets are hereby accepted for filing, effective October 16, 2005, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.