

137 FERC ¶ 61,133  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

The Nevada Hydro Company, Inc.

Project No. 11858-004

ORDER DENYING REHEARING

(Issued November 17, 2011)

1. By order issued July 12, 2011, the Director, Office of Energy Projects (Director), dismissed the application filed by The Nevada Hydro Company (Nevada Hydro) and Elsinore Valley Municipal Water District (District) (collectively, co-applicants) for an original license to construct and operate the proposed 500-megawatt (MW) Lake Elsinore Advanced Pump Storage (LEAPS) Project, to be located primarily on Lake Elsinore and San Juan Creek in Riverside County, California.<sup>1</sup> Nevada Hydro seeks rehearing of that order.<sup>2</sup> For the reasons discussed below, we deny rehearing.

**Background**

2. The co-applicants filed the application for this project on February 2, 2004. The project would include an upper reservoir,<sup>3</sup> a powerhouse near Santa Rosa with two

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<sup>1</sup> *Lake Elsinore Advanced Pumped Storage Project*, 136 FERC ¶ 62,033 (2011).

<sup>2</sup> The District filed a response to the request for rehearing and a motion to accept that response. Although answers normally may not be made to requests for rehearing, (*see* 18 C.F.R. § 385.213(a)(2) (2011)), we will accept the District's response, since the District is a co-applicant and since the extent to which the co-applicants are in disagreement was at the heart of the Director's dismissal of the application.

<sup>3</sup> The co-applicants proposed a reservoir in Morrell Canyon with a gross storage area of at least 5,500 acre-feet. In the final EIS prepared for this application and issued in January 2007, staff concluded that a reservoir in this location would have harmful environmental effects and recommended instead an upper reservoir in Decker Canyon. Final EIS at xxi.

reversible pump-turbine units with a total installed capacity of 500 MW, the existing Lake Elsinore to be used as a lower reservoir, and about 32 miles of 500-kilovolt (kV) transmission line connecting the project to the existing Southern California Edison (SCE) Valley-Serrano 55-kV transmission line in western Riverside County to the north and to the existing San Diego Gas and Electric (SDG&E) 230-kV Talega-Escondido transmission line in northern San Diego County to the south. The project would occupy 2,412 acres of federal lands, including lands managed by: the U.S. Department of Agriculture Forest Service, Cleveland National Forest; U.S. Bureau of Land Management; and the U.S. Department of Defense (Camp Pendleton).

3. With the Forest Service as a cooperating agency, Commission staff prepared draft and final Environmental Impact Statements (EIS) for the proposed project; it issued the draft and final EIS in February 2006 and January 2007, respectively. The final EIS noted that the Forest Service was reviewing an application filed by the co-applicants on July 3, 2003, for a special use permit for constructing a Talega-Escondido/Valley-Serrano (TE/VS) Interconnect Project, including transmission lines associated with the LEAPS Project, as a transmission line only project.<sup>4</sup> This stand-alone transmission line would essentially consist of the primary transmission lines included in the LEAPS project description. Because the Forest Service was a cooperating agency with an independent need to evaluate the impacts of authorizing the right of way for this stand-alone line, the EIS included an extensive analysis of the need for the transmission line, alternatively as a stand-alone line or primary line ancillary to the hydropower project.<sup>5</sup> Stating that the project would need a transmission line to be constructed only in one direction, the EIS concluded that the line extending south would be preferred, based on factors that were set out in the analysis.<sup>6</sup> However, the final EIS also concluded that the TE/VS Interconnect, as a stand-alone line, would be an appropriate long-term solution to southern California's transmission congestion bottlenecks as well as to the transmission-constrained, generation-deficient San Diego area.<sup>7</sup>

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<sup>4</sup> Final EIS at xxi, 1-1.

<sup>5</sup> See Appendix B to the final EIS.

<sup>6</sup> Final EIS at B-21.

