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Before the Public Utilities Commission of the State of California

In the Matter of the Application of The
Nevada Hydro Company for a Certificate
of Public Convenience and Necessity for
the Talega-Escondido/Valley-Serrano
500-kV Interconnect

Application No. 10-07-001
(Filed July 6, 2010)

**JOINT RESPONSE TO THE PETITION TO MODIFY DECISION 11-07-036
OF THE CENTER FOR BIOLOGICAL DIVERSITY,
SANTA ANA MOUNTAINS TASK FORCE OF THE SIERRA CLUB & THE
FRIENDS OF THE FOREST (TRABUCO DISTRICT) AND THE SANTA ROSA PLATEAU**

December 9, 2011

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Pursuant to Rule 16.4 of the Rules of Practice and Procedure, and the November 2, 2011 electronic ruling of Administrative Law Judge (“ALJ”) Minkin, Center for Biological Diversity (“CBD”), Santa Ana Mountains Task Force of the Sierra Club (“SAMTF”) and Friends of the Forest (Trabuco District) and the Santa Rosa Plateau (“FOF&P”) submit this joint response to the Petition to Modify Decision 11-07-036 (“D1107036”) filed by the Nevada Hydro Company (“TNHC”) on November 9, 2011.

SUMMARY

The proposed Petition to Modify Decision 11-07-036 should be rejected in its entirety for the following reasons:

- 1) A performance or surety bond are the appropriate form by which intervenor compensation should be guaranteed by TNHC;
- 2) TNHC’s letter of credit is not an appropriate substitute for a performance or surety bond;
- 3) TNHC’s letter of credit does not guarantee intervenor compensation because *it allows TNHC or the bank to cancel their obligation at any time* without notice to the CPUC or intervenors;
- 4) TNHC’s request for delay and failure to comply with the ALJ’s orders have placed an unfair drain on the resources of intervenors.

BACKGROUND

Phase I of this proceeding dealt with a number of preliminary issues, amongst them the question of whether TNHC should compensate intervenors and if so whether they would be required to post a bond through which eligible intervenors would be fully compensated. On July 28, 2011, the Commission issued decision D1107036, which stated in ordering paragraph 2 that TNHC “provide a surety or performance bond in the amount of \$550,000 that shall remain in effect until it has fully compensated all eligible intervenors determined to have made a substantial contribution to this proceeding.”¹ The Commission also ordered in paragraph 3 that “[n]o later than 30 days after the effective date of this decision, The Nevada Hydro Company shall file and serve proof of the bond in this proceeding and shall send a copy of the bond to the Commission’s Fiscal Office.”² Lastly, the Commission ordered that “to the extent that [TNHC] does not comply with Ordering Paragraphs 2 and 3, the Commission, on its own motion, shall dismiss this application with prejudice.”³

In the subsequent months, TNHC requested an extension, claimed to misunderstand how funds for the intervenor’s compensation would be distributed, and repeatedly failed to comply with the clear language of the July 28, 2011 order by the Commission. On August 22, 2011 TNHC sent a letter to Paul Clanon, Executive Director of the California Public Utilities Commission (“CPUC”) requesting an Extension of Time to Comply with articles 2 and 3 of the order in D1107036, to which Mr. Clanon responded by granting an extension until October 28, 2011.⁴

On October 28, 2011 TNHC filed a motion requesting approval of actions to comply with ordering paragraphs 2 and 3 of commission Decision 11-07-036.⁵ The motion included an attached document with the title “SURETY DEPOSIT AND BOND” signed by Rexford Wait. The motion claims to contain “a copy of a Cashier’s Check made payable to the California Public Utilities Commission (“the Commission”) in the amount of US\$550,000,00(sic).”⁶ The copy shows that the cashiers check is made payable to “PUBLIC UTILITIES COMMISSION (sic)” not to California Public Utilities Commission as stated in the motion.⁷ In its motion, TNHC also acknowledges that it “had misunderstood” how the funds would distributed by assuming the Commission would disburse the fund

¹ D1107036, DECISION REGARDING PHASE 1 ISSUES, Issued August 5, 2011 at 18.

