

January 10, 2017

**By Electronic Mail; Two Paper Copies and Archival-Grade DVDs By Hand Delivery**

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**Re: Comments of NextEra Energy Transmission West, LLC on the Draft Environmental Impact Report for NextEra Energy Transmission West's Proposed Suncrest Dynamic Reactive Power Support Project, November 2016 (SCH # 2016011004)**

Dear Mr. Peterson and Mr. Engels:

This letter and the enclosed documents provide the comments of NextEra Energy Transmission West, LLC ("NEET West") on the Draft Environmental Impact Report ("DEIR") for NEET West's proposed Suncrest Dynamic Reactive Power Support Project ("Suncrest Project" or "Proposed Project"). NEET West appreciates the time and effort of staff of the California Public Utilities Commission ("Commission") and its consultants in preparing the DEIR. NEET West's comments are intended to ensure that the DEIR is accurate, complete, and consistent with the California Environmental Quality Act ("CEQA").

**I. INTRODUCTION**

NEET West filed an application requesting a certificate of public convenience and necessity ("CPCN") for the Suncrest Project that is pending before the Commission in Docket Number A.15-08-027 ("Application"). The Suncrest Project is a policy-driven upgrade to the transmission system that was identified and selected by the California Independent System Operator Corporation ("CAISO") through its regional transmission planning process. The Proposed Project is comprised of a static var compensator and related equipment ("SVC Facility"), and an approximately one-mile underground 230 kV transmission line that connects the SVC Facility to the Suncrest Substation owned by the incumbent utility, San Diego Gas and Electric Company ("SDG&E"). The CAISO selected NEET West's Suncrest Project as the most cost-effective solution to meet the policy-driven need after conducting a competitive solicitation in accordance with the CAISO Tariff and Order 1000 issued by the Federal Energy Regulatory Commission ("FERC").<sup>1</sup>

The fundamental purpose of the Suncrest Project is for NEET West to provide the reactive power support project that the CAISO selected based on the CAISO Tariff and FERC Order 1000, and that NEET West committed to build to meet the CAISO's technical specifications and legal and regulatory

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<sup>1</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

requirements specified in the Approved Project Sponsor Agreement (“APSA”) executed by NEET West and the CAISO. The DEIR ignores this fundamental project purpose and NEET West’s stated project objectives. By doing so, the DEIR improperly identifies as environmentally superior an alternative known as the Suncrest Substation Alternative that would require NEET West to locate its SVC Facility at the site of the existing Suncrest Substation owned by SDG&E. The Suncrest Substation Alternative, however, is directly at odds with the CAISO’s selection of NEET West’s Suncrest Project and thus would not meet the project purpose or a majority of the project objectives. The DEIR’s failure to recognize this conflicts with the fundamental project purpose and jeopardizes the viability of the project selected as the lowest cost solution through the CAISO’s competitive solicitation process. This is contrary to ratepayers’ interests, and inconsistent with the goals of FERC Order 1000 to promote competition and ensure just and reasonable transmission rates. These flaws must be corrected by modifying the DEIR to include the underlying project purpose and the project objectives.

NEET West understands the Commission’s interest in analyzing a reasonable range of alternatives, but there is neither a legal nor a factual basis warranting inclusion of the Suncrest Substation Alternative. First, it is worth emphasizing that the DEIR demonstrates that the Proposed Project will have no residual, significant impacts. Thus, the Suncrest Substation Alternative is not necessary to reduce any impacts to less than significant, and both the Proponent’s Environmental Assessment (“PEA”) and the DEIR itself set forth a sufficient range of alternatives other than the Suncrest Substation Alternative to satisfy CEQA. Second, there is no evidence in the record that the Suncrest Substation Alternative is potentially feasible, and to the contrary, there is substantial evidence in the PEA demonstrating that it is infeasible. Specifically, the PEA shows that the Suncrest Substation Alternative is legally and factually infeasible because: (1) its selection would directly conflict with the CAISO competitive solicitation process, the CAISO Tariff, and the goals of FERC Order 1000, and could result in termination of the APSA; (2) there is no evidence in the record that NEET West could gain site control in order to locate the SVC Facility at the Suncrest Substation site in a timely manner that would meet the CAISO-identified policy need; (3) there is express evidence in the record that SDG&E would not allow NEET West to build its SVC Facility at the Suncrest Substation site; and (4) the Suncrest Substation Alternative would be economically infeasible because costs associated with attempting to acquire site control are not included in the cost cap specified in the APSA, and would render construction of the Suncrest Project impracticable. All of this argues against identification of the Suncrest Substation Alternative as a potentially feasible alternative in the DEIR. The DEIR should therefore be modified to thoroughly examine the feasibility of the Suncrest Substation Alternative, conclude that it is infeasible, and select the Proposed Project as the next environmentally superior alternative after the No Project Alternative.

In addition to concerns relating to identification of the Suncrest Substation Alternative, NEET West is concerned that the DEIR incorrectly identifies certain potentially significant environmental effects based upon conclusions, rather than evidence in the record. This does not meet the requirements of CEQA, which specifies that findings of significant impacts must be based on substantial evidence. The DEIR’s conclusions regarding potentially significant effects for certain environmental parameters, as discussed below, should be modified to correctively characterize impacts to those parameters as less than significant. Accordingly, the mitigation measures identified for those effects should be eliminated from the final EIR because they are not required under CEQA.

Finally, the DEIR fails to include and analyze many Applicant Proposed Measures (“APMs”) set forth in the PEA as part of the project description. This results in the DEIR identifying a number of potentially significant impacts that require mitigation, rather than finding such impacts to be less than significant. In turn, the DEIR identifies a number of required mitigation measures, many of which repeat verbatim APMs from the PEA. The DEIR thus improperly transforms APMs into mitigation measures, which is contrary to CEQA. While NEET West objects to this practice, and respectfully suggests that subsequent Commission EIRs should not engage in this approach, NEET West is largely amenable to accepting these APMs as mitigation measures, except as noted in Section II(C) below and the Table of Detailed Comments submitted concurrently herewith. However, to the extent that the Suncrest Substation Alternative is justified to address potential effects of the Proposed Project for which the DEIR failed to include APMs as part of the underlying project description, NEET West objects to such analysis.

Each of these concerns is explained in more detail below. NEET West also provides detailed comments on each section of the DEIR in the Table of Detailed Comments and Attachments, and in the Table of Editorial Comments, that are submitted with this letter.

