171 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Harbor Cogeneration Company, LLC Docket No. EL19-82-001
v.
Southern California Edison Company

ORDER DENYING REHEARING

(Issued June 18, 2020)

1. Harbor Cogeneration Company, LLC (Harbor) seeks rehearing of the Commission's order denying Harbor's complaint (Complaint) against Southern California Edison Company (SoCal Edison).[1] Harbor's Complaint alleged that SoCal Edison violated provisions of its Transmission Owner Tariff (TO Tariff) by assessing and collecting charges from Harbor related to network facilities during the period from June 10, 1999 through December 21, 2018. In this order, we deny rehearing.

I. Background

2. Harbor stated in the Complaint that it owns a natural gas-fired generation facility (Harbor Facility) that is interconnected with the SoCal Edison transmission system via a 0.22 mile radial tie-line terminating at the point of interconnection on a three-breaker ring bus at SoCal Edison's Harborgen substation.[2] Harbor stated that it paid for construction of the SoCal Edison Harborgen substation facilities, three-breaker ring bus, and radial tie-line, and sold capacity and energy from the Harbor Facility to SoCal Edison pursuant to a California Public Utilities Commission (CPUC) jurisdictional power purchase agreement and associated interconnection agreement dated April 12, 1985. The Harbor Facility was a qualifying facility under the Public Utility Regulatory Policies Act of

[1] *Harbor Cogeneration Co., LLC v. Southern California Edison Co.*, 169 FERC ¶ 61,067 (2019) (Order Denying Complaint).

[2] Complaint at 6.

1978,[3] but Harbor relinquished that status in 1999, and Harbor became an Exempt Wholesale Generator with market-based rate authority.[4]

3. Harbor stated that in June 1999, it and SoCal Edison entered into a Commission jurisdictional short-term interconnection agreement under which SoCal Edison effectively classified the SoCal Edison Harborgen substation facilities as interconnection facilities and directly assigned the costs associated with the Harborgen substation to Harbor.[5] Harbor stated that it paid SoCal Edison a monthly interconnection facilities charge applied against the network facility construction capital costs.[6] Harbor entered into two subsequent short-term interconnection agreements with SoCal Edison, with the last of those interconnection agreements being in effect until November 30, 2003.[7] Each of these interconnection agreements contained similar provisions directly assigning certain facilities costs to Harbor.[8]

4. In November 2003, Harbor entered into a long-term interconnection agreement (2003 long-term interconnection agreement) with SoCal Edison that provided Harbor with 110 MW of interconnection capacity for 20 years. Harbor stated in the Complaint that under this agreement, SoCal Edison continued to assess Harbor a monthly interconnection facilities charge at a rate applied to SoCal Edison's previously-incurred capital costs, which Harbor stated it had reimbursed, for constructing the Harborgen substation and the radial tie-in line. Harbor stated that the 2003 long-term interconnection agreement required it to fund the replacement of circuit breakers on the three-breaker ring bus at the Harborgen substation, at an estimated cost of $970,000, and to pay a monthly interconnection facilities charge at a rate applied to the capital

[3] 16 U.S.C. §§ 796, 824a-3 (2018).

[4] Complaint at 6-8; *see* 18 C.F.R. §§ 35.36-.42, 366.1, 366.7 (2019).

[5] Complaint at 9-10.

[6] *Id*. at 5; Harbor Ex. 1 at 1.

[7] According to Harbor, SoCal Edison and Harbor executed a series of letter agreements extending the termination date of the third short-term interconnection agreement to November 30, 2003. Harbor Ex. 1 at 1.

[8] *Id*. This order refers to the short-term interconnection agreements between the parties from June 1999 to November 2003 as the "short-term interconnection agreements."

component of these costs as well.[9] The 2003 long-term interconnection agreement was filed with the Commission on December 24, 2003 and was accepted by a delegated letter order.[10] Harbor and SoCal Edison executed a replacement agreement on December 1, 2018 (December 2018 replacement agreement).[11]

5. Harbor asserted in the Complaint that beginning in 1999 under the short-term interconnection agreements, and continuing under the 2003 long-term interconnection agreement (collectively, interconnection agreements), it was assessed $65,482 per month in interconnection facilities charges. These charges were incrementally reduced on several occasions until the monthly interconnection facilities charges were set at $9,394.38 in the December 2018 replacement agreement.[12] In the Complaint, Harbor challenged SoCal Edison's assessment of two disputed charges in the interconnection agreements: (1) SoCal Edison's assessment of monthly interconnection facilities charges in the short-term interconnection agreements and 2003 long-term interconnection agreement, and (2) the requirement that Harbor pay for the circuit breaker replacement in the 2003 long-term interconnection agreement, which Harbor alleged is in violation of SoCal Edison's TO Tariff.[13]

6. Harbor alleged that the monthly interconnection facilities charges were improper because SoCal Edison directly assigned the costs without obtaining Commission approval, which Harbor maintained violated the TO Tariff.[14] Harbor argued that the interconnection agreements incorrectly classified the Harborgen substation facilities as interconnection facilities, rather than network facilities, and directly assigned the cost of operating and maintaining network facilities to an interconnection customer. Harbor also alleged that the interconnection agreements applied a higher SoCal Edison-funded interconnection facilities charge to facilities funded by Harbor and should have assessed

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[9] *Id*. at 2, 10.

