

June 29, 2007

Via Electronic Delivery and USPS

Magalie Roman Salas
Office of the Secretary
Docket Room
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A, East
Washington, D.C. 20002

Dear Ms. Salas:

Re: Docket No. P-11858

Enclosed for filing in the above-docketed case, please find the a document titled

“STRUCTURE, FINANCING AND CONTROL OF THE LEAPS PROJECT: WHAT THE COMMISSION MUST DO TO INSURE THAT THE TE/VIS TRANSMISSION LINE IS NOT BUILT WITHOUT THE PUMPED STORAGE COMPONENT”

In addition, this submittal addresses recent comments made in public forums by The Nevada Hydro Company

Thank you for your cooperation in this matter.

Sincerely,

Jacqueline Ayer

STRUCTURING THE LEAPS LICENSE: WHAT THE COMMISSION MUST DO TO INSURE THAT THE TE/VS LINE IS NOT BUILT WITHOUT THE PUMPED STORAGE COMPONENT

On Wednesday, June 20, 2007, The Nevada Hydro Company (TNHC) made the following announcements at a public meeting of the Elsinore Municipal Water District (EVMWD):

- Financing for the TE/VS portion of the LEAPS project has been arranged with or by Morgan Stanley; financing for the pumped storage portion of the project has not been arranged¹.
- It appears that Morgan Stanley's participation in financing the TE/VS portion of the LEAPS project is contingent upon issuance of the LEAPS license by the Federal Energy Regulatory Commission (the Commission); such action must occur prior to PUC approval of the Sunrise Powerlink project (currently anticipated to occur in January, 2008).
- With TE/VS financing secured, TNHC intends to proceed with the complete LEAPS-TE/VS project.
- Pursuant to discussions with the California Public Utilities Commission (PUC), TNHC wants EVMWD to step down as Lead Agent under CEQA. TNHC claimed that the PUC is willing to serve as Lead Agent and will complete the CEQA project on an accelerated schedule.

TNHC's June 20 announcement raises the specter that the LEAPS license could be used as a vehicle to construct and operate the TE/VS line without any obligation to complete (or even start) construction of the pumped storage component. Specifically, the following chain of events appears quite likely:

1. The Commission issues a license and the USFS issues a Special Use Permit to the co-applicants.
2. The TE/VS line is constructed and connected to Southern California Edison (SCE) and San Diego Gas & Electric (SDGE) transmission lines.
3. CAISO approves TNHC's application as a Participating Transmission Owner, and the TE/VS line becomes part of the CAISO-controlled grid. At this point, TNHC is designated as a public utility that is subject to PUC jurisdiction.
4. Immediately prior to operating the TE/VS line as a CAISO-controlled asset, the Commission will be required to amend the LEAPS license by excising the TE/VS component. The Commission shall be compelled to do so because 18 CFR 2.2 requires that only transmission lines which are primary to the LEAPS project (and therefore only transmit LEAPS-power) may be included in the LEAPS license.

¹ A local paper reports that Morgan Stanley intends to underwrite the entire LEAPS project, however, this is inconsistent with actual statements that were made by TNHC with Morgan Stanley at the public meeting.

5. After the LEAPS license is amended, one or both of the co-applicants make no further progress on constructing the pumped storage component. Eventually, the Commission terminates the LEAPS license due to non-commencement of construction activities, just as it did on the Summit, Blue Diamond, Mount Hope, and River Mountain projects. Meanwhile, the co-applicants derive financial benefits from operation of the TE/VS line.

With this very real (and indeed likely) scenario, the LEAPS license provides TNHC with the distinct opportunity to “bootstrap” a transmission grid asset out of the Commission’s license without ever building the hydropower dam. Such benefits were never intended by the Federal Power Act; and in fact 18 CFR 2.2 was adopted specifically to avoid such situations.