<sup>7</sup> *Id.* at 1-6, 5-1. The EIS found that the TE/VS Interconnect could provide up to 1,000 MW of import capability into the San Diego area with up to 500 MW of this import power being supplied by the LEAPS Project during high demand periods. The EIS concluded that its alternative (which modified the original transmission line proposal somewhat) would have the benefit of allowing the co-applicants to construct and operate

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4. The application required certain approvals from the State of California. In March 2005, the co-applicants applied to the California State Water Resources Control Board (State Board) for water quality certification for the LEAPS Project pursuant to section 401(a)(1) of the Clean Water Act.<sup>8</sup> In March 2006, Nevada Hydro withdrew that request and refiled separate requests for certification for both the LEAPS Project and the TE/VS Interconnect Project.<sup>9</sup> It continued to withdraw and refile such applications in the following years. The California Environmental Quality Act (CEQA)<sup>10</sup> requires preparation of an Environmental Impact Report when a public agency finds substantial evidence that a project may have a significant impact on the environment. As the lead agency under CEQA, the District determined that such an Environmental Impact Report was required for the proposed LEAPS and TE/VS Interconnect Projects and initiated a notice and comment process.<sup>11</sup> Procedural issues subsequently arose relating to the application for water quality certification and the CEQA process. These issues delayed processing of the license application but will be referred to here only as they are necessary to address the request for rehearing.

5. As the proceeding progressed, disagreements began to surface between the co-applicants regarding the role of the TE/VS line. In order for the TE/VS line to be a part of the LEAPS Project, it would have to be considered a primary transmission line, because, under the Federal Power Act (FPA), the Commission has authority to license only primary lines - - those which transmit power from the project to the point of junction with the distribution system or interconnected primary transmission system and do not transmit power from other sources.<sup>12</sup> As we have stated elsewhere:<sup>13</sup>

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the project as a peak energy resource and as part of a long-term solution to southern California's transmission congestion bottlenecks. *Id.* at xxiii, 5-1.

<sup>8</sup> 33 U.S.C. § 1341(a)(1) (2006).

<sup>9</sup> Final EIS at 2-17.

<sup>10</sup> Public Resources Code sections 21000 *et seq.*

<sup>11</sup> *Id.* at 1-10-11.

<sup>12</sup> Section 4(e) of the FPA, 16 U.S.C. § 797(e) (2006), authorizes the Commission to issue licenses “for the purposes of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, *transmission lines, or other project works* [emphasis added] necessary or convenient for . . . the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce . . . or

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The Commission uses a two-pronged technical test for determining whether a line is a primary transmission line: whether it is used solely to transmit power from a Commission licensed project to the interconnected distribution system, and whether without it there would be no way to market the full capacity of the project. Under this test, the line leading from a project ceases to be a primary line at the point it is no longer used solely to transmit all of the power from its project to the interconnected grid. The Commission has recognized that this is at bottom a case-specific, factual inquiry.

The disagreements between the co-applicants essentially centered on the District's perception that Nevada Hydro was primarily interested in pursuing development of the TE/VS line as a stand-alone transmission line, to the detriment of the success of the application for the LEAPS Project.

6. In a May 6, 2011 letter to the co-applicants, the Director stated that recent actions by the co-applicants called into question the viability of their joint application for a license. Specifically, the Director noted that, on October 1, 2009, the State Board denied the application for water quality certification. While Nevada Hydro asked the State Board to reconsider its actions, the District supported the State Board's denial. Thereafter, the State Board denied Nevada Hydro's appeal, and Nevada Hydro then petitioned a California state court for a writ of mandate to direct the State Board to set aside its order and either allow Nevada Hydro to withdraw and resubmit its application or hold an adjudicatory hearing. The Director noted that the District did not appear to support Nevada Hydro's actions. Further, the Director cited a December 1, 2009 Filing with the Commission in which the District expressed concern that its expectations for a hydropower license were being frustrated by Nevada Hydro's independent pursuit of the TE/VS transmission line on a stand-alone basis, as evidenced by Nevada Hydro's application for a certificate of public convenience and necessity with the California

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upon any part of the public lands and reservations of the United States . . . .”  
Section 3(12) of the FPA defines “project works” as the physical structures of a project, and section 3(11) defines “project” as a complete unit of improvement or development consisting of specified project works including “the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system.”

<sup>13</sup> *City of Tacoma, et al., Proposed Order Directing Interconnection Services and Ordering Further Procedures, Order Finding Licensing Required, and Notice of Intent to Reopen Licenses*, 118 FERC ¶ 61,202 (2007) (citing other cases [footnotes omitted]).

Public Utilities Commission (CPUC) for the line, an application that the CPUC had accepted and was now processing.

7. The Director questioned whether, given the continuing differences between the co-applicants, it would be in the public interest to continue to commit the Commission's resources to processing the LEAPS Project application. The Director asked the co-applicants to explain why the application should not be dismissed. The co-applicants filed separate responses to that letter.