[10] *Id*. at 3 n.4.

[11] *Id*. at 3. The December 2018 replacement agreement was accepted by delegated letter order, effective December 21, 2018. *S. Cal. Edison Co.*, Docket No. ER19-688-001 (Apr. 23, 2019).

[12] Complaint at 9.

[13] *Id*. at 2.

[14] The TO Tariff states that "Direct Assignment Facilities shall be specified in the Interconnection Agreement that governs service to such party and shall be subject to FERC approval." Harbor Response, Ex. 7.

the lower rate.[15] According to Harbor, with the exception of the radial tie-line, the Harborgen substation facilities are network facilities under Commission policy because they are "at or beyond" the point of interconnection, and the interconnection agreements violated the Commission's "at-or-beyond" rule for network facilities.[16]

7. Harbor also contended that the direct assignment of charges related to network facilities violated the Commission's "and" pricing policy.[17] Further, it argued that the monthly interconnection facilities charges were incorrect in the interconnection agreements because the charges included the SoCal Edison-financed interconnection facilities charges, rather than the correct customer-financed charges which Harbor asserts should apply, given that Harbor had paid the Harborgen substation construction costs.[18]

8. With regard to the replacement circuit-breakers, Harbor contended that the 2003 long-term interconnection agreement required it to pay for the repair of circuit breakers at the Harborgen substation in violation of the TO Tariff. According to Harbor, these are direct assignment facilities under the TO Tariff. Harbor maintained that SoCal Edison violated its TO Tariff by not receiving Commission approval to directly assign the costs of the replacement circuit breakers, as required by the TO Tariff. Harbor also maintained that SoCal Edison violated the TO Tariff because the costs were not necessary to interconnect the Harbor Facility, as it was already interconnected, and SoCal Edison needed to replace the breakers because they were obsolete.[19]

9. Harbor asked the Commission to require SoCal Edison to pay refunds with interest for the costs of network facilities directly assigned Harbor. Harbor also sought a return of its capital contribution, plus interest, related to the $970,000 it paid for the replacement circuit breakers.[20] Harbor contended that refunds are appropriate because SoCal Edison violated its TO Tariff and Commission policy since June 10, 1999 by assigning Harbor

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[15] Complaint at 2.

[16] *Id*. at 15, 19-20.

[17] *Id.* at 16-18. Harbor stated that the Commission's "and" pricing policy prohibits utilities from collecting both an incremental rate and a rolled-in rate for service over the same facilities. *Id*. at 5-6.

[18] *Id*. at 21-22.

[19] *Id.* at 20.

[20] *Id*. at 4-5.

the disputed costs without Commission approval.[21] Harbor sought in total $22,824,560.09 in refunds for the disputed charges.[22]

10. In the Order Denying Complaint, the Commission found that none of Harbor's arguments controverted the dispositive fact that the interconnection agreements were properly filed with the Commission under section 205 of the FPA and were accepted under section 205. Consequently, the interconnection agreements constituted filed rates carrying the force of law, and SoCal Edison properly charged the rate reflected in those agreements.[23]

11. The Commission noted that Harbor did not directly dispute that the interconnection agreements were the filed rate, but it found that Harbor seeks to undermine the validity of the terms of those agreements providing for the direct assignment of costs to Harbor. The Commission dismissed Harbor's argument that because the TO Tariff in effect when the interconnection agreements were filed provided that "Direct Assignment Facilities . . . shall be subject to FERC approval," the delegated letter orders acting on those agreements only accepted the agreements for filing, and acceptance does not constitute "approval."[24] The Commission found that regardless of whether interconnection agreements submitted under FPA section 205 are accepted or approved, or whether made effective via delegated letter order or by Commission-voted order, they constitute the filed rate.[25]

12. The Commission found no basis in the record to interpret the TO Tariff's provision that "Direct Assignment Facilities . . . shall be subject to FERC approval" as requiring anything beyond what happened here. The Commission stated that the language in the delegated letter orders stating that acceptance of the interconnection

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[21] *Id*. at 22-23.

[22] *Id*., Ex. 2.

