

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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In the Matter of the Application  
of NEXTERA ENERGY TRANSMISSION  
WEST, LLC for a Certificate of Public  
Convenience and Necessity for the  
Suncrest Dynamic Reactive Power Support  
Project.

A.15-08-027  
(Filed August 31, 2015)

**OPENING BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES**

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## I. INTRODUCTION

The Office of Ratepayer Advocates (ORA) submits this opening brief pursuant to Rule 13.11 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure and the Administrative Law Judge's (ALJ) E-Mail Ruling Submitting Final Environmental Impact Report into Evidence and Directing Opening and Reply Briefs (Ruling) issued on February 1, 2018 in NextEra Energy Transmission West, LCC's (NEET West) Application (A.) 15-08-027 (Application). NEET West seeks a Certificate of Public Convenience and Necessity (CPCN) for the Suncrest Static Volt-Ampere Reactive Compensator project (SVC Project).

The Commission should approve this project. However, consistent with the findings of the Final Environmental Impact Report (Final EIR) the Commission should also order San Diego Gas & Electric Company (SDG&E) to show cause why the Commission should not require the Environmentally Superior Alternative to be built. The Environmentally Superior Alternative sites the SVC Project within the Suncrest Substation, which is owned and operated by SDG&E<sup>1</sup>. SDG&E is a party to this proceeding. Pursuant to that order, the ALJ should order an all-party mediation to determine the terms under which NEET West could build the Environmentally Superior Alternative. SDG&E should also provide the information necessary to provide the Commission with a cost estimate for the Environmentally Superior Alternative. SDG&E did not submit testimony or produce witnesses for cross examination at the evidentiary hearings held on August 28, 29, and November 16, 2017. Additionally, it would not provide responses to NEET West's Data Request which could be used to determine the cost to site the SVC Project at the Suncrest Substation.<sup>2</sup> However, it was present at the

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<sup>1</sup> California Public Utilities Commission, Final Environmental Impact Report NextEra Energy Transmission West's Proposed Suncrest Dynamic Reactive Power Support Project, January 2018 (Final EIR), pp. ES 9-ES-10. [http://www.cpuc.ca.gov/environment/info/horizonh2o/suncrest/docs/CPUC%20Suncrest%20FEIR\\_Volume%201\\_Combined.pdf](http://www.cpuc.ca.gov/environment/info/horizonh2o/suncrest/docs/CPUC%20Suncrest%20FEIR_Volume%201_Combined.pdf).

<sup>2</sup> NEET West Exhibit 17 - Response of NEXTERA Energy Transmission West, LLC Pursuant to Administrative Law Judge's Ruling Issued August 3, 2017.

evidentiary hearings and unequivocally stated that it does not oppose NEET West's SVC Project.<sup>3</sup>

According to the Commission's Final EIR, locating the SVC Project within the Suncrest Substation is the Environmentally Superior Alternative because it meets all project objectives while avoiding the environmental impacts associated with other siting locations.<sup>4</sup> Furthermore, this project will serve the Suncrest Substation. Therefore, the most efficient and cost effective location for the SVC Project is within the Suncrest Substation.<sup>5</sup> The Commission is the lead agency which ensures that the project is consistent with the California Environmental Quality Act (CEQA) and it is the only agency that may grant NEET West a CPCN.<sup>6</sup> Thus, it is the sole agency with authority to approve this project and to designate where it should be built.

## II. BACKGROUND

The SVC Project is a result of the California Independent System Operator's (CAISO) 2013/ 2014 Transmission Planning Process (TPP). It was a policy-driven project to facilitate delivery of renewable electricity generating capacity in the Imperial Valley area.<sup>7</sup> Under CAISO Tariff 24<sup>8</sup> and Federal Energy Regulatory Commission (FERC) Order 1000,<sup>9</sup> a policy-driven project is subject to competitive solicitation.<sup>10</sup>

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<sup>3</sup> Hearing Transcript (HT) Vol. 1, 22: 12-16.

<sup>4</sup> Final EIR, pp. 20-13-20-17.

<sup>5</sup> ORA Exhibit 1 – Testimony of ORA, pp. 7–9; Letter to Robert Petersen re: ORA Comments on the Draft EIR for the Suncrest Reactive Power Support Project, Proposed by NEET West A.15-08-027, January 10, 2017 (ORA Draft EIR Comments).

<sup>6</sup> CEQA Guidelines §§ 15040, 15051; Cal. Pub. Util. Code §1001.

<sup>7</sup> CAISO, 2013-2014 Transmission Plan, pp. 189-191, [https://www.aiso.com/Documents/Board-Approved2013-2014TransmissionPlan\\_July162014.pdf](https://www.aiso.com/Documents/Board-Approved2013-2014TransmissionPlan_July162014.pdf).

<sup>8</sup> CAISO Tariff 24 is the CAISO's Comprehensive Transmission Planning Process. [http://caiso.com/Documents/Section24\\_ComprehensiveTransmissionPlanningProcess\\_Oct1\\_2013.pdf](http://caiso.com/Documents/Section24_ComprehensiveTransmissionPlanningProcess_Oct1_2013.pdf).

<sup>9</sup> FERC Order 1000 provides transmission planning and cost allocation requirements to promote competition among transmission projects for the benefit of ratepayers. <https://www.ferc.gov/industries/electric/indus-act/trans-plan.asp>.

<sup>10</sup> CAISO Tariff 24.4.10; 24.5.1, [http://caiso.com/Documents/Section24\\_ComprehensiveTransmissionPlanningProcess\\_Oct1\\_2013.pdf](http://caiso.com/Documents/Section24_ComprehensiveTransmissionPlanningProcess_Oct1_2013.pdf); FERC Order 1000, para. 284, <https://www.ferc.gov/whats-new/comm-meet/2011/072111/E-6.pdf>.

