

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

In the Matter of the Application of The Nevada	Application No. 10-07-001
Hydro Company for a Certificate of Public	(Filed July 6, 2010)
Convenience and Necessity for the	
Talega-Escondido/Valley-Serrano 500-	
kV Interconnect	

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**REPLY BRIEF OF JOHN PECORA**

**December 10, 2010**

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## **REPLY BRIEF OF JOHN PECORA**

Pursuant to the ruling by Administrative Law Judge (ALJ) Minkin dated October 6, 2010, John Pecora hereby submits this reply brief. The purpose of this brief is to address issues arising from The Nevada Hydro Company (TNHC) with references to Elsinore Valley Municipal Water District (EVMWD) opening briefs dated November 19, 2010 on four threshold issues.

The following are the four threshold issues as presented ALJ Minkin in consultation with CPUC Commissioner Ryan.

**1. Entities applying for a Certificate of Public Convenience and Necessity (CPCN) at the Commission are generally certificated as public utilities if and when the project is approved. If the project is not approved, for some reason, the entity would not be determined to be a public utility. Is there a reason to proceed any differently in this matter? Why or why not?**

**2. There was some discussion at the PHC as to whether the transmission line proposed by TNHC is a stand-alone project. Since TNHC has co-applied with Elsinore Valley Municipal Water District to the Federal Energy Regulatory Commission for a license to construct and operate the Lake Elsinore Advanced Pumped Storage (LEAPS) facility, does this imply that TNHC will own any generation generated by LEAPS? If so, must TNHC seek a CPCN at this Commission for LEAPS? If not, how is this different from the Helms pumped storage project?**

**3. If, for some reason, the Talega-Escondido/Valley-Serrano project is not approved and TNHC is not determined to be a public utility under Pub. Util. Code § 218, should eligible intervenors receive intervenor compensation under Pub. Util. Code §§ 1801 et seq.? If so, who would be responsible for paying those intervenors?**

**4. Should TNHC Should TNHC be required to post a bond or provide some other guarantee of payment for intervenors or for payment to the Division of Ratepayer Advocates for consultant services pursuant to Pub. Util. Code § 631?**

I am addressing issue number two and four of TNHC opening brief dated November 19, 2010 with my response following each issue. I will be referencing an EVMWD Federal Energy Regulatory Commission (FERC) filing dated September 16, 2010 concerning a letter dated September 9, 2010 to Cathleen Cox, acting director Governors Office of Planning and Research (OPR letter). Exhibit F in the OPR letter is a development agreement dated May 15, 1997 (the Agreement) between TNHC and Elsinore Valley Municipal Water District (EVMWD).

**ISSUE NUMBER TWO**

**2. There was some discussion at the PHC as to whether the transmission line proposed by TNHC is a stand-alone project. Since TNHC has co-applied with Elsinore Valley Municipal Water District to the Federal Energy Regulatory Commission for a license to construct and operate the Lake Elsinore Advanced Pumped Storage (LEAPS) facility, does this imply that TNHC will own any generation generated by LEAPS? If so, must TNHC seek a CPCN at this Commission for LEAPS? If not, how is this different from the Helms pumped storage project?**

On page 11 of TNHC opening brief TNHC states this reasoning for TNHC not seeking a Certificate of Public Convenience and Necessity (CPCN) from the California Public Utilities Commission (CPUC) for The Lake Elsinore Advanced Pumped Storage (LEAPS) project, "The licensing of hydroelectric facilities is preempted by federal law. Therefore, even if Nevada Hydro owned generation and was an electrical corporation pursuant to Public Utilities Code § 218, it would not be required to obtain a CPCN from the Commission for LEAPS. Nevada Hydro states this point of law bearing in mind its respect for and full recognition of the Commission's jurisdiction."

TNHC assumes for the purposes of licensing that LEAPS is a "hydroelectric facility", yet in TNHC's arguments of issues number 1 and 2 they argue that LEAPS is the same as a natural gas storage facility, the same description they use in the Federal Energy Commission rate application ER-06-278-007.

Pages 3 and 4 in TNHC's opening brief states, *"As the ALJ Ruling notes, the Commission generally certifies entities as public utilities upon issuance of a CPCN. In Decision 09-10-035, for example, the Commission certificated Gill Ranch Storage, LLC ("GRS") as a public utility as a result of its issuance of a CPCN to GRS. The Commission explained that GRS was an Oregon limited liability company formed solely for the purpose of developing the proposed project, and that in its application GRS requested, among other things, a CPCN to construct and operate the proposed natural gas storage facilities.<sup>2</sup> In issuing the CPCN, the Commission explained that, "[a]s a result of our approval of [the CPCN application], GRS will be certificated as a public utility with respect to the Proposed Project and, as such, will have eminent domain authority pursuant to § 613."<sup>3</sup>*