[23] Order Denying Complaint, 169 FERC ¶ 61,067 at P 36 (citing *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Cal. ex. rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004); *Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988); *Me. Pub. Serv. Co. v. FPC*, 579 F.2d 659, 666 (1st Cir. 1978)).

[24] *Id.* P 37.

[25] *Id.* P 38 (citing *PJM Interconnection, L.L.C.*, 109 FERC ¶ 61,368, at P 19 (2004) (stating that agreements and rates accepted by delegated letter order are binding under the filed rate doctrine)).

agreements "does not constitute approval of any service, rate, charge, . . ." does not render SoCal Edison's filings accepted by those delegated letter orders to be something other than the filed rate. The Commission also found the interconnection agreements were "subject to FERC approval because SoCal Edison filed them with the Commission as required under section 205 of the FPA," and Harbor has not shown that the TO Tariff was intended to require the Commission to explicitly use the term "approve" in acting on them to make them filed rate.[26] The Commission noted that it has "wide discretion on how it chooses to process its filings."[27]

13. Finally, the Commission found that because SoCal Edison had acted consistent with the filed rate there was no need to address the substance and timing of the Commission's interconnection pricing policies or alleged inconsistencies between Commission policies and the TO Tariff.[28]

II. Rehearing Request

14. Harbor argues on rehearing that the Commission erred in finding that SoCal Edison complied with the filed rate and that Harbor is seeking to undermine the terms of that rate. Harbor maintains that there is no record evidence to support this finding, and it is seeking to enforce the filed rate, not to undermine it. According to Harbor, the Commission ignored the fact that each of the interconnection agreements incorporated the terms of the SoCal Edison TO Tariff, and at all times the TO Tariff required Commission approval as a condition of the direct assignment of costs of facilities to Harbor.[29] Harbor maintains that the fact that the interconnection agreements are the filed rate "is not a 'dispositive fact,' it is the necessary prerequisite to the enforcement Harbor

[26] *Id.* P 39.

[27] *Id.* (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977) ("We ordinarily will defer to an agency's choices concerning its procedures because in making such choices agencies are best situated to determine how they should allocate their finite resources.")).

[28] *Id.* P 40 (citing *Williston Basin Interstate Pipeline Co. v. FERC*, 874 F.2d 834, 837 (D.C. Cir. 1989) (finding that the Commission is bound by the terms of accepted rate schedules)).

[29] Rehearing Request at 6-7.

seeks."[30] Harbor argues that it is seeking enforcement of that condition, and the fact that one term of the interconnection agreements provided for rates that directly assigned the cost of interconnection facilities to Harbor does not negate or contradict other terms of the interconnection agreements requiring Commission approval of direct assignments of costs.[31]

15. Harbor maintains that the Commission erred as a matter of law in finding that filing of the interconnection agreements is the equivalent of obtaining Commission approval of the direct assignment of costs. Harbor states that section 34.5 of the Commission's regulations[32] and Commission precedent make clear that Commission acceptance of a rate, contract, or tariff for filing does not constitute approval of it. Harbor also states that the Commission letter orders accepting the interconnection agreements for filing expressly state that such acceptance does not constitute approval. Harbor contends that Commission approval is required to address the question of undue discrimination that direct assignment raises.[33]

16. Harbor states that the Commission erred by invoking its discretion to determine its internal administrative processes for managing filings as a substitute for actual Commission approval of the direct assignments as required by the SoCal Edison Tariff. Harbor states that administrative processing is not a substitute for substantive determinations. Harbor argues that the issue here is SoCal Edison's failure to obtain Commission approval of the direct assignments, as required by the SoCal Edison TO Tariff. Harbor states that the Complaint did not challenge the Commission' internal administrative processing of filings. It also states that the Commission's internal administrative processes cannot override, negate, or modify the terms of the filed rate.[34]

17. Harbor claims that the Commission erred to the extent that it based its denial of the Complaint on the fact that Harbor or its predecessors did not seek rehearing of the delegated letter-orders that accepted the interconnection agreements for filing. According to Harbor, a customer cannot through its own unilateral action or inaction

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[30] *Id.* at 7-8.

[31] *Id.*

[32] 18 C.F.R. § 34.5 (2019).

[33] Rehearing Request at 9-12 (citing *Otter Tail Power Co. v. FERC*, 583 F.2d 399, 405 (D.C. Cir. 1978) (*Otter Tail*); *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (D.C. Cir. 1979) (*Papago*)).