Therefore, the CAISO released a description of, and functional specifications for, a 300 Mega Volt-Ampere Reactive (MVAR) Dynamic Reactive Power Support facility which would connect at the Suncrest Substation's 230 kilovolt (kV) bus for competitive solicitation.<sup>11</sup> NEET West won the solicitation against a bid from SDG&E primarily because (1) its binding cost containment measures were more robust and (2) it assumed more of the risk for cost increases.<sup>12</sup> NEET West agreed to build the SVC Project under a binding cost of \$42,288,000 which included a cap on all costs associated with the construction period, including direct costs, allocated overhead costs, capital costs, and allowance for funds used during construction.<sup>13</sup>

After NEET West was awarded the SVC Project, NEET West approached SDG&E, which owns and operates the Suncrest Substation, to determine whether they could site the SVC Project within the Suncrest Substation.<sup>14</sup> SDG&E refused.<sup>15</sup> Thus, NEET West proposes to construct the SVC Project outside of the Suncrest Substation. The SVC Project will comprise of a static volt-ampere reactive (VAR) compensator and related equipment as well as an approximately one-mile underground 230 kV transmission line that will connect it to the Suncrest Substation (Proposed Project).<sup>16</sup> The SVC Project will provide dynamic reactive power support to the 230 kV bus of the existing Suncrest Substation.<sup>17</sup> On August 31, 2015, after the CAISO selected NEET West as the project sponsor, NEET West filed its CPCN Application for the Suncrest

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<sup>11</sup> CAISO, Suncrest 230 kV 300 MVAR Dynamic Reactive Power Support Description and Functional Specifications for Competitive Solicitation, April 15, 2014, <https://www.caiso.com/Documents/Description-FunctionalSpecificationsSuncrest230ReactivePowerSupport.pdf>.

<sup>12</sup> Suncrest Reactive Power Project: Project Sponsor Selection Report, January 6, 2015, p. 46, <http://www.caiso.com/Documents/SuncrestProjectSponsorSelectionReport.pdf>.

<sup>13</sup> Application of NEXTERA Energy Transmission West, LLC for a CPCN for the Suncrest Dynamic Reactive Power Support Project, August 31, 2015 (Application), p. 22.

<sup>14</sup> Prehearing Conference Transcript 25:9-10; HT Vol. 1, 32-33: 1-23.

<sup>15</sup> Prehearing Conference Transcript 25:9-10; HT Vol. 1 32-33: 1-23.

<sup>16</sup> Application, p. 4, Appendix B.

<sup>17</sup> Application, p. 4.

SVC Project to implement the Approved Project Sponsor Agreement (APS Agreement) with the CAISO.<sup>18</sup>

ORA filed a response to NEET West's Application on October 5, 2015.<sup>19</sup> On January 10, 2017, ORA also submitted comments on the Draft Environmental Impact Report and supported the Environmentally Superior Alternative (the Suncrest Substation Alternative) as the most reasonable, as well as the most cost effective and environmentally superior option of those studied.<sup>20</sup> The CAISO, NEET West, and SDG&E also filed comments and asserted it would be infeasible for NEET West to construct, own, and operate the SVC Project within the existing Suncrest Substation footprint.<sup>21</sup> A prehearing conference was held on February 7, 2017 where CAISO, ORA, NEET West, and SDG&E made similar arguments.<sup>22</sup>

All parties, except SDG&E, served testimony on May 16, 2017 and produced witnesses for cross examination at the evidentiary hearings held on August 28, 29, and November 16, 2017. Although SDG&E neither produced a witness nor cross examined other witnesses, it was present at the evidentiary hearings and raised issues related to the

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<sup>18</sup> NEET West will construct, operate, own, and maintain the Suncrest SVC Project pursuant to the Approved Project Sponsor Agreement (APS Agreement) with the CAISO. The APS Agreement is an agreement between an Approved Project Sponsor and the CAISO establishing the terms and conditions under which the Approved Project Sponsor will complete the siting and construction of the transmission facilities that the Approved Project Sponsor was selected to construct and own under CAISO Tariff 24; NEET West Exhibit 10 - Approved Project Sponsor Agreement between NextEra Energy Transmission West, LLC and CAISO.

<sup>19</sup> ORA Response to NEET West Application, October 5, 2015.

<sup>20</sup> ORA Draft EIR Comments.

<sup>21</sup> Letter to Robert Petersen re: CAISO Comments on the Draft EIR for the Suncrest Reactive Power Support Project, Proposed by NEET West A.15-08-027, January 10, 2017; Letter to Robert Petersen re: SDG&E Comments on the Draft EIR for the Suncrest Reactive Power Support Project, Proposed by NEET West A.15-08-027, January 10, 2017; Letter to Robert Petersen re: NEET West Comments on the Draft EIR for the Suncrest Reactive Power Support Project, Proposed by NEET West A.15-08-027, January 10, 2017.

<sup>22</sup> Prehearing Conference Transcript, pp. 23-39.

sufficiency of NEET West’s Application.<sup>23</sup> SDG&E unequivocally stated at the hearings that it does not oppose NEET West’s SVC Project.<sup>24</sup>

The Final EIR was published in January 2018.<sup>25</sup> The Final EIR identified a number of impacts resulting from the Proposed Project, but concluded that the Suncrest Substation Alternative would “avoid virtually all of the environmental impacts of the Proposed Project.”<sup>26</sup> Although the significant impacts of the Proposed Project could be mitigated, Commission staff noted that an alternative which avoids an impact altogether is preferable to minimization or compensation of environmental impacts and that this interpretation is consistent with the basic purposes of CEQA.<sup>27</sup> The Suncrest Substation Alternative is the Environmentally Superior Alternative because it would site the SVC Project within the existing Suncrest Substation facility and eliminates the need for the Proposed Project’s one-mile underground transmission line and other related components.<sup>28</sup> It also eliminates land disturbance at the remote site and within the right of way of the one-mile transmission line.<sup>29</sup> The Final EIR found that the Environmentally Superior Alternative would meet all project objectives while avoiding the environmental impacts of the Proposed Project.<sup>30</sup>

In its testimony and at hearings CAISO states that it could chose to terminate the APS Agreement with NEET West if the Commission were to require the

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<sup>23</sup> HT Vol. 1, 18-19:2-6.

