STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	Docket No. 08-AFC-13C
The Application for Certification for the Calico Solar Project Amendment	

SIERRA CLUB REPLY BRIEF RE JURISDICTION OF THE CALIFORNIA ENERGY COMISSION

June 3, 2011

Gloria D. Smith
Sierra Club
85 Second Street, Second floor
San Francisco, CA 94105
(415) 977-5532 Voice
(415) 977-5739 Facsimile
gloria.smith@sierraclub.org

Travis Ritchie
Sierra Club
85 Second Street, Second floor
San Francisco, CA 94105
(415) 977-5727 Voice
(415) 977-5739 Facsimile
travis.ritchie@sierraclub.org

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: The Application for Certification for the Calico Solar Project Amendment	Docket No. 08-AFC-13C

SIERRA CLUB REPLY BRIEF RE JURISDICTION OF THE CALIFORNIA ENERGY COMISSION

Sierra Club continues to object to the California Energy Commission's ("Commission") exercise of jurisdiction over Calico Solar, LLC's (the "Applicant") request for permission to develop a solar photovoltaic ("PV") facility. Sierra Club alerted the Commission to its lack of jurisdiction in this proceeding over six weeks ago by filing a Motion to Dismiss the Petition to Amend on April 20, 2011. Several parties filed briefs on May 23, 2011 addressing the issue of the Commission's jurisdiction as it relates to the Applicant's newly proposed solar PV project. As discussed in more detail below, those briefs do not articulate any legal foundation upon which the Commission can assert jurisdiction over the PV Facility.

I. STAFF AND THE APPLICANT FAIL TO ADDRESS THE THRESHOLD MATTER THAT THE WARREN-ALQUIST ACT EXPRESSLY EXCLUDED SOLAR PV FACILITIES FROM THE COMMISSION'S JURISDICTION

The Warren-Alquist Act authorized the Commission to exert extraordinary authority over the permitting of thermal powerplants that are greater than 50 MW. (Pub. Resources Code § 25500 *et seq.*) However, the limits of this extraordinary authority are clear. "'Thermal powerplant' does not include any wind, hydroelectric, or solar

photovoltaic electrical generating facility." (Pub. Resources Code § 25120.) The Commission cannot enlarge its jurisdiction to include matters outside of this legislatively circumscribed sphere. 61 Ops.Cal.Atty.Gen. 127 (1978).[1] Neither Staff nor the Applicant addressed this plain and unambiguous statutory language.

The Modified Project is a solar PV facility. Phase 1 of the Modified Project is 100% PV. There is no component of Phase 1 that will result in the generation of electricity from thermal technology. Phase 2 of the Modified Project is speculative at best. The Applicant admitted that SunCatchers are not commercially available in the near future,[2] there is no transmission capacity or power purchase agreement for Phase 2, and the Applicant has no binding agreement with the manufacturer of SunCathers to purchase any solar thermal components.[3] Whatever labels Staff or the Applicant attempt to attach to the Modified Project, it is presently solar PV facility, and the Warren-Alquist Act expressly excluded such a facility from the Commission's jurisdiction.

II. THE COMMISSION DOES NOT HAVE UNLIMITED JURISDICTION OVER A "SITE"

The Applicant argued that the Modified Project is within the Commission's jurisdiction because the Applicant proposed to locate it on the same footprint as the previously approved project site. The Commission would set a disturbing principle if it followed the Applicant's strained logic. The Applicant's rationale would allow any

---

[1] Neither can the Commission subsume environmental review of a solar PV project into its certified regulatory program under the guise that it is reviewing the "whole of the project." The Commission must conform to "those provisions of CEQA from which it has not been specifically exempted by the Legislature." *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1228. The Legislature specifically exempted the siting of **thermal** powerplants from portions of CEQA by approving the Warren-Alquist Act's certified regulatory procedure. This exemption from CEQA does not extend to a solar PV facility. The PV facility proposed by the Applicant falls under the normal CEQA provisions that require, among other things, a Draft EIR, public review and comment of the Draft EIR, and a Final EIR that is subject to judicial review in California Superior Court. CEQA Guidelines §§ 15080 *et seq.*; Pub. Resources Code § 21167.

