Comments on the Draft EIS and Responses

LOCAL AGENCIES

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transwestern Pipeline Company, LLC **Docket No. CP06-459-000**

TOWN OF BUCKEYE'S MOTION FOR WITHDRAWAL OF DRAFT ENVIRONMENTAL IMPACT STATEMENT OR, IN THE ALTERNATIVE, MOTION TO EXTEND THE COMMENT PERIOD

LA1-1 The Town of Buckeye ("Buckeye") hereby moves that the Federal Energy Regulatory Commission ("FERC") withdraw the draft Environmental Impact Statement ("EIS") for the Proposed Phoenix Expansion Projection in the above-captioned matter for the reason that the draft EIS, as more fully set forth herein after, fails to adequately address matters required by relevant statute, regulations and case law including, but not limited to, failure to present any meaningful discussion of alternatives to the proposed Transwestern pipeline project, failure to properly discuss the pipeline routing alternatives, failure to adequately discuss and include an assessment of collective or total direct, indirect and secondary impact to be caused by the proposed agency action, failure to adequately address adverse human health and environmental affects of the proposed agency action on minority and low income populations and federally recognized Indian tribes, failure to analyze threats of terrorism acts and the postponement or deferral of analyses necessary for informed decision making and informed public participation in the present process. Should FERC refuse to withdraw the draft EIS until such time as the record is appropriately supplemented and an appropriate independent review has been

LA1-1 See the responses to comments PM3-1, PM3-2, PM3-3, PM3-12, and LA2-1 through LA2-282.

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undertaken, Buckeye requests that the deadline for comments on the draft EIS be extended for at least one hundred twenty days to allow it and other interested parties to investigate and submit additional relevant information for review and that FERC submit the missing data and analyses at least sixty days prior to the extended date for comments. Buckeye and other interested parties in the Buckeye municipal area did not receive appropriate notice of the proposed Transwestern pipeline project, were denied their right to public participation and have been jeopardized thereby.

I. BACKGROUND

Buckeye was founded in 1888 and incorporated under the laws of Arizona in 1926. It is situated approximately 35 miles west of Phoenix, straddling Interstate 10. It has a 600 square mile municipal planning area that includes much of the remaining undeveloped land in the Phoenix metropolitan area. Currently, thirty proposed master-planned communities have been approved within this planning area, including almost 400,000 single-family residences.

On September 15, 2006, Transwestern Pipeline Company, LLC ("Transwestern") filed an application with FERC under § 7(c) of the Natural Gas Act and parts 157 and 284 thereof seeking a Certificate of Public Convenience and Necessity to construct and operate: (i) approximately 25 miles of 36-inch diameter pipeline loop in two segments on its existing San Juan Lateral in San Juan and McKinley Counties, New Mexico; (ii) a new 259 mile pipeline consisting of 36-inch and 42-inch diameter pipe extending southward from Transwestern's existing mainline near Ash Fork in Yavapai County, Arizona, through Coconino and Maricopa Counties, Arizona, and terminating at

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the beginning of El Paso Natural Gas Company's East Valley Lateral near the City of Coolidge in Pinal County, Arizona; and (iii) customer laterals, meter stations, and ancillary facilities. ("Phoenix Pipeline Project").

In addition, Transwestern seeks authority to acquire an undivided interest in the East Valley Lateral and to use the facilities to render services in conjunction with the Phoenix Pipeline Project. The projects are collectively known as the Phoenix Expansion Project. Transwestern has proposed that 27.8 miles of the Phoenix Pipeline Project be routed through Buckeye, passing directly through its development corridor and a series of already-approved master-panned communities that are currently under construction, or are soon to be under construction.

On October 11, 2006, Buckeye, along with several builders and developers that would be adversely affected by Transwestern's proposed pipeline route through Buckeye filed motions to intervene in the FERC proceeding. In its motion, Buckeye expressed its concern that the proposed pipeline route may have unnecessary adverse short and long term impacts on environmental and economic conditions within its planning area, may interfere with the development of already-approved master-planned communities in the area, and may otherwise adversely affect the interests of Buckeye and its citizens. Buckeye further objected and expressed its concerns that Transwestern did not adequately consider alternative routes through or adjacent to its planning area that would reduce or minimize such impacts. Buckeye's motion is incorporated herein by reference.