<sup>24</sup> HT Vol. 1, 22: 12-16.

<sup>25</sup> Final EIR.

<sup>26</sup> Final EIR, pp. ES-9, ES-11- ES-22.

<sup>27</sup> Final EIR - Comments and Responses to Comments on Draft EIR, pp. 2-21-2-22, citing California Coastal Commission’s Procedural Guidance for Evaluating Wetland Mitigation Projects in California’s Coastal Zone, Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, and CEQA Guidelines § 15002(a)(2), [http://www.cpuc.ca.gov/environment/info/horizonh2o/suncrest/docs/CPUC%20Suncrest%20FEIR\\_Volume%203\\_Combined.pdf](http://www.cpuc.ca.gov/environment/info/horizonh2o/suncrest/docs/CPUC%20Suncrest%20FEIR_Volume%203_Combined.pdf).

<sup>28</sup> Final EIR, pp. ES-9-ES-10.

<sup>29</sup> Final EIR, pp. ES-9-ES-10.

<sup>30</sup> Final EIR, pp. ES-9-ES-10.

Environmentally Superior Alternative.<sup>31</sup> The Commission should not make its siting decision based on these threats. However, because the outcome of this proceeding would likely impact future competitive solicitations that benefit ratepayers and limit costs, ORA's recommendation, as discussed further below, reflects the need for an efficient resolution process which does not jeopardize NEET West's project.

### **III. SUMMARY OF RECOMMENDATIONS**

The Commission should approve the Proposed Project and issue an Order to Show Cause directing SDG&E to show why the Environmentally Superior Alternative should not be built.<sup>32</sup> Once the Order is issued, the Commission should delay implementation of the approved Proposed Project to give the parties time to engage in mediation to agree on the terms under which NEET West could construct the Environmentally Superior Alternative. During this time, SDG&E should provide NEET West with the information it failed to previously provide so that NEET West can determine what steps it must take to site the SVC Project within the substation and so that it can compare the costs of the Environmentally Superior Alternative with the Proposed Project. SDG&E's response would also be useful to the Commission so that it may better facilitate coordination between incumbent transmission owners and competitive transmission owners for the benefit of ratepayers in the future. If agreement is not possible or the Commission is satisfied with SDG&E's showing, NEET West should be allowed to begin construction of the Proposed Project. This is consistent with the Commission's siting authority and its being the lead agency under CEQA.<sup>33</sup>

Whichever alternative is constructed, NEET West should construct this project. The CAISO determined that bids for this project should be open to competition and it asked for project proposals which could provide 300 MVARs at the 230 kV bus at the

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<sup>31</sup> ISO Exhibit 2 - Neil Millar Testimony on Behalf of the CAISO, pp. 12-13; HT Vol. 2, 133-138:8-7.

<sup>32</sup> The Environmentally Superior Alternative locates the SVC Project within the Suncrest Substation, Final EIR, pp. ES-9-ES-10.

<sup>33</sup> Cal. Pub. Util. Code §§762, 762.5, 1001, CEQA Guidelines §15050.

Suncrest Substation.<sup>34</sup> After NEET West was awarded the contract, SDG&E refused to cooperate with NEET West to construct this project at the Suncrest Substation and therefore, NEET West was forced to site the project one mile away from the substation.<sup>35</sup> Despite the fact that NEET West's project was to be one mile away, the CAISO selected it as the most cost competitive bid. Thus, it is NEET West's Application that is before the Commission, not SDG&E's. The Commission should reject any attempt by SDG&E to obtain approval for its losing and more expensive bid. Additionally, since the issue in this proceeding is one of siting, which is within the Commission's purview, the Commission should reject any recommendation or outcome that undermines its siting authority, compromises its jurisdiction, or results in an inferior project.

If the Commission approves the Proposed Project, the Commission should approve \$49 million as the maximum prudent and reasonable cost of the project.<sup>36</sup> No party could make an accurate estimate of costs for the Environmentally Superior Alternative because SDG&E would not provide the information needed to do so.<sup>37</sup> If the Commission issues an Order to Show Cause, as recommended by ORA, it should also require SDG&E to provide NEET West with the information it needs to estimate the cost of the Environmentally Superior Alternative.

NEET West also requests exemptions from certain affiliate transaction rules and reporting requirements under General Orders 65-A, 77-M, and 104-A.<sup>38</sup> The Commission should not exempt NEET West or its affiliates from reporting requirements. At a minimum, the reporting requirements should apply to NEET West and to those affiliates that NEET West would interact with in order to construct and operate the project.<sup>39</sup> If other affiliates were later involved in the construction or operation of the

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<sup>34</sup> CAISO, Sunset Reactive Power Project: Project Sponsor Selection Report, January 6, 2015, p. 1, <http://www.caiso.com/Documents/SuncrestProjectSponsorSelectionReport.pdf>.

<sup>35</sup> Prehearing Conference Transcript, 25:9-10, 37-38:28-3; HT Vol. 1, 32-33: 1-23.

<sup>36</sup> NEET West Exhibit 2 - Opening Testimony of Daniel Mayers, p. 19.

<sup>37</sup> NEET West Exhibit 17.

<sup>38</sup> Application, pp. 25-33.

<sup>39</sup> HT Vol. 1, 64: 16-22.

project, NEET West should provide that information to the Commission within 30 days. To the extent that any information is similar to reports required by FERC, those same documents could be used to meet Commission reporting requirements.