[34] *Id.* at 3, 12-13.

modify the terms of a public utility's filed rate. Harbor states that the Commission has an independent obligation to enforce the filed rate.[35]

18. Harbor also states that the Commission erred in not addressing SoCal Edison's violation of the filed rate by directly assigning the costs of facilities located beyond the point of interconnection. Harbor states that the SoCal Edison TO Tariff does not allow for direct assignment of costs of integrated network facilities located on SoCal Edison's side of the point of interconnection. Harbor states that SoCal Edison nevertheless directly assigned costs of facilities that the record shows are located beyond the point of interconnection, and the Order Denying Complaint does not address this issue.[36]

19. Finally, Harbor states that the Commission erred by not addressing its complaint about SoCal Edison's current excessive interconnection rates. Harbor states that the currently effective Interconnection Agreement improperly assesses Harbor the higher SoCal Edison-Financed Monthly Rate for Non-ISO Facilities (currently 1.10%) instead of the lower Customer-Financed Monthly Rate for Non-ISO Facilities (currently 0.34%) on the costs of facilities actually financed by Harbor under the CPUC agreement and later through the improper direct assignment of costs of those facilities under the interconnection agreements.[37]

20. SoCal Edison filed a motion for leave to answer and answer to Harbor's rehearing request on December 10, 2019. On December 26, 2019, Harbor filed motion for leave to answer and answer to SoCal Edison's answer.

III. Discussion

A. Procedural Matters

21. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2019), prohibits an answer to a request for rehearing. Accordingly, we deny SoCal Edison's motion to answer Harbor's request for rehearing, and we reject both SoCal Edison's answer and Harbor's answer thereto.

B. Substantive Matters

1. Charges Under the Prior Agreements

[35] *Id.* at 3, 8.

[36] *Id.* at 13-15.

[37] *Id.* 15-16.

22. We deny rehearing. We continue to find that the Commission processed the interconnection agreements in conformance with the SoCal Edison TO Tariff, that the agreements were the filed rate carrying the force of law, and that SoCal Edison properly charged the rate reflected in those agreements.

23. Harbor sought in the Complaint a refund of all interconnection facilities charges it paid to SoCal Edison for the period beginning June 10, 1999 through December 21, 2018, a period of 19 years and five months, as well as capital funding for circuit breaker replacements under the 2003 long-term interconnection agreement.[38] In total, Harbor sought approximately $22.8 million in refunds, plus interest.[39] Harbor argued that this relief is justified because SoCal Edison violated its TO Tariff and Commission policy since June 10, 1999 by assigning Harbor the disputed costs without Commission approval.[40] Harbor thus posited that it should be awarded the relief it seeks because of an alleged insufficiency in the Commission's action on the interconnection agreements when they were filed.

24. Importantly, Harbor concedes that the interconnection agreements "were properly filed and accepted" at the Commission and "constitute filed rates carrying the force of law."[41] Harbor nevertheless maintains that SoCal Edison violated the filed rate because it failed to obtain Commission "approval" of the direct assignment of costs.[42] Specifically, Harbor contends that because the interconnection agreements incorporated the terms of the TO Tariff, SoCal Edison violated the filed rate by violating a term of the tariff.[43] But this contradicts Harbor's acknowledgement that the interconnection agreements are the filed rate carrying the force of law, as it makes a term of the agreements, the direct assignment of costs, unlawful and thus unenforceable.

25. According to Harbor, the Commission's failure to state explicitly that it had "approved" the agreements meant that the direct assignment of costs to Harbor was

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[38] Complaint at 1-2.

[39] *Id.* at 24.

[40] *Id.* at 22-23.

[41] Rehearing Request at 7 (internal citation omitted).

[42] *Id.* at 3-4, 6-9, 11, 15.

[43] *Id.* at 7.

invalid, but Harbor makes no comparable objection to the agreement's other terms,[44] including the obligation for SoCal Edison to provide interconnection service. Such an argument, we find, is facially untenable, as it suggests that the interconnection agreements were the filed rate carrying the force of law in one respect but not in another.

26. We also find unconvincing Harbor's contention that, in seeking rehearing, it does not challenge the Commission's discretion in choosing how to process filings and that the "Complaint is not seeking to impose any additional procedural requirement on the Commission."[45] Harbor's argument on rehearing is, for the most part, just such a challenge, in particular given that Harbor does not suggest what SoCal Edison should have done in addition to, or in place of what it did do. To begin with, to put a proposed rate into effect, SoCal Edison is required under section 205 of the FPA to file that rate with the Commission, which it did. As provided in the Commission's regulations,[46] SoCal Edison's uncontested filings were acted on through an exercise of delegated authority, using the language routinely found in such delegated orders. Harbor, in essence, contends that this language is inadequate to allow SoCal Edison's charges under the interconnection agreements to become lawful because of the TO Tariff requirement that direct assignment of costs is "subject to Commission approval." The inference to be drawn from this argument is that the Commission should have used some other means to process the filings, since, as relevant here, the delegation does not use the words "approve" or "approval."[47] It is difficult to see how this argument does not amount to a challenge to the Commission's discretion in processing filings.[48]

27. The Commission's regulations explain that acceptance by a delegated order represents a finding that a filing meets the applicable requirements. Specifically, under section 375.307(a)(1)(i) of the Commission's current regulations, the Commission has

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[44] *Id.* at 7.