## II. DISCUSSION

### A. **By Failing To Adhere To CEQA’s Requirements, The DEIR Engages In An Alternatives Analysis That Could Jeopardize The Viability Of The Lowest Cost Project Selected In The CAISO’s Competitive Solicitation.**

#### 1. **The Suncrest Substation Alternative Is Considered Only Because The DEIR Ignores The Underlying Fundamental Project Purpose And Most Of The Project Objectives.**

CEQA requires an EIR to contain a clearly written statement of the underlying fundamental purpose and the objectives sought by the proposed project, which will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include “the underlying purpose of the project.” (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15124(b).) The project objectives are integral to the analysis of alternatives, because CEQA requires an EIR to focus on alternatives that can eliminate or reduce significant environmental impacts while attaining most of the project objectives. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.6(a)-(b).) Under California law, it is not enough for the project purpose to simply describe the nature of a project. Rather, the underlying purpose motivating the project must also be reflected. (*Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4<sup>th</sup> 1277, 1300 (confirming that project objectives must reflect the underlying purpose of the project).) Correctly identifying the underlying fundamental purpose of the Suncrest Project and its project objectives is critical because an EIR need not study an alternative that “cannot achieve the project’s underlying fundamental purpose.” (*In re Bay-Area Delta Programmatic Environmental Impact Report Coordinated Proceedings* (hereinafter, “*Bay-Area Delta*”) (2008) 43 Cal.4<sup>th</sup> 1143, 1165.) This is also critical because an EIR need not consider alternatives that would change the basic nature of the project. (*See Al Larson Boat Shop Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4<sup>th</sup> 729, 745.)

The Application and PEA clearly showed that the underlying fundamental purpose of the Suncrest Project is for NEET West to provide the reactive power support project that the CAISO selected based on the CAISO Tariff and FERC Order 1000, and that NEET West committed to build to meet the CAISO's technical specifications and legal and regulatory requirements specified in the executed APSA. (Application at 1-2; PEA, Chapters 1.0 and 2.0.) Through its transmission planning process, the CAISO identified a policy-driven need for a reactive power support project that is necessary to facilitate achievement of the California Renewables Portfolio Standard ("RPS"). To meet that policy-driven need, the CAISO conducted a competitive solicitation in accordance with the CAISO Tariff, which specifies that the CAISO's transmission planning process must include a competitive solicitation process for new, stand-alone regional transmission facilities needed for reliability, economic and/or public policy driven reasons. (CAISO Tariff Section 24.5.1.) This requirement complies with FERC Order 1000, which enacted reforms to ensure "an opportunity for more transmission projects to be considered in the transmission planning process on an equitable basis," and, in turn, "ensure that [FERC]-jurisdictional transmission services are provided at rates, terms, and conditions that are just and reasonable and not unduly discriminatory or preferential." (FERC Order 1000 at P 42.) Under the FERC Order 1000 reforms, a competitive process is required to identify and select more cost-effective solutions than would be available if incumbent utilities retained a right of first refusal to build all transmission upgrades. (*Id.* at P 284) ("granting incumbent transmission providers a federal right of first refusal with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process," which "may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, the inclusion of higher-cost solutions in the regional transmission plan".)

In its competitive solicitation, the CAISO evaluated competing proposals submitted by NEET West and SDG&E. The CAISO ultimately determined that NEET West's proposed Suncrest Project would meet the policy-driven need and technical specifications at the best available cost. The CAISO therefore selected NEET West as the approved project sponsor. The CAISO explained that NEET West agreed to a materially lower cap on capital costs and proposed to assume more cost increase risk than SDG&E. (CAISO Suncrest Reactive Power Project Sponsor Selection Report at 46, submitted as Annex B to the prepared testimony of NEET West that was served with the Application.) NEET West and the CAISO subsequently executed the APSA, which identifies the specifications for the Suncrest Project, establishes a binding cost cap and an in-service date, and allows the CAISO to terminate the Suncrest Project if the CAISO's specifications and legal and regulatory requirements are not met. The APSA thus ensures that the CAISO's technical specifications, and the legal and regulatory requirements underlying the CAISO's competitive solicitation process, will be satisfied.

This underlying fundamental purpose of the Suncrest Project – for NEET West to provide the reactive power support project that the CAISO selected based on the CAISO Tariff and FERC Order 1000, and that NEET West committed to build to meet the CAISO's technical specifications and legal and regulatory requirements specified in the APSA – is embedded in the eleven project objectives that NEET West proposed in the Application and the PEA, and particularly in Project Objectives 1, 2, 3 and 9, which are highlighted below. The Application and PEA specify that the project objectives are to:

- (1) *Meet the CAISO's policy-driven need for reactive support at the Suncrest Substation's 230 kV bus identified in CAISO's powerflow, stability, and deliverability assessment for the SDG&E area in a manner consistent with the requirements of the Approved Project Sponsor Agreement.*
- (2) *Meet the technical specifications set forth by the CAISO for a 230 kV, +300/-100 Mvar dynamic reactive power support system near the Suncrest Substation.*
- (3) *Achieve commercial operation by May 31, 2017, to meet the CAISO's required in-service date of June 1, 2017.*
- (4) Improve and maintain the reliability of the transmission grid by providing dynamic reactive power support, and increase deliverability of renewable power, by building and operating a facility that will help keep transmission voltages within specified parameters, reduce transmission losses, increase reactive margin for the system bus, increase transmission capacity, provide a higher transient stability limit, increase damping of minor disturbances, provide greater voltage contract and stability, and provide power oscillation damping.
- (5) Facilitate deliverability to load of renewable generation from the Imperial Valley area and corresponding progress toward achieving California's RFP goals in a timely and cost-effective manner by California utilities.
- (6) Meet the policy-driven project need while minimizing environmental impacts.
- (7) To the extent practicable, locate the dynamic reactive support equipment and transmission tie-line on land that is, or has previously been, disturbed or in an existing right-of-way, or which would otherwise minimize environmental impacts in a manner consistent with prudent transmission planning.
- (8) Construct and operate the facility with safety as a top priority.
- (9) *Meet the project need in a safe, cost-effective manner and consistent with NEET West's cost containment agreement in the Approved Project Sponsor Agreement.*
- (10) Comply with and assist the CAISO in meeting applicable Reliability Standards and Regional Business Practices developed by NERC, WECC, and the CAISO.
- (11) Design and construct the Proposed Project in conformance with NEET West's standards, the National Electrical Safety Code, and other applicable national and state codes and regulations.