Following a series of Environmental Information Requests issued by FERC staff to Transwestern seeking such additional required information as to development along

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the proposed pipeline route, potential impacts on development along the proposed pipeline route and suggested alternative routes, to which Transwestern provided inadequate responses, FERC issued the subject draft EIS for public comment. Comments to the draft EIS are presently due on or before June 18, 2007.

II. THE DRAFT ENVIRONMENTAL IMPACT STATEMENT IS FATALLY DEFICIENT

The purpose of the National Environmental Policy Act ("NEPA") is described in 42 U.S.C. § 4331(b). Among other objectives, NEPA is designed to "assure for all Americans, safe, healthful...surroundings," "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," and "achieve a balance between population and resource use which will permit high standards of living..." In order to meet these goals, NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for all actions significantly affecting the quality of the human environment. 32 U.S.C. § 4332. The EIS is the heart of NEPA and "must discuss the environmental effects of the federal action it covers and any alternatives to that action." Daniel R. Mandelker, NEPA Law and Litigation § 1.1 (2006). Its importance to NEPA's goals cannot be overstated.

The EIS required by NEPA is designed to ensure that the federal agency responsible for the action takes a "hard look" at the environmental consequences of that action and fosters informed decision-making and informed public participation. *See State of California v. Block,* 690 F.2d 753 (9th Cir. 1982). "What constitutes a 'hard look' cannot be detailed with 'rule-like precision,' but at least 'it encompasses a thorough

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investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail.'" Daniel R. Mandelker, NEPA Law and Litigation § 10.16 (2006) (quoting *National Audubon Soc' v. Dep't of the Navy*, 422 F.3d 174 (4th Cir. 2005)). Nevertheless, an EIS must, at a minimum, adequately address those issues set forth in the relevant statutes, regulations and case law. The substantive and procedural deficiencies of the EIS are numerous and far ranging—nearly every part of the EIS suffers from inadequate or missing information. FERC's draft EIS fails to address these issues, falls well short of the "hard look" standard and cannot possibly allow the public to make an informed decision about the Transwestern Project.

A. Alternatives.

While the EIS is the heart of the NEPA, the alternatives to the proposed federal action are the heart of the EIS. 40 C.F.R. § 1502.14. 42 U.S.C. § 4331(2)(C)(iii) requires the federal agency undertaking a major action to prepare a detailed statement on the "alternatives to the proposed action." 40 C.F.R. § 1502.14 includes more detailed instructions:

> Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public. In this section agencies shall:
>
> (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

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(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

The present EIS fails to present any meaningful discussion of alternatives and in this respect violates not only the above quoted statutes and regulations but demonstrates that FERC did not undertake the "hard look" required of an EIS.

1. The EIS fails to discuss alternatives to the Transwestern pipeline.

While the EIS mentions some categories of alternative means to meet the growing energy requirements of the Phoenix metropolitan area, the lack of information and analysis in these discussions leads one to believe that the pipeline must be built in order to stave off future shortages or limits on electrical power use. Notably, the EIS fails to discuss potential projects such as El Paso Energy Corporation's announced expansion of salt cavern gas storage in nearby Eloy, Arizona. This project alone is projected to provide for storage of 2.5 billion cubic feet of natural gas and may provide enough gas per day to provide electricity for over 735,000 residential customers. Without considering alternative projects, FERC is effectively limiting itself to the Transwestern

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Pipeline Project, a course of action the courts have repeatedly rejected. *See City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004) (An agency that effectively limits itself to only one alternative may have its impact statement rejected); Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000).

FERC further limits its considerations of alternatives to those that can be brought into service with the same capacity and within the same timeframe as the Transwestern Expansion Project. This arbitrary limitation misleads the public and artificially rules out numerous alternatives that may mitigate the alleged need for the Transwestern pipeline. The argued need is indeed no more than an allegation. The EIS lacks a clear calculation of existing use of or demand for natural gas and projected deficits that would allow public stakeholders to evaluate whether the proposal is necessary or desirable. FERC merely asserts without proof that the Transwestern Expansion Project will exert downward pressure on natural gas prices. Absent the missing information, no thorough understanding of alternatives, including the required no alternative option, can be had.