*Similarly, in Decision 00-05-048, the Commission certificated Lodi Gas Storage, LLC ("LGS") as a public utility as a result of its issuance of a CPCN to LGS.<sup>4</sup> The Commission explained that LGS sought a CPCN "to develop, construct, and operate an underground natural gas storage facility and ancillary pipeline and to provide firm and interruptible storage services at market-based rates." The Commission also explained that it "interpret[ed] the Public Utilities Code to provide that once LGS obtains a CPCN, it is a gas corporation . . . ." On rehearing, the Commission reiterated that when it "granted LGS a CPCN to construct and provide natural gas storage services, this independent storage provider became a gas corporation within the meaning of law."*

This Commission must agree with TNHC that pumped storage is not electrical generation and is in fact "storage" (similar to natural gas as this is the only reference TNHC uses) and under the jurisdiction of the CPUC and the State of California. A quote from Richard Darman (1991 economic advisor to George Bush) is appropriate to identify

pumped storage as defined by TNHC *"If it looks like a duck, quacks like a duck and walks like a duck, it's a duck."* TNHC has diligently portrayed pumped storage (LEAPS) as a *"duck"* (storage).

TNHC asserts that a CPCN application for LEAPS would be a "dual system of duplication over the same subject matter". TNHC includes in their opening brief (page 16) this admission, "The Commission, as a basis for granting a CPCN, must consider the impacts a project will have on community values, recreational and park areas, historical and aesthetic values, and the environment. The CPCN application must include, among other things, information on the preliminary engineering and design, project implementation, cost estimates, alternative sources of power, and the financial impact on ratepayers. When compared to the FERC statutes and regulations regarding hydropower projects, any regulation by the Commission over a hydropower project would be an impermissible dual system of duplication over the same subject matter."

TNHC does not mention their failed attempt to use The LEAPS FERC Final Environmental Impact Statement (FEIS) as a Proponents Environmental Assessment for CPUC CPCN Application number 07-01-005. Nicholas Sher Attorney for the California Public Utilities Commission) in a letter to Scott Morgan (State Clearinghouse Acting Director Governor's Office of Planning and Research) dated October 1, 2010 gives a detailed account of TNHC's five rejected filings (this may violate section 6.8 of the Agreement the "Expertise" clause) in Application number 07-01-005.

The following is one example of the woeful inadequacy of the LEAPS FERC FEIS. The OPR letter exhibit G is a Quitclaim Deed transferring ownership of Lake Elsinore from the State of California Department of Parks and Recreation to EVMWD. One condition of the deed states that, "This deed is made subject to the express condition that the real property and rights herein conveyed shall be used in a manner consistent with the use maintenance and improvement of the said real property for park and recreation purposes." The LEAPS project, as planned, will drastically change the shape, of the Lake, thus changing and inhibiting recreational use. The LEAPS project, as planned, will introduce tidal action that will render shoreline residents and park visitors' recreational use and access to the lake impossible. These two consequences violate the terms of the Quitclaim deed. These conditions are not addressed or mitigated in the

LEAPS FERC FEIS or with State of California Parks and Recreation Department.

**Issue number four**

**4. Should TNHC Should TNHC be required to post a bond or provide some other guarantee of payment for intervenors or for payment to the Division of Ratepayer Advocates for consultant services pursuant to Pub. Util. Code § 631?**

The following is a quote from my own opening brief from the transcripts of the Sept 26, 2006 EVMWD Board of Directors meeting, which is eerily similar to the quote from TNHC supplemental submittals dated November 30, 2010 labeled "Medla Testimony" of E. Scott Medla's testimony regarding potential investors for TE/VS - LEAPS which follows Mr. Young's statement.

**GENERAL MANAGER YOUNG** – *They continue to work on that. I believe that they are very close but, of course, their discussions are their business deals and their contracts, so I'm not, if you will, privy to the details. I have met with the various potential investors and every different entity that has come to the District to look at our facilities. And our involvement to the projects has been very positive about their interest. I guess I can only report that things look very positive and we are moving ahead. We have a meeting in the near future to meet with the fire service about these issues. So, things are continuing ahead at a regular pace, an anticipated pace. The developer is continuing to make their progress reports or quota reports to the FERC. So, we can publish those reports. So, they are on schedule and everything looks like it is moving ahead at this point in time."*

**Medla Testimony pages 3, 4**

*Q. Please identify the principal issues that will impact the ability of TNHC to raise capital and state your opinions with respect to whether sufficient capital will be raised to fund the Project?*

*A. The following factors will impact the ability to raise capital for TEVS: credit and equity investment considerations and assumptions, overall market conditions, project*

*finance market conditions, equity market conditions, market depth and debt financing strategy. I will address each separately below:*

*Credit and Equity Investment Considerations and Assumptions*

*Upon receipt of a CPCN, TNHC will become a public utility and, accordingly, will be in a position to access a very deep pool of capital available from both debt and equity sources. The capital markets have a very deep and longstanding base of experience with investment in regulated entities. Investors and lenders with this deep utility experience understand the commercial business characteristics, specialized I accounting practices and financial characteristics of businesses that operate as public utilities. This long and broad base of capital market experience with utility transactions provides additional comfort that capital will be available to the Project after it receives a CPCN.*

