



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

FILED
12-09-11
04:59 PM

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 RESPONSE TO THE PETITION FOR MODIFICATION
OF DECISION 11-07-036 BY THE NEVADA HYDRO COMPANY**

Pursuant to Rule 16.4(f) of the Rules of Practice and Procedure of the Public Utilities Commission of the State of California (Commission), FRONTLINES offers this timely response to The Nevada Hydro Company’s (“TNHC’s”) Petition (“Petition”) to Modify Decision D.11-07-036. In their Petition, TNHC declares that an “Irrevocable Standby Letter of Credit” in combination with a “Cash Fund Deposit” is in substantial compliance with the requirement for a performance or surety bond imposed by D.11-07-036 (Page 3) and even argues that such an arrangement is superior to a performance or surety bond because it eliminates any “independent bank inquiry or opportunity for dispute or delay” (Page 5). The Petition further requests that, in the event that the Commission determines that TNHC’s proposed “Letter of Credit + Cash Fund Deposit” scheme does not substantially comply with the D.11-07-036 performance/surety bond requirement, the Decision be modified to allow TNHC to use this scheme in lieu of securing a performance/surety bond.

FRONTLINES opposes TNHC’s Petition because their “Letter of Credit + Cash Fund Deposit” scheme fails to provide the intervenor compensation funding guarantee that is sought by D.11-07-036. As FRONTLINES demonstrates in the following

pages, the supporting documents provided by TNHC with their Petition and in their subsequent filing on November 11, 2011 clearly show that the “Letter of Credit + Cash Fund Deposit” scheme provides NO intervenor compensation funding guarantees whatsoever. This scheme does not provide intervenors with the same fiscal protection as the performance/surety bond requirement secured by D.11-07-036, thus it should not be deemed to be “substantially in compliance” with this requirement, and it certainly should not replace the surety/performance bond required by D.11-07-036. For these reasons, FRONTLINES urges the Commission to reject TNHC’s Petition in its entirety.

THE “IRREVOCABLE STANDBY LETTER OF CREDIT” OFFERED IN TNHC’S PETITION FAILS TO ACTUALLY SECURE INTERVENOR COMPENSATION FUNDS.

Commercial banks and businesses will generally rely on an “Irrevocable Standby Letter of Credit” (“LOC”) as a secondary payment mechanism; it is issued by a bank to a beneficiary on behalf of an applicant to provide assurance to the beneficiary that the beneficiary will receive payment in the event that the applicant defaults on a debt owed to the beneficiary. Based on these fundamental principles, an LOC that is intended to secure intervenor compensation funds in the event TNHC fails to pay the eligible intervenor fees awarded by the Commission should identify TNHC as the applicant with a debt obligation to the intervenors; and designate the Commission (acting as agent for the intervenors) as the beneficiary. This would enable the Commission to draw on the LOC in the event that TNHC defaults on their intervenor compensation obligation. With this structure, the Commission would have substantial control over disbursements from, and release of, the LOC, thus it could perhaps be argued an LOC structured in this way would operate in a manner similar to the surety/performance bond required by D.11-07-036. However, the LOC offered in TNHC’s Petition does not adopt this structure; in fact, TNHC’s LOC is so bizarrely configured that it is almost nonsensical. For instance:

- Rexford Waite, acting as agent for TNHC, is identified as the *beneficiary* of the LOC, thus in the event that TNHC fails to meet their debt obligation to intervenors, then Rexford Waite will receive any draws made pursuant to the LOC. Because TNHC's LOC contains no provisions which compel Rexford Waite to disburse the drawn funds to intervenors, it provides no actual compensation protection to intervenors. Stranger still, the decision whether to draw on TNHC's LOC rests solely with Rexford Waite (acting as beneficiary on behalf of TNHC) rather than the Commission or the intervenors that the LOC is supposedly protecting. In FRONTLINES opinion, it is highly unlikely that Rexford Waite will choose to draw from the LOC even if TNHC fails to meet their intervenor debt obligation; he is certainly not obligated to do so under the terms of the LOC. In other words, if TNHC's Petition is granted, the Commission and the intervenors will not have the legal means necessary to compel Rexford Waite to draw from the LOC and pay the intervenors in the event TNHC fails to do so. In this regard, the intervenor protection provided by the LOC proposed by TNHC differs substantially from (and is substantially inferior to) the protection provided by the performance/surety bond required by D. D.11-07-03. FRONTLINES is certain beyond doubt that TNHC's LOC would not provide any intervenor funds in the event TNHC fails to meet their intervenor compensation obligations, and for this reason urges the Commission to deny TNHC's petition.
- Page 3 of the TNHC's LOC indicates that the LOC is subject to International Standby Practice 98 ("ISP98"). Consistent with ISP98 Rule 7.01, and acting as the named beneficiary on behalf of TNHC, Rexford Waite can cancel the LOC *at any time and without any notice* to the Commission or intervenors. In fact, it is quite possible that the LOC has already been cancelled! There is certainly nothing in either TNHC's Petition or the LOC which obligates

Rexford Waite or TNHC to maintain the LOC until all debt obligations to intervenors are paid, or even notify the Commission in the event the LOC is cancelled. Simply put, TNHC's "Letter of Credit + Cash Fund Deposit" scheme does not provide the Commission with any management control of, or draw authority over, the LOC, thus it is NOT "substantially in compliance" with the performance/surety bond requirement imposed by D.11-07-036. For this reason, FRONTLINES urges the Commission to reject TNHC's Petition.

