



July 25, 2019

The Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE Washington, D.C. 20426

RE: *FERC Docket No. P-14227-003*

Lake Elsinore Advanced Pumped Storage (LEAPS) Project

1. *Comments Regarding the City's Ownership of the "Lower Reservoir";*
2. *Comments Regarding Nevada Hydro's Response dated April 3, 2018 to Commission's January 3, 2018 Deficiency Request for Additional Information (request nos. 6 and 7) and Revised Exhibit A and B to the Final License Application submitted in Response to Commission's January 22, 2019 Request for Additional Information and Comments on Study Plans (request no. 1, entitled "Revised Exhibits");*
3. *Comments Regarding Nevada Hydro's Supplemental Responses dated September 13, 2018 to Commission's January 3, 2018 Deficiency Request for Additional Information (request nos. 6 and 7) and;*
4. *Request for Off the Record Meeting*

Dear Secretary Bose:

We are writing concerning the Final License Application ("FLA") for the Lake Elsinore Advanced Pumped Storage ("LEAPS") Project, Project No. 14227, submitted by project applicant Nevada Hydro Company ("Nevada Hydro").

The City of Lake Elsinore ("City") has been highly participatory in the licensing process, having commented to Nevada Hydro's May 31, 2017 Notification of Intent to File License Application and, following that, submitting several additional study requests on December 1, 2017. The City has, when requested, submitted information to Nevada Hydro regarding its study plans concerning traffic and visual impacts.

Recently, the Commission allowed Nevada Hydro to revise the project's minimum operating level in Lake Elsinore, which serves as the "lower reservoir" for the LEAPS Project. The "new minimum operating level" for the Lake was changed from elevation 1,240 feet mean sea level ("msl") to 1,235 feet msl. This change was allowed without soliciting input from the City or other stakeholders.

The lowering of the LEAPS Project's minimum operating range elevation in the Lake significantly expands use of the Lake beyond the water storage easement rights held by the Elsinore Valley Municipal Water District ("EVMWD"), legal rights which Nevada Hydro directly relies upon for operation of the LEAPS Project in the Lake.

951.674.3124

130 S. Main Street

Lake Elsinore, CA 92530

www.lake-elsinore.org

Our review of the entire chain of correspondence dating back to the Commission's January 3, 2018 Request for Additional Information and ending with the submittal of revised Exhibits A and B to the FLA earlier this year reveals an alarming lack of critical information leading up to this change in the project.

Our intent is to close what we believe is a widening informational gap and explain that the informational gap has been hastened because EVMWD is not allowed to effectively participate in the licensing process by way of its settlement agreement with Nevada Hydro.

1. Comments Regarding the City's Ownership of the "Lower Reservoir"

The City's ownership of the real estate comprising the Lake was granted by the State of California in 1993. For reference, we have attached a copy of the State's various grants as Attachment A. The Lake was then part of the California State Park System known as the "Lake Elsinore Recreation Area." (Cal. Uncod. Init. Measures & Stats. Deering's 1974-23.) By way of a Quitclaim Deed,

"the State of California ... hereby quitclaims to the City of Lake Elsinore ... all of its right, title and interest in and to the [Lake Elsinore Recreation Area.]" (Attachment A, p. 1.)

The State's grant was made "subject to the express condition that the real property herein conveyed shall be used, maintained, and improved by the City for public park and recreation purposes in perpetuity." (*Id.*)

The vast real estate interest granted the City is burdened with a water storage easement granted by the State to EVMWD. To EVMWD, the State reserved an "Easement Deed for Flood and Water Storage and Related Appurtenances" to use:

"the Lake Elsinore State Recreation Area ... as a water storage facility to receive, use, store withdraw and sell any and all waters above water level elevation 1240 feet above sea level" (Attachment A, pp. 10-11, hereinafter the "Water Storage Easement.")

This easement is a critical document that FERC's legal team should be aware of. The Lake will be used to store Nevada Hydro's project water which will be purchased from a third party and transported to the Lake. This is contemplated in both the "Consent Judgment" entered into between Nevada Hydro and EVMWD and the related settlement agreement. Copies of the Consent Judgment and the "Agreement for Settlement and Release of Claims" ("Settlement Agreement") are attached hereto as Attachments B and C, respectively. The Consent Judgment provides:

"The Water Management Services to be provided by the District shall include facilitating, at Hydro's cost ..., the purchase, importation, *and storage* of fifteen thousand acre feet (15,000 AF) of water to be introduced into Lake Elsinore" (Attachment B, p. 5, ¶ 2, italics added.)