8. Nevada Hydro responded that it has complied with every requirement for the issuance of a license except for the provision of water quality certification, which it now has a plan of action to obtain. Nevada Hydro explained that the State Board's denial of certification was primarily due to a dispute over which agency, the District or the CPUC, should serve as the lead agency for purposes of CEQA. The company asserts that this dispute has been resolved, as the CPUC has been designated the lead agency for both the LEAPS Project and the TE/VS application and is now proceeding to establish a schedule for preparing an Environmental Impact Report. Nevada Hydro stated that development of the TE/VS line as a stand-alone transmission line would benefit both the LEAPS Project and a wider class of ratepayers, while development of the line solely as a primary transmission line for the LEAPS Project would be uneconomical. Development of the line as a stand-alone transmission line necessitated applying for a certificate of public convenience and necessity from the CPUC since the Commission could not license such a line, but the Nevada Hydro stated that it remains committed to obtaining approval of both the transmission line and the LEAPS Project. Nevada Hydro added that, under its 1997 Development Agreement with the District, it has the exclusive right and obligation to construct the LEAPS Project, and the District's affirmative advocacy is not required for it to do so.

9. The District responded that its status as a municipal water district allows it to pursue only the development of hydroelectric projects, including associated transmission lines, not free-standing transmission lines such as the TE/VS transmission line. It added that its involvement with the LEAPS Project, as set forth in its 1997 Development Agreement with Nevada Hydro, was predicated on the development of only a hydroelectric project. The District stated that, over the last several years, Nevada Hydro has stated to permitting agencies that the LEAPS Project should be treated as two separate projects, a hydroelectric project and a stand-alone transmission line, and that, from the District's perspective, Nevada Hydro's pursuit of a stand-alone transmission line is not consistent with either the District's historical position or its statutory authority. The District did not take a position on whether the LEAPS Project application should be dismissed.

10. In his order dismissing the license application, the Director referred again to the co-applicants' differing actions in respect to the State Board's dismissal of the water quality certification application, which the State Board dismissed on the ground that the

environmental documents submitted by Nevada Hydro did not comply with CEQA and did not provide a sufficient basis for the State Board to evaluate the proposed project. The Director also stated that, on July 6, 2010, Nevada Hydro applied for a certificate of public convenience and necessity with the CPUC for the TE/VS transmission line portion of the LEAPS Project, and that, in a February 9, 2011 letter, the CPUC notified the State Board that it was preparing an Environmental Impact Report to meet CEQA requirements for both the LEAPS Project and the TE/VS transmission line. However, the Director noted, Nevada Hydro took these actions without the support of the District.

11. After considering these circumstances and reviewing the co-applicants' responses and the 1997 Development Agreement, the Director concluded that the District's goal is clearly to develop the hydroelectric project and improve the water quality of Lake Elsinore through the project's operation, while Nevada Hydro's primary interest is in the TE/VS transmission line. The Director pointed out that the Commission holds co-licensees jointly and severably liable for the performance of all license obligations, and that fundamental disagreements between co-licensees therefore make it difficult, if not impossible, for co-licensees to comply with the terms of a license. The Director concluded that the co-licensees' divergent responses to his May 6, 2011 letter further clarify that the co-applicants have different goals, have been unable to work together in the past, and would likely be unable to work together if issued a license for the project. Finding that it would be unreasonable to expend further public resources on processing the application, the Director dismissed it.

### **Positions of the co-applicants**

#### **A. Position of Nevada Hydro**

12. On rehearing, Nevada Hydro asks the Commission to reinstate the application. Nevada Hydro contends that the application fulfills all of the conditions for issuance of a license except for the issuance of water quality certification, which it expects to receive following completion of environmental review by the CPUC. Nevada Hydro argues that the LEAPS Project will be an important addition to the California electric grid, particularly given its capabilities to provide quick ramp reserves, highly responsive load/variation following capability, and other ancillary services. It argues that the project will also provide benefits to the District, because, under the Development Agreement, Nevada Hydro would pay the costs of supplemental water to maintain Lake Elsinore water elevations, a requirement that now falls on the District through a water management agreement to which it is a party.

13. Nevada Hydro acknowledges that it is pursuing development of the TE/VS as an open access line, which would be certificated by the CPUC, since licenses can include only primary transmission lines. Nevada Hydro states that, in light of the District's concerns about the limitations on its own authority, it applied for a certificate of public

convenience and necessity with the CPUC in its own name, and it intends to take all required actions to assure that the line is developed without the District's participation.