#### **IV. JURISDICTION**

##### **A. The Commission has siting authority over transmission facilities.**

In 1935 when Congress enacted the Federal Power Act, it maintained transmission planning and expansion within the purview of state regulatory agencies. Specifically, under § 201(b) of the Federal Power Act, states have jurisdiction over electric generation facilities and facilities used in the transmission of electric energy in intrastate commerce.<sup>40</sup> In *New York v. FERC*, the Court reaffirmed this authority, stating that “among other things, Congress left to the States authority to regulate generation and transmission siting.”<sup>41</sup>

FERC Order 1000 preserved states’ siting authority over transmission solutions, stating, “we acknowledge that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction ... nothing in this final rule involves an exercise of siting, permitting, and construction authority.”<sup>42</sup> Additionally, FERC stated that Order 1000 “in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states, including integrated resource planning, or authority over such transmission facilities.”<sup>43</sup>

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<sup>40</sup> 16 U.S.C. § 824(b).

<sup>41</sup> *New York v. FERC* (2001) 535 U.S. 1, 24.

<sup>42</sup> FERC Order 1000, para. 107; see also *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 62 (D.C. Cir. 2014), reaffirming that FERC’s authority “extend[s] only to those matters which are not subject to regulation by the States.”

<sup>43</sup> FERC Order 1000, para. 107; see also FERC Order 1000-A, para. 188 stating, “it is important to recognize that Order No. 1000’s transmission planning reforms are concerned with process; these reforms are not intended to dictate substantive outcomes, such as what transmission facilities will be built and where. We recognize that such decisions are normally made at the state level.”  
<https://www.ferc.gov/whats-new/comm-meet/2012/051712/E-1.pdf>.

Further, the California Legislature has specifically granted siting authority to the Commission by stating that, “no electrical corporation ... shall begin the construction of a ... line, plant or system, or any extension thereof without having first obtained from the Commission a certificate that the present or future convenience and necessity require or will require such construction.”<sup>44</sup> Additionally, as a basis for granting a CPCN pursuant to Cal. Pub. Util. Code §1001, Cal. Pub. Util. Code § 1002, requires the Commission to consider the following factors:(1) Community values, (2) Recreational and park areas, (3) Historical and aesthetic values, and (4) Influence on environment...”<sup>45</sup> The Commission has previously concluded that Cal. Pub. Util. Code §1002 imposes a “responsibility independent of CEQA to include environmental influences and community values in its consideration of a request for a CPCN.”<sup>46</sup> Therefore, the Commission has authority over the siting of the SVC Project and it must consider the influence of this project on the environment.

**B. Under Public Utilities Code §§ 762 and 762.5 the Commission may order SDG&E and NEET West to coordinate to site the SVC Project within the existing Suncrest Substation**

The Commission has the authority to require NEET West and SDG&E to coordinate to site the SVC Project within the existing Suncrest Substation. In considering the location of the facility, the Commission is required to consider the influence of the project on the environment, not only as the lead agency, but also under the Public Utilities Code.<sup>47</sup> Furthermore, under Cal. Pub. Util. Code §§ 762 and 762.5, the Commission, on its own motion, may hold a hearing to determine whether NEET West should build the SVC Project within the Suncrest Substation. Specifically, Cal. Pub. Util. Code § 762 states that the Commission may make such an order when, after a hearing, it:

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<sup>44</sup> Cal. Pub. Util. Code §1001.

<sup>45</sup> Cal. Pub. Util. Code §1002(a).

<sup>46</sup> *Application of Southern California Edison for CPCN for Kramer-Victor Transmission Line* (D.90-09-059), (1990) 37 CPUC 2d 413, 453.

<sup>47</sup> CEQA Guidelines §15021; Cal. Pub. Util. Code §762; see also, Cal. Pub. Util. Code §1002.

... finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities.

**C. The Commission is the lead agency under CEQA**

CEQA requires a lead agency to identify and study potentially feasible alternatives and mitigation measures to reduce a project's significant impacts.<sup>48</sup> It is settled that the Commission is the lead agency under CEQA for this project.<sup>49</sup> As the lead agency, the Commission must exercise its independent judgment as to the significance of all impacts and must consider mitigation measures and alternatives to the Proposed Project.<sup>50</sup>

**V. DISCUSSION**

**A. Does the proposed project serve a present or future public convenience and necessity?**

ORA does not comment on this issue.

**B. Is there no substantial evidence/ substantial evidence that the project will have a significant effect on the environment?**

ORA does not comment on this issue.

**1. What are the significant environmental impacts of the Proposed Project?**

ORA does not comment on this issue.

**2. Are there potentially feasible mitigation measures that will eliminate or lessen the significant environmental impact?**

ORA does not comment on this issue.

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<sup>48</sup> CEQA Guidelines §§ 15091, 15092.

<sup>49</sup> CEQA Guidelines §15367.

<sup>50</sup> CEQA Guidelines §§15084(e), 15126.

### **3. The Suncrest Substation Alternative is the Environmentally Superior Alternative**

The Final EIR found that siting the SVC Project within the Suncrest Substation was feasible and environmentally superior.<sup>51</sup> Feasibility is defined as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.<sup>52</sup> The Environmentally Superior Alternative meets all project objectives while avoiding the environmental impacts associated with other siting locations.<sup>53</sup> The Commission should approve the Proposed Project, but it should also issue an Order to Show Cause requiring SDG&E to show why the Commission should not require the Environmentally Superior Alternative to be built.

### **4. The Environmentally Superior Alternative is feasible**

#### **a) The Environmentally Superior Alternative is technologically feasible**

No party has shown that the Environmentally Superior Alternative is electrically or technologically infeasible.<sup>54</sup> Furthermore, there are no safety or security issues that would make locating the SVC Project within the Suncrest Substation technologically infeasible. In fact, SDG&E bid on the same project and proposed to site it within the Suncrest Substation.<sup>55</sup> Additionally, “NEET West initiated discussions with SDG&E... regarding a potential conveyance to NEET West of ...a site within the Suncrest

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<sup>51</sup> Final EIR, 20-13-20-17.