(Application at 18-19; PEA, Section 2.2 at 2-5 through 2-6 (emphasis added).)

Commission staff conceived of the Suncrest Substation Alternative and required its inclusion and evaluation in NEET West's PEA. NEET West explained at that time that the Suncrest Substation



Alternative is at odds with the fundamental project purpose and project objectives and conflicts with the CAISO's competitive selection of NEET West's Suncrest Project, and its selection could trigger termination of the APSA. The PEA clearly states that (1) the CAISO may terminate NEET West's right to develop the Suncrest Project if the project is required to be sited within the Suncrest Substation, and (2) under the CAISO Tariff, only the incumbent utility (*i.e.*, SDG&E) can construct a project within an existing substation. (PEA, Chapter 5, Section 5.2.6.4 at 5-31.) Yet the DEIR ignores these points, and adopts a different, truncated set of project objectives. The Application and PEA set forth eleven project objectives in total; the DEIR, notably and without explanation, condenses these objectives into only three:

- (1) Provide reactive support at or connected to the Suncrest Substation;
- (2) Improve and maintain the reliability of the transmission grid; and
- (3) Support achievement of the state's RPS by facilitating delivery of a higher percentage of renewable energy generation from the Imperial Valley area to population centers to the west.

(DEIR, Section 2.2 at 2-2:33-38.)

In doing so, the DEIR disregards many of the other project objectives that were identified in NEET West's Application and PEA that are integral to the underlying project purpose, such as meeting the project need in a safe and cost-effective manner consistent with the APSA. NEET West recognizes that a lead agency must independently investigate, review, analyze, and discuss alternatives in good faith. (*See Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 906; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736.) Although this responsibility may afford some discretion to enlarge an applicant's project objectives in a reasonable manner if necessary to facilitate a legally adequate alternatives analysis, the DEIR goes far beyond what is needed for an adequate alternatives analysis. The DEIR does not merely enlarge the objectives, but instead completely eliminates the majority of NEET West's stated project objectives. There is no justification for doing so.

Nothing in the record or the law supports this extreme modification of the project purpose and objectives. NEET West's PEA considered a sufficient range of alternative technologies and site locations, and as discussed herein, there are no residual significant effects of the Proposed Project that would be minimized by inclusion of the Suncrest Substation Alternative. On the other hand, by ignoring the fundamental project purpose and objectives, the DEIR inexplicably delves into an alternative that would present clear challenges and conflicts. NEET West made clear that the Suncrest Substation Alternative would not meet the requirements of the APSA and could trigger its termination based upon provisions arising from restrictions in the CAISO Tariff, which specifies that only the incumbent utility (*i.e.*, SDG&E) can construct a project within an existing substation. (*See CAISO Tariff Section 24.5.1.*) Such termination would be contrary to ratepayers' interests and undermine the goals of FERC Order 1000 to promote competition and ensure just and reasonable transmission rates. (*See Order 1000 at P 42.*) Thus, selection of the Suncrest Substation Alternative would not only fail to meet the underlying project purpose or most of the project objectives, but also would directly conflict with and

undermine the CAISO competitive process, and the specific CAISO actions resulting in the selection of NEET West as the approved project sponsor for the Suncrest Project. Only by ignoring the underlying project purpose and the key project objectives is the DEIR able to select a wholly infeasible site as the environmentally superior alternative.<sup>2</sup>

These flaws must be corrected by modifying the DEIR to include the underlying fundamental project purpose and NEET West's project objectives, as specified in the Application and PEA. The EIR must consider the requirements of the APSA, which are not irrelevant and must be considered in the EIR and the Commission review process. (*Kings County Farm Bureau v. City of Hanford, supra*, 221 Cal.App.3d at p. 737.)<sup>3</sup> For these reasons, and to ensure an accurate analysis of alternatives and their potential feasibility, NEET West requests that the DEIR be modified to clearly identify the fundamental project purpose and the eleven project objectives specified in the Application and PEA, which are reproduced above.

## **2. The DEIR Incorrectly Assumes That The Suncrest Substation Alternative Is Potentially Feasible, But Fails To Cite Evidence For That Assumption.**

NEET West made clear in submitting its PEA that the Proposed Project warranted preparation of a Negative Declaration (“ND”) or Mitigated Negative Declaration (“MND”) because there would be no significant impacts. Had either a ND or MND been prepared, the Commission would not have been required to consider alternatives to the project. The DEIR essentially affirms this conclusion because it finds that the Proposed Project will not have any significant adverse impacts.

Having decided to prepare an EIR despite the lack of any significant impact, the Commission must follow CEQA's requirements in conducting its alternatives analysis. An EIR is required to describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.6(a).) As noted above, the addition of the Suncrest Substation Alternative was not even necessary in order to reduce any impacts of the Proposed Project to less than significant, and both the PEA and DEIR set forth a sufficient range of reasonable alternatives other than the Suncrest Substation Alternative to satisfy CEQA. CEQA clearly states that “[o]nly locations that would avoid or substantially lessen any of the significant effects of the project need be considered for inclusion in the EIR.” (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.6(f)(2)(A).)

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<sup>2</sup> The Suncrest Substation Alternative is the only alternative site location that could trigger the APSA's termination provision. Thus, unlike in other cases where project objectives may have been drawn too narrowly to limit alternatives to one technology or one site, the NEET West project objectives allowed consideration of a broad range of technologies and a broad range of sites, but precluded the use of only one alternative site.

<sup>3</sup> In *Kings County*, the Court of Appeal explained that, although contracts executed in support of a proposed project “cannot be used to avoid the scrutiny envisioned by CEQA,” the contract executed by the project applicant “is not irrelevant” and “must be considered in the review process.” Here, rather than suggest that the APSA limits the alternatives analysis to a single technology or site, NEET West asks that APSA be considered and analyzed as evidence that is relevant to consideration of whether the Suncrest Substation Alternative would meet the fundamental project purpose and project objectives, and be feasible. The DEIR completely fails to consider the APSA in those analyses and should be modified accordingly.

