

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

03-22-11

04:59 PM

In the Matter of the Application of THE NEVADA
HYDRO COMPANY for a for a Certification of
Public Convenience and Necessity for the Talega-
Escondido/Valley-Serrano 500 k V Interconnect
Project

Application 10-07-001

(Filed July 6, 2010)

**MOTION FOR ACCEPTANCE OF LATE FILED COMMENTS
ON PHASE 1 SCOPING MEMO RULING**

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Date: March 22, 2011

The Center for Biological Diversity (["Center"]) respectfully submits this Motion requesting that the California Public Utilities Commission (["CPUC"]) accept the late filing of comments on the Phase 1 Scoping Memo Ruling for Application 10-07-001.¹

The Center electronically served these comments, by the February 11, 2011 deadline, to Administrative Law Judge Angela Minkin along with the entire A 10-07-001 Service List, but an administrative error resulted in the comments not being properly filed with the CPUC by that date. The comments were not submitted until today because the Center attempted to handle the matter informally by contacting the docket office, Administrative Law Judge Minkin, and the Public Advisor's office. After exhausting informal avenues for submission this motion was prepared.

This request is non-prejudicial to the parties and represents a harmless error because all of the parties, information only recipients, and state staff specified in the service list received the comments within the specified timeframe and had an opportunity to respond. Indeed, on February 25, 2011 The Nevada Hydro Company provided Reply Comments in Response to the February 11, 2011 comments served on behalf of the Center for Biological Diversity, Santa Ana Mountains Task Force of the Sierra Club, and Friends of the Forest (Trabuco District) and the Santa Rosa Plateau.

By this motion, we respectfully ask the CPUC to accept the attached comments filed.

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¹ Attachment 1, Comments of the Center for Biological Diversity, Santa Ana Mountains Task Force of the Sierra Club, and Friends of the Forest and Santa Rosa Plateau on the Proposed Surety Bond Pursuant to the Phase 1 Scoping Memo Ruling, February 11, 2011

Respectfully submitted,

Center for Biological Diversity
Santa Ana Mountains Task Force of the
Sierra Club
Friends of the Forest (Trabuco District) and
the Santa Rosa Plateau

Date: March 22, 2011

By: /s/
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the California Public Utilities Commission's Rules of Practice and Procedure, I have served a true copy of the MOTION FOR ACCEPTANCE OF LATE FILED COMMENTS ON PHASE 1 SCOPING MEMO RULING on all the parties identified on the attached service list.

Service was effectuated by transmitting the copies via email to all parties who have provided email addresses, and submitting hardcopies to the assigned ALJ and Commissioner.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this March 22, 2011, in San Francisco, CA.

/s/Jonathan Evans _____
Jonathan Evans

ATTACHMENT 1:

Comments of the Center for Biological Diversity, Santa Ana Mountains Task Force of the Sierra Club, and Friends of the Forest and Santa Rosa Plateau on the Proposed Surety Bond Pursuant to the Phase 1 Scoping Memo Ruling, February 11, 2011

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Application 10-07-001
(Filed July 6, 2010)

**COMMENTS OF
THE CENTER FOR BIOLOGICAL DIVERSITY,
SANTA ANA MOUNTAINS TASK FORCE OF THE SIERRA CLUB, AND
FRIENDS OF THE FOREST AND THE SANTA ROSA PLATEAU
ON THE PROPOSED SURETY BOND PURSUANT TO THE
PHASE 1 SCOPING MEMO RULING**

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Date: February 11, 2011

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THE CENTER FOR BIOLOGICAL DIVERSITY,
SANTA ANA MOUNTAINS TASK FORCE OF THE SIERRA CLUB, AND
FRIENDS OF THE FOREST AND THE SANTA ROSA PLATEAU
ON THE PROPOSED SURETY BOND PURSUANT TO THE
PHASE 1 SCOPING MEMO RULING**