<sup>52</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565; CEQA Guidelines §15364.

<sup>53</sup> Cal. Pub. Resources Code §21002; See also Final EIR - Comments and Responses to Comments on Draft EIR, pp. 2-21-2-22.

<sup>54</sup> Final EIR p. 20-12, stating, “[in SDG&E’s] February 8, 2016, comment on the Notice of Preparation of this DEIR, SDG&E requested that an alternative be evaluated that locates a dynamic reactive device within Suncrest Substation and stated that such an alternative would be feasible. SDG&E submitted a project sponsor bid to CAISO to locate an SDG&E-owned dynamic reactive device within the Suncrest Substation based on SDG&E’s determination that doing so was feasible.”

<sup>55</sup> Final EIR, p. 20-12.

Substation” because it believed this site to be feasible and that siting the project at this location “could lower costs [and] potentially lower environmental impacts.”<sup>56</sup>

NEET West contemplated that it could successfully coordinate with SDG&E to site the SVC Project within the Suncrest Substation and that doing so would benefit ratepayers.<sup>57</sup> Additionally, NEET West has experience coordinating with other utilities to construct and operate collocated transmission projects.<sup>58</sup> In all of NEET West’s experiences, they were able to create protocols for operations, maintenance, safety, and security with the other utility.<sup>59</sup> NEET West’s witness, Daniel Mayers, also refuted the idea that two utilities or the people inside the substation, who are all qualified to do this type of work, would need large clearances between the fence and the SVC Project.<sup>60</sup> Even if clearances were necessary, the amount of clearance could be limited by placing the lower voltage side of the SVC on the 230 kV side of the substation which would reduce the setback needed.<sup>61</sup> Thus, there are no security or safety issues that would prevent siting the SVC Project within the Suncrest Substation.

**b) The Environmentally Superior Alternative is legally feasible**

No state or federal laws prevent the Commission from requiring the Environmentally Superior Alternative. Where courts have found a mitigation measure or alternative to be legally infeasible, they have cited to specific laws which prevent the agency from taking the actions required to implement the mitigation measure or alternative. For example, in *Association of Irrigated Residents v. Kern County Board of Supervisors*, the court held that a mitigation measure was properly found to be infeasible because it was preempted by federal law and not fully enforceable.<sup>62</sup> Additionally, in

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<sup>56</sup> HT Vol. 1, 31:16-22.

<sup>57</sup> HT Vol. 1, 33:14-17.

<sup>58</sup> HT Vol. 1, 73-76:19-11.

<sup>59</sup> HT Vol. 1, 74-75: 2 -18.

<sup>60</sup> HT Vol 1, 88:13-18.

<sup>61</sup> HT Vol. 1, 88:5-10.

<sup>62</sup> *Association of Irrigated Residents v. Kern County Board of Supervisors*, (2017) 17 Cal.App.5th 708, 752.

*Sequoyah Hills Homeowners Assn. v. City of Oakland*, the court held that an alternative was legally infeasible because it was prohibited by California law, leaving no way to legally implement it.<sup>63</sup>

Conversely, in *Uphold Our Heritage v. Town of Woodside*, the court held that an alternative was legally feasible because there was no legal restraint on the town's ability to implement the environmentally superior alternative. Rather, the town erroneously based its infeasibility finding on the fact that the town believed that it could not compel the project proponent to implement the environmentally superior alternative.<sup>64</sup> The town's rationale is similar to the arguments that NEET West and the CAISO have made to support their claims that the Environmentally Superior Alternative is legally infeasible; that SDG&E cannot be compelled to cooperate with NEET West.<sup>65</sup> The Commission has authority under a variety of state and federal laws to implement the Environmentally Superior Alternative and no laws limit that authority.<sup>66</sup> Thus, similar to *Uphold Our Heritage*, there is no legal restraint on the Commission's ability to implement the Environmentally Superior Alternative.

**(i) The APS Agreement does not require the CAISO to terminate NEET West's project**

The Commission should not make its siting decision based on the CAISO's threats to terminate the APS Agreement with NEET West if the Commission were to require the Environmentally Superior Alternative. However, because the outcome of this proceeding would likely impact future competitive solicitations that benefit ratepayers and limit costs, the Commission should first approve the Proposed Project by NEET West, but delay it. At the same time, it should issue an Order to Show Cause requiring SDG&E to show why it cannot cooperate with NEET West to build the Environmentally Superior

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<sup>63</sup> *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715.

<sup>64</sup> *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 602.

<sup>65</sup> *Atchison Topeka & Santa Fe Railway Co. v. Railroad Commission of California* (1930) 209 Cal. 460, 474–475, stating that the Commission may require two companies to jointly erect a union station and share the expenses.

<sup>66</sup> Cal. Pub. Util. Code §1001; CEQA Guidelines §15041; 16 U.S.C. § 824(b).

Alternative. This conditional delay ensures that the CAISO does not fault the approved project sponsor, NEET West, for any delays incident to obtaining approval of the project, which the CAISO could use to eliminate similar projects from consideration in the future. Additionally, it provides the Commission with a venue to consider SDG&E's reasons for why a regulated utility would obstruct the development of project that supports the state's policies and benefits ratepayers. This will also help the Commission facilitate cooperation between utilities in the future.

Delay is a common feature of infrastructure projects. The CAISO's APS Agreement includes, as boilerplate, language regarding what may happen in the case of delay.<sup>67</sup> The APS Agreement does not require CAISO to terminate a project in the case of delay, particularly where the project is a policy-driven project, rather than a reliability project, such as the SVC Project.<sup>68</sup> The APS Agreement states that if an unreasonable delay occurs, the CAISO shall consult with the Approved Project Sponsor.<sup>69</sup> If, after that consultation, the CAISO determines that "the Approved Project Sponsor cannot secure necessary approvals or property rights ... or the Approved Project Sponsor is otherwise unable to timely construct the project," the CAISO shall take action it determines to be necessary, including termination of the APS Agreement.<sup>70</sup> Thus, the CAISO has discretion in these cases.

