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Elsinore Valley Municipal Water District

Our Mission...

EVMWD will provide reliable, cost-effective, high quality water and wastewater services that are dedicated to the people we serve.

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Legal Counsel
Best Best & Krieger

May 6, 2014

Jeff C. Wright
Director, Office of Energy Projects
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

SUBJECT: INADEQUACY OF THE 2007 ENVIRONMENTAL IMPACT STATEMENT FOR CONSIDERATION OF LEAPS LICENSE APPLICATION (PROJECT No. P-14227)

Dear Mr. Wright:

The Elsinore Valley Municipal Water District ("District") is writing in response to The Nevada Hydro Company Inc.'s ("NHC" or "Nevada Hydro") April 22, 2014, request to public agencies for feedback on what is required to update the 2007 Environmental Impact Statement ("2007 EIS") for the Lake Elsinore Advanced Pumped Storage Project (the "LEAPS Project"). Because the District is not a co-applicant or proponent for the LEAPS Project, the District submits this letter solely on its own behalf. As such, this letter does not reflect the opinions, viewpoints, or interests of any other persons or entities involved in the LEAPS Project, including those of NHC.

Nonetheless, and given the District's involvement with earlier iterations of the LEAPS Project, the District felt it prudent to clarify the record with regard to the history of the LEAPS Project and to make clear that Nevada Hydro is pursuing the LEAPS Project entirely on its own behalf and without District involvement. Additionally, the District must raise several important environmental issues that it believes must be resolved as part of any revisit to the 2007 EIS under the National Environmental Policy Act ("NEPA").

I. THE ELSINORE VALLEY MUNICIPAL WATER DISTRICT

The District is a municipal water district organized pursuant to Section 71000 et seq. of the California Water Code, known as the Municipal Water District Law of 1911. The District's powers, which are limited to those powers prescribed by the Municipal Water District Law, include the provision of water and wastewater services, and the provision, generation, and delivery of hydroelectric power. (Cal. Wat. Code, § 71662.)

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The District provides water service to approximately 96 square miles located in western Riverside County. The District provides service to more than 133,000 water, wastewater and agricultural customers in Western Riverside County, including the provision of potable water service to over 42,000 service connections. To do so, the District delivers a combination of local groundwater, local surface water, and imported water originating from the State Water Project to meet the water demands of its customers.

To serve its customers, the District relies on its extensive water rights throughout the Elsinore Valley, including but not limited to its rights to water in Canyon Lake, the San Jacinto River, and rights to the groundwater in the Elsinore Basin. Furthermore, within the LEAPS Project area, the District operates hundreds of miles of pipeline, lift stations, wells sites and water treatment facilities. As a steward for the health of Lake Elsinore and to protect its ratepayers from any anticipated costs, the District wishes to ensure that the environmental review of the LEAPS Project fully complies with all applicable federal and state laws.

II. HISTORY OF THE DISTRICT'S PRIOR INVOLVEMENT WITH THE LEAPS PROJECT

On April 7, 1995, the District obtained a Preliminary Permit from the Federal Energy Regulatory Commission ("FERC") for Project No. 11504 for the development of the LEAPS Project. The LEAPS Project, as originally proposed, would develop a 250-megawatt hydroelectric facility and one of two 230 kilovolt transmission line alternatives to be located west of the City of Lake Elsinore in the Cleveland National Forest. One of the transmission line alternatives would carry power south to San Diego Gas & Electric and the other transmission line alternative would carry power north to Southern California Edison.

On May 15, 1997, the District and NHC entered into a development agreement for the LEAPS Project and set forth the terms by which the FERC license for the Project would be applied for and obtained ("Development Agreement"). The LEAPS Project, as contemplated by the District and NHC in the Development Agreement, proposed the construction of a 500 megawatt hydropower facility and attendant transmission line(s), the latter emerging thereafter as the so-called Talega-Escondido/Valley-Serrano ("TE/VS") transmission line. As envisioned, the TE/VS transmission line would be ancillary to the hydropower facility. However, at no time did the District anticipate or endorse the concept of standalone transmission, a concept which the District understands that NHC now is actively pursuing.¹

¹ Pursuant to the California Water Code, the District is solely authorized to construct, maintain, and operate facilities necessary for the provision, generation, and delivery of hydroelectric power. Thus, even if the District were to pursue the LEAPS Project – which it is not – freestanding transmission line projects like TE/VS that involve the transmission of electricity independent of hydropower facilities are not a type of project over which the District has jurisdiction. (Cal. Wat. Code, § 71662.)