In accordance with the January 19, 2011 Joint Assigned Commissioner’s and Administrative Law Judge’s Phase 1 Scoping Memo Ruling (“Phase 1 Scoping Memo Ruling”) the Center for Biological Diversity (“Center”) the Santa Ana Mountains Task Force of the Sierra Club (“SAMTF”), and the Friends of the Forest (Trabuco District) and the Santa Rosa Plateau (“FOFandP”) submit these comments related to inquiries presented in the Phase 1 Scoping Memo Ruling for the above mentioned proceeding. Specifically we address the following request:

Comments on appropriate amounts, if any, required for surety bond or other guarantee of payment related to intervenor compensation and funding of DRA consultant.

Phase 1 Scoping Memo Ruling at 6. For the reasons set forth below a surety bond in an amount commensurate to compensate intervenors and the Division of Ratepayers Advocates (“DRA”) is appropriate in this proceeding to assure that the California Public Utilities Commission (“CPUC”) receives the substantial assistance contemplated by the legislature in Public Utilities Code sections 631, 1801, 1801.3.

AMOUNT OF SURETY BOND

The amount of a surety bond provided for this case must assure that the intervenors¹ and DRA are fully compensated. The Applicant's inability or unwillingness to provide compensation to intervenors and DRA should not form the basis upon which the CPUC determines the amount and appropriateness of compensation. To determine the amount of the surety bond to cover all potential compensation a simple calculation can be made.

First, the total amount of intervenor compensation requested from the Notices and Amended Notices of Intent to Claim Intervenor compensation can be tallied into an aggregate total. Second, the total amount of projected compensation to be provided to DRA can be added to the aggregate total of requested intervenor compensation. Third, the total noticed amounts from intervenors and DRA should be increased by approximately 25 percent to allow for any additional costs beyond those projected at this early stage in the proceeding. Finally, to assure that any potential litigation costs associated with this proceeding are compensated, if appropriate,² the total preceding amount should be multiplied by two. This calculation can be reduced to a simple formula as follows:

Total Amount of Surety Bond (B) = ((Total Amount of Intervenor Request [I] + Total Amount of DRA Request [D]) x 25 percent cost overrun) x potential compensable litigation costs

or

$$B = ((I + D) \times 1.25) \times 2$$

¹ The determination of whether intervenors should be compensated will be determined at a later date. *See* Public Utilities Code § 1804.

² Intervenor compensation "includes the fees and costs of... obtaining judicial review, if any." *Southern Cal. Edison Co. v. Public Utilities Com.*, 117 Cal. App. 4th 1039, 1049 (Cal. App. 2d Dist. 2004) citing Cal Pub Util Code § 1802(a).

A SURETY BOND IS BOTH APPROPRIATE AND NECESSARY IN THIS CASE

As set forth more fully in the parties' briefing on threshold issues as requested by Administrative Law Judge Angela K. Minkin's October 6, 2010 ruling a surety bond, or other guarantee, is both appropriate and necessary for this proceeding involving the Nevada Hydro Company ("TNHC"). Surety bonds are a common and appropriate method for the CPUC to assure that liability is shouldered by the appropriate party that stands to benefit financially from the proceeding,³ and is also appropriate to assure intervenor compensation.⁴ THNC's attempts to become a public utility through this proceeding while avoiding fiduciary obligations of the public utility it seeks to become must be rejected.⁵

THNC has clearly held itself out to become a public utility through this proceeding.⁶ A fundamental test of becoming a public utility is whether or not a person held himself out, expressly or impliedly, as engaged in the business of supplying a service of commodity to the

³ See Cal. Pub. Util. Code §§ 4010, 4665, 5162, 5392, 5506, 24350; *Application of Lodi Gas Storage, LLC for a Certificate of Public Convenience and Necessity for Construction and Operation of Gas Storage Facilities*, Decision 00-05-048, 200 Cal. PUC LEXIS 394, at *e.g.* **1,122 (2000).