That intent to use the Lake to store Nevada Hydro's water is also evidenced in the Settlement Agreement. "Exhibit 2" to the Settlement Agreement includes the "term sheet" for Nevada Hydro's storage of its water in the Lake. The term sheet provides for a:

"proposed Water Supply and Storage Agreement which would allow Hydro to purchase, import, and store 15,000 AF of water in Lake Elsinore"
(Attachment C, p. 37, ¶ 1.)

The initial 9,000 acre feet of water is defined in the term sheet as "Stored Water." That Nevada Hydro owns the water is also made clear:

"... District will procure water ... in sufficient amounts, including actual conveyance losses, to establish and maintain a 15,000 AF pool of water in Lake Elsinore for use in connection with the operation of the LEAPS Project ('Hydro Water'). Hydro will be responsible for all costs associated with the securing and delivering the Hydro Water to Lake Elsinore" (Attachment C, p. 37, ¶ 1(a).)

The decision to use the Lake to store Nevada Hydro's water (that is, the "Hydro Water") has a significant consequence: EVMWD's Water Storage Easement does not allow for *withdrawal* of that stored water when the Lake is below elevation 1,240 feet.¹ We discuss that restriction in greater detail below in connection with the Commission's recent decision regarding the minimum operation level in the "lower reservoir."

That a major hydroelectric project license would proceed on an easement right where the public agency *and owner* of the underlying vast real estate interest (namely, the City) has declined to give its consent is not unprecedented but has led to failed applications in at least two instances we have found.

In *Metro Hydroelectric Company, LLC*, 121 F.E.R.C. ¶ 61,049 (2007), the owner of a public park (Metro Parks) was faced with a proposed hydroelectric project in a park in which the applicant held an easement. Metro Park successfully denied the applicant access to the park. Without this access, the Commission determined to terminate the license process. (*See also, Metro Hydroelectric Co. LLC v. Metro Parks*, 541 F.3d 605 (6th Cir. 2008).)

In *BOSTI Hydroelectric LLC, Three Rivers Park District*, 133 F.E.R.C. ¶ 62,027 (2010), the applicant (which held no property rights to the park site) and Three Rivers Park District filed competing applications for similar hydroelectric projects. The Commission in *BOSTI* adroitly addressed the rather huge hurdle posed if an applicant ultimately finds that condemnation is necessary in a project involving park lands. Section 21 of the Federal Power Act limits the use of eminent domain to acquire any lands included within any public park, recreation area, or wildlife refuge established under state or local law. (16 U.S.C. § 814.) While ruling that Section

¹ The City acknowledges that the State of California separately quitclaimed to EVMWD the "water rights" in the Lake. (See Exhibit A, pp. 20-21, "Quitclaim Deed for Water Rights.") That water right encompasses the naturally occurring water within the Lake and does *not* include a specific lake level restriction. However, the LEAPS Project does not propose to use *that* water; Nevada Hydro and EVMWD have agreed that Nevada Hydro will purchase water from a third party and store *Nevada Hydro's* water in the Lake which squarely falls under the Water Storage Easement. (See Exhibit A, pp. 10-11.)

21 does not necessarily pose a “permanent legal barrier” to licensing, the Commission warned that “BOST1 does bear the risk of losing its investment of effort and capital if it ultimately is unable to acquire necessary rights.” (133 F.E.R.C. ¶ 62,027, fn. 7.) That admonition did indeed come to fruition six years later when BOST1’s application was dismissed. (156 F.E.R.C. ¶ 61,044.)

Given the Lake was part of the California’s State Park System prior to the passage of Energy Policy Act of 1992 and the State’s grant to the City in 1993 requires the continued use of the Lake for “public park and recreation purposes,” the City simply notes its position that its property interest in the Lake is not subject to condemnation by the applicant under Section 21.²

2. *Comments Regarding Nevada Hydro’s Response dated April 3, 2018 to Commission’s January 3, 2018 Deficiency Request for Additional Information (request nos. 6 and 7) and Revised Exhibit A and B to the Final License Application submitted in Response to Commission’s January 22, 2019 Request for Additional Information and Comments on Study Plans (request no. 1, entitled “Revised Exhibits”)*

On January 3, 2018, the Commission posed a series of information requests to Nevada Hydro, including information identifying the sources of supplemental water to “maintain Lake Elsinore above 1,240 feet” (request no. 6) and how Nevada Hydro intended to “retain enough control over the operation of Lake Elsinore to ensure that it can meet any Commission license requirements” (request no. 7). (FERC eLibrary Accession No. 20180103-3012, Schedule B at B-2, B-3.)

