

**STATE OF CALIFORNIA**  
**Energy Resources Conservation and**  
**Development Commission**

**DOCKET**

**11-CAI-01**

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In the Matter of:

Complaint and Investigation

CALICO SOLAR PROJECT  
Calico Solar, LLC

Docket No. 11-CAI-01

**HEARING STATEMENT OF K ROAD CALICO SOLAR LLC**

September 28, 2011

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**STATE OF CALIFORNIA**

**Energy Resources Conservation and  
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In the Matter of:

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CALICO SOLAR PROJECT  
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Docket No. 11-CAI-01

**HEARING STATEMENT OF K ROAD CALICO SOLAR LLC**

K Road Calico Solar LLC<sup>1</sup> (“Calico”) provides this Hearing Statement pursuant to the directions provided in the Committee’s Notice of Hearing on BNSF Railway Company’s Verified Complaint to Revoke Certification (“Notice of Hearing”), filed on September 19, 2011.

**I. INTRODUCTION**

In this proceeding, two intervenors, who attempted, but failed, in the original certification proceedings to stop the Calico Solar Project (“the Project”) are now seeking to revoke the Project’s certification based on unsupported and unsupportable allegations that the SES failure to find financing for the SunCatchers shows that Calico lied to the Energy Commission. These allegations are entirely inconsistent with the reality of project planning, permitting and financing and are wholly without merit. The allegation that

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<sup>1</sup> Calico Solar, LLC changed its name to K Road Calico Solar LLC as evidenced in the Calico Name Change docketed in this matter on August 31, 2011.

Calico spent millions of dollars and thousands of person hours on designing and permitting a sham project is simply ludicrous.

The facts in this case are simple. Its consequences, however, are potentially monumental. The complainants in this proceeding are asking the Commission to engage in a Monday-morning-quarterbacking review of what a proponent of a proposed power plant knew, may have known, should have known, or could have guessed about the ultimate commercial availability of a particular component of the plant that was being manufactured by another company. If such an investigation reveals that certain expectations or plans related to that component did not come to fruition, the complainants here propose that the Commission should punish the applicant by revoking certification. This request is not only to our knowledge unprecedented, but it would also have the chilling effect of requiring developers of all power plant projects to ensure that financing is fully in place and to receive guarantees of every technology component prior to seeking certification from the Commission. This is a result that is not only inconsistent with the Warren-Alquist Act and the Commission regulations, but would also be wholly against the public's interest.

Calico spent tens of millions of dollars to design, plan for, and entitle the Project. On December 1, 2010, the Commission approved and licensed the Project, which would generate energy produced by solar collectors called "SunCatchers." Stirling Energy Systems ("SES"), the manufacturer of SunCatchers, was affected by the economic turbulence that hurt many businesses, including other solar projects, over the past three years. In this economic climate, SES had difficulty obtaining financing for the production of SunCatchers. Similar economic troubles befell Tessera Solar North America, Calico's parent company and on December 24, 2010, Tessera Solar sold Calico to K Road Sun LLC.

In March 2011, Calico, under new management, submitted a Petition to Amend, which proposed to add photovoltaic (“PV”) technology in the Project and to delay the deployment of the SunCatcher portion of the Project to the second phase of development. Calico’s decision provided additional time to SES to acquire financing and produce SunCatchers for the Project.

Both projects and technology, particularly innovative technology, typically require financing. It should be no surprise to anyone that financing is difficult to obtain in uncertain economic times. Developers propose, schedule, and permit projects contingent upon acquisition of sufficient financing. Often financing is contingent on receipt of applicable permits. Financing can also be contingent on obtaining a power purchase agreement, on market conditions, and for many other reasons. Thus, financing is frequently not obtained until after a project receives its regulatory approvals. Accordingly, the Commission, appropriately, does not condition its approvals upon project developers and technology manufacturers having sufficient financing in place at the time of approval, nor does the Commission require a demonstration that the proposed technology is readily available.

There is no provision in either the Warren-Alquist Act or in the Commission’s Regulations that requires project financing or the current availability of a proposed technology. Indeed, there is nothing in the statute or regulations to indicate that financing or technology availability is material to the Commission’s siting decisions. This is not remarkable given that what concerns the Commission is that energy projects which are built:

- are in compliance with all applicable laws, ordinances and regulations;

- avoid, minimize and mitigate impacts to the extent feasible; and
- are in the public interest.

Under the Warren-Alquist Act, the Commission *does* consider power plant reliability. In considering reliability, the Commission does not examine whether financing for a power plant or a proposed technology is reliable such that there is a guarantee that a power plant will be built on the applicant's proposed schedule; rather, the Commission evaluates whether a power plant will potentially adversely impact the grid following construction. As explained in the Calico Solar Power Project Commission Decision, for purposes of considering power plant reliability, "the Commission considers a project is acceptable [sic] if it does not degrade the reliability of the utility system to which it is connected." Calico Decision at VI, C, 1.