⁴ A bond to assure intervenor compensation is appropriate because "without some assurance of payment, intervenors might be deterred from such participation." *In re Request of MCI WorldCom, Inc. and Sprint Corporation for Approval to Transfer Control of Sprint Corporation's California Operating Subsidiaries to MCI WorldCom, Inc.*, Decision 02-07-030, 2002 Cal. PUC LEXIS 438, at ** 56-57.

⁵ THNC has repeatedly stated it "will become a public utility" if it receives a Certificate of Public Convenience and Necessity ("CPCN"), but "would not be responsible for paying intervenor compensation" if it does not receive a CPCN. See *e.g.* Brief of The Nevada Hydro Company in Response to the Administrative Law Judge's Ruling Establishing Date for Service of Supplemental Testimony and Setting Briefing Dates Dated October 6, 2010 (filed 11/19/10) ("TNHC Nov. 19 Brief") at vi.

⁶ *Id.*

public as a class.⁷ Where THNC has held itself out as a public utility to purport to provide an electrical commodity to the public it should be bound by the statutory obligations to compensate intervenors and the DRA.⁸

The need for a bond in this particular factual scenario is acutely appropriate because of their repeated statements that they would not provide compensation and TNHC's history of non-payment to ratepayers for the project that is the subject of this proceeding. TNHC has repeatedly stated that it "would not be responsible for paying intervenor compensation" if it does not receive a CPCN. *See e.g.* TNHC Nov. 19 Brief. In addition TNHC has demonstrated through past performance that it is unable or unwilling to provide compensation to ratepayers for this project. A grand jury investigation into misconduct surrounding the associated Lake Elsinore Advanced Pumping Station ("LEAPS") Project uncovered that TNHC has already expended over \$4 million dollars in ratepayer resources that have not been compensated.⁹ Intervenors who have provided a substantial contribution to the proceeding and the State of California, through DRA, should not be required to shoulder costs that the legislature intended to be paid by the applicant that stands to benefit from the proceeding.

⁷ *Indep. Energy Producers Ass'n, Inc. v. State Bd of Equalization*, 22 Cal Rptr. 3d 562, 575 (2004) (internal citations omitted).

⁸ *See* Public Utilities Code §§ 631, 1801, 1801.3.

⁹ "After more than two years of negotiations, EVMWD's effort to enter into a new formal contract with Nevada-Hydro to ensure repayment reached an impasse. Worst-case scenario would be that repayment will never be made, nor will the pump/storage portion of the project ever be built. EVMWD's legal counsel has verified this. In a letter dated July 7, 2006, a board member had inquired: "What happens if the project doesn't go? How is EVMWD going to get their money back from Nevada-Hydro?" The response from legal counsel was: "If the project does not come to fruition, the amount that has been recorded as a receivable will be written off the District's financials." A present board member estimated the current expenditures at four million dollars."

(2008-2009 GRAND JURY REPORT, Elsinore Valley Municipal Water District, Lake Elsinore Advanced Pumped Storage Project at 4) Attachment 2 to Brief of the Center for Biological Diversity on Threshold Issues Pursuant to October 6, 2010 Ruling (filed Nov. 19, 2010).

ALTERNATIVELY, AN UP-FRONT DETERMINATION THAT COMPENSATION BE PAID OUT OF THE INTERVENOR COMPENSATION FUND IS APPROPRIATE

Should the CPUC determine that a surety bond is not appropriate for this proceeding than an up front determination that this award could be paid out of the general intervenor compensation fund is appropriate given that TNHC has stated it would not being responsible for the payment.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

Center for Biological Diversity
Santa Ana Mountains Task Force of the
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Friends of the Forest (Trabuco District) and
the Santa Rosa Plateau

Date: February 11, 2011

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this February 11, 2011, in San Francisco, CA.

/s/Jonathan Evans
Jonathan Evans



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ATTACHMENT 2:

Service List for A.10-07-001



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