14. Nevertheless, Nevada Hydro claims that the District has for years, including in the application, supported the open access approach and that the District's concern about the stand-alone transmission line is newfound. Nevada Hydro states that, early in the application process, the co-applicants determined that the LEAPS Project would be most efficient if it could draw and inject energy to the lines north and south, which would also allow the line to be used to transfer, between those connection points, power generated and used by other resources and loads.

15. Thus, Nevada Hydro characterizes as contrary to the record the Director's conclusion that the District, unlike Nevada Hydro, preferred that the TE/VS be a primary line "as proposed" and that the District predicated its involvement in the LEAPS Project on the development of only a hydroelectric project. Instead, Nevada Hydro contends, the District expressly adopted an option of treating the TE/VS line as an open access transmission line, including sequencing its construction ahead of that of the LEAPS Project. In support of this contention, Nevada Hydro cites a statement of the District's general manager during initial stage consultation in 2001 acknowledging that the permitting and development of the transmission route might occur before development of the hydro project itself, and that, since the line would then provide regional benefits and serve as a transmission interconnection, it would no longer fall under Commission jurisdiction as a primary transmission line. Nevada Hydro also notes the adoption of a formal resolution in January 2002 by the District confirming its approval of the TE/VS line as a transmission line for open access outside the scope of the license. Further, Nevada Hydro states, the project description in the application itself describes alternate treatments of the line as a primary transmission line or a stand-alone interconnection, and the District, in early comments prior to preparation of the EIS, informed the Commission that the LEAPS Project and the TE/VS line could be separate projects even though they would be addressed as part of a single environmental document.

16. Nevada Hydro sets out a number of advantages to treating the TE/VS line as a transmission facility, with open access to all comers, rather than as a mere primary line, usable only for the LEAPS Project, including the reduction of engineering, procurement, and construction costs. Conversely, Nevada Hydro states, there would no disadvantages to the District in treating TE/VS as an open access line, since, under the Development Agreement, the District does not participate in the financial risks or potential rewards of the LEAPS Project but is concerned only with its environmental benefits.

17. For these reasons, Nevada Hydro explains, it sought treatment of TE/VS as a stand-alone transmission line, including pursuit of incentive rates at the Commission and filing for a certificate of public convenience and necessity with the CPUC. Nevada Hydro states that, whether the transmission line were treated as an open access line or as the LEAPS primary transmission line, its construction would precede construction of the

LEAPS Project, since no one would be willing to finance construction of a generation plant that could not be connected to the grid promptly. Nevada Hydro adds that constructing the TE/VS line as a restricted primary use line would be economically destructive. Nevada Hydro asserts that, in any case, arguments over whether the LEAPS Project and the TE/VS transmission line are one project or two are only arguments over semantics, because the Commission cannot license a stand-alone transmission line, while the CPUC cannot license the LEAPS Project.

18. Nevada Hydro argues that the Director cited no legal standard for his dismissal of the application, and it alleges that none of the legal predicates for dismissal support his action. Nevada Hydro states that the FPA establishes a statutory standard for the grant or denial of a license, resting on the necessity and convenience of the project for purposes of developing and improving navigation and transmission and utilization of power.

19. Nevada Hydro asserts that the Director's action was not based on these considerations but instead merely on the divergent views of the co-applicants and the prospect that co-licensees with fundamental disagreements would be unlikely to be able to comply with the terms of a license. Nevada Hydro argues that these factors are not grounds for dismissal. Moreover, Nevada Hydro states, there is no identified and demonstrable nexus between the divergence of the co-applicants' views and the performance of any license requirements, especially since the TE/VS line, as a stand-alone transmission line, would not be within the scope of the license. Nevada Hydro argues that the Director's assessment that it has a "primary interest" in the TE/VS line pertains to no applicable legal standard for evaluating a hydro license application and sheds no light on whether its prosecution of a hydro license is adequate and appropriate; rather, what is important is whether an applicant is pursuing a license application in good faith. Nevada Hydro asserts that it has been doing that, and that the record does not support a conclusion that the TE/VS line is its primary interest or that its pursuit of certification of that line frustrates its pursuit of the LEAPS Project.