² Ibid., at 19.

³ Ibid., at 19.

⁴ Letter from David Kates, Project Manager for TNHC to Paul Clanon, Executive Director, CPUC dated August 22, 2011.

⁵ MOTION OF NEVADA HYDRO COMPANY FOR APPROVAL OF ACTIONS TO COMPLY WITH ORDERING PARAGRAPHS 2 AND 3 OF COMMISSION DECISION 11-07-036, October 28, 2011.

⁶ Ibid, at 1.

⁷ Ibid, photocopy attachment. We note that there are at least 8 other Public Utilities Commissions in the United States.

rather than Nevada Hydro.⁸ In order to resolve its error, TNHC stated that “no later than November 4, 2011, Nevada hydro will provide a Letter of Credit in the amount of US\$550,000.00 from a major domestic bank from which it can disburse funds when ordered to do so by the Commission.”⁹

However, on November 1, 2011 David Kates, acting for TNHC, sent an *ex parte* e-mail to ALJ Minkin explaining that Wells Fargo would need 6-10 business days to process TNHC's application for a letter of credit.¹⁰ The e-mail also contained a copy of an e-mail sent November 1, 2011 from the Wells Fargo Letter of Credit Resource Center to David Kates explaining the conditions for a letter of credit.¹¹

On November 2, 2011 ALJ Minkin issued an electronic ruling directing TNHC to file and serve no than November 9, 2011 a Petition to Modify the July 28, 2011 order from the Commission requiring a surety or performance bond from TNHC and to explain whether and how a letter of credit is in substantial compliance with the Commission's orders. ALJ Minkin requested that rather than respond to the Motion filed by TNHC, parties should respond to the Petition for Modification.¹² We are complying with that request.

On November 9, 2011, TNHC filed a Petition to Modify Decision 11-07-036 by adding in “or other creditworthy facility” into order paragraph 2.¹³ The petition contained as exhibit B “FORM OF WELLS FARGO LETTER OF CREDIT.” Attached to the motion were two exhibits including, exhibit B a “form of Wells Fargo Letter of Credit” with the following disclaimer:

THIS SAMPLE WORDING IS PRESENTED WITHOUT ANY RESPONSIBILITY ON OUR PART... THE LETTER OF CREDIT IS IN DRAFT FORM ONLY AND REMAINS UNISSUED AND IS NOT AN ENFORCEABLE INSTRUMENT.¹⁴

On November 11, 2001 TNHC filed a second motion requesting approval of actions to comply with ordering paragraphs 2 and 3 of Commission’s July 28, 2011 order.¹⁵ Attached to this motion as

⁸ Ibid, at 2.

⁹ Ibid, at 2.

¹⁰ Electronic Ruling of ALJ Angela Minkin dated November 2, 2011 containing a copy of an e-mail from David Kates dated November 1, 2011 to Minkin, Angela K. which itself contained a copy of an e-mail from Vivienne K. Miller, Letter of Credit Resource Center of Wells Fargo Bank to Mr. Kates dated November 1, 2011.

¹¹ Ibid.

¹² Ibid.

¹³ PETITION TO MODIFY DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY, November 9, 2011, EXHIBIT B FORM OF WELLS FARGO LETTER OF CREDIT at 1. (The modified order would then instead be “The Nevada Hydro Company shall provide a surety or performance bond or other creditworthy facility in the amount of \$550,000...”)

¹⁴ PETITION TO MODIFY DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY, November 9, 2011, EXHIBIT B FORM OF WELLS FARGO LETTER OF CREDIT at 1.