2 Hearing Transcript, April 20, 2011, p.24:4-9.

[3] Exhibit A to BNSF Railway Company's Brief Regarding Jurisdiction and Baseline, at p. 83, lines 14-22.

company to perform a "bait and switch" with the Commission. The Original Project's footprint is 6,215 acres. The Applicant asserts that it can request authority to build **anything** it wants to within this footprint as long as it includes at least 50 MWs of thermal generation.[4] Taken to the extreme, the Applicant could have proposed a golf course or housing development at the Calico site, as long as it included a plan to build a 50 MW gas generator somewhere on the site. This absurd result cannot be the intended purpose of the Warren-Alquist Act.

Even more disturbing than this extreme example is the very real possibility that speculators will waste the State's resources and abuse the Commission's process to lock-down prime renewable energy locations upon which they never intend to construct the originally proposed facilities. The Commission and intervenors expended considerable resources to carefully consider and evaluate the Original Project. Allowing a developer to obtain a license and then immediately change the project undermines the Commission's entire process. Such an action is even more egregious where, as here, the Applicant switches to a technology that the Commission clearly does not have jurisdiction to authorize. Allowing the Applicant to proceed in this manner would send a dangerous signal to other solar project developers that could lead to speculative applications for renewable energy sites. If the Applicant wishes to build a different project with solar PV technology, it should withdraw its existing license and re-file a new application with the appropriate state and federal agencies.

III. THE MODIFIED PROJECT IS NOT A "HYBRID FACILITY"

Staff attempted to find Commission jurisdiction by arguing that the Modified Project is a new type of "hybrid" facility that the Warren-Alquist Act never envisioned.[5]

---

4 "What the Warren-Alquist Act does *not* say is that *only* a 'thermal powerplant' or 'electric transmission line' may be constructed on a 'site.'" Calico Solar LLC's Brief re Jurisdiction of Energy Resources Conservation and Development Commission, p. 4 (emphasis in original).

5 Staff's Response to Committee Briefing Order, p. 4.

The Modified Project is not a hybrid facility. At best, it is a solar PV facility that may one day be co-located with a solar thermal facility. These facilities, should the latter materialize, would rely on completely different types of technology that do not interact with each other. They do not even produce the same type of current. PV modules convert solar energy into direct current (DC) whereas SunCatchers use heat to create mechanical energy that produces alternating current (AC).

Staff based its argument that the PV and thermal facilities constitute a single integrated "hybrid" plant on the premise that the PV modules and SunCatchers will, "operate from a single control room, utilize the same transmission interconnection system, access a common water system and road network, and depend upon the same construction and operation personnel."[6] The proposed sharing of infrastructure does not create a single facility. An applicant could similarly construct a large steel mill with a 50 MW gas generator on the site. Both the steel mill and the gas generator could use the same control room, the same parking lot, the same water supply, the same employees, and so on, but the Warren-Alquist Act clearly would not allow the Commission to exert jurisdiction over the steel mill. The only difference between this hypothetical case and the present scenario is that the co-located facility would produce power rather than steel. This difference, however, does not alter the determination of jurisdiction because it is indisputable that the Warren-Alquist Act expressly excluded solar PV facilities from the Commission's jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Commission dismiss the Petition to Amend.

[6] *Id.* at p. 3.

Dated: June 3, 2011

Respectfully submitted,

/s/ *Travis Ritchie*

Travis Ritchie
Sierra Club
85 Second Street, Second floor
San Francisco, CA 94105
(415) 977-5727 Voice
(415) 977-5739 Facsimile
travis.ritchie@sierraclub.org

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

FOR THE CALICO SOLAR PROJECT AMENDMENT

Docket No. 08-AFC-13C
PROOF OF SERVICE
(Revised 5/25/2011)

APPLICANT
Calico Solar, LLC
Daniel J. O'Shea
Managing Director
2600 10th Street, Suite 635
Berkeley, CA 94710
dano@kroadpower.com

CONSULTANT
URS Corporation
Angela Leiba
AFC Project Manager
4225 Executive Square, #1600
La Jolla, CA 92037
angela_leiba@URSCorp.com