[45] *Id.* at 13 n.34.

[46] 18 C.F.R. § 375.307(a) (2019).

[47] *Id*. Rather, the delegation instead uses the word "accept," and on the other side "reject." *Id*.

[48] To this analysis, we add that a failure to use "magic words"—here, "approve" versus "accept"—is not a fatal error. *TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1, 10 (D.C. Cir. 2015); *see also R.I. Consumers' Council v. FPC*, 504 F.2d 203, 213 n. 19 (D.C.Cir.1974) (holding that "an order is not invalidated by mere failure to use the magic words").

authorized the Director of the Commission's Office of Energy Market Regulation, or his or her designee, to

> [a]ccept for filing all uncontested tariffs or rate schedules and uncontested tariff or rate schedule changes submitted by public utilities . . . *if they comply with all applicable statutory requirements, and with all applicable Commission rules, regulations and orders* for which waivers have not been granted . . . .[49]

28. The scope of the finding necessary to accept a filing by delegated order thus includes a determination that there was no inconsistency between, as relevant here, the interconnection agreements and the requirements of the SoCal Edison TO Tariff, as well as no violation of the TO Tariff. Moreover, to the extent Harbor argues that this was not the case, it had a duty to raise that objection at that time.[50]

29. Harbor argues that there is language in the orders accepting the interconnection agreements that demonstrates the inadequacy of Commission action by delegated order here. Harbor specifically cites language found in all such Commission delegated orders, as well as in section 35.4 of the Commission's regulations,[51] specifying that the Commission's finding in the order does "not constitute approval of any service, rate, charge."[52] But this language must be read in context.[53] Immediately following this statement, the Commission's delegated orders routinely state, and stated here, that the Commission's action is "without prejudice to any findings or orders which have been or any which may hereafter be made by the Commission in any proceeding now pending or

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[49] 18 C.F.R. § 375.307(a)(1)(i) (emphasis supplied).

[50] *See infra* P 30, n.65.

[51] 18 C.F.R. § 35.4 (2019).

[52] Rehearing Request at 10; *see Southern California Edison Co.*, Docket No. ER04-338-000, at1- 2 (Feb. 12, 2003) (SoCal Edison Delegated Order) (attach. 1 to Southern California Edison Co., Answer and Motion to Dismiss Complaint, Docket No. EL19-82-000 (filed July 18, 2019)).

[53] *See*, *e.g.*, *Pharmaceutical Research and Mfrs. of America v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) ("[A] word's "ordinary understanding" is not always controlling. Words draw meaning from context."); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (explaining that "since context determines meaning, the same word can mean different things in different sentences—to monopolize a conversation doesn't mean the same thing as to monopolize the steel industry ...").

hereafter instituted by or against" the party to whom the order is addressed.[54] In this context, an "acceptance" lacks the precedential effect of a substantive determination on the justness and reasonableness of the filing that an "approval" would carry.[55] Of greater relevance here, though, as explained in the Order Denying Complaint,[56] both acceptance and approval equally have the effect of making the interconnection agreements in their entirety, i.e., including provisions regarding the direct assignment of costs, the lawful filed rate binding on both parties to such agreements.[57] If Harbor's position is that additional Commission action was necessary in the orders on the interconnection agreements to have made them the lawful filed rate or to have complied with the TO Tariff, its recourse was to have sought rehearing of the orders accepting the interconnection agreements to make the argument that the Commission erred in the orders or that there was a violation of the TO Tariff.[58] Harbor did not seek rehearing of

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[54] SoCal Edison Delegated Order at 2.

[55] *See Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 n.4 (D.C. Cir. 1993) (explaining that the Commission was not bound to follow earlier orders which accepted the type of rate at issue, noting that "the Commission correctly explained that the mere acceptance of agreements for filing does 'not constitute a substantive determination that the rate methodology employed is just and reasonable'"); *accord Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) ("FERC's acceptance of a pipeline's tariff sheets does not turn every provision of the tariff into 'policy' or 'precedent.'"); *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) (citing 18 C.F.R. § 35.4, explaining that the Commission's permitting a rate to go into effect "does not amount to a determination that the rate is 'just and reasonable'"; permission for a rate to go into effect "does not constitute a finding that the rate is just and reasonable").

[56] Order Denying Complaint, 169 FERC ¶ 61,067 at P 36.

[57] *Id*. (citing *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Cal. ex. rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004); *Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988); *Me. Pub. Serv. Co. v. FPC*, 579 F.2d 659, 666 (1st Cir. 1978)); *see also Williston Basin Interstate Pipeline Co. v. FERC*, 874 F.2d 834, 837 (D.C. Cir. 1989) (finding that the Commission is bound by the terms of accepted rate schedules).