Furthermore, in implementing Order 1000, the CAISO specifically stated that where a project is delayed because of the permitting process, it will take steps to address potential reliability concerns and *only if* this concern cannot be addressed would the CAISO *consider* reassigning the transmission project.<sup>71</sup> The SVC Project is a policy-driven project, not a reliability project.<sup>72</sup> Thus, the CAISO can work with an Approved

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<sup>67</sup> NEET West Exhibit 10, Article 5.8.

<sup>68</sup> CAISO, 2013-2014 Transmission Plan, pp. 189-191.

<sup>69</sup> NEET West Exhibit 10, Article 5.8; "Unreasonable" is not defined, See HT Vol. 2, 272:10-16.

<sup>70</sup> NEET West Exhibit 10, Article 5.8.

<sup>71</sup> FERC, Order on Compliance Filing, Apr. 18, 2013, para. 260, <https://www.ferc.gov/whats-new/comm-meet/2013/041813/E-2.pdf>.

<sup>72</sup> CAISO, 2013-2014 Transmission Plan, pp. 189-191.

Project Sponsor to accommodate an in-service date that is later than expected, as they have already been doing in this proceeding.<sup>73</sup> Therefore, the CAISO has discretion to determine the steps it should take in the event of delay.<sup>74</sup>

No party could determine how long the SVC Project could be delayed if the Environmentally Superior Alternative were built because SDG&E refused to provide NEET West with the information needed to determine the components NEET West would need and steps it would need to take to site the SVC Project within the Suncrest Substation.<sup>75</sup> However, the CAISO has stated that there is no imminent, identified reliability need for the SVC Project.<sup>76</sup>

Additionally, the Commission has, in the past, modified projects after the CAISO approved a different design or route despite the possibility of delay. For example, in 2009 the Commission granted a CPCN to Southern California Edison Company for the Tehachapi Renewable Transmission Project (segments 4-11) and chose the environmentally superior alternative for several segments, rather than approving the entire route as proposed.<sup>77</sup> Despite these required changes, the CAISO did not terminate the project and the project was energized in 2016.<sup>78</sup>

Lastly, the fact that the CAISO and NEET West signed the APS Agreement cannot preclude the Commission from performing its role as the lead agency nor can it

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<sup>73</sup> HT Vol. 1, 50:12-17.

<sup>74</sup> NEET West Exhibit 10 - Article 5.9.3., stating, “any modifications to the Project’s facilities ordered by a siting agency are not subject to CAISO approval.”

<sup>75</sup> NEET West Exhibit 17.

<sup>76</sup> Suncrest Reactive Power Project: Project Sponsor Selection Report, January 6, 2015, p. 46.

<sup>77</sup> *Decision Granting a Certificate of Public Convenience and Necessity for the Tehachapi Renewable Transmission Project (Segments 4-11)* (D.09-12-044) (2009) 2009 WL 5172271, p. 41.

<sup>78</sup> Southern California Edison Company, Tehachapi Transmission Project, [https://www.sce.com/wps/portal/home/about-us/reliability/upgrading-transmission/TRTP-4-11/!ut/p/b1/hdCxDoIwEAbgp2GIlhy2KbiWYWmJUgonQxYDBggFKAOH1RcNConLbf\\_n-4Q4JFCBRR10mozTZZS\\_s1heDYvRHfeBg28T4LYLnmWcDO6YAwgHAD-Gwlz\\_gsSUsDMxB7JYYWZzfGbmfc4MAMIGcGawXbnHt\\_Aw8CxBwefUgywHMGfK1wkZK7iz0dCWsbYkkjUyT2pk1p\\_1sM6bduq2WigQd\\_3ulRK5ol-U4UG3yqpaloUTCWqigAy\\_jDz9fZwJDOg!!/dl4/d5/L2dBISEvZ0FBIS9nQSEh/?from=trtp](https://www.sce.com/wps/portal/home/about-us/reliability/upgrading-transmission/TRTP-4-11/!ut/p/b1/hdCxDoIwEAbgp2GIlhy2KbiWYWmJUgonQxYDBggFKAOH1RcNConLbf_n-4Q4JFCBRR10mozTZZS_s1heDYvRHfeBg28T4LYLnmWcDO6YAwgHAD-Gwlz_gsSUsDMxB7JYYWZzfGbmfc4MAMIGcGawXbnHt_Aw8CxBwefUgywHMGfK1wkZK7iz0dCWsbYkkjUyT2pk1p_1sM6bduq2WigQd_3ulRK5ol-U4UG3yqpaloUTCWqigAy_jDz9fZwJDOg!!/dl4/d5/L2dBISEvZ0FBIS9nQSEh/?from=trtp).

require the Commission to relinquish its jurisdiction as the agency with regulatory oversight for transmission projects. Contracts or agreements entered into by the proponent of an environmental impact report on a proposed project prior to completion of the environmental review process cannot be used to avoid the scrutiny envisioned by CEQA.<sup>79</sup> Contracts, such as the APS Agreement, may be renegotiated, rather than terminated.<sup>80</sup> Therefore, the CAISO and NEET West’s APS Agreement should not affect the Commission’s consideration of environmentally superior sites.