Beyond this significant flaw, inclusion of the Suncrest Substation Alternative in the DEIR presents significant concerns based on feasibility. An EIR is not required to consider alternatives which are infeasible, and an EIR need examine in detail only those alternatives that “could feasibly attain most of the basic objectives of the project.” (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.6(f).) “Feasible” 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.” (Pub. Resources Code § 21061.1; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15364.)

In *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4<sup>th</sup> 957, 981, the Court of Appeal explained that the issue of feasibility arises at two different junctures in the CEQA review and project approval process: (1) in the assessment of alternatives in the EIR; and (2) during the agency’s later consideration of whether to approve the project. In the first phase – inclusion in the EIR – the standard is whether the alternative is “potentially” feasible. (*Ibid.*) In the second phase – the final decision on project approval – the decision-making body evaluates whether the alternatives are “actually” feasible. (*Ibid.*) At that juncture, the decision-makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible. (*Ibid.*)

Under this structure, the DEIR should analyze in detail only those alternatives that could attain the fundamental underlying project purpose and most of the basic project objectives, and are potentially feasible.<sup>4</sup> The DEIR recognizes that “[i]n accordance with State CEQA Guidelines Section 15126.6(f), the Lead Agency should consider site suitability, economic viability, availability of infrastructure, general plan consistency, other regulatory limitations, and jurisdictional boundaries in determining the feasibility of alternatives to be evaluated in an EIR.” However, this ignores other important specifications in Section 15126.6(f)(1) which states that: “Among the factors that may be taken into account when addressing feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects within a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent).” (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.6(f)(1) (emphasis added), citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 and *Save our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4<sup>th</sup> 1745, 1753, fn. 1.) It is notable that the DEIR omits the underlined language from its formulation of the factors that the lead agency should consider under CEQA, since the Suncrest Substation Alternative would clearly fail to satisfy the requirement that “the proponent can reasonably acquire, control or otherwise have access to the alternative site,” as explained in Section II(A)(3)(b) below.

The DEIR wrongly assumes, without adequate evidence, analysis or explanation, that the Suncrest Substation Alternative is potentially feasible. The DEIR appears to rely solely on the notion that there is sufficient physical space in the substation, as suggested by the statement that: “San Diego Gas & Electric

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<sup>4</sup> The DEIR’s analysis and selection of the Suncrest Substation Alternative as the environmentally superior alternative fails to meet either requirement. As explained in Section II(A)(1) above, the Suncrest Substation Alternative would not meet the fundamental underlying project purpose or the key project objectives, and should be eliminated from detailed consideration on that basis. In addition, the Suncrest Substation Alternative is not potentially feasible, and should be excluded from detailed consideration in the EIR for the reasons explained in Section II(A)(3) below.



(SDG&E) has indicated that there is room within the existing substation to construct the SVC without expanding the substation footprint.” (DEIR, Section 20.3.3 at 20-12:3-7.) Physical space alone is insufficient to demonstrate potential feasibility, as shown by the litany of factors identified in the CEQA Guidelines as quoted above. Yet the DEIR advances no other evidence to support its assumption of potential feasibility. The DEIR thus inappropriately engages in consideration of an alternative that is speculative at best.

### **3. The DEIR Also Completely Ignores Substantial Evidence Demonstrating That The Suncrest Substation Alternative Is Infeasible On Numerous Grounds.**

In addition to its failure to cite evidence supporting a determination that the Suncrest Substation Alternative is potentially feasible, the DEIR completely ignores and fails to consider substantial evidence in the record demonstrating that the Suncrest Substation Alternative is actually infeasible, including evidence showing infeasibility based on the factors specifically identified in the CEQA Guidelines and case law cited above. To comply with CEQA, the DEIR should analyze and address this information provided in the PEA. Although the determination of the actual feasibility of the reasonable project alternatives set forth in an EIR is generally made by the Commission in its decision on project approval, this does not translate into *carte blanche* discretion for Commission staff to entertain alternatives in the DEIR that are not reasonable because they are not potentially feasible. To conclude otherwise fails to meet CEQA’s requirements.

If Commission staff continues to believe that the Suncrest Substation Alternative is potentially feasible, notwithstanding the lack of sufficient evidence supporting this belief, and notwithstanding contrary substantial evidence provided by NEET West, then at a minimum, and to comply with CEQA, the DEIR must be revised to disclose the evidence provided by NEET West. Additionally, the DEIR should acknowledge that NEET West provided substantial evidence regarding the infeasibility of the Suncrest Substation Alternative that will be addressed to the extent necessary in the formal application proceeding that is pending in A.15-08-027. Because all environmental impacts of the Proposed Project will be reduced to less than significant levels, the Commission in its ultimate decision granting a CPCN for the Suncrest Project is not required to make findings regarding the infeasibility of the environmentally superior alternative selected in the EIR. Nevertheless, NEET West will be prepared to demonstrate in A.15-08-027 that the Suncrest Substation Alternative is infeasible, including on the following grounds.

#### **a) The Suncrest Substation Alternative is legally infeasible because it violates the regulatory requirements of the CAISO competitive solicitation and triggers termination of the APSA.**

The DEIR fails to recognize that the Suncrest Substation Alternative is legally infeasible because it is not allowable under the APSA and could result in termination of the APSA. The DEIR completely ignores information in the PEA that shows the following:

- NEET West’s APSA with the CAISO states that the CAISO may terminate NEET West’s right to develop the Suncrest Project if the project is required to be sited within the Suncrest Substation. Under the CAISO Tariff, only the incumbent utility can construct a project within an existing substation, so NEET West would not have been awarded the project, if it were

located within the substation. The Suncrest Substation Alternative would not be feasible due to lack of site control and would not meet the basic project objectives of meeting the CAISO's in-service date and conformance with the APSA.

(PEA, Chapter 5, Section 5.2.6.4 at 5-31.)