20. Nevada Hydro argues that the applicable legal standard provides no basis to conclude that development of the TE/VS for open access is a ground for license denial, since the standard does not preclude interconnection of a hydro facility with an open access, non-primary transmission line. Yet, it claims, the Director stated that the application must be dismissed because the TE/VS line is not subject to the Commission's license jurisdiction. Nevada Hydro states that this factor is immaterial since it does not seek licensing of the TE/VS line from the Commission but rather certification from the CPUC. Nevada Hydro contends that the Director's dismissal of the application on that basis would be harmful precedent as it would discourage the development of hydro facilities that may need to be sited away from the grid where an open access transmission line might be the most efficient interconnection solution. Nevada Hydro adds that the Director's implication that Nevada Hydro should treat the TE/VS line as a primary line

would burden the LEAPS Project with substantial additional costs and is without legal support.

21. Nevada Hydro asserts that the Director's dismissal of the application is an abuse of discretion, because a less draconian solution was available. For instance, Nevada Hydro states, the application could be amended to remove the District, and commitments could be made that the District not participate in the TE/VS operation. In any event, material disagreements could have been worked out at a technical conference or in other appropriate discussions, but the Director did not respond to Nevada Hydro's requests for such a conference. Nevada Hydro adds that the Director did not state any reason why the LEAPS Project could not be licensed with a short primary line connecting to the TE/VS line as part of the grid, rather than connecting to the grid through a 30-mile primary line, approximately 15 miles to the north and 15 miles to the south.

### **B. Position of the District**

22. In its response to Nevada Hydro's request for rehearing, the District states that the idea of a stand-alone transmission line has not always been part of the LEAPS Project proposal; rather transmission was always viewed as being ancillary to the pumped storage facility. The District states that, although the license application defined the TE/VS line as a transmission line that would deliver electricity both north to Riverside County and south to San Diego, the project description was unclear: while the two possible segments of the transmission line could distribute energy either north to SCE's existing line *or* south to SDG&E's existing line, it was less clear whether the line would connect *both* the northern and southern existing lines and become an open access line. It points out that, in the EIS, Commission staff, although engaging in a need determination for the transmission line, ultimately identified the southern segment as the preferred option for a primary transmission line.

23. The District states that, over time, various actions undertaken by Nevada Hydro have raised uncertainty about its legitimate commitment to the District's objective of developing hydropower, and that, in the past several years, nearly all of Nevada Hydro's actions have demonstrated a preference for pursuing open access transmission to the exclusion of hydropower. The District asserts that Nevada Hydro has consistently defined the LEAPS Project as two separate projects, not one single project, and that, acting on its own accord, Nevada Hydro has stated to several permitting agencies on the public record that the LEAPS Project should be treated as two separate projects. For example, the District points out, in the notice of preparation issued by CPUC for the Environmental Impact Report for the LEAPS Project, Nevada Hydro described the TE/VS line as "primarily a transmission project" that is "connected with a related project, the proposed [LEAPS] Project." Moreover, the District claims, Nevada Hydro's two-project characterization of the proposal is what ultimately caused the State Board to dismiss, without prejudice, the application for water quality certification for the LEAPS Project, because the failure of Nevada Hydro to obtain an analysis of the project under

CEQA as a single project that consisted of hydropower and ancillary transmission meant that the State Board could not lawfully process the application.

24. The District disputes Nevada Hydro's contention that water quality certification is the sole remaining authorization that must be obtained before the LEAPS Project application can be further processed by the Commission. The District points out that the State Board cannot issue certification without first considering a CEQA document, so that the entire CEQA process must first be completed. The District states that, as a responsible agency for the project, the State Board has an independent obligation to review the CEQA document produced by the CPUC and to determine whether that document adequately analyzes the water-related impacts associated with certification or whether the State Board itself may need to undertake further CEQA review.

25. The District states that, under the 1997 Development Agreement, Nevada Hydro agreed to promptly and timely take all actions necessary and obtain any other federal, state, and local entitlements required for the license application and for construction and operation of the project, and to provide all necessary funding and pay all expenses to complete the license applications and obtain the related entitlements. In exchange, the District agreed to grant Nevada Hydro the exclusive right to operate the project. The District asserts that, over time, Nevada Hydro has defaulted on its assurances and has made no further meaningful progress since issuance of the final EIS that would have potentially demonstrated its commitment to pumped storage. The District contends that Nevada Hydro refused to provide it with the funding necessary to complete the CEQA process, then commenced a new proceeding before the CPUC and argued that the CPUC was the lead agency for the project. As a result of Nevada Hydro's actions, coupled with the Director's dismissal of the application, the District confirmed its termination of the 1997 Development Agreement by letter of July 18, 2011.