**(ii) The Commission’s authority is not limited by possible future litigation**

The purpose of the Fifth Amendment requiring just compensation where private property is taken for public use is to place certain economic losses inflicted by public improvements upon the public rather than wholly upon those who happen to lie in the path of the project.<sup>81</sup> This is not the case here. SDG&E is not a private property owner who would suffer personal economic loss because their property must now be forfeited to a different and public use. Rather, the Environmentally Superior Alternative seeks to construct this project to benefit the public on land, which is already being used to serve the public in the same manner.<sup>82</sup> Furthermore, SDG&E does not oppose this project<sup>83</sup> and in fact, it proposed to use the land for the exact same purpose.<sup>84</sup>

The threat to pursue litigation if the Commission does not rule in one’s favor is not a limitation on the Commission’s authority. Additionally, regulated utilities are distinct from private property owners. Even if it is found that property has been taken or

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<sup>79</sup> *Kings Cty. Farm Bureau v. City of Hanford*, (1990) 221 Cal. App. 3d 692, 737.

<sup>80</sup> *Kings Cty. Farm Bureau v. City of Hanford*, (1990) 221 Cal. App. 3d 692, 737, Footnote 28.

<sup>81</sup> *U.S. v. Willow River Power Co.* (1945) 324 U.S. 499, 502.

<sup>82</sup> See also *Southern California Edison Co. v. Railroad Commission of California* (1936) 6 Cal.2d 737, 754, stating, “This is not like the property of a strictly private corporation, as to which the productiveness in excess of a reasonable return might be controlling. Here the public has already acquired an interest in the property in the sense that it may insist upon service faithfully and impartially and at no more than reasonable rates.”

<sup>83</sup> HT Vol. 1, 23: 12-13.

<sup>84</sup> Suncrest Reactive Power Project: Project Sponsor Selection Report, January 6, 2015, p. 46.

damaged, to succeed in an inverse condemnation claim the plaintiff must establish that just compensation was not paid for that property.<sup>85</sup> If the Commission were to invoke Cal. Pub. Util. Code §762 to require the two utilities to take joint action to make an improvement or change to existing plant, it could also require the utilities to coordinate and share costs. Specifically, Cal. Pub. Util. Code §762 states that if the Commission's order requires "joint action by two or more public utilities, the Commission shall notify the public utilities and fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear."<sup>86</sup> The Commission may also fix those costs.<sup>87</sup> Therefore, SDG&E would have the opportunity to participate in determining the reasonable division of costs and could not claim that just compensation had not been paid. If the government has provided an adequate process for obtaining compensation and if resort to that process yields just compensation then the property owner has no claim against the government for a taking.<sup>88</sup>

**c) The Environmentally Superior Alternative is economically feasible**

After considering SDG&E's response to the Order to Show Cause, the Commission may order SDG&E and NEET West to take joint action and require them to agree upon the division of costs. Where the utilities are not able to come to an agreement, the Commission may determine the proportion of costs that each utility must bear.<sup>89</sup> Therefore, the Commission can ensure a fair cost sharing agreement which would not render the project economically infeasible.

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<sup>85</sup> *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172, 194, stating, "the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."

<sup>86</sup> Cal. Pub. Util. Code §762.

<sup>87</sup> Cal. Pub. Util. Code §§762, 762.5.

<sup>88</sup> *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172, 194–195.

<sup>89</sup> Cal. Pub. Util. Code §762.

Furthermore, the construction of the Environmentally Superior Alternative would obviate the need for the following components<sup>90</sup>:

- The one-mile underground transmission line
- Six acres of remote land
- Signage and lighting for the remote site
- Access driveway improvements
- A storm water detention basin
- A retaining wall, storm water drainage, and conveyance system
- Chain link and barb wire security fencing approximately 7 feet in height
- 230 kV Lightning Arresters
- 230 kV Potential Measurement Transformers

NEET West states that there might be other unknown costs in locating the SVC Project in the Suncrest Substation.<sup>91</sup> However, NEET West cannot adequately estimate the cost of siting the SVC Project within the Suncrest Substation because SDG&E has not provided the information necessary to make these estimates.<sup>92</sup> Proving economic infeasibility requires a showing that “the additional costs or lost profits are so severe the project would become impractical.”<sup>93</sup> While any particular economic analysis or data is not required for this showing, generally CEQA requires “‘some context’ that allows for economic comparison”<sup>94</sup> and “without any comparative numbers, it [is] not possible to determine the feasibility of ... alternatives.”<sup>95</sup>

NEET West cannot establish, and the Commission cannot find, economic infeasibility based on the record of this proceeding. However, upon a showing in response to the Order to Show Cause, which compares the cost of the Environmentally

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<sup>90</sup> ORA Exhibit 1, p. 17; Final EIR, ES-4 -ES-5.

<sup>91</sup> HT Vol. 1, 41:20-23.

<sup>92</sup> NEET West Exhibit 17; HT Vol. 1, 41:20-23.

<sup>93</sup> *Citizens of Goleta Valley v. Bd. of Supervisors*, (1998) 197 Cal. App. 3d 1167, 1181.

<sup>94</sup> *SPRAWLDEF v. San Francisco Bay Conservation & Dev. Comm'n* (2014) 226 Cal. App. 4th 905, 918. citing *Uphold Our Heritage v. Town of Woodside*, (2007) 147 Cal. App. 4th 587.

<sup>95</sup> *SPRAWLDEF v. San Francisco Bay Conservation & Dev. Comm'n* (2014) 226 Cal. App. 4th 905, 919.

Superior Alternative to the cost of the Proposed Project, the Commission may determine whether any increased costs would result and whether that increase would render the project economically infeasible. Thus, SDG&E must produce the relevant information that would give the Commission an accurate estimate on the cost to construct the SVC Project within the Suncrest Substation.

Lastly, funds expended to develop the Proposed Project cannot be used to support claims that a project alternative is economically infeasible. As the lead agency, the Commission cannot “avoid an objective consideration of an alternative simply because, prior to commencing CEQA review, an applicant made substantial investments in the hope of gaining approval for a particular alternative.”<sup>96</sup> The Commission must make an objective and independent determination on the feasibility of the Environmentally Superior Alternative,<sup>97</sup> irrespective of any funds that NEET West expended to construct the Proposed Project.