Under CEQA, an alternative may be found legally infeasible due to a conflict with regulatory limitations. *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4<sup>th</sup> 214, 255 (alternative of discontinuing hatchery production and fish stocking activities was infeasible due to conflict with Department's statutory mandate); *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4<sup>th</sup> 362, 418 (school district reasonably determined that reduced school size alternative was infeasible because of conflict with state school siting guidelines). The DEIR completely ignores clear legal constraints, as detailed in the PEA, showing that Exhibit E of the APSA allows the CAISO to terminate NEET West's right to develop the Suncrest Project if the project is required to be located within the Suncrest Substation site, and potentially conduct a new solicitation under Section 24.6.4 of the CAISO Tariff. This termination provision arises from the CAISO Tariff, under which only the incumbent utility can construct a project within an existing substation. The DEIR as drafted thus could place the Commission in the potential situation where it needs to consider approving the Suncrest Substation Alternative as the environmentally superior alternative, even though NEET West would not be allowed to build it under the APSA, which in turn could trigger termination of the APSA and the NEET West Suncrest Project. Termination of the project that was selected as the lowest cost proposal in the CAISO's competitive solicitation would be contrary to ratepayers' interests, and would undermine the goals of FERC Order 1000 to promote competition and ensure just and reasonable transmission rates. (Order 1000 at P 42.) Because the CAISO Tariff and the limitations of the CAISO's competitive solicitation process do not allow NEET West to build the Suncrest Project inside the substation footprint, the Suncrest Substation Alternative creates a clear conflict with the legal and regulatory requirements of the CAISO Tariff. Moving the SVC Facility into the substation could terminate NEET West's Suncrest Project completely, and it is thus is not "potentially feasible."

In addition, an EIR need not consider an alternative whose effect cannot be reasonably ascertained or whose implementation is remote and speculative, because unrealistic alternatives do not contribute to useful analysis. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.6(f)(3); *Bay-Area Delta*, 43 Cal.4<sup>th</sup> at 1163; *Foundation for San Francisco's Architectural Heritage*, 106 Cal.App.3d at 910.) A lead agency may conclude that an alternative is remote or speculative if significant changes in governmental policy or legislation are necessary to accomplish it. (*Residents Ad Hoc Stadium Commission v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286.) An alternative also may be found remote and speculative if it is unlikely as a practical matter to be carried out within the reasonable future or is contingent on the occurrence of uncertain future events. (*Al Larson Boat Shop, Inc., supra*, 18 Cal.App.4<sup>th</sup> at p. 745; *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1084.) Here, it would be necessary to obtain CAISO (and potentially FERC) authorization to deviate from the policies governing eligibility for competitive solicitations in order to allow NEET West to build the Suncrest Project inside an existing substation owned by the incumbent utility. It is not clear whether that would be possible. Even if possible, obtaining such authorization likely would add significant time and uncertainty to the project approval process. Given the current regulatory policies governing which projects are

eligible for construction by non-incumbent utilities, the Suncrest Substation Alternative is remote and speculative and should be rejected as not potentially feasible.

**b) The Suncrest Substation Alternative is infeasible because it would result in extensive delay that would not meet the CAISO's required in-service date or the fundamental project purpose.**

The DEIR also completely ignores information in the PEA that shows the following:

- SDG&E owns the Suncrest Substation and the underlying land. SDG&E denied NEET West's request to locate the SVC within the Suncrest Substation. Because SDG&E is not a willing seller, it would be infeasible for NEET West to obtain site control to locate the SVC inside the Suncrest Substation in time to meet the CAISO's required in-service date. If directed to locate the SVC within the Suncrest Substation, NEET West would have to then attempt to obtain site control via eminent domain. But NEET West cannot exercise eminent domain authority until after it is certificated as a public utility, which will not occur until after a CPCN is granted for the Suncrest Project. There is not sufficient time to complete the proceeding, acquire rights through eminent domain, and then build the Suncrest Project to meet the CAISO's required in-service date.

(PEA, Chapter 5, Section 5.2.6.4 at 5-30 through 5-31; *see also* SDG&E Comment Letter in Appendix B.)

As noted above, CEQA provides that a lead agency's decision on the feasibility of alternatives may rest on "economic, legal, social, technological, or other considerations." (Pub. Resources Code § 21081(a)(3).) Similarly, the CEQA Guidelines define "feasible" 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." (Pub. Resources Code § 21061.1; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15364.) A substantial delay could, by itself, render an alternative incapable of being "successfully accomplished within a reasonable period of time," and hence infeasible. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15364; *Bowman v. City of Petaluma*, *supra*, 185 Cal.App.3d at p. 1084 (condition of project approval requiring development of ring road that would result in long delay was infeasible).) As noted above, in the context of alternative locations for a project, the CEQA Guidelines recognize that another factor in the determination of feasibility is whether the proponent can reasonably acquire, control or otherwise have access to the alternative site. (CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.6(f)(1).)

The Suncrest Substation Alternative would not be feasible due to lack of site control and would not meet the basic project objectives of meeting the CAISO's in-service date and conformance with the APSA. (PEA, Chapter 5, Section 5.2.6.4 at 5-31.) In this case, NEET West cannot reasonably acquire, control or otherwise have access to the Suncrest Substation site. NEET West has already asked SDG&E if it would be willing to grant such access, and SDG&E said no. (*See* SDG&E Comment Letter in Appendix B at page 3.) Because SDG&E is not a willing seller, NEET West's only recourse is to attempt to obtain site control via eminent domain. But NEET West cannot exercise eminent domain authority until after it is certificated as a public utility, which will not occur until after a CPCN is granted for the

Suncrest Project. Given the current status of the proceeding, and the time expected to be required for testimony, evidentiary hearings and briefing, it does not appear likely that NEET West will have a CPCN until late 2017 or early 2018. That end date marks the earliest time that NEET West could initiate eminent domain proceedings to require SDG&E to convey a portion of the site. NEET West understands that eminent domain proceedings in California can take a significant amount of time to complete. The combined effect would be to add years to the development timeline just for obtaining site control. This added delay would further delay the in-service date for the Suncrest Project years beyond the CAISO's required in-service date, with resulting additional substantial delays to the ability of the project to meet the policy-driven need for reactive power to facilitate achievement of the RPS as required by the CAISO. That substantial delay alone is sufficient to demonstrate that the Suncrest Substation Alternative is infeasible. (*Bowman v. City of Petaluma, supra*, 185 Cal.App.3d at p. 1084.)

**c) The Suncrest Substation Alternative is economically infeasible because it adds substantial expense that is not included in the cost cap under the APSA.**

The DEIR also completely ignores information in the PEA that shows the following:

- NEET West proposed its project subject to binding cost estimate and cost containment measures that the CAISO found to result in a “materially lower and more robust binding cost cap” with “more robust limitations on potential cost increases” than SDG&E’s proposed project that would be constructed within the Suncrest Substation. NEET West did not provide a binding cost estimate for a project constructed inside the substation and therefore could not feasibly construct the project within the Suncrest Substation for the estimate provided in the its proposal to the CAISO. “Although SDG&E provided an estimate for a project inside the substation, based on its estimate to the CAISO, SDG&E could do so only for a materially higher cost and with a less robust binding cost cap than NEET West is providing.” “NEET West’s project provides significant economic benefits in the form of a lower cost estimate and more robust cost controls.”