Nevada Hydro responded on April 3, 2018. (FERC eLibrary Accession No. 20180403-4006.) As for its response to item no. 6, Nevada Hydro submitted a “Privilege” disk. (Page 6.) Earlier this year, the City learned for the first time the nature of that so-called “privileged” information from the Commission’s correspondence. The Commission’s January 22, 2019 Request for Additional Information states, in part:

“In response to item 6, you [Nevada Hydro] state that the proposed LEAPS Project would be capable of operating when extended drought conditions result in water levels in Lake Elsinore to fall below 1,240 mean sea level (msl), because the project’s intake/outlet facilities would be able to intake water at a range of water levels below 1,235. This response appears to change the proposed project operation” (FERC eLibrary Accession No. 20190122-3014, Schedule A at A-1.)

The Commission then instructed Nevada Hydro to “amend your FLA by filing a revised Exhibit A that reflects your new minimum operating level and a revised Exhibit B that states your new

² The adoption date of the Energy Policy Act of 1992 (Pub. L. No. 102-486, 106 Stat. 2776) sets the cutoff date on a licensee’s ability to use eminent domain on state and local park lands:

“...no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992 [enacted Oct. 24, 1992], were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law.” (18 U.S.C. § 814.)

proposal to operate during both normal and drought conditions.” (*Id.*) Nevada Hydro dutifully submitted revised Exhibits A and B on February 19, 2019. (FERC eLibrary Accession No. 20190221-4001 [V18 SA 1 – Revised FLA Exhibit A; V18 SA 1 – Revised FLA Exhibit B].)

Eight days following the Commission’s request for the revised exhibits, Nevada Hydro’s water quality consultant Dr. Michael Anderson issued the “Final Report” concerning project water quality impacts in response to study requests 4 and 7. (FERC eLibrary Accession No. 20190221-4001(V18 E1 1-Study 4 & 7.)) Dr. Anderson clearly anticipated the Commission’s notice to Nevada Hydro allowing the changed project just eight days earlier and devoted a full ten pages of the report to “Scenario 1: 1235 ft (low lake level)” in assessing the effects of LEAPS on water quality in the Lake.

The right to store supplemental water in the Lake – 15,000 acre-feet of water proposed to be imported into the Lake by Nevada Hydro to prime the LEAPS Project – relies on the Water Storage Easement held by EVMWD. As noted above, that easement only allows the withdrawal of stored water from the Lake when its level is above elevation 1,240 feet. (See Attachment A, p. 11, providing an easement to “receive, use, store withdraw and sell any and all waters above water level elevation 1240 feet above sea level”)

The right to withdraw stored water from the Lake *below elevation 1,240 feet* is a right held by the City of Lake Elsinore as the repository of all rights in the Lake granted under the Quitclaim Deed, excepted only by those limited rights specifically granted to EVMWD. In recasting the LEAPS Project’s “lower reservoir” operating level from a minimum of 1,240 feet to a minimum of 1,235 feet, the license application for the first time goes well beyond the water withdrawal rights held by EVMWD under the Water Storage Easement.

It is worth noting that in the prior iteration of the LEAPS Project, the “Final Application for License of Major Unconstructed Project (Project No. 11858) Lake Elsinore Advanced Pumped Storage Project,” the LEAPS Project hemmed tightly to EVMWD’s rights under its Water Storage Easement. Then, the proposed operating range of the project in the Lake was preserved between elevations 1,240 and 1,247 feet far into the licensing process,³ thereby not exceeding EVMWD’s Water Storage Easement to “receive, use, store withdraw and sell any and all waters above the water level elevation 1240 feet”

We respectfully submit that the Commission should have solicited comments from the City and stakeholders prior to allowing Nevada Hydro to change the project. We further submit, in changing the project, Nevada Hydro is demonstrably short of being able to someday satisfy the Article 5 requirements with respect to the operating range component because the LEAPS Project cannot be operated in a manner that results in the withdraw of Nevada Hydro’s *stored* water below 1,240 feet under the Water Storage Easement.

The City cannot put it more directly: neither Nevada Hydro nor EVMWD possess the legal right to withdraw stored water from the Lake below elevation 1,240 feet msl. In facilitating this “new

³ The Final Environmental Impact Statement for Project No. 11858 stated that “the co-applicants propose to operate the lower reservoir (Lake Elsinore) between 1,240 and 1,247 feet msl.” (FERC eLibrary Accession No. 20070130-4000 [08 LEAPS Section 3 Environmental Analysis, p. 3-39].)

proposal” to lower the project’s operating range in the Lake, the Commission appears to have undone, at least in part, Nevada Hydro’s assertion that its settlement with EVMWD places Nevada Hydro in position to meet the Article 5 standard condition.

We next turn to Nevada Hydro’s September 13, 2018 supplemental response, submitted through its legal counsel Winston & Strawn, to request no. 6 and request no. 7.