¹⁵ MOTION OF NEVADA HYDRO COMPANY FOR APPROVAL OF ACTIONS TO COMPLY WITH ORDERING PARAGRAPHS 2 AND 3 OF COMMISSION DECISION 11-07-036, November 11, 2011.

exhibits A and B were copies of the letter of credit issued by Wells Fargo Bank and of the deposit confirmation for the cash account backing the letter of credit.¹⁶ The exhibits were provided to show that on November 9, 2011 Wells Fargo Bank issued a Letter of Credit in the amount of \$550,000.00 with Rexford J. Wait as applicant and TNHC as beneficiary.¹⁷

On November 10, 2011 the parties met in San Francisco for a second prehearing conference. At that time ALJ Minkin reiterated her request that parties respond to the Petition to Modify rather than TNHC's motion. There was no further discussion of that particular issue.

DISCUSSION

TNHC's proposed modification fails to comply with D1107036 and we urge the Commission to reject the Petition for Modification. Intervenors can play an important role in the public utilities regulation process and are provided compensation when they provide a "substantial contribution" to the Commission's decision-making process.¹⁸ However continued intervenor contribution can only be ensured if intervenor compensation is adequately guaranteed. Rather than comply with the order to provide a bond, TNHC has proposed a letter of credit and cash deposit receipt as an alternative form of guarantee and filed a Petition for Modification. However, surety or performance bonds are the appropriate instruments to guarantee intervenor compensation, not a letter of credit. Furthermore, the letter of credit submitted by TNHC contains numerous inappropriate clauses which fail to guarantee that intervenor compensation will actually be provided. TNHC actions over the past few months have placed an unfair financial burden on the intervenors and we urge the Commission to deny their Petition for Modification as well as consider ordering that this proceeding be terminated.

1) A surety or performance bond are the appropriate form by which intervenor compensation should be guaranteed by TNHC

When ordering TNHC to provide a guarantee to intervenors that they will receive intervenor compensation at the conclusion of this proceeding, the Commission ordered THNC to provide "a surety or performance bond in the amount of \$550,000 that shall remain in effect until it has fully compensated all eligible intervenors determined to have made a substantial contribution to this proceeding."¹⁹ It is not the first time that the Commission has ordered a company to provide a

¹⁶MOTION OF NEVADA HYDRO COMPANY FOR APPROVAL OF ACTIONS TO COMPLY WITH ORDERING PARAGRAPHS 2 AND 3 OF COMMISSION DECISION 11-07-036, November 11, 2011.

¹⁷Ibid., EXHIBIT A, TRUE AND CORRECT COPY OF LETTER OF CREDIT ISSUED BY WELLS FARGO BANK

¹⁸ Cal Pub Util Code §1802.

¹⁹ D1107036, DECISION REGARDING PHASE 1 ISSUES, Issued August 5, 2011, 18.

performance or surety bond as part of CPCN proceeding.²⁰

Bonds are a commonly used form of guarantee because they are “an obligation in writing which binds a signatory to pay a sum certain upon the happening of an event.”²¹ More specifically, a performance bond is defined as a “type of contract bond which protects against loss due to inability or refusal of a contractor to perform his contract.”²² Similarly, a surety bond is “a contractual arrangement between the surety, the principal and the obligee whereby the surety agrees to protect the obligee if the principal defaults in performing the principal’s contractual obligations.”²³ The structure and the obligations of bonds provide assurance to an obligee that they will be paid in spite of any subsequent actions by the principal. Therefore a bond is uniquely structured instrument to provide certainty and security to an obligee without having an obligee bear the risk of a principal’s financial instability.

In this proceeding, TNHC, the principal, is required to directly pay eligible intervenors, the obligees, the compensation sum as ordered by the CPUC through the claim validation process. The CPUC’s intervenor compensation program and the D1107036 order also required a well defined process in which intervenors can be guaranteed timely collection of compensation. This is especially critical in the case where the CPCN application is denied and TNHC is not a public utility. In addition, questions about the financial viability of TNHC continue to be of concern.²⁴ Creation of a bond by TNHC would require a well-funded and stable surety that would be required to guarantee payment of specified and valid claims to eligible intervenors should TNHC fail to do so. Such an instrument would stay in effect until all such claims are paid and that a method is established for the intervenor to actually collect the claims.²⁵

2) TNHC’s letter of credit is not the functional equivalent of a either a surety or performance bond

TNHC is petitioning the Commission to modify its earlier order and replace its requirement of a surety or performance bond with a less certain and secure requirement of “other creditworthy facility.”

