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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 (“TNHC”) for
a Certificate of Public Convenience and
Necessity for the Talega-Escondido/
Valley-Serrano (“TEVS”) Interconnect

Application No. 10-07-001
[filed July 6, 2010]

FRONTLINES REPLY BRIEF ON THRESHOLD ISSUES

FRONTLINES offers this Reply Brief in response to the threshold issues raised in the Administrative Law Judge’s October 6, 2010 ruling establishing the date for service of supplemental testimony and setting briefing dates. In the following sections, FRONTLINES responds to matters raised in the Initial Briefs submitted by TNHC, the Center for Biological Diversity (“CBD”), the Elsinore Valley Municipal Water District (“EVMWD”) and the concurrent brief of Santa Ana Mountains Task Force Of The Sierra Club & Friends Of The Forest And The Santa Rosa Plateau.

1. TNHC’S Initial Brief

FRONTLINES disputes the following argument proffered by TNHC’s in their Initial Brief:

“If Nevada Hydro is not determined to be a public utility, then the intervenor compensation provisions would not apply to it. This conclusion is consistent with Commission precedent. Because the intervenor compensation provisions apply only to a “public utility which is the subject of the hearing, investigation, or proceeding,” no other entity in the TE/VS Interconnect proceeding would be responsible for paying intervenor compensation”.

First, FRONTLINES points out that this conclusion is NOT consistent with the Intervenor Compensation provisions of the Public Utilities Code (“PUC”), which state (in pertinent part):

1801. The purpose of this article is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission.

and

1801.3. It is the intent of the Legislature that:

(a) The provisions of this article shall apply to all formal proceedings of the commission involving electric, gas, water, and telephone utilities.

.....

By law, intervenor compensation opportunities for public utility customers exist in any proceeding of the Commission and are not limited to only those proceedings in which a CPCN project is approved. Equally important, the intervenor compensation opportunity applies to *all* public utility customers whether or not they are customers of the project applicant. SCE customers can intervene in SDGE proceedings, and can be awarded a payment from SDGE even if they are not SDGE customers as long as they meet the intervenor compensation requirements and make an appropriate contribution to the proceeding.

Second, we point out that TNHC relies on a strict interpretation of specific provisions of the PUC to argue one position, and then applies a lax and vague interpretation of other provisions of the PUC to argue a different point. For instance: the definition of “electrical corporation” is constrained by PUC §218 to include only those entities which own, control, operate, or manage, and electrical plant. Yet, TNHC loosely “interprets” §218 to mean that “electrical corporation” status will be conferred on TNHC contemporaneously with the Commission’s approval of the TEVS CPCN even though TNHC will not actually own, control, operate, manage any plant at that time. At the same time, TNHC argues that the intervenor compensation provisions of the PUC should be strictly interpreted to mean that TNHC is not obligated to pay intervenor compensation if the TEVS CPCN is not granted because (according to TNHC) they will not be a “public utility” unless and until the CPCN is issued. FRONTLINES is disgusted by TNHC’s random and frivolous interpretations of the PUC and

we argue that TNHC cannot have it both ways; the matter of whether a strict or a loose interpretation of the PUC should be resolved swiftly.

FRONTLINES supports a strict interpretation of the PUC, which clarifies (in §218) that TNHC would not be an electrical corporation or public utility even if the TEVS CPCN is issued because TNHC does not own, control, operate, or manage an electrical plant. Thus, TNHC is precluded from constructing TEVS in accordance with §1001 even with a CPCN because TNHC lacks “electrical corporation” status and is therefore ineligible to construct anything pursuant thereto. With this stringent interpretation of the PUC, TNHC is not even eligible to submit a CPCN application.

Nonetheless, in accepting TNHC’s CPCN application and initiating the CPCN proceeding, the Commission has obviously concluded that TNHC is eligible to apply for a TEVS CPCN by applying a more relaxed interpretation of PUC §218 and §1001. The Commission should adopt a similar perspective in their interpretation of the intervenor compensation provisions of the PUC, and determine that TNHC shall pay intervenor compensation in accordance with §1807 regardless of whether or not a CPCN is granted. Only this approach will ensure that the stated purpose and legislative intent of the intervenor compensation regulations are not thwarted.

2. EVMWD’s Initial Brief

EVMWD asserts (on page 5 of their Initial Brief) that “the Commission is required to consider the whole of the TEVS project, i.e. the LEAPS Project, regardless of its lack of licensing power over the hydroelectric facility component of the LEAPS project” and cites *Riverwatch v. County of San Diego* (76 Cal. App. 4th 1428) and *San Joaquin Raptor v. County of Stanislaus* (27 Cal. App 4th 713). Neither of these cases support EVMWD’s claim that LEAPS must be considered part of the TEVS project, and in fact, they clarify just the opposite.

In *Riverwatch*, the court found that, among other things, an EIR prepared for a quarry project had not sufficiently addressed the impact of widening State Route 76 which the court determined was necessary to accommodate increased truck traffic generated by the quarry. The appellate court determined that the EIR did provide sufficient information to permit the county to consider the impact of the road widening.