- According to the terms of TNHC's LOC, Wells Fargo will only permit a draw if the named beneficiary (Rexford Waite on behalf of TNHC) provides the "Original" copy of the LOC at the time the draw is requested (See page 1). Thus, even if the Commission were somehow able to compel Rexford Waite to request a draw on the LOC to pay intervenors, he could still prevent the draw by simply failing to produce the "original" LOC. The Commission is advised that ISP98 does NOT require the presentation of the "Original" LOC as a condition of a draw (See Rule 4.15). FRONTLINES contends that this condition was included in TNHC's LOC merely to provide an additional impediment to eligible intervenors seeking compensation from TNHC.
- FRONTLINES observes that Rexford Waite is the sole owner of the \$550,000 bank account that serves as collateral for the LOC, thus he has a clear and substantial interest in ensuring that NO draws on the LOC are ever made. To provide such an outcome, Rexford Waite has structured the LOC in a manner which grants him exclusive authority over all draws on the LOC, and insulates him from any obligation to make such draws in the event TNHC fails to meet their intervenor compensation obligations.

- The LOC is valid for only one year, and it is solely at the discretion of Wells Fargo whether to extend the LOC beyond the initial one-year term. FRONTLINES points out that it may take more than a year for the Commission to conduct the TEVS proceeding and issue a decision regarding intervenor compensation eligibility, thus it is quite possible that the LOC will expire before any draws can be made against it. In contrast, the term of the performance/surety bond required by D.11-07-03 is not to limited.

D.11-07-036 achieves substantial and sufficient intervenor protection in the event TNHC fails to meet their intervenor compensation obligation because it imposes a performance/surety bond requirement which provides the Commission with control over payments made pursuant to the bond. TNHC's LOC does provide this level of intervenor protection, and in fact it serves the opposite purpose because it insulates TNHC and Rexford Waite from ANY obligation to compensate intervenors and it prevents the Commission from controlling or even monitoring the LOC account status. TNHC's claim that the "Letter of Credit + Cash Fund Deposit" scheme substantially complies with the surety/performance bond requirement imposed by D.11-07-036 is absurd on its face. For this reason, FRONTLINES urges the Commission to deny TNHC's Petition in its entirety.

TNHC'S "IRREVOCABLE STANDBY LETTER OF CREDIT" IS SECURED BY AN UNRELIABLE AND UNCERTAIN FUNDING SOURCE.

Page 1 Line 1 of TNHC's \$550,000 LOC issued by Wells Fargo states that it was issued "for the account of" Rexford Waite, who contemporaneously opened a \$550,000 Wells Fargo "Time Account" (i.e. Certificate of Deposit [CD] account) with a 12 month term and a 0.15% interest rate. FRONTLINES points out that Mr. Waite is under no obligation to maintain this CD account if the Letter of Credit is cancelled and in fact he would be charged less than \$210 in early withdrawal fees if the

account were closed before the 12 month maturity date¹. In essence, the “Letter of Credit” which TNHC has asked the Commission to rely upon in lieu of a performance/surety bond:

- 1) Was procured by Rexford Waite (as the applicant);
- 2) Can be cancelled at any time by Rexford Waite (as the named beneficiary); and
- 3) Is secured by a CD Account that can be closed by Rexford Waite at any time without substantial penalties.

IN CONCLUSION

There is no question that the performance/surety bond required by D.11-07-036 provides the Commission with substantial control over intervenor compensation matters in the event TNHC defaults on its intervenor compensation obligations. This in turn provides intervenors with a secure path for full participation in the TEVS proceeding. *There is also no question* that TNHC’s “Letter of Credit + Cash Fund Deposit” scheme is not “substantially in compliance” with the performance/surety bond requirement imposed by Commission Decision 11-07-036. Unlike the flimsy and insubstantial LOC proposed by TNHC, the performance/surety bond required by D.11-07-036:

- Cannot be arbitrarily and unilaterally cancelled by TNHC or Rexford Waite;
- Will clearly designate that payments shall be made to eligible intervenors in the event TNHC defaults on its intervenor compensation obligations;
- Is secured by a reliable and certain funding source;

¹ According to Page 40 of Wells Fargo’s Consumer Account Fee Schedule the early withdrawal fee charged for a 12 month term CD accounts is just 3 months worth of interest (See https://www.wellsfargo.com/downloads/pdf/online_disclosures/FEE/EN/FII-CA-EN.pdf),

- Vests control and oversight authority with the Commission rather than TNHC or Rexford Waite.
- Cannot expire in less than a year, and will remain valid for the duration of the TEVS proceeding.

For these reasons, FRONTLINES urges the Commission to deny TNHC's petition in its entirety.

Respectfully Submitted;

/S/ Jacqueline Ayer
Jacqueline Ayer on behalf of FRONTLINES
AirSpecial@aol.com
(949) 278-8460

November 9, 2011 (PST)