²⁰ See Lodi Gas 6 CPUC 3d at 245 (In D00-05-048, the Commission ordered Lodi Gas Storage to post a surety or performance bond to cover its obligations under its CPCN).

²¹ 12 Am. J 2d Bonds §1

²² Black’s Law Dictionary (6th ed. 1990).

²³ Black’s Law Dictionary (6th ed. 1990); *see also* California Civil Code Sections 2787 – 2856.

²⁴ ADMINISTRATIVE LAW JUDGE’S RULING REQUIRING COMMENT ON DISMISSING APPLICATION, filed December 1, 2011 at 2.

²⁵ See Black’s Law Dictionary (6th ed. 1990); *see also* Surety Information Office, How to Obtain Surety Bonds (2011) (available at <http://www.sio.org/html/obtain.html>)

²⁶ Rather provide a bond as required, TNHC submitted a letter of credit and receipt of cash deposit as exhibit.²⁷ Despite acknowledging that it “understands that *a letter of credit, by itself, is not a form of guarantee under California law,*” TNHC urges the Commission to accept it as one.²⁸ However a letter of credit and receipt of cash deposit are clearly not interchangeable with a surety or performance bond.

A letter of credit “means a definite undertaking...by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.”²⁹ More broadly a letter of credit refers to “an engagement by a bank or other person made at the request of a customer that the issuer will honor draft or other demands for payment upon compliance with the conditions specified in the credit,” which “may be either revocable or irrevocable.”³⁰ Letters of credit, unlike a surety bond, bind the applicant and an issuer. Therefore, as demonstrated below in the letter of credit provided by TNHC, its validity can be altered by either the applicant and the issuer irrespective of the concerns of an obligee.

This revocable letter of credit provides none of the security and certainty that a surety or performance bond would provide. Although TNHC “[s]ubmits that its proposed structure may be more conducive to the comfort of the intervenors than a form of surety bond,” it is clearly mistaken.³¹ The letter of credit and cash deposit are at the whim and control of TNHC, which does not assure or comfort us that we will actually receive intervenor compensation if eligible at the end of this proceeding.

While TNHC focuses on the fact that a letter of credit allows TNHC to withdraw “the appropriate amounts under exactly the circumstances that were of concern to the intervenors and the Commission,” TNHC fails to understand the purpose of the ordering paragraphs 2 and 3 in D1107036. The purpose of the surety bond was to provide “some guarantee that funding will be available to pay those eligible intervenors.”³² We are not concerned with “detailed proofs or waiting periods” at the time of payment or potential litigation over whether the “underlying obligation of the principal has

²⁶PETITION TO MODIFY DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY, November 9, 2011, at 3.

²⁷MOTION OF NEVADA HYDRO COMPANY FOR APPROVAL OF ACTIONS TO COMPLY WITH ORDERING PARAGRAPHS 2 AND 3 OF COMMISSION DECISION 11-07-036, November 11, 2011, at 2.

²⁸PETITION TO MODIFY DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY, November 9, 2011, at 3 [emphasis added].

²⁹ Cal U Com Code §1502

³⁰ Black’s Law Dictionary (6th ed. 1990).

³¹PETITION TO MODIFY DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY, November 9, 2011, at 3.

fully matured” but rather the ability and willingness of TNHC to make such a payment in the future.³³ Although TNHC feels that “other creditworthy facility” such as a letter of credit and receipt of cash deposit provides the same level of guarantee as a performance or surety bond, the structure and obligations of these instruments suggests otherwise. We urge the Commission to hold TNHC to the obligation it ordered in D1107036 and require TNHC to provide a surety or performance bond rather than allow inferior alternatives.