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In 2004, the District and NHC, as co-applicants, submitted to FERC a license application for the LEAPS Project (Project No. 11858). However, over the course of the FERC process, and in relation to the commencement of environmental review, NHC, acting on its own accord and wholly unbeknownst to the District, suggested to FERC that the License Application encompass two projects: (1) a pumped storage facility and (2) a free-standing TE/VS transmission line. Notwithstanding NHC's characterization of the LEAPS Project, FERC adopted a single project view, stating it "consider[ed] the LEAPS Project to consist of the co-applicants' proposal for a pumped storage facility and associated transmission lines." (See January 2007 Final Environmental Impact Statement, Project No. 11858 at E-83.)

After several years of delay, FERC sent both the District and NHC a "Request for Just Cause" letter under Project No. P-11858, dated May 6, 2011. The letter cited ongoing litigation filed by NHC against the State Water Resources Control Board and NHC's apparent inability to secure a 401 water quality permit for the Project. The letter requested that the District and NHC provide FERC with an explanation as to why the FERC License Application should not be dismissed. The District responded to FERC's request on June 3, 2011 and explained that as a municipal water district organized pursuant to the Municipal Water District Law of 1911 (Cal. Wat. Code §§ 71000 et seq.), the District's powers are limited to those prescribed by law and that projects involving the transmission of electricity independent of hydropower facilities, such as free-standing transmission lines, do not fall within the District's statutory authority.

On July 12, 2011, FERC issued an Order dismissing the FERC License Application, Project 11858 (the "Dismissal Order"). (Exhibit A.) In the Order, FERC concluded that, "it is clear that [the District's] goal is to develop the hydroelectric project On the other hand, Nevada Hydro's primary interest is in the TE/VS transmission line." (Exhibit A, ¶ 11.)

Since the issuance of the Dismissal Order and based on other events between the District and Nevada Hydro, the District considered and has since treated the Development Agreement to be irrevocably terminated.

On August 11, 2011, Nevada Hydro filed a Motion for Rehearing with FERC seeking reconsideration of the Dismissal Order. In an effort to assist FERC in its evaluation of the Request, the District filed a formal response with FERC on September 13, 2011, to clarify the history of LEAPS and certain assertions made by Nevada Hydro. In its response, the District confirmed its support for a hydroelectric facility, but noted the statutory limits on the District's ability to pursue a stand-alone transmission facility under state law. The District's response highlighted the District's commitment to pursuing hydropower generation and ancillary transmission and chronicled the detailed history of LEAPS dating back to 1992. Further, the District's response noted that the Preliminary Permit application for LEAPS was premised on transmission being ancillary to the pumped storage LEAPS facility. The District's

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response also raised uncertainty about Nevada Hydro's legitimate commitment to LEAPS and the generation of hydropower. The response also reiterated the

District's concerns about whether the District had the statutory authority for projects involving the transmission of electricity independent of hydroelectric facilities and whether Nevada Hydro had sufficient funds to proceed with LEAPS as a hydropower project. On November 17, 2011, FERC denied Nevada Hydro's Motion for Rehearing. Although it had the opportunity to do so, Nevada Hydro did not seek review of FERC's Dismissal Order through any judicial process. Instead, Nevada Hydro proceeded with the prosecution of a separate stand-alone FERC application – filed in Nevada Hydro's name alone – for the LEAPS Project. This application, FERC Project No. P-14227, is currently pending before FERC.