In *Riverwatch*, The project to widen SR 76 was found to be a necessary element of the proposed quarry project because the quarry project could not proceed without the road widening project. For this reason, the road widening project was included in, and addressed by, the quarry project. Presumably, EVMWD cites this case because it believes that the inclusion of the road widening project in the quarry project EIR supports their contention that LEAPS should be included in the Commission's review of the TEVS CPCN application. However, EVMWD fails to grasp the fundamental reason for including the road widening project in the quarry project was because these projects were inexorably linked (the quarry project could not proceed without the road widening project). EVMWD is advised that TEVS has NO such similar linkage with, or reliance on LEAPS. It is widely acknowledged that TEVS can be constructed and operated whether or not LEAPS is ever built, and no party has ever disputed this *fact*. *Riverwatch* is simply not relevant to the instant proceeding because LEAPS is not a necessary prerequisite of TEVS. *Riverwatch* does not support EVMWD's assertion the TEVS CPCN review must include LEAPS, rather it affirms FRONTLINES position that the TEVS CPCN proceeding should encompass all elements that are necessary for the TEVS project, and since LEAPS is not necessary for the TEVS project, it cannot be included in the Commission's review of the TEVS CPCN application.

In *San Joaquin*, the appellate court deemed an EIR for a 633-home subdivision to be inadequate in part because it failed to consider the impacts of an off-site sewer system expansion that was required to service all the connections created by the subdivision. The appellate court found that there was a direct causal link between the development project and the sewer expansion project since the development project could not proceed without the sewer expansion project. Thus, the appellate court concluded that the sewer expansion was a required element of the development project, and its exclusion from the EIR resulted in an "improperly curtailed and distorted project description".

Unlike the circumstances considered in *San Joaquin*, there is no causal link (either direct or indirect) between the proposed TEVS project and the LEAPS project because TEVS does not depend on the LEAPS project in any way. TEVS can proceed independently from, and without reliance on, LEAPS. Thus *San Joaquin* does not "shore up" EVMWD's unsupported argument that LEAPS must be included in the Commission's consideration of the TEVS

CPCN application. In fact *San Joaquin* confirms FRONTLINES argument that the Commission's consideration of LEAPS in the TEVS proceeding should be as a "reasonably foreseeable future project", in which case only LEAPS impacts that are cumulative to, and common with, the TEVS project can be addressed in the TEVS EIR. *San Joaquin* even cites the same provisions of the CEQA guidelines document that FRONTLINE has cited previously in this proceeding (namely, §15130 and §15355).

Additionally, EVMWDs argument that the Commission must "analyze the whole of the LEAPS Project in determining whether to issue a CPCN for the TEVS project" is not supported by the plain language of the CEQA regulations. CEQA Guidelines 15165 state:

"Where an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project"

The notion that a Commission approval of TEVS will result in a commitment to the LEAPS project is simply ludicrous, and no party in any LEAPS proceeding (either before the Commission or the FERC) has *ever* made such a claim. Yet, EVMWD continues to argue (without basis or justification) that LEAPS should be considered in the TEVS proceeding anyway.

It must be recognized that TNHC seeks CPCN approval of TEVS from the Commission based solely on the transmission benefits that TEVS can provide as a stand-alone transmission grid asset. TEVS's lack of dependency on LEAPS was clearly affirmed *by the FERC* in both the LEAPS FEIS (see Appendix B) and the May 9, 2008 Order Conditionally Accepting Interconnection Agreement issued in Docket ER08-654. No party has ever disputed the fact that TEVS can be constructed and operated irrespective of whether LEAPS is ever built. In fact, TNHC has repeatedly and emphatically stated their intention to construct and operate TEVS separately from, and far in advance of, LEAPS (See the April 2009 PTO application submitted to CAISO and FERC dockets ER 06-278 and ER-08-654).

EVMWD's argument that the Commission must "analyze the whole of the LEAPS project in determining whether to issue a CPCN for the TEVS project" lacks foundation and is simply baseless.

3. CBD's Initial Brief

CBD's argument that the LEAPS project should be included with Commission's consideration of the TEVS project is based in large part on the Commission's prior approval of the Helms pumped storage project. CBD states:

"However, as the Helms pumped storage decisions make clear approval for pumped storage projects and transmission also falls within the jurisdiction of the CPUC and the CPUC should not improperly segment the TE/VS Project from the larger LEAPS Project when both the pumped storage and transmission components should properly received a Certificate of Public Convenience and Necessity ("CPCN") from the CPUC in order to proceed".

Unfortunately, this argument fails to consider the substantial and fundamental differences between the TEVS transmission line and the transmission lines approved as part of the Helms project. According to D.85910:

- The Helms transmission lines were intended to "provide reliable transmission capability for the Helms motor-generator units", and it was on this basis that the Commission included them with the HELMS CPCN .
- The Commission approved construction of the Helms lines in advance of completing the pumped storage portion of the project solely for the purpose of providing "power for testing".
- The Commission approved the capacity of the Helms transmission lines based on the determination that they would be "capable of absorbing up to 1,125 MW of generation for load or of delivering up to 1,064 MW for pumping".