3) TNHC’s letter of credit includes impermissible provisions that make it inappropriate to guarantee intervenor compensation

Even if a letter of credit and receipt of cash deposit could be considered an acceptable substitute to a performance or surety bond, the letter of credit provided by TNHC in its Petition to Modify contains numerous clauses that render it unacceptable. The content of the letter of credit, in particular the expiration and cancellation provisions, satisfy neither the spirit nor the letter of the ordering paragraph 2 of D1107036.

The expiration clause included in the letter of credit issued by Wells Fargo Bank states,

This letter of credit expires at our above office on November 9, 2012... [S]uch expiration date shall be deemed automatically extended... for one year periods to November 9 in each succeeding calendar year, unless... we send written notice to you at your address...that we elect not to extend the expiration date of this Letter of Credit...³⁴

This expiration and non-renewal clause allows Wells Fargo to not extend the expiration date of the Letter of Credit by giving notice to TNHC only.³⁵ Therefore, the letter of credit that intervenors would be relying upon to guarantee their compensation could expire without notice if, for example, TNHC reduces the amount of their cash deposit on hold with Wells Fargo. In addition, nothing in the terms of the letter of credit requires Wells Fargo to specify the reason for non-renewal.³⁶ In our estimation if this proceeding goes for its full length, it will be well past November 9, 2012 before any award of intervenor compensation is ordered and there is no guarantee the letter of credit will still be valid at that time.

³² D1107036, DECISION REGARDING PHASE 1 ISSUES, Issued August 5, 2011, 17.

³³ PETITION TO MODIFY DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY, November 9, 2011, at 3.

³⁴ MOTION OF NEVADA HYDRO COMPANY FOR APPROVAL OF ACTIONS TO COMPLY WITH ORDERING PARAGRAPHS 2 AND 3 OF COMMISSION DECISION 11-07-036, November 11, 2011, EXHIBIT A TRUE AND CORRECT COPY OF LETTER OF CREDIT ISSUED BY WELLS FARGO BANK at 2.

³⁵ Ibid.

³⁶ Ibid.

Even more troubling is that TNHC can cancel the letter of credit at any time without providing notice to the CPUC or intervenors. The letter of credit includes another cancellation clause which states,

CANCELLATION PRIOR TO EXPIRATION: you may return this letter of credit to us for cancellation prior to its expiration provided that this letter of credit is accompanied by your written agreement to its cancellation.³⁷

Based on the language of this clause, any time prior to full intervenor compensation being paid, TNHC agent Rexford Wait can cancel the letter of credit without cause or explanation and withdraw the surety deposit without providing notice to the CPUC or the intervenors. Nothing in the letter of credit or the Petition to Modify requires notice to the CPUC or intervenors that the letter of credit is no longer in effect, therefore for all we know it could already be canceled.

The expiration and cancellation clauses are contrary to the spirit and letter of ordering paragraph 2 of D1107036 which states “The Nevada Hydro Company shall provide a surety or performance bond in the amount of \$550,000 that shall remain in effect until it has fully compensated all eligible intervenors determined to have made a substantial contribution to this proceeding.”³⁸ The structure and content of the letter of credit provide no assurances to the intervenors that compensation they are guaranteed will actually be available at the time of payment. Rather than have the security of a bond, intervenors are left with uncertainty as to whether the letter of credit still exists or has been canceled or allowed to expire by TNHC. For example, if the application for the subject CPCN is denied, TNHC may not see any value in paying intervenor compensation and collect its deposit to be used for purposes other than intervenor compensation. Under such circumstances TNHC will not be a public utility and we do not see how the CPUC or intervenors can enforce a collection claim for ordered but unpaid compensation.

A. Letter of Credit incorrectly references unrelated CPUC decision

We would also like to note that TNHC incorrectly references “Decision 11-07-035 dated July 28, 2011” in the non-renewal clauses of both its proforma letter of credit³⁹ and official Wells Fargo letter of credit.⁴⁰ Decision 11-07-035 dated July 28, 2011 grants a CPCN to Accelar, Inc. in A 10-06-

³⁷Ibid at 2-3.