2. The EIS fails to properly discuss pipeline routing alternatives.

The EIS presents five criteria to evaluate route alternatives: (1) environmental impact, (2) use of existing rights of way, (3) impact upon existing or planned developments, (4) public safety impact and (5) constructability and economic viability. Unfortunately, the only criteria that appears to have undergone any evaluation is the economic viability of the proposed routes and even that discussion is seriously flawed. With regard to the other criteria, FERC has made only desktop determinations. Language appearing in the EIS, such as "Based upon USGS topographic maps and physiographic

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maps…" (at 3.4.2.1), are the hallmark of desktop analysis. However, it is empirical analysis that underpins the "hard Look" doctrine essential to NEPA compliance.

FERC also attempts to sidestep the analysis of alternative routes by making conclusory statements without site-specific analysis. Rather than evaluate the specific safety risk associated with alternative routes, FERC merely declares that alternative routes are not necessary because the proposed pipeline does not pose safety concerns. FERC fails to discuss the specific safety challenges of the proposed route through the Buckeye development corridor where numerous master-planned communities with thousands of homes, schools and attendant facilities such as daycare centers are to be built. It fails to take into account the proximity of residences to the proposed pipeline and nearly constant construction and excavation for utilities that will take place in the proposed pipeline's path for the next decade. While FERC believes that the proposed route through Buckeye is safe because it meets minimum federal safety standards, it is required to inquire into the safety issues of the alternative route around Buckeye and present that information to the public in the EIS. This is especially important where the alternative route, unlike the proposed route, will not be in proximity to new developments and will not be exposed to constant excavation for construction and maintenance of utilities. The importance of this information is conceded by FERC at page 4-200 of the EIS where it states "The dominant incident cause is outside forces, constituting 53.8 percent of all service incidents between 1970 and 1984 and 38.5 percent between 1986 and 2005. Outside forces incidents result from the encroachment of mechanical equipment such as bulldozers and backhoes; earth movements due to soil settlement,

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washouts, or geologic hazards; weather effects such as winds, storms, and thermal strains; and willful damage." Without consideration of this critical information, FERC does not meet the "hard look" standard and deprives the public of the opportunity to make an informed decision about the Transwestern Expansion Project.

Finally, even the area in which it appears FERC has performed some analysis, the inquiry is flawed and incomplete. Not only does FERC fail to analyze the cost of potential mitigation measures associated with the proposed pipeline route through Buckeye as required by 40 C.F.R. § 1502.14, but it assigns a cost figure to the alternative route around Buckeye without any supporting data. If the cost analysis is superficial and suspect on its face, can other analyses be any better? FERC's flawed and incomplete presentation of the issue underscores the multiple deficiencies of this EIS.

B. Cumulative Effects.

40 C.F.R. § 1508.7 requires FERC to undertake an analysis of "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." The EIS must include a "useful analysis of the cumulative impacts of past, present, and future projects" in sufficient detail to be "useful to the decision maker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Natural Res. Def. Council v. U.S. Forest Service*, 421 F.3d 797, 814 (9th Cir. 2005). "At a minimum," EIS must provide a catalog of relevant past projects in the area and a discussion of how those projects have "harmed" the environment. *Id.* at 814-815. The analysis of cumulative impacts should include an

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assessment of "collective" or "total" direct impacts caused by activities authorized by the proposed agency action, as well as indirect, or secondary, impacts in the area, i.e., foreseeable future activities in the same geographic area that are not authorized by the proposed action. *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F.Supp.2d 1232, 1241 n. 1 (D. Wyo. 2005); *Taxpayers of Michigan v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 815-816 (9th Cir. 2005). The EIS does not meet this requirement.

While the EIS section on cumulative effects is organized to account for the past, present, and reasonably foreseeable projects that occur in the watersheds to be affected by the proposed pipeline work, it does not do so. It falls significantly short of meeting the requirement that the predicted direct and indirect effects of the pipeline project be added to the direct and indirect effects of the projects listed as the 'universe' of past, present, and reasonably foreseeable projects. Putting aside the question of factual errors in what projects are included, the requirement is to identify the impacts of the other projects and add the effects of the Phoenix Expansion Project to these. There is little discussion of the harm other projects have caused to the physical, biological, and socioeconomic environments, and there is correspondingly little information on how the additional impact from the proposed project would further affect a resource. Instead, the EIS focus is upon the small size of the project footprint, the relatively short duration of construction, and other means of discounting the potential for cumulative adverse affects that may require additional mitigation.