3. Comments Regarding Nevada Hydro’s Supplemental Response dated September 13, 2018 to Commission’s January 3, 2018 Deficiency Request for Additional Information (request nos. 6 and 7)

By letter dated September 13, 2018, Nevada Hydro’s attorney Kimberly Ognisty announced with some fanfare the settlement of the long-running litigation between Nevada Hydro and EVMWD. (FERC eLibrary Accession No. 20180913-5130.) That litigation followed the Commission’s dismissal of Project No. 11858 in 2011. Included with the correspondence was the Superior Court’s “Consent Judgment.” Ms. Ognisty goes on to conclude:

“As a result of settlement agreement and the Consent Judgment, the District and NHC have confirmed the District’s role as the entity responsible for managing Lake Elsinore and confirmed that the District will continue in this role once the Project is operational.” (Page 2.)

Missing from Ms. Ognisty’s letter is the above-referenced Settlement Agreement between Nevada Hydro and EVMWD, which is included here as Attachment C.

While the agreement is titled “Agreement for Settlement and Release of Claims,” it is fundamentally a document of forced servitude upon EVMWD. The City certainly respects that Nevada Hydro and EVMWD are entitled to resolve their lengthy lawsuit. But the Commission should understand that the settlement has come with the muzzling of the government agency – EVMWD – that holds the easement to store water in the Lake. The Settlement Agreement is direct on this point:

“3.01 No Affirmative Opposition or Interference. At no time shall EVMWD directly or indirectly oppose, interfere with, or cause any third party to oppose or interfere with, any effort or proceeding to entitle, develop or construct the Project, including without limitation, the pending FERC application for Project No. 14227, State Water Resources Control Board proceedings for water quality certification for the Project under Section 401 of the federal Clean Water Act (‘401 Certification’), or proceedings before the United States Forest Service; nor shall EVMWD directly or indirectly prevent any consultant, lobbyist, or other third party from engaging or working with Hydro on the LEAPS Project.” (Attachment C., pp. 5-6.)

In light of the fact that: (1) the governmental agency/owner of the real estate (the City) comprising a “lower reservoir” opposes the project, and (2) the governmental agency/holder of the easement (EVMWD) necessary to store water in this “lower reservoir” has been contractually gagged from commenting on the project, we are compelled to ask: is this normal in FERC licensing?

Is the City the only participant in this process that is rather uncomfortable with, to use Ms. Ognisty's words, "the District's role as the entity responsible for managing Lake Elsinore" when EVMWD is contractually prohibiting from commenting to the Commission about that role or potential operational problems with the LEAPS Project?

In continuing to process the FLA, the Commission finds itself complicit in the gagging of EVMWD, a governmental agency responsible for serving 148,587 residential customers and 3,767 commercial users in Riverside County, California.⁴

We submit that the legal issues raised by the "new proposal" on the minimum operating Lake level could have been avoided had Nevada Hydro been working in proper consultation with EVMWD as it had in Project No. 11858.

In giving Nevada Hydro free rein to plow through the licensing process without the benefit of EVMWD's towering institutional knowledge of the Lake has put all of us in a worse place and certainly led to the ill-advised "new proposal" minimum elevation discussed above. That EVMWD would be placed in the role "responsible for managing Lake Elsinore" once the "Project is operational" and yet be gagged under the provisions of the Settlement Agreement is, in our view, irresponsible. That this forced marriage could somehow ultimately meet the Commission's operational control mandates is, to us, unfathomable.

4. Request to Hold Off-the-Record Meeting consistent with Federal Regulations

The City has made much of its ownership rights in the Lake for good reason: the City is not entitled to consultation with the Commission under federal regulations despite the fact that the City holds, by a wide margin, the real estate rights to the "lower reservoir." (*Cf.*, 18 CFR § 2.1 regarding consultation with Indian tribes.)

Recognizing the limits placed on *ex parte* communications by 18 CFR 383.2201, the City nonetheless requests an opportunity to meet with Commission staff to fully discuss the factual and legal basis for the City's concerns as they relate to the lowering of the operational level of the Lake from 1,240 feet to 1,235 feet. As the Commission continues its review and considers project related conditions, it is critical that the decision makers have a full understanding of both the dynamic legal history and physical environment affecting the Lake.

⁴ Source: http://www.evmwd.com/depts/engineering/new_development/requesting_maps_or_drawings.asp

The Honorable Kimberly D. Bose, Secretary

July 25, 2019

Page 8 of 8

Thank you for considering our position on these important issues facing the Lake and our community.

Sincerely,



Barbara Leibold
City Attorney

cc: Mayor Manos and Members of the City Council
Grant Yates, City Manager
Jim Fargo, FERC (via overnight delivery)
Rexford Wait, Nevada Hydro Company, Inc. (via overnight delivery)