### **Discussion**

26. Nevada Hydro explains in detail why the TE/VS transmission line, as a stand-alone line, would be a valuable asset for the public. Indeed, the final EIS noted that the TE/VS Interconnect would help address transmission congestion problems and generation deficiencies in southern California. But the Director did not dismiss the application because of any controversy over the line's value, and the benefits of a stand-alone transmission line, which we have no jurisdiction to authorize, are not before us for review. Rather, the Director dismissed the application based on his conclusion that the parties' disputes would make it unlikely that they could cooperate as co-licensees. It is the validity of this action that we must consider.

27. Likewise, the Director did not dismiss the application because Nevada Hydro decided to develop the TE/VS as an open-access line or because the TE/VS, as a stand-alone transmission line, would not be subject to Commission jurisdiction, as Nevada Hydro asserts. In referring to Nevada Hydro's focus on the certification of TE/VS as a

line that the Commission could not license, the Director was addressing the contrast between Nevada Hydro's priorities and those of the District: as he stated, the District has made it clear that it has no interest in pursuing a transmission line other than a primary line, while Nevada Hydro has insisted that limiting it to construction of a primary line would undermine the successful development of the LEAPS Project.<sup>14</sup> It is this conflict in priorities and objectives that was the basis for the Director's dismissal. Nor did the Director imply that a hydro facility could not be connected with an open access, non-primary transmission line, as Nevada Hydro asserts.

28. Nevada Hydro claims that the District was always agreeable to development of the TE/VS line as a stand-alone line, and it cites statements by the District during this proceeding in support of this claim. The District's response makes it clear that the District has a very different view of whatever understanding the co-applicants had reached when this proceeding commenced. In fact, the record reveals that the positions of the co-applicants on this matter diverged early in the proceeding.

29. For example, in its comments on the draft EIS, Nevada Hydro requested that the final EIS include a brief discussion of the "possible impacts associated with the construction and operation of the 'transmission line only project'" and separately identify "those conditions and [protection, mitigation, and enhancement] measures that relate to the TE/VS Interconnect Project and those that distinctively relate to the LEAPS Project based on its shorter point of junction."<sup>15</sup> In its separately filed comments, the District distanced itself from Nevada Hydro's position and stated that it was not pursuing the TE/VS Interconnect on a stand-alone basis. It continued that, even apart from whether the Commission had authority to issue a license for a stand-alone transmission project, the District did not want to be part of an application process that could result in pursuing transmission alone and unrelated to the hydroelectric project. The District stated that it would attempt to resolve this disparity in positions in the course of negotiating a contract with Nevada Hydro.

30. In supplemental comments filed by the District on December 15, 2006, before issuance of the final EIS, the District expressed its concern that the license for the LEAPS Project would be put at risk unless the Commission made it clear in the final EIS that it was considering an application for a single hydropower project with ancillary transmission and not two separate projects, a stand-alone hydro project and a stand-alone transmission project. The District stated that Nevada Hydro, in its comments on the draft EIS, had for the first time, unilaterally, and inconsistently with the license application,

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<sup>14</sup> *Lake Elsinore Advanced Pumped Storage Project*, 136 FERC ¶ 62,033 at 12.

<sup>15</sup> Nevada Hydro comments on draft EIS, filed April 24, 2006 at 8.

suggested that it was seeking authorization for two separate projects. The District stated that, over the previous six months, it had tried without success to negotiate a contract with Nevada Hydro and to convince it that the subject of the license application was a single hydro project. The District insisted that it would not be a party to any effort to obtain, through the license application, authority to construct a transmission line only project. The District reasserted this position in comments on the final EIS, filed April 13, 2007.

31. These comments only serve to underscore that the Director was correct in perceiving a long-running lack of agreement on how the license application would be processed. In any event, whatever its initial assumptions were, the District, over several years, has expressed concern about Nevada Hydro's preoccupation with the TE/VS line at the perceived expense of developing the LEAPS Project. Whether or not the District's concerns are well-founded or consistent with its earlier position is not relevant to our review of the Director's order; the Director dismissed the application not because the District's concerns were necessarily valid but because the co-applicants' long-standing disagreement suggests that they would be unlikely to cooperate as licensees.<sup>16</sup>

32. Nevada Hydro contends that the Director did not adhere to standards set out in the FPA for dismissal of license applications and that he relied instead on factors that were not a proper basis for a dismissal. Section 4(e) of the FPA,<sup>17</sup> which Nevada Hydro cites, authorizes the Commission to issue licenses for "project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power." While this is a standard that would justify denial of an application if a proposal did not meet it, it is not a mandate that would require the Commission to license all such projects, regardless of the circumstances. Moreover, this language implies the Commission's consideration of a proposal on its merits. The Director did not deny the license application based on a consideration of its merits but rather dismissed it for essentially procedural reasons.