[58] *Baltimore Gas and Elec. Co. v. FERC*, 954 F.3d 279 (D.C. Cir. 2020) ("Because staff exercise only authority delegated to them by the Commission, their decisions to accept, reject, or take other actions on filings are decisions of the Commission until superseded by subsequent agency action."); 18 C.F.R. § 385.1902(a) (2019) ("Any staff action ... taken pursuant to authority delegated to the staff by the Commission is a final

the orders accepting the interconnection agreements. Instead, Harbor took interconnection service under those agreements for almost 20 years before complaining in this proceeding about the form of the orders and a violation of the TO Tariff. Based on these factors, it was reasonable for the Commission to have denied Harbor's complaint in this proceeding.

30. Harbor claims that it is not arguing that the Commission should simply have said "approve" where it said "accept." Rather, Harbor maintains that the Commission was required to make a "substantive determination,"[59] by which it means "a Commission ruling on the merits of the direct assignment of costs,"[60] which Harbor argues acceptance does not provide.[61] Harbor bases the need for a determination on the merits on the Commission's concern, expressed in prior decisions, that "'when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation of participant funding, including the 'but for' pricing approach, creates opportunities for undue discrimination.'"[62] Harbor also bases the need for a determination on the merits on Commission precedent on the propriety of direct assignment versus rolled-in rates.[63] In other words, Harbor treats direct assignment of costs as inherently problematic in a way that mandates a full investigation of whether undue discrimination is occurring or whether the issues raised in the precedent Harbor

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agency action that is subject to a request for rehearing."); *see also Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) ("[W]e have previously defined 'order' expansively to include any agency action capable of review on the basis of the administrative record.") (citation and quotation marks omitted).

[59] Rehearing Request at 3.

[60] *Id.* at 12.

[61] *Id.* at 11.

[62] Rehearing Request at 12 (quoting *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 at P 696 (2003) (additional internal citations omitted)).

[63] Harbor cites *Northeast Texas Electric Cooperative, Inc.*, 108 FERC ¶ 61,084, at P 55 (2004); *Mansfield Municipal Electric Department v. New England Power Co.*, 94 FERC ¶ 63,023, *aff'd*, Opinion No. 454, 97 FERC ¶ 61,134 (2001), *reh'g denied*, Opinion No. 454-A, 99 FERC ¶ 61,115 (2002); *Allegheny Power*, 122 FERC ¶ 61,160, at PP 21-36 (2008). All these orders involve contested proceedings in which the Commission set the matter for hearing. None of them establish requirements for uncontested matters where the record does not suggest the need for a full investigation.

cites are somehow implicated.[64] Harbor cites no authority for this proposition, and we are not aware of any. The filings at issue here were uncontested. Moreover, the courts have found that parties to an agreement have a duty to timely raise issues if they believed at the time that they were present.[65] Harbor, for its part, did not do this.[66]

31. Harbor also incorrectly asserts that the absence of any objection to SoCal Edison's filings by itself or its predecessors is irrelevant to this proceeding. As noted above, the courts have found that parties to contracts are obligated to raise any concerns they may have when the agreements are filed with the Commission.[67] Secondly, as noted above, if Harbor contends that the Commission's orders on the interconnection agreements erred by failing to take action beyond acceptance of the agreements, its recourse was to have sought rehearing of the orders in question. In other words, even if Harbor had no specific objections to SoCal Edison's filings, it was in a position to seek rehearing on the ground that the Commission's treatment of them was insufficient to satisfy SoCal Edison's TO Tariff requirements.[68] Finally, Harbor's lack of objection and its failure to seek rehearing

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[64] For this reason, *Otter Tail*, which Harbor cites for the proposition that a presumption of reasonableness does not attach to a rate schedule simply because it is effective, is not relevant here. *See* Rehearing Request at 11.

[65] *Rhode Island Consumers' Council v. FPC*, 504 F.2d 203, 212 (D.C. Cir. 1974) ("The agency's obligation presupposes a burden on the part of interested parties to draw attention to the consequences of proposed action that adversely affects their interests."); *see also Central Vermont Pub. Serv. Corp.*, 39 FERC ¶ 61,366, at 62,198 (1987) (denying an appeal of staff action "insofar as it claims that the staff action is invalid for failing to include a determination of justness and reasonableness. Under our longstanding practice, we will permit a rate to take effect without determining whether it is just and reasonable when the parties raise no legal or factual issue requiring hearing and when our preliminary analysis finds that the proposed rate is not excessive.").