(PEA, Chapter 5, Section 5.2.6.4 at 5-31.)

The DEIR ignores this evidence and inexplicably concludes that “the Suncrest Substation Alternative would be a cost-effective alternative that does not require construction of the proposed mile-long 230 kV underground transmission line.” (DEIR, Section 20.2.4 at 20-8:26-28.) The DEIR does not explain the conclusion that this would be cost effective. NEET West has not undertaken a design for installing the SVC Facility in the Suncrest Substation, so it is purely speculative to conclude that such an alternative would be cost effective compared to the Proposed Project. SDG&E’s proposal for a similar facility located inside the Suncrest Substation footprint had a materially higher cost than the NEET West proposal, suggesting that locating the SVC Facility inside the substation footprint is not as cost effective as the Proposed Project.

The DEIR’s conclusion on cost-effectiveness also is contrary to the evidence showing that the Suncrest Substation Alternative would add expenses that are not accounted for in the cost cap specified in the APSA. As demonstrated in the PEA, NEET West’s binding cost estimate specified in the APSA does not include the cost of acquiring additional land rights from SDG&E. It also does not include the cost of



acquiring site control through eminent domain proceedings. The cost of acquiring rights through eminent domain likely would be substantial, and that added expense alone would add significant cost if the Suncrest Substation Alternative were selected.

Accordingly, the Suncrest Substation Alternative would render it impractical for NEET West to proceed with the Suncrest Project in an economically viable manner. This supports a finding of economic or financial infeasibility under the standard adopted in *Citizens of Goleta Valley v. Board of Supervisors* (1988) 97 Cal.App.3d 1167, 1181, affd. (1990) 52 Cal.3d 553; see also *Association of Irrigated Residents v. Madera* (2003) 107 Cal. App. 4th 1383, 1403 (“Economic viability is a factor that may be considered when assessing the feasibility of alternatives. . . Here, the lender’s letter and the economic analysis constitute substantial evidence supporting the board’s finding that the reduced-herd-size alternative is not economically feasible; elimination of all profit and loss of construction financing adequately proves that the reduced-herd-size alternative is not viable.”); *SPRAWLDEF v. San Francisco Bay Conservation & Dev. Commission* (2014) 226 Cal.App.4th 905, 912 and 918 (affirming a decision to approve a landfill to be located in a marsh because all of the alternative sites were “too costly on a per unit basis [and] any alternative costing 50 percent more per ton than the proposed expansion was not economically practical,” and confirming that this conclusion was supported because the definition of feasible under CEQA “embraces the concept of reasonableness.”)

**d) The Suncrest Substation Alternative should be rejected because it changes the basic nature of the Suncrest Project.**

Moving the SVC Facility into the Suncrest Substation footprint also would change the basic nature of the Suncrest Project. An EIR need not consider alternatives that would change the basic nature of the project. (See *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, supra*, 18 Cal.App.4th at p. 745.) As explained above, the Suncrest Project was selected by the CAISO through its competitive solicitation process conducted in accordance with the requirements of the CAISO Tariff and FERC Order 1000. Those legal requirements do not allow the CAISO to solicit competitive bids for, or NEET West to compete for or be awarded, a project that can only be constructed entirely within the substation footprint owned by the incumbent utility in order to meet the technical specifications. The Suncrest Substation Alternative thus changes the basic nature of the Suncrest Project from a competitively sourced project into a project that would not have been eligible for competitive solicitation in the first place. Under the precedent cited above, an EIR is not required to analyze such an alternative, and the DEIR should be modified to recognize both the fundamental nature of the Suncrest Project and the resulting limitation on consideration of the Suncrest Substation Alternative.<sup>5</sup>

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<sup>5</sup> The Suncrest Substation Alternative also changes the jurisdictional status of the project under the Commission’s General Order 131-D. Moving the SVC Facility into the substation footprint would eliminate the jurisdictional basis for requiring NEET West to obtain a CPCN for the Suncrest Project because it eliminates the approximately one-mile 230 kV transmission line that would connect the SVC Facility to the Suncrest Substation. Under the Suncrest Substation Alternative, which is conceived as an upgrade to existing substation facilities, a CPCN would no longer be required. And under General Order 131-D it appears that no discretionary approval would be required, because the project would merely be an upgrade to existing substation facilities.



**B. The DEIR Incorrectly Identifies Certain Potentially Significant Environmental Effects Based Upon Conclusions Rather Than Evidence in the Record**

CEQA is clear that the identification of potentially significant effects must be based upon substantial evidence. (Pub. Resources Code § 21082.2; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15064.) However, as detailed in the Table of Detailed Comments submitted concurrently herewith, the DEIR fails to meet this standard in its identification of several allegedly significant effects. Indeed, the DEIR ignores substantial evidence presented by NEET West in its PEA demonstrating that these effects are less than significant, and instead, concludes that these effects will be potentially significant based solely upon conjecture.

First, the DEIR identifies potentially significant effects to Hermes copper butterfly. (DEIR, Section 7.4.3 at 7-44 through 7-45). This determination is based upon only the fact that the species is known to have been identified within 500 feet of the Proposed Project boundary. However, the record is clear – including in the record for the Sunrise Powerlink Project – that there is no suitable habitat for the species within the Proposed Project boundary. In turn, because there is no evidence of potential effects on the species, there is no basis for the DEIR to identify the need for Mitigation Measures BIO-8 or BIO-9 and these mitigation measures should therefore be deleted. (DEIR, Section 7.4.3 at 7-44 through 7-45.)<sup>6</sup>

Second, the DEIR identifies potentially significant effects on Scenic Vistas (Impact AES-1) based upon a conclusion that the “Proposed Project would be marginally visible” from I-8 for approximately 0.25 miles. (DEIR, Section 4.4.3 at 4-12.) However, the visual analysis and simulations performed for the Proposed Project and included in the PEA show that it would be virtually impossible to see the Proposed Project’s lighting masts from I-8 because intervening topography shields the Proposed Project site. Thus, there is substantial evidence supporting the conclusion of no potentially significant effect, and the DEIR should be revised to eliminate the unsupported assertion of Impact AES-1.