Project No. P-14227 is essentially the LEAPS Project and the separate TE/VS transmission line. However, NHC has yet to resolve a myriad of outstanding issues involving the rights and obligations of the District's rights. Paramount among these is the proposed use of Lake Elsinore and the Lake's Back Basin, as to which the District owns the water rights. Further, NHC has not resolved how the LEAPS Project would use water from Lake Elsinore or mitigate for the Project's impacts to water resources, which is fundamental to the receipt of a 401 water quality certification and, hence, to the potential receipt of a FERC license.

Nonetheless, despite the opposition to the current iteration of the LEAPS Project, NHC continues to seek a FERC license and apparently wishes to rely on the outdated 2007 EIS to seek federal environmental clearance of the Project. Therefore, in the interest of preserving the rights of its ratepayers and in response to FERC's request for input from public agencies, the District submits the following comments on the further use of the 2007 EIS.

III. THE 2007 EIS IS NOW INADEQUATE FOR ENVIRONMENTAL REVIEW OF THE LEAPS PROJECT

The 2007 EIS is no longer an adequate document for environmental review under NEPA. The 2007 EIS was prepared by FERC and the United States Forest Service ("USFS") pursuant to NEPA. The Final EIS for the LEAPS Project was issued in January 2007 and is based on dated observations and data from as far back as 2001.

The 2007 EIS was done for the LEAPS Project, a hydroelectric facility, as defined in the February 2, 2004 Application submitted by the District and Nevada Hydro, as co-applicants ("Project No. P-11858").

Project No. P-11858 proposed a 500-megawatt hydroelectric facility, rather than a 250-megawatt facility, and the potential construction of two transmission lines, one

that would carry power south to SDG&E's Talega-Escondido transmission line, and one that would carry power north to SCE's Valley-Serrano transmission line.² In its Need Determination for the LEAPS Project's TE/VS 500-kV Transmission Line, Appendix B to FERC's Final Environmental Impact Statement, FERC noted in Section 1.2.2 that "[o]nly facilities that carry project power and are not part of the distribution or interconnected transmission system can be categorized as project primary lines." Accordingly, FERC's evaluation of the Project description referred to the "TE" and "VS" portions of the transmission line as candidates for potential construction, noting FERC only has authority to license primary lines. FERC also concluded that, after considering various transmission options for the Project, LEAPS solely required a transmission line that traveled in one direction: either north to SCE's system or south to SDG&E's system. FERC considered the TE/VS transmission line to be associated with the LEAPS Project. Project No. P-14227 is a different project, essentially the LEAPS Project and a separate TE/VS transmission line.

The Development Agreement was included as an attachment to the joint application for FERC Project No. P-11858. As noted above, the Development Agreement has terminated and there is no longer any relationship between the District and Nevada Hydro relative to the LEAPS Project.

Due to the passage of time and rapid development in the Project area, much of the analysis included in the 2007 EIS is now out of date and inconsistent with the actual facts on the ground. For this reason, and for the reasons listed below, the District believes that the 2007 EIS is no longer a valid NEPA document for the purposes of environmental decision making.

As one example, the biological impact analyses in the 2007 EIS no longer accurately represent the environmental conditions in the Project area. According to the 2007 EIS, 11 federally listed plant species and 8 federally listed wildlife species could occur or have been documented to occur in the Project area. (EIS p. 3-124.) This conclusion is based on field studies conducted between 2001 and 2005. (Id.) Considering that the locations of endangered or threatened species and their critical habitat have likely changed since 2001, it is clear that new surveys are required. As to biology alone, NHC must conduct new surveys of the Project area to account for current species distributions.

Further, as part of the 2007 EIS, consultation was conducted with the U.S. Fish and Wildlife Service, the USFS, the Bureau of Land Management, the California Department of Fish and Game (now called the Department of Fish and Wildlife) and other resources agencies. This consultation process should be reopened and refreshed to ensure that the EIS reflects the actual impacts of the project to species and their critical habitat and to address necessary mitigation and any reasonable

² Together, these two lines were referred to as the TE/VS transmission line or TE/VS Interconnect ("TE/VS").

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and prudent alternatives that may be required for the protection of special status species.