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As discussed, the EIS states that future development in Buckeye will have no additional impact on public safety solely because the pipeline will meet minimum federal safety standards. This assertion effectively denies that there can or will be any potential consequences from an incident involving a large diameter, high-pressure transmission pipeline or that the risks are increased by the construction of Buckeye's master-planned communities and the proximity of homes, schools, parks, hospitals and other sensitive land uses. The EIS cannot ignore these cumulative effects or this important discussion.

Further, the EIS is silent on the quintessential cumulative effect—climate change. The Transwestern Expansion Project proposes to deliver natural gas for the production of electricity. It is well-understood that burning natural gas causes the release of carbon dioxide and other greenhouse gases. The release of these gases and their effects on climate should be discussed in the EIS. *Border Power Plant Working Group v. Dep't of Energy*, 260 F. Supp.2d 997 (S.D. Cal 2003). Without this information, the EIS is incomplete.

C. <u>Postponed and Deferred Information.</u>

In an unusual move, FERC lists some 16 different analysis areas that were not complete or acceptable enough for draft EIS review by public stakeholders. Yet these deficient and incomplete analyses are directed by FERC to be completed and filed with FERC during the "draft EIS comment period for analysis in the Final EIS." This acknowledged lack of information begs the question, How can the draft EIS foster informed decision-making and informed public participation when it is admittedly incomplete? It cannot.

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The material to be prepared includes the need to create pipeline route alignment sheets demonstrating minimization of impacts to a landfill; alignments that avoid five specific platted developments; preparation of measures to avoid or minimize adverse impacts to an existing development; post-construction restoration plans to meet U.S. Department of Agriculture, Forest Service and Bureau of Land Management ("BLM") requirements on public lands; directional drilling plan revisions, preparation of additional documentation and analysis concerning other means of crossing the San Juan River; continued detailed analysis of a proposed Verde River crossing; more detailed analysis of proposed vegetation maintenance practices; additional analysis of migratory bird impacts; development of an adequate visual resources study and site-specific visual mitigation measures for BLM managed public lands, Prescott National Forest, and Little Hell Canyon Reservoir; preparation of cultural resources studies needed for all areas proposed for construction; preparation of a draft conformity statement addressing conformity with the federal 8-hour ozone standard in the Phoenix-Mesa Planning Area; preparation of maps, alignment sheets, and other information for all route alignments, facility relocations, construction staging areas, pipe storage yards, new construction and facility access roads (eleven of which are identified elsewhere in the EIS with no indication of proposed routes or their predicted impact upon the physical and biological environments), and other areas that would be disturbed and have not been previously identified to the FERC. There also is a concern with the water resources that would be used for various aspects of construction and facility operation, and the applicant is directed to estimate the use of this resource and report it during the EIS comment period.

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In addition to the foregoing, the EIS lacks information central to the public's interest in the preservation of threatened and endangered plant and animal species and their critical habitat. Multiple aquatic and terrestrial species are identified in the EIS as "potentially adversely affected" by proposed construction and/or operation of the Transwestern project yet the required Endangered Species Act Section 7 biological assessments for these species are still in preparation with the U.S. Fish and Wildlife Service yet to review any of them.

Put simply, beyond its other deficiencies, it cannot be disputed that the EIS lacks federally mandated, relevant information. Among the regulations violated by the draft EIS are 40 CFR § 1502.15, requiring information on the "affected environment;" 40 CFR § 1508.27(b)(9) regarding endangered species; 40 CFR § 1508.27(b)(3) regarding parkland and other scenic resources; 40 CFR § 1508.8 regarding natural resources and 40 CFR § 1508.27(b)(3) and (8) regarding cultural resources. If the federally required information has not yet been developed, how can FERC have conducted meaningful consultation with other agencies as required by 40 U.S.C. § 4332? The EIS must be withdrawn and completed.

D. Environmental Justice.

Executive Order 12898 requires federal agencies to implement actions that will identify and address disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations and federally recognized Indian tribes. While FERC includes certain demographic information and references meetings held with Indian tribes, its conclusion that "no

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disproportionately high and adverse human health or environmental effects on minority and low-income communities have been identified," is completely unsupported by any real data. Among the information missing from the EIS are:

1. There is no assessment of the potential for environmental harm to minority communities.

2. There is no determination whether populations having lower levels of education may encounter difficulties in the ability to understand technically complex documents or in the ability to sufficiently identify and interpret risk and other potentially adverse or beneficial impacts of the proposed project.

3. There is no assessment as to whether proposed influx of temporary construction activity and personnel could affect local services and infrastructure serving minority and low-income populations.