The facts of the project and recent activities by TNHC certainly indicate that this is a likely course of action. It is certain that 1) TNHC intends to begin TE/VS operations as quickly as possible and well in advance of the pumped storage component of the LEAPS project² 2) TNHC has only secured funding for the TE/VS component of the project, 3) TNHC is aware that the Commission must remove the TE/VS component from the LEAPS license as soon as TE/VS is operated as a transmission grid asset³; and 3) TNHC realizes that the Commission will terminate the LEAPS license if construction is not commenced on the dam within a specified time. While TNHC has not made public statements which indicate that this is their intent, the Commission would be irresponsible and derelict in it’s duty were it to just assume that LEAPS construction will be completed (or even started) after the TE/VS line is completed.

THEREFORE, the Commission must take decisive action to insure that the project does not proceed in this manner ***by imposing conditions on the LEAPS license***. Such conditions should be imposed pursuant to Section 10(h)(2)(B) of the Federal Power Act, which specifies that conduct which “is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in Part II of this Act) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance.” It is certainly not in the public interest for the Commission to issue a water-power project license which enables the licensee to avoid constructing the water-power project and instead profitably operate a transmission grid asset. The Commission is in fact compelled by Section 10(h)(2)(B) to impose adequate conditions which will ensure that the pumped storage component is completed before the TE/VS transmission line is built.

In addition, Section 10(a)(1) of the Federal Power Act requires that Commission licenses shall be on the condition that the project shall be “best adapted to a comprehensive plan for improving or developing a waterway or waterways, for the improvement and utilization of water-power development....” This provision clearly articulates that a fundamental purpose of any hydro-dam license is for the improvement of waterways and water-power development, *but certainly not for the construction of stand-alone transmission lines*. Accordingly, the Commission is obligated to impose conditions on the license that insures development of the water resource and prevents construction of stand-alone infrastructure which is unrelated to water-power development.

² Evidenced by CAISO presentations, CEC workshops, EVMWD meetings, CAISO PTO applications, and the Commission Order on Rate Request Issued November 17, 2006 [Docket 06-278].

³ See Appendix B of the Final EIS

There are a number of conditions that can be imposed to achieve this goal, for example:

- 1) Permit only the construction of the southern portion of the TE/VS line from the generator to SDGE territory until the pumped storage component is fully operational.
- 2) Permit only the construction of the northern portion of the TE/VS line from the generator to SCE territory until the pumped storage component is fully operational.
- 3) Prohibit construction of any portion of the TE/VS line until after the pumped storage component is fully operational.
- 4) For every construction dollar spent on TE/VS transmission line construction, the applicants must first spend 5 dollars to construct the pumped storage component.

Any of these conditions will ensure that the pumped storage component is completed before the TE/VS line⁴. If the LEAPS license is issued without imposing conditions to achieve this goal, the Commission's action shall be construed as deliberately intending to grant the co-applicants an opportunity to illegally "bootstrap" a transmission grid asset out of a hydro-dam license.

It is certainly likely that TNHC will resist the imposition of such conditions, but in truth these conditions should not cause TNHC any problems if indeed their ultimate goal is to construct the entire LEAPS project as proposed.

FINANCING AND CONTROL OF THE LEAPS PROJECT

There are other equally serious concerns stemming from the June 20 announcement by TNHC, not the least of which is a pronounced lack of understanding of 1) The limitations imposed on the Commission and the USFS in approving hydro-dam projects; 2) PUC jurisdictional authority over the project as it is proposed by the Commission; and 3) Basic CEQA procedural requirements. For example:

The USFS Will Not Approve A Project Which is Only Partially Funded

It appears that TNHC and Morgan Stanley mistakenly believe that the Commission license is the only entitlement of concern. In fact, the Special Use Permit by the US Forest Service (USFS) must also be obtained and this permit is by no means perfunctory. In fact, the USFS is prohibited from issuing a Special Use Permit for any project unless the applicant provides "sufficient evidence to satisfy the authorized officer that the proponent has, or prior to commencement of construction will have, the technical *and financial* capability to construct, operate, maintain, and terminate the project for which an authorization is requested" [36 CFR 251.54(d)(3)]. This project is a hydro-dam with transmission lines, therefore, TNHC must demonstrate funding for