Along this same vein, the land use analysis in the 2007 EIS does not account for the fact that Lake Elsinore and the areas surrounding the Project are among the fastest growing and developing areas in the nation since the analysis in the 2007 EIS was prepared. The location of the LEAPS Project and transmissions lines, as proposed in the 2007 EIS, does not take into account or otherwise consider the potential impact to existing development and infrastructure that has been built since the EIS was issued. The EIS provides that several of the proposed sites for the Project are located on federal lands managed by the Cleveland National Forest Land Management Plan ("CNFLMP"). (EIS p, 3-174.) Accordingly, the EIS considers the Project's consistency with the CNFLMP. However, the CNFLMP was amended as of January 14, 2009, which is not accounted for in the 2007 EIS. The entire land use analysis should be reconsidered as it is likely that other documents that govern land use and planning have been updated since the EIS was initially drafted.

Further, the 2007 EIS conducted an environmental analysis of the potential impacts to groundwater and surface water, including Lake Elsinore, as a result of the LEAPS Project. This analysis was based on data that is over a decade old and does not account for the significant population growth in the District's service area nor take into account the historic drought conditions that currently exist throughout the State. (Governor Brown's State of Emergency Proclamation (January 17, 2014).) Moreover, the 2007 EIS does not consider the District's 2011 Urban Water Management Plan ("UWMP"). Lake Elsinore is an important recreational resource and its water levels are important to the District's customers. Therefore, the 2007 EIS must fully consider the Project's impacts on the Lake's future waters levels and water quality. Further, the district relies heavily on groundwater to meet the needs of its customers. The construction of the Project will likely use significant amounts of water and the Project's impacts to the groundwater basin must be fully considered in conjunction with the UWMP.

FERC should also note that the 2007 EIS, if reissued today, would not be in compliance with NEPA, as the 2007 EIS predates much of the information now available regarding the Project's greenhouse gas ("GHGs") emissions. When the 2007 EIS was issued in January 2007, the U.S. Environmental Protection Agency ("EPA") had not yet regulated GHGs under the Clean Air Act. However, later that year the Supreme Court ruled in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), that GHGs fit within the Clean Air Act's definition of a pollutant. In 2009, the EPA responded to this ruling and made an endangerment finding that GHGs pose a threat to the public health and welfare. In 2010, the EPA began adopting rules and regulations for GHGs. A discussion and analysis of GHGs is not included the 2007 EIS. To meet the requirements of NEPA, the GHG emissions as a result of the construction, operation and maintenance of the LEAPS Project must be added.

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Additionally, the District understands that the issuance of any FERC license would be pre-conditioned upon the receipt of a 401 Water Quality Certification from the State Water Resources Control Board. The State Water Board, however, cannot issue a 401 Water Quality Certification until the completion of environmental review under California's equivalent of NEPA, the California Environmental Quality Act (CEQA). (Cal. Pub. Res. Code, § 21000 *et seq.*; Cal. Code Regs., tit. 14, § 15000 *et seq.*) Currently, and for at least the same reasons identified above, the 2007 EIS does not meet the requirements of CEQA. To the extent that NHC intends to try and utilize the EIS as a CEQA document at some future date, the 2007 EIS should be further updated to address CEQA's rigorous environmental review requirements.³

At a minimum, and for all the reasons discussed above, FERC should require NHC to revise the 2007 EIS to reflect current conditions and reissue the revised EIS for public review.

IV. CONCLUSION

As explained above, the District is not a party or co-applicant in the LEAPS Project currently proposed by NHC. Furthermore, and to be faithful to its legislatively prescribed duties and to its ratepayers, the District could not participate in the type of standalone transmission project that NHC proposes. Moreover, as a steward of natural resources in and around Lake Elsinore, the District must insist that the 2007 EIS be revised to fully comply with NEPA and with CEQA, particularly if NHC anticipates asking local and State agencies (such as the State Water Board) to rely upon that EIS for purposes of issuing permits.

I hope FERC finds this information helpful in its inquiry concerning the 2007 EIS. The District is available to discuss this matter further, at your convenience.