4. There is no assessment as to whether proposed construction may physically affect infrastructure serving low income and minority populations through utility relocation, service interruptions, or changes to levels of service.

5. There is no analysis of whether adverse temporary or permanent impacts caused by the proposed construction and operation of the Phoenix project will affect populations who depend upon subsistence living from hunting, gathering, farming, fishing or on the consumption of other natural resources.

6. There is no determination of whether populations who rely on natural resources for economic base (tourism, crops, use of natural resources to create saleable items, fisheries etc.) will be affected.

7. There is no analysis of the indirect effects of the proposed project that low income and minority populations will not be able to avoid including vehicle pollution, existence of polluted sites secondary to construction activity, degradation of local air quality due to construction, and other effects.

As with much of the EIS, the conclusions of the environmental justice analysis seem preordained and lack any reasonable foundation.

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E. Terrorism

The threat of terrorist attacks must be addressed in the EIS. *See San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006). The present EIS addresses the environmental impact of a high-pressure gas pipeline that will travel through the middle of Buckeye's development corridor as close as 15 feet to residential development. Given a blast radius that would put thousands of homes in harm's way, how can the public evaluate and make an informed decision regarding the proposed pipeline or routing alternatives without an analysis of the effects of a terrorist attack, including a comparison of the results of such an attack on the proposed alignment versus the alternative alignment? They cannot. On this basis alone, the EIS should be withdrawn and resubmitted for comment when complete.

III. BUCKEYE DID NOT RECEIVE APPROPRIATE NOTICE OF TRANSWESTERN'S PIPELINE PROJECT APPLICATION

Buckeye did not receive appropriate notice.

Between January and March 2006, FERC and Transwestern held public information meetings about the proposed Phoenix Expansion Project in Prescott Valley, Sun City West, Black Canyon City, Maricopa and Casa Grande, Arizona. No public information meeting was held in Buckeye despite the fact that approximately 28 miles of the proposed pipeline route would run through the heart of Buckeye's development corridor.

In February and March 2006, FERC and Transwestern held public scoping meetings in Black Canyon City, Casa Grande, Prescott Valley and Avondale, Arizona.

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Again, no public scoping meeting was held in Buckeye. In fact, no meetings at all were held in Buckeye until December 14, 2006 when FERC held a technical review meeting in Buckeye following objections and motions to intervene filed by Buckeye and several interested developers.

Approximately four months after the first meeting held in Buckeye, FERC issued the EIS giving Buckeye and others wishing to comment 45 days in which to do so. Buckeye and the interested intervening developers have been significantly prejudiced by the failure of FERC and Transwestern to provide to them the same information provided to others beginning in January 2006. The failure to notice and hold public information and scoping meetings in Buckeye, a town directly and significantly affected by the proposed pipeline route, denied them 9-11 months during which to question, consider and evaluate issues relating to the proposed pipeline route and to develop information for proposed alternate routes. This prejudice has been exacerbated by Transwestern's failure to adequately provide the information required by relevant statute, regulations and case law resulting in a EIS that falls well short of the "hard look" standard required to allow informed public decision making. Should FERC not agree to withdraw the EIS, its deficiencies can only be overcome by granting a significant extension of time for Buckeye and other directly affected interveners to file their comments.

IV. CONCLUSION

"The very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for such speculation by insuring that available data is *gathered* and analyzed prior to the implementation of

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the proposed action." *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984). An EIS need not "document every particle of knowledge that an agency might compile in considering the proposed action...The detail required is that which is sufficient to enable those who did not have a part in [the EIS's] compilation to understand and consider meaningfully the factors involved." *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974). To take the required "hard look" at a proposed project's effects, an agency may not rely on incorrect assumptions or data in an EIS. *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 964 (9th Cir. 2005). Buckeye did not have a part in the compilation of the EIS and the EIS contains insufficient information to allow it to meaningfully consider and comment upon the factors involved.

Wherefore, Buckeye respectfully requests that the EIS be withdrawn or that the deadline for submission of comments on the draft EIS be extended to at least October 15, 2007, with FERC to provide the missing data and analyses at least sixty days prior to such date.

Respectfully submitted this 1st day of June, 2007.

By: /s/ Richard B. Hood

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of June, 2007, I caused the foregoing document to be served, by electronic mail, upon each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Phoenix, Arizona this 1st day of June, 2007.

By: *_/s/ Richard B. Hood_*

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