These excerpts from D.85910 clearly demonstrate that the Commission considered the Helms transmission lines to be "generation tie" lines that were necessary to carry power from the Helms project. The Commission was obligated to include these "gen-tie" lines with the Helms CPCN because the Helms project could not proceed without them. More to the point, PGE would never have proposed constructing these "gen-tie" lines independent of the Helms generation project. In adopting D.85910, the Commission contemplated that the Helms "gen tie" lines would not be used for any purpose other than to serve the Helms

pumped storage project. D.85910 even clarifies that the Commission was already contemplating (separately) other transmission system projects deemed necessary by 1980 to bring Helms power to PGE load after Helms construction was completed¹.

The transmission lines approved in the Helms decision served no purpose other than to interconnect the Helms generation project and were therefore an integral part of the Helms project itself. Thus, the Helms transmission lines differ fundamentally from the TEVS line.

The Commission is fully aware that TEVS will serve as a CAISO-controlled, imbedded transmission grid asset that is operated independent of, and without regard for, any generation source. Thus, TEVS differs intrinsically from the Helms lines, and the Helms decision has no bearing or relevance in the TEVS CPCN proceeding.

Although FRONTLINES disagrees with CBD's conclusion that the TEVS CPCN should include LEAPS pursuant to the Helms decision, we do agree that the Helms CPCN establishes a precedent for the LEAPS project. We further expect that, when it is submitted, the LEAPS CPCN application will include "gen-tie" lines to bring LEAPS power to the grid just as the Helms CPCN included "gen-tie" lines to bring Helms power to "PGEs interconnected transmission system".

4. The Concurrent Brief on Threshold Issues of Santa Ana Mountains Task Force of The Sierra Club & Friends Of The Forest And The Santa Rosa Plateau

FRONTLINES concurs with nearly all the comments provided by the Sierra Club and the Friends of the Forest in their concurrent Initial Brief. We only disagree with an argument they proffer to TNHC for use in the FERC's LEAPS licensing proceeding in the event that the CPUC denies the TEVS CPCN application. The Concurrent Brief states: "We would further argue that an appendix of an Environmental Impact Statement is not the appropriate nor legal place to make a substantial change in the project definition which serves as the basis for project analysis and evaluation". FRONTLINES points out that the LEAPS FEIS merely

¹ D.85910 describes other PGE transmission projects that are separate and distinct from the Helms generation project and were intended to "provide transmission capacity to connect the Helms facility to PG&E's total system". These projects include an additional 230 kV circuit to supplement the (then) existing five 230 kV circuits in Fresno, as well as a future "Gregg substation" and two new 230 kV circuits that eventually would operate as a 500 kV line from Gates to the Gregg substation. According to D.85910, these were "PGE interconnected transmission projects" that would serve more than just the Helms project and were not therefore included in the Helms CPNC.

reflects the “project” proposed by TNHC/EVMWD, which incorporates multiple elements that the FERC is statutorily precluded from including in any hydro license it issues. More to the point, the “project definition” employed by the FERC in the LEAPS licensing proceeding is derived from the *entire* FERC record (of which the FEIS is only a part). For these reasons, there is no persuasive argument that the LEAPS “project definition” is changed by the discussion of FERC’s licensing authority appended to the FEIS.

FRONTLINES further points out that FERC’s consideration of LEAPS and TEVS as two separate and distinct projects that will be constructed independently of each other is not relegated solely to an appendix of the LEAPS FEIS. FERC states clearly that “Nevada Hydro’s project is really two separate projects with distinct benefits and attributes” and also affirms that “the TE/VS Interconnect can be made operational before the LEAPS project” (See page 4, Item 12 of FERC’s Order Conditionally Accepting Interconnecting Agreement issued May 9, 2008). At a minimum, this ruling confirms FRONTLINES assertion that TEVS will be constructed and operated independent of LEAPS, which specifically precludes FERC from including TEVS in any hydro dam license issued for LEAPS because TEVS is not a “project primary” line within the meaning contemplated by the FPA.

Additionally, the Sierra Club and the Friends of the Forest maintain that the issue of whether TNHC must seek a CPCN from the Commission for LEAPS is not ripe for decision. FRONTLINES agrees with this position for the simple reason that TNHC has consistently represented to CAISO and the FERC that TEVS will be constructed and operated separately from, and years in advance of, LEAPS. If LEAPS construction is indeed years away, then there is no point in discussing whether or not a CPCN is required at this time. This issue is not relevant to the TEVS CPCN because TNHC has specifically excluded LEAPS from the TEVS CPCN application and seeks Commission approval of only the TEVS line.

Respectfully Submitted;

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December 10, 2010 (PST)

CERTIFICATE OF SERVICE

I, Jacqueline Ayer, certify that I have on this 10th day of December, 2010 (PST) caused a copy of the foregoing

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to be served on all parties to A.10-07-001 listed on the most recently updated service list (provided below) available on the California Public Utilities Commission website.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of December, 2010 PST in Okinawa, Japan.

/S/ Jacqueline Ayer
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