⁴ The Commission is urged to reject conditions which appear to obligate TNHC to complete the pumped storage before the TE/VS line, but do not actually achieve this goal. For example, it is not sufficient to prohibit interconnection with SCE and SDGE at the ends of the TE/VS line until the dam is fully operational and it is inadequate to simply prohibit the transmission of non-LEAPS power until the dam is fully operational. Both of these cases permit full construction of the TE/VS line, at which point the Commission will be required to amend the license to remove the TE/VS line under 18 CFR 2.2, thereby enabling TNHC to operate the TE/VS line as a fully integrated transmission grid asset without completing (or commencing) the pumped storage construction.

both the dam and the TE/VS line before any construction can commence. If TNHC cannot identify funding for the entire project prior to commencement of construction, the USFS is bound by law to *deny the Special Use Permit in it's entirety*.

The PUC has No Jurisdiction or Authority to Serve As Lead Agency Under CEQA.

The Commission is licensing LEAPS as a hydro-dam project with associated transmission lines that are primary to the project. By including the TE/VS line in the license, the Commission takes the position that these lines are merely ancillary to the hydro-dam. The PUC has no jurisdiction over hydro-dam projects [Section 216(d) Public Utilities Code], therefore the PUC has no authority over any component of this project *as it is being licensed by the Commission*. CEQA regulations require that the Lead Agency have “principal responsibility for carrying out or approving a project which may have a significant effect upon the environment” [Section 21067 of the California Public Resources Code]. If LEAPS is a hydro project with ancillary transmission lines that are primary to the project (which the Commission asserts), then PUC has no jurisdictional authority to carry out or approve the project *as it is being licensed by the Commission*.

Indeed, participation by the PUC and the Commission is mutually exclusive; the Commission’s license must assert that the transmission lines are project primary lines which, by definition, are not subject to PUC authority. Lacking jurisdictional authority, the PUC cannot serve as Lead Agency under CEQA. Conversely, by serving as Lead Agency under CEQA, the PUC successfully establishes that the transmission lines are part of the California transmission grid *and therefore cannot be included in the LEAPS license*.

PUC Has No Mechanism For “Accelerating” The CEQA Process

There is simply no mechanism by which the PUC or any other agency can “accelerate” the CEQA process; CEQA is a state law which has specific procedural, content, and schedule requirements that cannot be avoided. More importantly, the PUC has adopted standard CEQA procedures and practices which must be followed. Before the PUC can even initiate the CEQA process, TNHC must submit an application for a Certificate of Public Convenience and Necessity (CPCN) which must be accompanied by a detailed and factual Proponent’s Environmental Assessment (PEA). Moreover, given the substantial inadequacies of the Final EIS that has been prepared by the Commission, the PUC shall be compelled to re-draft the EIS in a parallel effort.

PUC CEQA procedures also include consultations with other public agencies such as the State Water Board and the California Department of Fish & Game. Both these agencies have requested (and are still awaiting) additional information and studies which will require a substantial investment of time and effort by the project proponents. These agencies have made it clear that their review of the project pursuant to CEQA will not be completed until the information is provided, and the PUC cannot just side-step these agencies or their concerns in the interest of “accelerating” the project.

Issuance Of The LEAPS License And Entitlements By January 2008 Is Unlikely

It is unlikely that the Commission will issue the LEAPS license by January, 2008 because the Water Quality Certification process is substantially incomplete. In fact, the EIR must be certified and a statement of Overriding Considerations must be adopted before the Water Quality Certification process can be completed.. Even if the Commission issues the LEAPS license by January of 2008, an additional 8 to 12 months will be required to complete the permit approval and entitlement procedures (such as satisfying the US Forest Service 4E conditions).

Respectfully Submitted;

Jacqueline Ayer

CERTIFICATE OF SERVICE

Pursuant to the Commissions Rules of Practice and Procedure, 18 CFR385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Palmdale, California, this 29th day of June, 2007.

Jacqueline Ayer

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