Calico did not, nor was not required to, make any statements affirming the existence of adequate financing for the Project or manufacture of SunCatchers; likewise, Calico did not affirm that SunCatchers were commercially available at the time of certification. Throughout the permitting process, Calico made statements about its expectations, its proposed project design, and its anticipated schedules for construction and operation. None of these statements were inconsistent with the facts. None of the statements quoted by BNSF and Patrick Jackson in the various documents and correspondence filed in this matter are inconsistent with the facts. BNSF and Mr. Jackson have failed to state a prima facie case in their allegations that Calico made a material false statement to the Commission.

BNSF and Mr. Jackson are asking that the Commission find that representations about future plans for projects and schedules, all of which are invariably tied to future financing, be actionable statements if they turn out to not be accurate predications. Such a

ruling could require the Commission to make inquiries into the finances of particular projects as well as the available supply chain of different technologies and project components. Such an inquiry would not only be outside the ambit of the Commission's regulatory regime but would also have a chilling effect on applicants seeking to promote innovative and potentially highly beneficial energy projects in California.

Based on the number of projects that have been approved by this Commission but for one reason or another not constructed, the effect of this ruling would be significant and investigating such claims would result in a colossal waste of time and resources. It would represent a 180 degree turn in the way that power plants are permitted in California. Select examples of facilities that were certified by the Commission, but not built due to financing, technology, or contract issues include:

- (Solar Millennium) Blythe Solar Power Project (09-AFC-6)
- San Joaquin Valley Energy Center (01-AFC-22C)
- Calpine East Altamont Energy Power Plant Project (01-AFC-4C)
- Tesla Power Project (01-AFC-21)
- RAMCO Chula Vista II Peaker Generation Station (01-EP-3)

## **II. APPLICABLE LEGAL STANDARDS**

Because this proceeding involves a complaint brought by BNSF and joined by Mr. Jackson, they bear the burden of proving their allegations. Under Public Resources Code Section 25534(a), the Commission “may amend the conditions of, or revoke the certification for, any facility for . . . [a]ny material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant.”

In order to make a prima facie case, BNSF or Mr. Jackson must point to: (1) a particular *statement* made by Calico to the Commission; (2) that was *false*; and (3) that was *material* to the Commission’s decision to certify the Project. Neither BNSF nor Mr. Jackson has, or can, meet this standard. To date, both BNSF and Mr. Jackson have simply pulled out true statements from the record in the Calico certification proceeding which explained Calico’s proposed Project and anticipated schedule. They then attempt to call into question the veracity of *implications* that might be drawn from these statements by pointing to statements made outside these proceedings which simply document the financial reality of constructing large scale energy projects. Such allegations fall far short of the regulatory requirements and do not raise even an inference that Calico made any false statement..

The Public Resources Code, the Commission’s implementing regulations, and the legislative history of the Warren-Alquist Act are all silent as to the meaning of the salient words in Section 25534(a). Accordingly, this discussion includes the legal standards for determining what constitutes a “statement” and what makes a statement “false,” as well as “the applicable legal standard for determining materiality in siting proceedings before the Commission” as directed to by the Notice of Hearing.

**A. What is a “Statement”?**

“Statement” as used in Public Resources Code Section 25534(a)(1) should be interpreted narrowly to include only an oral assertion, a written assertion, or nonverbal conduct intended as an assertion. Notably, the Committee should recognize that

“statement” excludes omissions, as well actions not intended as assertions.<sup>2</sup> Although both BNSF and Mr. Jackson’s claims are founded entirely upon the allegation that Calico made false statement about the availability and viability of the SunCatcher at the time of certification, neither have pointed to a single verbal assertion, an oral assertion or an example of nonverbal conduct intended as an assertion by Calico to the Commission regarding this subject.

Had the Legislature intended to include within Section 25534(a) actions other than actual oral or written representations, it easily could have done so. Indeed, numerous other state laws exist which have prohibit the making of false *representations* or *omissions* (in addition to statements) to an agency, thereby providing broader prohibitions against misrepresentation. *See, e.g.*, Cal. Bus. & Prof. Code § 475(a)(1) (providing for the denial of a business license for “making a false statement of material fact, or knowingly omitting to state a material fact”); Cal. Fin. Code § 4836 (prohibiting making “any untrue statement of material fact in any application or report filed with the [Commissioner of Financial Institutions]. . . or willfully omit[ting] to state . . . any material fact which is required to be stated therein”); Cal. Health & Safety Code § 1265.5(a)(4) (prohibiting applicants wishing to establish intermediate care facilities from making “false statements, representations, or omissions”); Cal. Welf. & Inst. Code § 5404(b)(3) (providing that an applicant for a license for a mental health facility that “willfully makes false statements, representations, or