Third, the DEIR requires a mitigation measure for NO<sub>x</sub> emissions, not based upon substantial evidence in the record of a potentially significant effect, but rather, based solely upon conjecture that a “margin of safety” is required to keep NO<sub>x</sub> emissions less than significant. (DEIR, Section 6.4.3, AQ-1 at 6-16.) This once again fails to meet CEQA evidentiary requirements. In fact, evidence in the record establishes that Proposed Project’s NO<sub>x</sub> emissions will be below the stated CEQA significance criteria even under a worst-case (*i.e.*, maximum emissions) scenario. Indeed, the DEIR itself acknowledges that there likely is an over-estimation for the Proposed Project’s use of off-road trucks. (DEIR, Section 6.4.3 at 6-15.) CEQA requires mitigation only to address potentially significant effects, which again, must be based upon substantial evidence. Here, not one of these CEQA requirements has been met in the DEIR, and thus AQ-1 should be eliminated. Further, NEET West revised the CalEEMod air quality inputs to include use of an existing graveled road to access the intermediate pole on the overhead segment. This approximately 30-foot-wide by 150-foot-long road would be the only additional unpaved road used during construction, operation, and maintenance of the Proposed Project. Even with the addition of this unpaved road, the CalEEMod results indicate compliance with all San Diego County pollutant thresholds,

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<sup>6</sup> Regarding BIO-8, NEET West’s consultant SWCA performed surveys for Hermes copper butterfly surveys in 2015 to confirm absence of the species and suitable habitat. There is no reasonable basis to require duplication of these surveys.

including NOx. This substantiates NEET West’s argument to eliminate AQ-1. An Updated Air Quality Memorandum (January 2017) is provided as Attachment B to the Table of Detailed Comments that is submitted with this letter.

Fourth, the DEIR identifies Mitigation Measure BIO-4 to allegedly “compensate” for impacts to special-status plant species. (DEIR, Section 7.4.3 at 7-42.) However, there is no evidence cited in the DEIR establishing potentially significant effects on special-status species. In fact, NEET West performed focused plant species during the appropriate blooming period for species with the potential to occur in the Proposed Project area, and found no such species to be present within the Proposed Project footprint. Additionally, NEET West included APM BIO-4 in the PEA to protect special-status plant populations, such as the felt-leaved monardella, that are present adjacent to the Proposed Project footprint. The text of this APM specified as follows:

***APM BIO-4: Delineating Sensitive Plant Populations.***

*The Proposed Project does not directly impact any sensitive plant populations, although felt-leaved monardella has been observed immediately adjacent to the Proposed Project. To ensure proper protection of these plants on or near the Proposed Project alignment, a qualified botanist will flag plant populations to be protected and avoided prior to Proposed Project implementation. The flagging will remain in place until work has ceased and the potential for impacts to the populations has abated. Flagging and demarcation will be updated as necessary. The botanist will also map populations using GPS/GNSS to update Proposed Project designs for avoidance in the field. If any sensitive plants are encountered during construction, buffers will be established for avoidance. A minimum buffer of 50 feet will be established from an identified special-status plant species unless consultation with a qualified biologist determines a reduced buffer would suffice to avoid impacts to the species. If plants cannot be avoided, seed will be collected and used during revegetation efforts following construction.*

This APM was not carried forward into the DEIR and was replaced with Mitigation Measure BIO-3 which calls for similar protections to special-status plants. The fact that the felt-leaved monardella is an annual species and therefore the populations can move year to year, is speculative and should not serve as the basis for additional mitigation and the compensation required under Mitigation Measure BIO-4.

Fifth, the DEIR ignores the APM included in the PEA for construction monitoring by an archeologist and Native American monitor during initial ground disturbing activities. This was specified as APM CUL-2. (PEA, Section 4.5.6.2 at 4.5-21.) The DEIR, however, identifies Mitigation Measure CR-1, which would require full-time monitoring of all ground disturbing activities. (DEIR, Section 8.4.3 at 8-19.) The DEIR asserts that this mitigation is required due to the claimed “presence of archaeological sites ... within the Proposed Project SVC” which alleged makes the area “sensitive for archaeological resources.” (*Id.*) However, this conclusion is not based on any actual evidence, and disregards the substantial evidence that is in the record indicating that there is little potential for effects on

archaeological resources. Surveys done in support of the PEA found that it is unlikely that intact subsurface archaeological deposits are present in the Proposed Project area, given that, *inter alia*, the site has already been disturbed down to a depth of 24 inches, and the site has been surveyed three times for cultural resources since 2008. Specifically, the Cultural Resources Technical Report (November 2015), attached as Attachment E to the Table of Detailed Comments included with this letter, concludes on pages 66-67 that it is unlikely that previously unidentified cultural resources, including intact buried archaeological deposits, occur within the Proposed Project Area:

*The results of SWCA's survey and research indicate that it is unlikely that intact, subsurface archaeological deposits are present in the Proposed Project Area. As noted above, the SVC location has been disturbed down to a depth of 24 inches as part of recent construction activities. The majority of the proposed underground transmission line will be located within the paved roadbed of Bell Bluff Truck Trail. Further, with the exception of the SVC site, most of the Proposed Project Area is located on slopes where the depositional context is not conducive to sediment accumulation, reducing the possibility of encountering buried deposits. Prehistoric sites in the vicinity of the project consist primarily of lithic and ground stone scatters, bedrock milling stations, or a combination of these. These types of sites typically do not have buried deposits. Of the three sites in the project vicinity that have been evaluated, two (CA-SDI-20166 and CA-SDI-20239) did not have a buried component, and the buried component of the remaining site (CA-SDI-19036) was not significant.*

*Further, the survey coverage of the Proposed Project Area is excellent, and it is likely that any resources present have been identified. In addition to the current study, three cultural resources studies have been conducted within the Proposed Project Area since 2008: these include two cultural resources surveys (Garcia-Herbst et. al 2010 and Noah 2008) and one construction monitoring project (Kyle and Williams 2013).*

*Based on background research, survey results, and the highly disturbed context of sediments in the Proposed Project Area, it is unlikely that previously unidentified cultural resources, including intact buried archaeological deposits, occur within the Proposed Project Area. Proposed construction activities will be limited to the Proposed Project Area, and potential blasting will be limited to excavations for the underground electrical transmission line in areas wherein standard excavation methods are not feasible, such as within bedrock, which is highly unlikely to contain archaeological deposits. NEET West anticipates that majority of the site can be excavated by conventional methods, although a minimal amount of hydraulic hammering or blasting may be required. Further, the potential blasting will occur after other sediments have been mechanically removed through standard excavation methods*

*and will be minimized to localize disturbance. Thus, proposed construction activities, including potential blasting, are unlikely to disturb previously unidentified cultural resources.*

As a result, there is no substantial evidence to warrant full-time archaeological and/or Native American monitoring during all ground disturbing activities.