³⁸ D1107036, DECISION REGARDING PHASE 1 ISSUES, Issued August 5, 2011, 18.

³⁹PETITION TO MODIFY DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY, November 9, 2011, EXHIBIT B FORM OF WELLS FARGO LETTER OF CREDIT at 2.

⁴⁰MOTION OF NEVADA HYDRO COMPANY FOR APPROVAL OF ACTIONS TO COMPLY WITH ORDERING

009 and is unrelated to this proceeding.⁴¹ This clear error further makes the letter of credit inappropriate and fails to comply with the ordering paragraphs of D1107036.

4) TNHC’s request for delay and failure to comply with the ALJ’s orders have placed an unfair burden and drain on the resources of intervenors

TNHC’s actions over the past few months have drawn out the relatively straightforward process of providing a guarantee of intervenors’ compensation by requesting extensions, claiming to misunderstand clear instructions from the Commission, and failing to comply with the Commission’s orders. Despite TNHC’s claims to the contrary, its actions have negatively impacted the intervenors and potentially harm the CPUC’s important intervenor compensation program. While waiting for TNHC to provide a bond, intervenors have had to expend incremental funds by preparing for and attending a Prehearing Conference, studying a variety of payment guarantee proposals and preparing this response to a Petition to Modify D1107036, all at considerable cost in time and expense.

Based on TNHC’s actions throughout the course of this proceeding, it appears to us that TNHC is poorly prepared due to a lack of the resources which are required to proceed with the major undertaking of permitting and constructing this proposed transmission line. TNHC’s status as a paper-only entity, a characterization of TNHC that San Diego Gas & Electric also made earlier, makes them ill-equipped to not only carry out its proposed transmission line but also guarantee intervenor compensation as ordered by CPUC.⁴²

Intervenor compensation is included in California Public Utilities Code because it “encourages effective and efficient participation of all groups that have a stake in the public utilities regulation process.”⁴³ Such participation can only be insured if public utilities comply with orders like D1107036 and can guarantee intervenors’ that they will not left bearing the financial burden of its substantial contribution to the regulation process. As the Commission noted in D1107036 that “it would have a chilling effect on effective participation, if there is not some guarantee that funding will be available to pay those eligible intervenors who are determined to have made a substantial contribution to this

PARAGRAPHS 2 AND 3 OF COMMISSION DECISION 11-07-036, November 11, 2011, at 2.

⁴¹ See D1107035, DECISION GRANTING APPLICATION, Issued August 3, 2011.

⁴² See APPLICATION FOR REHEARING OF SAN DIEGO GAS & ELECTRIC COMPANY, September 6, 2011 at 4 (“SDG&E is concerned...with the broader precedent that is suggested if a paper-only proposals submitted from paper-only entities can be held to be the statutory equivalents as ‘public utilities’”).

⁴³ Cal Pub Util Code §1801.3.

proceeding.”⁴⁴

TNHC must meet the obligations placed on it by the Commission in D1107036 or the effectiveness and quality of public utilities regulation process could be diminished. We ask the CPUC to give us relief before the exhaustion of forbearance produces the chilling effect that D1107036 and the CPUC’s Intervenor’s Compensation process was meant to prevent.

CONCLUSION AND RECOMMENDATION

We conclude that the proposed modification fails to comply with D1107036 and that TNHC's Petition for Modification should be rejected. It has been over four months since D1107036 was issued. Despite this generous allowance of time, TNHC continues to fail to comply with D1107036. On that basis and in light of the TNHC repeated requests for delays it is just and proper that the decision denying the petition to modify should also deny the application and order this proceeding terminated.

Respectfully submitted,

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⁴⁴ D1107036, DECISION REGARDING PHASE 1 ISSUES, Issued August 5, 2011, 17.