**Media Testimony page 8**

*Q. Are there potential investors interested in the project?*

*A. Yes, we have conducted an assessment of market appetite for equity investors in the Project. There are several credible investors that have demonstrated interest in providing equity capital. Investors that have demonstrated interest by signing confidentiality agreements and undertaking due diligence have included sophisticated financial investors examples of which include private equity firms, infrastructure firms and unregulated subsidiaries of public utility holding companies that do not operate as utilities in California.*

*Q. Would receipt of a CPCN affect the likelihood of raising capital?*

*A. Receipt of a CPCN is an important milestone in the development of the TE/VS Interconnect and demonstrates a substantial de-risking of the project. With a CPCN, investors will more likely spend the time, effort and development capital necessary to complete the development process and proceed to construction.*

Despite the very lucid arguments of TNHC opening brief pages 22 and 23, "In any event, Nevada Hydro notes that it has met its payment obligations to the Commission thus far in a timely manner. For example, Nevada Hydro timely paid its filing fee costs in preparing the Environmental Impact Report pursuant to Rule 2.5 of the

Commission's Rules of Practice and Procedure pursuant to Public Utilities Code § 1904(a) and the first installment of the fees for recovery of costs in preparing the Environmental Impact Report pursuant to Rule 2.5 of the Commission's Rules of Practice and Procedure", Mr. Young and E. Scott Medla's testimonies infer that since 1997 TNHC has not secured investors and any current "potential" investors are hesitant and waiting for the issuance of a CPCN.

EVMWD may be the only investor TNHC has secured and EVMWD's expenditures on LEAPS - TE/VS may be another violation of the Agreement. A Grand Jury investigation (viewed by searching <http://www.stopleaps.info/> scrolling to Grand Jury) dated February 2009 indicates EVMWD violated the Agreement and LEAPS - TE/VS is not economical viable.

The Grand Jury Report states, "The Development Agreement, signed May 15, 1997, stated on page 2, paragraph 1.4: (In the following quote, FERC refers to Federal Energy Regulatory Commission.) "The Company will provide all necessary funding and will pay all expenses and costs to complete and submit the FERC license application to obtain the FERC license and to obtain related entitlements." Anticipating repayment from Nevada-Hydro, the EVMWD has spent approximately four million dollars in support of LEAPS. The Development Agreement outlines payment to EVMWD on page 3, paragraph 3.0. It details full repayment plus interest; however, there are disclaimers to the repayment found in the Development Agreement on page 3, paragraph 3.1 which states: ". . . the successful closing of all financing and/or equity contribution required to construct and operate the project and solely contingent upon such successful closing, the company will pay, within (30) days thereafter, District as follows, which amounts, unless otherwise agreed herein, shall comprise the sole consideration to which District is entitled herein." In essence, this three-man company must acquire financing for an estimated 1.3 billion dollars from outside sources and complete the entire LEAPS project before it is obligated to repay the EVMWD for its expenditures."

The Grand Jury Report makes the following recommendations,

**"Elsinore Valley Municipal Water District Board  
Elsinore Valley Municipal Water District General Manager"**



- "1. EVMWD must follow established contract policies and procedures, which require due diligence, in the selection of bidders in all future contracts. In addition, meeting with all solicited bidders should be mandatory.
2. The EVMWD Board of Directors should accept the results of the consultant reports (referencing the Van Vactor report see <http://www.stopleaps.info/>), which conclude that the LEAPS project is not economically viable, especially the pumped storage portion.
3. The EVMWD Board of Directors should make available to ratepayers an itemized accounting of the approximately four million dollars spent thus far on the LEAPS project, including direct and indirect expenses and pass through expenses paid to legal counsel."

EVMWD and TNHC have enough violations of the Agreement to nullify the "Severability" clause and the "Force Majeure" clause is not applicable as neither TNHC nor EVMWD are a "Force Majeure". The status of the Agreement is uncertain and LEAPS - TE/VS cannot be operational without water.

### **Conclusion**

For all of the above reasons I urge this Commission to dismiss this application with prejudice stipulating that EVMWD and TNHC have a clearly defined relationship, contract, adequate financing, EVMWD provides its ratepayers an accurate and complete accounting of all ratepayer money spent on LEAPS - TE/VS and any associated expenses, EVMWD place the LEAPS - TE/VS project on a ballot for ratepayer approval before a third application is submitted to the CPUC (to quote New York Yankee baseball great Yogi Bera, "This is like Déjà vu all over again").

Respectfully submitted,

December 10, 2010

By:       /S/ John Pecora        
John Pecora

## CERTIFICATE OF SERVICE

I, John Pecora, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On December 10, 2010, I served the attached:

### **REPLY BRIEF OF JOHN PECORA**

on all eligible parties on the attached list **A 10-07-001** by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this December 10, 2010, at Lake Elsinore, California.

      /S/        
John Pecora

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Proceeding: A1007001 - THE NEVADA HYDRO  
CO. Filer: THE NEVADA HYDRO COMPANY  
List Name: LIST Last changed: October 20, 2010**

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