[66] As noted in the Order Denying Complaint, except for an initial protest of the 1999 short-term interconnection agreement that it later withdrew, Harbor did not contest any of the other short-term interconnection agreements or the 2003 long-term interconnection agreement (and, indeed, executed those subsequent agreements). Further, notwithstanding that Harbor now argues the Commission never "approved" the direct assignment of costs in the delegated letter orders, Harbor never sought rehearing of the delegated letter orders that "accepted" the filings. Order Denying Complaint, 169 FERC ¶ 61,067 at n.59. Nor did Harbor did not seek a hearing at any time prior to filing its Complaint.

[67] *See supra* note 65 and accompanying text.

[68] *CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994)

of the orders on the interconnection agreements is relevant because it forms a basis for denying the relief that Harbor sought in its Complaint. In this complaint proceeding, Harbor is seeking refund of all interconnection-related charges it paid to SoCal Edison over an almost 20-year period under the interconnection agreements. The Commission's authority to order refunds is discretionary,[69] and the courts have held that decisions on refunds are to be guided by equitable principles.[70] It is a fundamental principle of equity that "equity aids the vigilant" and not "those who slumber on their rights."[71] Thus, under these guiding principles, even if Harbor's complaint had merit, Harbor's failure to raise any concern with the interconnection agreements at the time the agreements were filed, or at the time the Commission issued the orders on the interconnection agreements is relevant to the relief Harbor sought in the Complaint. Moreover, we note that Harbor's arguments are limited largely to its interpretation of the distinction between "accept" and "approve" and a discussion of the inadequacy of the Commission's processing of the interconnection agreements when filed. Harbor has not explained how SoCal Edison's retention of the amounts it received for providing interconnection services to Harbor in accordance with the terms and conditions of the interconnection agreements, in exchange

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(where petitioner had, among other things, opportunity to make its case on rehearing, it had "ample notice and opportunity to be heard").

[69] *See, e.g., La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (2008) ("'[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.'") (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

[70] *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.3d 67, 75 (D.C. Cir. 1992) (*Towns of Concord*).

[71] *Pacific Gas & Elec. Co. v. Sunnyside Cogeneration Partners L.P.*, 97 FERC ¶ 61,378, n.16 (2001) (citing *Annual Charges Under the Omnibus Budget Reconciliation Act of 1986,* (*Koch Energy Trading, Inc.,* et al.), 88 FERC ¶ 61,068, at 61,159 (1999) (citing *LaChapelle v. Berkshire Life Insurance Co.*, 142 F.3d 507, 510 (1st Cir. 1998) (equity aids the vigilant); *Texaco Puerto Rico v. Dep't of Consumer Affairs*, 60 F.3d 867, 879-80 (1st Cir. 1995) (unreasonable delay militates against relief); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 87 (1st Cir. 1990) (equity ministers only to the vigilant; it gives no aid to those who slumber upon their rights); *International Union, Allied Industrial Workers of America, AFL-CIO v. Local Union No. 589*, 693 F.2d 666, 674 (7th Cir. 1982) (equity aids only the vigilant; courts will deny relief to those who slumber upon their rights); *DiVito v. Fidelity and Deposit Co. of Maryland*, 361 F.2d 936, 939 (7th Cir. 1966) (equity aids the vigilant)).

for Harbor being provided those services, would give offense to equity and good conscience.[72]

32. In its rehearing request, Harbor argues that the Commission failed to address sufficiently Harbor's argument that SoCal Edison violated its TO Tariff by directly assigning costs for facilities located beyond the point of interconnection to Harbor and requiring Harbor to pay for replacement breakers. In the Order Denying Complaint, the Commission stated that it did not address these arguments because it found that SoCal Edison had "acted consistent with the filed rate."[73] As discussed above, the acceptance of the interconnection agreements was sufficient to establish that SoCal Edison did not violate its TO Tariff because they included the direct assignment of charges and constituted the filed rate. Therefore, there was no need address the specific costs in question.

33. In addition, we disagree with Harbor's invocation of the court's finding in *Papago* that the court was "'unable to subscribe to the Commission's holding that they authorized [a utility] to raise rates merely by securing administrative acceptance of a purported section 205(d) filing' because of, among other factors, the Commission's overbroad reading of *certain* contractual provisions."[74] Harbor treats *Papago* as presenting a situation analogous to the one it argues obtains here, i.e., Commission action constituting a misreading of language in the TO Tariff in a manner similar to the overly broad reading of contract provisions that the court found in *Papago*. However, *Papago* is distinguishable from this case.

34. *Papago* dealt with the interpretation of a *Mobile-Sierra*[75] clause in a power sales contract specifying that "[t]he rates hereinabove set out . . . are to remain in effect . . . until changed by the [Commission]" and further specifying that "either party hereto [is] free unilaterally to take appropriate action before the [Commission] . . . in connection

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[72] *Towns of Concord*, 955 F.3d at 75 (holding that refunds are a form of equitable relief, akin to restitution, and agencies should order them only when retention of the funds received would give offense to equity and good conscience).