**d) NEET West must construct the SVC Project, under any alternative**

This project was subject to a competitive bid under the CAISO’s rules regarding policy-driven projects.<sup>98</sup> NEET West was the winner of that bid because it agreed to a cost cap of \$42 million, which also included a cap on all costs associated with the construction period, including direct costs, allocated overhead costs, capital costs, and allowance for funds used during construction, which benefits ratepayers.<sup>99</sup> The CAISO found this bid to be superior to SDG&E’s bid.<sup>100</sup> Thus, it is NEET West’s application that is before the Commission, not SDG&E’s. The Commission should reject any

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<sup>96</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736 citing *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal. 3d 376, 425.

<sup>97</sup> CEQA Guidelines §15084.

<sup>98</sup> CAISO, Suncrest Reactive Power Project: Project Sponsor Selection Report, January 6, 2015, p. 2.

<sup>99</sup> CAISO, Suncrest Reactive Power Project: Project Sponsor Selection Report, January 6, 2015, p. 46.

<sup>100</sup> SDG&E’s cost cap was higher and did not include the risk of increased costs associated with changes to the scope of the Proposed Project, unforeseen issues outside of SDG&E’s control, and increases in commodity costs. CAISO, Suncrest Reactive Power Project: Project Sponsor Selection Report, January 6, 2015, pp. 39-41.

outcome that undermines NEET West’s right to construct this project. While the Commission should consider the narrow subject of where NEET West’s project should be constructed, it should not consider whether SDG&E should construct the project. Although the Final EIR found that the Proposed Project to be the third best alternative, it still found that the significant impacts could be mitigated to less than significant levels.<sup>101</sup> Therefore, the Commission could comply with CEQA by approving the Proposed Project with the required mitigation measures.<sup>102</sup>

**5. To the extent that the proposed project and/or project alternatives result in significant and unavoidable impacts, are there overriding considerations that nevertheless merit Commission approval of the proposed project or project alternative?**

ORA does not comment on this issue.

**B. Was the EIR completed in compliance with CEQA, did the Commission review and consider the EIR prior to approving the project or a project alternative, and does the EIR reflect the Commission’s independent judgment?**

ORA does not comment on this issue.

**C. Is the proposed project and/or project alternative designed in compliance with the Commission’s policies governing the mitigation of EMF effects using low-cost and no-cost measures?**

ORA does not comment on this issue.

**D. The maximum prudent cost of the Proposed Project should be \$49 million**

If the Commission were to require NEET West to construct the Proposed Project, it should set the maximum prudent cost at \$49 million. NEET West’s bid to the CAISO included a \$42 million cost cap.<sup>103</sup> While several project costs are not subject to that cap,

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<sup>101</sup> Final EIR, p. 20-13.

<sup>102</sup> Final EIR, p. ES-11-ES-22.

<sup>103</sup> Application, p. 22.

NEET West does not estimate that the ultimate cost would exceed \$50 million.<sup>104</sup> Therefore, \$49 million is a reasonable maximum prudent cost for the Proposed Project to account for these costs.

**1. If the Commission issues an Order to Show Cause regarding the Environmentally Superior Alternative, it should require SDG&E to provide information to estimate the costs**

Under the Environmentally Superior Alternative, the SVC Project will be collocated within the existing Suncrest Substation; therefore, it would eliminate the project components listed in Section III.D. above such as, the one-mile underground transmission line and previously undisturbed land for the project site. Thus, the cost of the Environmentally Superior Alternative should be less than that of the Proposed Project. It is possible that additional costs may arise from the Environmentally Superior Alternative. However, those costs are unclear because NEET West was unable to obtain the information needed to make these estimates. Thus, the Commission should require SDG&E to provide the information necessary to make an informed decision regarding the maximum prudent cost.

**E. The Commission should not grant NEET West exemptions from reporting requirements**

If the Commission grants NEET West's request for exemptions from the reporting requirements, ORA's ability to obtain relevant and accurate information to ensure that customer interests are protected may be impeded. While NEET West's witness', Michael Sheehan, testimony stated that NEET West does not have California retail customers,<sup>105</sup> he clarified that the energy produced by NextEra (NEET West's parent company) does eventually reach California retail customers through contracts with other providers, such as investor owned utilities.<sup>106</sup> Since California's retail customers pay for their share of the costs of transmission under the CAISO's operational control through transmission

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<sup>104</sup> Application, p. 23.

<sup>105</sup> NEET West Exhibit 1, Opening Testimony of Michael Sheehan, p. 27.

<sup>106</sup> HT Vol. 1, 38:5-13.

access charges, the Commission must ensure that NEET West provides this critical information to both Commission staff and ORA without additional litigation. At a minimum, the Commission should apply the reporting requirements on NEET West and the affiliates with which it plans to work with to construct and operate the SVC Project. NEET West should update these reports within 30 days if additional affiliates are later involved in the construction and operation of the SVC Project. To the extent that any information is similar to reports required by FERC, those same documents could be used to meet Commission reporting requirements.

## **VI. CONCLUSION**

The Commission should approve the Proposed Project. However, it should require SDG&E to show cause why the Environmentally Superior Alternative should not be built. Pursuant to that order, the ALJ should order an all-party mediation to determine the terms under which NEET West could build the Environmentally Superior Alternative. As part of its showing, SDG&E should also provide the information necessary for NEET West to make an accurate estimate regarding costs. Whichever alternative is approved, the Commission should not authorize SDG&E to construct the SVC Project. The Commission should not exempt NEET West from the reporting requirements. But, at a minimum, it should apply the reporting requirements on NEET West and the affiliates with which it plans to work with to construct and operate the SVC Project.

Respectfully submitted,

/s/ CANDACE CHOE

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