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<sup>2</sup> This understanding of “statement” matches that provided in the California Evidence Code, which defines “statement” to include: (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.” Cal. Evid. Code § 225.; *see also*, Black’s Law Dictionary, Ninth Edition (2009) at 1539 (defining statement in the context of evidence as either “A verbal assertion or nonverbal conduct intended as an assertion” or “A formal and exact presentation of facts.”

omissions” may be subject to administrative action). Because the provision in Public Resources Code Section 25534(a)(1) is limited only to material false *statements*, the Committee should interpret the term narrowly as exclusive of representations and omissions not amounting to intentional assertions. Thus, general impressions or implications which could be drawn from evidence presented by an applicant do not rise to the level of “statement” for purposes of Section 25534(a)(1).

Even if “material false statement” of Section 25534(a)(1) was interpreted to include omissions, BNSF and Mr. Jackson have not pointed to any specific material false omission Calico allegedly made during the siting proceedings.

**B. What Makes a Statement “False”?**

Truth or falsity implies the existence of a present or past *fact*. Neither opinions, business judgments, nor speculations regarding future events can ever be “true” or “false.” Even if the Committee interprets BNSF’s or Mr. Jackson’s vague allegations so as to include a particular “statement” of Calico regarding the availability or financing of SunCatchers, any such “statement” would be in the nature of an expectation, a business judgment, an opinion, or a speculation with regard to future events and cannot therefore be “false.”

It is well established under California law that representations of opinion generally, and predictions about future events specifically, that cannot be proven true or false at the time the statements are made are ordinarily not actionable “false statements” as a matter of law. *See Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells*; 86 Cal.App.4th 303, 308, 309-10 (2000) (“The law is quite clear that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action .

. . . It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.”) (internal quotations omitted); *see also Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm’n*, 366 F.3d 692, 698 (9th Cir. 2004) (“predictions as to future events are ordinarily non-actionable expressions of opinion under basic principles of the tort of fraudulent misrepresentation”) (internal citations omitted). As explained by the Fifth Circuit, a business prediction regarding future events is *neither* true nor false at the time it is made. *See Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp.*, 784 F.2d 674, 679 (5th Cir. 1986). In contrast to a business prediction, “[a] statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification.” *Id.* Because Calico has made no statement of fact with regard to SunCatcher availability that could, at the time it was made, be validated by empirical evidence, Calico made no “false statement” under Section 25534(a)(1).

Assuming again that BNSF and Mr. Jackson have identified a statement that Calico made regarding SunCatcher availability or financing, neither BNSF nor Mr. Jackson have explained, or can explain, how plans, expectations and opinions about the future could be false at the time they were made. Additionally, there would be no need for the Commission to have relied upon any such statements, since financing is not a prerequisite for approval of a project.

**C. When is a False Statement “Material”?**

Although multiple standards of materiality exist in different contexts involving claims of misrepresentation or perjury, in this context “materiality” should be determined for the Commission’s purposes in terms of relationship to the statutory and regulatory

requirements governing power plant certification application and review, namely Public Resources Code Section 25520 et seq. and 20 Cal. Code Regs. Section 1741 et seq. In other words, a statement made in the certification process is material if it relates either to something that an applicant must include in its Application for Certification, or to a finding that the Commission must make upon granting certification.<sup>3</sup> Nothing in the relevant statutory or regulatory provisions requires consideration of an applicant's ability to acquire or to finance a particular generating technology. Therefore, neither BNSF nor Mr. Jackson have alleged any false statement that could be deemed "material."

Defining materiality in relationship to the siting requirements in the Public Resources Code and the Commission's regulations aligns well with standards for materiality used in other legal contexts. Several situations involving misrepresentation define materiality in terms of either objective or subjective reliance on false information. A statement is material under the objective reliance standard if it is of such a nature to likely affect the decision-making of a party receiving it. For example, whether a false statement or claim under either the Federal and California Claims Act is material depends on "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." *City of Pomona v. Superior Court*, 89 Cal. App. 4th 793, 802 (Ct. App. 2001), citing *U.S. ex rel. Berge v. Trustees of Univ. of Ala.*, 104 F.3d 1453,

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<sup>3</sup> A very similar standard of "materiality" is used in the context of misrepresentation in applications for insurance. As explained by the California Supreme Court, under the Insurance Code, "Materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." *Thompson v. Occidental Life Ins. Co.*, 9 Cal. 3d 904, 916 (1973); see also *Williamson & Vollmer Engineering, Inc. v. Sequoia Ins. Co.* 64 Cal. App. 3d 261, 271-72 (Ct. App. 1976) (finding that the materiality of the insured's representation was established by the terms of the policy and the fact that the question was asked on the application).