[73] Order Denying Complaint, 169 FERC ¶ 61,067 at P 40.

[74] Rehearing Request at 11 (quoting *Papago*, 610 F.2d at 926) (emphasis supplied).

[75] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

with changes which may be desired by such party."[76] The court found that the Commission had interpreted this latter clause overbroadly by finding that it permitted effectuation of a change to the contract unilaterally through a FPA section 205 filing rather than being an acknowledgement that either party was entitled to seek a rate change by the Commission through a section 206 filing.[77] The court found that "appropriate action" before the Commission could not be the effectuation of a rate change through a FPA section 205 filing because the contract language provided only for rate changes by the Commission, not a self-effectuation of a new rate. Contrary to Harbor's reading, *Papago* says nothing about the efficacy of Commission acceptance of a filing under section 205. *Papago* dealt with what a contract authorized the parties to it to do. The fact that the language in question did not authorize a section 205 filing does not imply that administrative acceptance under section 205 is not authorized in the instant case.

2. Charges Under the Current Agreement

35. Finally, we find unconvincing Harbor's assertion that the Commission erred in failing to address Harbor's concerns regarding the December 2018 Replacement Agreement. As an initial matter, if Harbor had concerns about the December 2018 Replacement Agreement it had executed only a few months before filing the Complaint, it did not express those concerns clearly in the Complaint. A complainant must clearly identify the issues it wishes to raise in a complaint.[78] Moreover, Harbor's statements in its Complaint and its conduct indicate that Harbor was not seeking relief in connection with the December 2018 Replacement Agreement.

36. First, Harbor's stated concerns in the Complaint pertained only to the charges assessed for periods prior to the December 2018 Replacement Agreement. For example, Harbor stated in the Complaint that, while SoCal Edison had provided some relief going forward in the December 2018 Replacement Agreement, "it did not exhibit a willingness to compromise its position with respect to Disputed Charges *assessed in prior periods*."[79] Moreover, in its estimate of the harm due to SoCal Edison's alleged tariff violations, Harbor stated that SoCal Edison "continued to assess the Disputed Charges for periods at least through December 21, 2018, the effective date of [SoCal Edison's] filing in Docket

[76] *Papago*, 610 F.2d at 920.

[77] *Id.* at 928.

[78] 18 C.F.R. § 385.206(b)(1) (2019) (a complainant must "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements").

[79] Complaint at 25 (emphasis added).

No. ER19-688."[80] By contrast, Harbor does not state explicitly that the charges for which it sought refunds were ongoing. Thus, while the Commission recognized that some of the charges that Harbor objected to were carried over in the December 2018 Replacement Agreement (and thus are currently being assessed), the Complaint suggests that Harbor sought relief only to the effective date of that newly executed agreement.

37. Second, the absence of a protest by Harbor, and indeed Harbor's execution of the December 2018 Replacement Agreement, which was filed six months before Harbor filed its Complaint, further indicate that it was reasonable for the Commission to have read the complaint as seeking relief only up to December 21, 2018. If Harbor disputed provisions of the December 2018 Replacement Agreement, it could have requested that SoCal Edison file the agreement unexecuted and then exercise the right to protest the December 2018 Replacement Agreement under section 205 of the FPA.

38. In addition, following SoCal Edison's filing of the December 2018 Replacement Agreement, Harbor filed a letter in support of SoCal Edison's filing in which Harbor explicitly disclaimed the existence of any objections to the December 2018 Replacement Agreement. Specifically, Harbor explained that SoCal Edison's "transmittal letter noted the existence of a dispute between Harbor and [SoCal Edison] regarding charges under the prior agreements governing the Harbor-[SoCal Edison] interconnection." Harbor went on to explain that this "dispute *has no bearing on [SoCal Edison's] filing in Docket No. ER19-688-000* and, therefore, provides no basis for delaying or impeding *the acceptance* of [SoCal Edison's] filing." Finally, Harbor noted that SoCal Edison had acknowledged that its filing "is not intended to prejudice Harbor's right to seek relief with respect to charges imposed *prior to* the effective date of the [December 2018 Replacement Agreement]."[81] Given these statements, as well as Harbor's failure to address these matters clearly in the Complaint, we reject Harbor's claim that the Commission inappropriately "failed to acknowledge, much less address, Harbor's requested relief under the currently effective interconnection agreement."[82]

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[80] *Id.* at 24.

[81] Harbor Cogeneration Co., LLC, Comments in Support of Filing, Docket No. ER19-688-000 (filed January 16, 2019) (emphasis supplied).

[82] Rehearing Request at 16.

The Commission orders:

Harbor's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.