Sixth, the DEIR identifies Mitigation Measure NOI-1, purportedly to address potentially significant construction noise impacts, yet the DEIR identifies such potentially significant effects only by ignoring the noise methodology used in the PEA and selecting an alternative methodology (the FTA's Transit Noise and Vibration Impact Assessment) without any explanation. (DEIR, Section 15.5.3 at 15-12.) Moreover, use of this methodology includes an assumption that the two loudest pieces of construction equipment (*i.e.*, rock drill and scraper) would operate simultaneously at the same location under full power for one hour. (DEIR, Section 15.5.3 at 15-11.) There is absolutely no evidence or even suggestion, however, that these two pieces of equipment would operate at the same time in the same location. In fact, the evidence is to the contrary; a rock drill would only be used to break up rock deposits before a scraper could then be used. Similarly, blasting, which is also mentioned in this mitigation, would only be used after a rock drill or scraper proved ineffective in achieving required excavation depths. (*Id.*) Thus, once again, the DEIR reaches a conclusion of a potentially significant effect, and identifies a mitigation measure for such claimed effect, absent evidence in the record supporting its conclusion.

The conclusions in the DEIR of potentially significant effects for the environmental parameters discussed above lack any substantial evidence, and thus the DEIR must be revised to characterize impacts to these parameters as less than significant. In turn, the mitigation measures identified for these effects should be eliminated from the final EIR because they are not needed under CEQA.

### **C. The DEIR Improperly Transforms APMs Into Mitigation Required To Reduce Significant Impacts.**

NEET West carefully designed the Proposed Project to incorporate measures that reduce potential project impacts below the threshold of significance. These measures were identified as APMs and expressly incorporated into the project design. The APMs were intended to be part of the Proposed Project.

The DEIR ignores the APMs and fails to include the APMs in its discussion of potential impacts, except in the areas of Air Quality and Greenhouse Gas Emissions. Indeed, Table 2-3 of the DEIR demonstrates that only a handful of APMs set forth in the PEA were properly treated in the DEIR as part of the Proposed Project's design. (DEIR, Section 2.6 at 2-27.) Because the description of the Proposed Project includes the APMs, the DEIR's analysis of potentially significant environmental effects of the Proposed Project should have started with the Proposed Project as described. The DEIR's analysis effectively re-wrote the project description to remove the APMs as part of the project design, and to impose them as mitigation measures identified through the EIR process. This fails to comply with Section 15126.4(a)(1)(A) of the CEQA Guidelines, which requires EIRs to distinguish and recognize mitigation proposed by the applicant to be included in the project. Specifically, Section 15126.4(a)(1)(A)

requires that: “The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project.” (Cal. Code Regs., tit. 14, §15126.4(a)(1)(A).)

Ignoring the APMs in the project description also is contrary to case law recognizing that when mitigation is built into the project’s design, the lead agency may presume that the project will be implemented consistent with the project description. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4<sup>th</sup> 1018, 1035-36; *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4<sup>th</sup> 316, 337.)

At this time, NEET West has reviewed the mitigation measures that have been derived from APMs, and is amenable to adhering to these mitigation measures. (Please see the table comparing APMs and mitigation measures submitted as Attachment A to the Table of Detailed Comments that is provided with this letter.) However, to the extent that the Suncrest Substation Alternative is justified to address potential effects of the Proposed Project for which the DEIR failed to include APMs as part of the underlying project description, NEET West objects to such analysis on the bases discussed above.

### III. CONCLUSION

NEET West appreciates the opportunity to submit these comments and requests that the DEIR be modified as described herein. NEET West is particularly troubled by the DEIR’s failure to recognize the fundamental project purpose and project objectives for the Suncrest Project, and the DEIR’s improper selection of the Suncrest Substation Alternative as a potentially feasible alternative without recognizing or analyzing substantial evidence demonstrating infeasibility. To correct those problems and the others identified above, NEET West requests that the DEIR be modified as follows:

- Include and address the underlying fundamental project purpose and NEET West’s project objectives, as specified in the Application and PEA, and as restated in full in Section II(A)(1) above. The EIR must consider the requirements of the APSA and the FERC-ordered competitive solicitation process, including in its alternatives analysis.
- Revise the analysis of the Suncrest Substation Alternative and its potential feasibility, and recognize and consider the substantial evidence in the record showing that the Suncrest Substation Alternative is legally and factually infeasible. That evidence supports a decision to eliminate the Suncrest Substation Alternative and select the Proposed Project as the environmentally superior alternative after the No Project Alternative.
- Modify the conclusions in the DEIR regarding potentially significant effects for the environmental parameters discussed in Section II(B) above to characterize impacts to these parameters as less than significant. Eliminate the mitigation measures identified for these effects from the final EIR because they are not required under CEQA.



- Modify the DEIR to include the additional detailed comments and edits specified in the attached Table of Detailed Comments and Attachments, and the attached Table of Editorial Comments.

Very truly yours,



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**Enclosed: Additional Documents Provided With This Letter:**<sup>7</sup>

**Table of Detailed Comments and Attachments:**

- Attachment A: Applicant-Proposed Measures versus DEIR Mitigation Measures Comparison Table
- Attachment B: Updated Air Quality Memorandum (January 2017)
- Attachment C: Fire Protection Plan (December 2016)
- Attachment D: Biological Resources Technical Report (November 2015)
- Attachment E: Cultural Resources Technical Report (November 2015)

**Table of Editorial Comments**

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<sup>7</sup> The Attachments to the Table of Detailed Comments are provided in the two paper copies and in electronic format in the Archival-Quality DVD submitted with each paper copy. Due to file size, the Attachments are not being submitted via electronic mail.