1459 (4th Cir. 1997), cert. den. 522 U.S. 916. Likewise, a material false statement amounting to perjury in federal court is one “hav[ing] a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed.” *United States v. Wells*, 519 U.S. 482, 489-90 (1997) (internal citations omitted). A statement is material under the subjective reliance standard if the party receiving the statement actually relied upon it in making a decision or taking some action. For example, in the context of a false advertising claim in California, a representation is material if without the representation, the party receiving the representation would not have acted as it did. *See, e.g., True v. American Honda Motor Co., Inc.*, 520 F. Supp. 2d 1175 (C.D. Cal. 2007); *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658 (C.D. Cal. 2009). Here, the Commission is guided in its decision-making by the requirements of the Public Resources Code and the agency’s own regulations. Accordingly, if a statement does not relate to the specified application requirements or review criteria, the Commission presumably does not rely upon it in making its decision whether to grant or deny an application and it should not be considered “material.”

In other contexts, materiality is determined in terms of whether a reasonable person would consider the representation important to the instant transaction or situation. *See, e.g., Weinstat v. Dentsply Intern., Inc.* 180 Cal. App. 4th 1213, 1222-23 (Ct. App. 2010) (the question of materiality under the California Unfair Competition law is whether a reasonable person would attach importance to the representation or omission in deciding how to proceed in the particular transaction); *People v. Hedgecock*, 51 Cal. 3d 395, 406-07 (1990) (finding, as a matter of first impression, that the reliance-based definition of materiality was not appropriate in the context of the disclosure provisions of the Political Reform Act, and

instead adopting a reasonable-person standard); *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 157 (Ct. App. 2010) (a misrepresentation to the public under the Consumers Legal Remedies Act is deemed material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 977 (1997) (providing same standard for common law misrepresentation). Because licensing decisions are made according to the standards of the Public Resources Code and the Commission's regulations, a statement could be deemed objectively "important" and therefore "material" if it relates to one of those standards. Because no "statement" allegedly made by Calico with regard to the commercial availability or financing for SunCatchers relates to those standards, it should not be deemed "material" pursuant to Public Resources Code Section 25534(a)(1).

Unless BNSF or Mr. Jackson identifies a specific material false statement made by Calico to the Commission, Calico is at a loss as to how to respond to the allegations in this Complaint and Investigation proceeding.

### **III. WITNESSES**

Due to the fact that neither BNSF nor Mr. Jackson have attempted to make a prima facie case, failing to identify even a single false statement that Calico made to the Commission, Calico will not sponsor any witness. However, Calico reserves the right to call rebuttal witnesses.

**IV. EXHIBITS**

Due to the fact that neither BNSF nor Mr. Jackson have made a prima facie case for their allegations of material false statements, Calico does not intend to offer any exhibits into evidence. However, Calico reserves the right to offer rebuttal evidence.

**V. PROPOSALS**

Pursuant to Section 1235 of the Commission Regulations, Calico proposes that the Committee prepare a proposed decision on or before Monday, October 24, 2011. Pursuant to Section 1236, Calico proposes that the Commission make a final decision within 21 days of the Committee's proposed decision.

**VI. COMMENTS ON INFORMAL HEARING PROCEDURES**

Calico has no objection to the Committee's use of informal hearing procedures as specified in the Notice of Hearing.

Date: September 28, 2011

Respectfully submitted,



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Ella Foley Gannon  
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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
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**FOR THE CALICO SOLAR PROJECT  
COMPLAINT AND INVESTIGATION**

**Docket Nos. 11-CAI-01  
(Revised 9/15/11)**

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**DECLARATION OF SERVICE**

I, Marsha Curtis, declare that on September 28, 2011, I served and filed copies of the attached **Hearing Statement of K Road Calico Solar LLC**, dated September 28, 2011. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[[www.energy.ca.gov/sitingcases/calicosolar/investigate/index.html](http://www.energy.ca.gov/sitingcases/calicosolar/investigate/index.html)]**.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

**(Check all that Apply)**

**For service to all other parties:**

- Served electronically to all e-mail addresses on the Proof of Service list;
- Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "e-mail preferred."

**AND**

**For filing with the Docket Unit at the Energy Commission:**

- by sending an original paper copy and one electronic copy, mailed with the U.S. Postal Service with first-class postage thereon fully prepaid and e-mailed respectively, to the address below (preferred method); **OR**
- by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first-class postage thereon fully prepaid, as follows:

**CALIFORNIA ENERGY COMMISSION – DOCKET UNIT**  
Attn: Docket No. 11-CAI-01  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

**OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:**

- Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid:

California Energy Commission  
Michael J. Levy, Chief Counsel  
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Sacramento, CA 95814  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

  
\_\_\_\_\_