Sincerely,



John D. Vega
General Manager

cc: EVMWD Board of Directors

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³ CEQA allows a NEPA document to substitute for a CEQA document in some circumstances. However, the NEPA document must fully comply with CEQA's procedural requirements and include environmental analysis sufficient to meet CEQA's rigorous standards. (See, generally, Cal. Code Regs., tit. 14, §§ 15220 *et seq.*)

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EXHIBIT A

FERC Order Dismissing FERC License Application (Project 11858)

UNITED STATES OF AMERICA 136 FERC ¶ 62,033
FEDERAL ENERGY REGULATORY COMMISSION

Lake Elsinore Advanced Pumped Storage Project

Project No. 11858-002

ORDER DISMISSING LICENSE APPLICATION

(July 12, 2011)

1. On February 2, 2004, the Elsinore Valley Municipal Water District (Elsinore Valley) and the Nevada Hydro Company, Inc. (Nevada Hydro), or co-applicants, filed an application for an original license to construct and operate the proposed 500-megawatt Lake Elsinore Advanced Pumped Storage Project (LEAPS Project), which would be located primarily on Lake Elsinore and San Juan Creek in Riverside County, CA. The project would occupy 2,412 acres of federal lands, including lands managed by: the U.S. Department of Agriculture Forest Service (USFS), Cleveland National Forest; U.S. Bureau of Land Management; and the Department of Defense (Camp Pendleton). As proposed, the co-applicants' project would consist of an upper reservoir in Morrell Canyon, a powerhouse near Santa Rosa, and about 32 miles of 500-kilovolt transmission line connecting the project to an existing Southern California Edison transmission line located north of the proposed powerhouse and to an existing San Diego Gas and Electric transmission line located to the south.

2. As discussed below, the co-applicants have divergent views as to how to move forward with the project. Elsinore Valley desires to license the project as proposed and Nevada Hydro intends to first develop the LEAPS Project transmission line as a stand-alone transmission line, which is outside of the Commission's jurisdiction, and then develop the pumped storage part of the project.¹ For this reason, I am dismissing the application.

Background

3. During the course of the proceeding, it has become apparent that Nevada Hydro's primary interest is developing the LEAPS Project's transmission line, which it ultimately hopes to use to transport electric power between the systems of major California utilities,

¹ The Federal Power Act only authorizes the Commission to license primary transmission lines, which are defined as lines that are needed to transmit power to or from a licensed hydroelectric project.

rather than building a pumped storage project and its associated transmission lines. Elsinore Valley, on the other hand, wants to develop a pumped storage project as proposed and improve the water quality of Lake Elsinore through the operation of that project.

4. With the USFS as a cooperating agency, Commission staff prepared draft and final Environmental Impact Statements (EIS) for the proposed project and published the final EIS in January 2007. As part of the licensing process, the co-applicants must obtain water quality certification from the California State Water Resources Control Board (State Board), pursuant to the Clean Water Act. As part of that process, the State Board required the co-applicants to prepare a California Environmental Quality Act (CEQA) document in addition to the Commission's EIS. Though Elsinore Valley was originally designated as the lead agency under CEQA to prepare the document,² the co-applicants were unable to resolve funding disputes to get the document prepared.

5. On October 1, 2009, the State Board dismissed Nevada Hydro's and Elsinore Valley's January 21, 2009 certification request, because 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. On November 2, 2009, Nevada Hydro, on its own, filed a petition with the State Board asking the State Board to reconsider. On December 1, 2009, Elsinore Valley filed an opposing response supporting the State Board's action denying the certification application.

6. On July 6, 2010, Nevada Hydro, again on its own, applied for a Certificate of Public Convenience and Necessity with the California Public Utilities Commission (CPUC) for only the Talega-Escondido/Valley-Serrano (TE/VS) transmission line portion of the LEAPS Project. 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.

7. On March 1, 2011, the State Board denied Nevada Hydro's petition to reconsider its denial of the certification application. On April 1, 2011, Nevada Hydro, without the support of Elsinore Valley, petitioned a California State court for a writ of mandate to direct the State Board to set aside and vacate its order and direct the State Board to either allow Nevada Hydro to withdraw and resubmit its application or hold an adjudicatory hearing.