33. The Commission has jurisdiction over a project during the entire time that it remains under license. Therefore, it must be able to ensure the cooperation of its licensees. If it appears, even before the issuance of a license, that co-applicants are not

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<sup>16</sup> While Nevada Hydro asserts that it could operate the project without the District's cooperation, this prospect does not seem promising, given that Nevada Hydro would be using the District's facilities, and given that the Commission holds co-licensees jointly and severably liable, regardless of any agreement they may have reached with each other.

<sup>17</sup> 16 U.S.C. § 797(e) (2006).

inclined to coordinate their actions, take positions that conflict with one another, or fail to cooperate generally, the Commission has an interest in avoiding a potential long-term license administration problem that could result from such co-applicants becoming co-licensees.<sup>18</sup> On this basis, we think that the Director acted well within his discretion, basing his decision on an established record of disagreement between the co-applicants.

34. Nevada Hydro asserts that the Director erred in dismissing the application when there are less draconian solutions to address the co-applicants' disagreements, such as amending the application to remove the District or making commitments that the District not participate in the TE/VS operation. In fact, recognizing that the co-applicants' differences had become an obstacle in this proceeding, the Director, in a letter of July 15, 2010, notified the co-applicants that he had asked the Commission's Dispute Resolution Service (DRS) to contact them to arrange a meeting at which they could begin to work with DRS to identify an appropriate dispute resolution process. The Director recommended strongly to the co-applicants that they work with DRS to explore their conflicting interests and attempt to resolve them. No resolution emerged from this effort. Given this unsuccessful effort and the long history of disagreements between these co-applicants, it was an appropriate use of the Director's discretion to dismiss the application rather than experiment with any further remedies. While Nevada Hydro contends that any material disagreements could have been worked out at a technical conference or in other appropriate discussions, it had ample time to resolve its disagreements with the District, including through the DRS, but failed to do so. The Director was under no obligation to hold a technical conference to address these issues.

35. Nevada Hydro places considerable weight on the value of the TE/VS line as a stand-alone transmission line and implies that dismissal of this application would prevent its development. As Nevada Hydro itself emphasizes, however, the Commission is not authorized to license the TE/VS line as a stand-alone transmission line. As Nevada Hydro has clearly chosen to pursue construction of the line as a stand-alone transmission line, authorization of that action is a matter for the CPUC, which is already considering it. In sum, authorization and construction of the transmission line is not dependent on the status of the license application filed with this Commission.

36. Our action here is based on our conclusion that it does not make sense to continue processing an application the co-applicants for which do not agree as to the project at

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<sup>18</sup> Indeed, the Commission has previously found that disagreements between co-licensees as to project ownership and operation gave rise to an implied surrender of the project license. *Fourth Branch Associates (Mechanicsville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194 (1999). We do not wish to see this situation repeated.

issue. This in no way represents a conclusion as to the merits of a pumped storage project at Lake Elsinore<sup>19</sup>.

37. It is worth noting that the District did not file a request for rehearing of the dismissal order or oppose the dismissal in its response to Nevada Hydro's rehearing request. We must infer from this that the District has no objection to the dismissal. The District's failure to object to dismissal of the application, in contrast to Nevada Hydro's strong objection to it, only reinforces the conclusion that the co-applicants have very different attitudes about the project proposal as it has developed, such that they could not be expected to cooperate as co-licensees.

38. For all of the above reasons, we will deny the request for rehearing.

The Commission orders:

(A) The motion filed September 13, 2011, by Elsinore Valley Municipal Water District to accept its response to The Nevada Hydro Company's request for rehearing is granted.

(B) The request filed August 11, 2011, by The Nevada Hydro Company, Inc., for rehearing of the Director's July 12, 2011 Order dismissing the license application for the Lake Elsinore Advanced Pump Storage Project is denied.

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>19</sup> It may be possible to use in any future licensing proceeding those portions of the record that have been developed in these proceedings which remain up to date.