8. Citing the lack of coordination and disagreements among the co-applicants, Commission staff asked the co-applicants, in a letter dated May 6, 2011, to explain why

² The Commission's and USFS's National Environmental Policy Act scoping was also intended to be used by Elsinore Valley to satisfy its scoping needs under CEQA.

the pending application for the LEAPS Project should not be dismissed. On June 6, 2011, the co-applicants filed separate responses to that letter.

9. In its response, Elsinore Valley stated that its status as a municipal water district allows it to pursue only the development of hydroelectric projects (including associated transmission lines), but not free-standing transmission lines, such as the TE/VS transmission line. Elsinore Valley also stated that its involvement with the LEAPS Project, as set forth in its 1997 Development Agreement with Nevada Hydro, has been predicated on the development of only a hydroelectric project. Elsinore Valley did not take a position on whether the LEAPS application should be dismissed.

10. Nevada Hydro responded that it now has a clear plan to obtain water quality certification because the CPUC is preparing a CEQA document. It also stated, however, that the certification application is for a Certificate of Public Convenience and Necessity for the TE/VS transmission line, but that the CPUC will also consider, as a connected action, development of the LEAPS pumped storage project. Nevada Hydro further asserts that development of the TE/VS transmission line will enhance the likelihood that the LEAPS pumped storage project will succeed, and that Elsinore Valley's affirmative support is unnecessary. It asks the Commission not to dismiss the application.

Discussion

11. Based on our review of both Elsinore Valley's and Nevada Hydro's responses and the 1997 Development Agreement between Nevada Hydro and Elsinore Valley (Appendix A of Nevada Hydro's response), it is clear that Elsinore Valley's goal is to develop the hydroelectric project and improve the water quality of Lake Elsinore through the operation of that project. On the other hand, Nevada Hydro's primary interest is in the TE/VS transmission line.³

12. The LEAPS application is for a pumped storage project, including a primary transmission line running north to an existing Southern California Edison transmission line and south to an existing San Diego Gas and Electric transmission line. Elsinore Valley has made clear that it has no interest in pursuing a transmission line other than a primary line to deliver project power to the grid. Moreover, with respect to the LEAPS Project, the Commission lacks jurisdiction to authorize anything other than a primary

³ In July 2003, before the co-applicants' filed the hydroelectric project application, Nevada Hydro filed an application for a special use permit from the USFS to build only the TE/VS transmission line. That application is still pending with the USFS. In addition, in March 2005, Nevada Hydro tried unsuccessfully to separate the State Board's WQC proceeding for the proposed pumped storage portion of the LEAPS Project from the TE/VS transmission line.

transmission line. Nevada Hydro states that “limiting Nevada Hydro to construction of a primary line would undermine successful development of LEAPS” and “treatment of the interconnection as a transmission line makes the best development sense from both reliability and economic standpoints.”

13. Because the Commission holds co-licensees jointly and severally liable for the performance of all license obligations,⁴ fundamental disagreements between co-licensees make it difficult, if not impossible, for the licensees to comply with the terms of a license.

14. The co-applicants’ divergent responses to the May 6, 2011 just cause letter further clarify that the co-applicants have different goals, that they have been unable to work together in the past, and that they likely would be unable to do so if issued a license for the project. Moreover, the non-primary transmission line that Nevada Hydro now seeks to construct is beyond our jurisdiction to authorize as a stand-alone line. Based on these factors, it would be unreasonable to expend further public resources on this matter. Therefore, the license application is dismissed.

The Commission Orders:

(A) The license application filed on February 2, 2004, by the Elsinore Valley Municipal Water District and the Nevada Hydro Company, Inc for proposed Project No. 11858 is dismissed.

(B) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2011).

Jeff C. Wright
Director
Office of Energy Projects

⁴ KAMO Electric Cooperative, Inc., 41 FERC ¶ 61,046 (1987); Dan River, Inc., 48 FERC ¶ 62,078 at 63,075 (1989); New York Irrigation District, 46 FERC ¶ 61,379 at 62,183 (1989).