APPLICANT'S COUNSEL
Allan J. Thompson
Attorney at Law
21 C Orinda Way #314
Orinda, CA 94563
allanori@comcast.net

Bingham McCutchen, LLP
Ella Foley Gannon, Partner
Three Embarcadero Center
San Francisco, CA 94111
e-mail service preferred
ella.gannon@bingham.com

INTERVENORS
Society for the Conservation of Bighorn Sheep
Bob Burke, Gary Thomas
1980 East Main St., #50
Barstow, CA 92311
e-mail service preferred
cameracoordinator@sheepsociety.com

*indicates change

Basin and Range Watch
Laura Cunningham,
Kevin Emmerich
P.O. Box 70
Beatty, NV 89003
e-mail service preferred
atomictoadranch@netzero.net

California Unions for Reliable Energy (CURE)
c/o: Tanya A. Gulesserian,
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard,
Ste. 1000
South San Francisco, CA 94080
e-mail service preferred
tgulesserian@adamsbroadwell.com

Patrick C. Jackson
600 Darwood Avenue
San Dimas, CA 91773
e-mail service preferred
ochsjack@earthlink.net

Sierra Club
Gloria D. Smith,
Travis Ritchie
85 Second Street, Second floor
San Francisco, CA 94105
e-mail service preferred
gloria.smith@sierraclub.org
travis.ritchie@sierraclub.org

Newberry Community Service District
c/o Wayne W. Weierbach
P.O. Box 206
Newberry Springs, CA 92365
e-mail service preferred
newberryCSD@gmail.com

Defenders of Wildlife
Kim Delfino, California Program Director
1303 J Street, Suite 270
Sacramento, California 95814
e-mail service preferred
kdelfino@defenders.org

Defenders of Wildlife
Jeff Aardahl, California Representative
46600 Old State Highway, Unit 13
Gualala, California 95445
e-mail service preferred
jaardahl@defenders.org

BNSF Railroad
Cynthia Lea Burch,
Helen B. Kim,
Anne Alexander
Katten Muchin Rosenman LLP
2029 Century Park East, Suite 2700
Los Angeles, CA 90067-3012
cynthia.burch@kattenlaw.com
helen.kim@kattenlaw.com
anne.alexander@kattenlaw.com

*County of San Bernardino
Jean-Rene Basle, County Counsel
Bart W. Brizzee, Principal Assistant County Counsel
385 N. Arrowhead Avenue, 4th Fl.
San Bernardino, CA 92415-0140
bbrizzee@cc.sbcounty.gov

INTERESTED
AGENCIES/ENTITIES/PERSONS
California ISO
e-recipient@caiso.com

BLM – Nevada State Office
Jim Stobaugh
P.O. Box 12000
Reno, NV 89520
jim_stobaugh@blm.gov

Bureau of Land Management
Rich Rotte, Project Manager
Barstow Field Office
2601 Barstow Road
Barstow, CA 92311
richard_rotte@blm.gov

California Department of
Fish & Game
Becky Jones
36431 41st Street East
Palmdale, CA 93552
dfgpalm@adelphia.net

County of San Bernardino
Ruth E. Stringer,
County Counsel
385 N. Arrowhead Avenue, 4th Floor
San Bernardino, CA 92415

BNSF Railroad
Steven A. Lamb
Katten Muchin Rosenman LLP
2029 Century Park East, Suite 2700
Los Angeles, CA 90067-3012
steven.lamb@kattenlaw.com

ENERGY COMMISSION
KAREN DOUGLAS
Commissioner and Presiding Member
kldougla@energy.state.ca.us

Galen Lemei
Adviser to Commissioner Douglas
glemei@energy.state.ca.us

ROBERT B. WEISENMILLER
Chairman and Associate Member
rweisenm@energy.state.ca.us

Eileen Allen
Adviser to Chairman Weisenmiller
eallen@energy.state.ca.us

Kourtney Vaccaro
Hearing Officer
kvaccaro@energy.state.ca.us

Kerry Willis
Staff Counsel
e-mail service preferred
kwillis@energy.state.ca.us

Stephen Adams
Co-Staff Counsel
e-mail service preferred
sadams@energy.state.ca.us

Craig Hoffman
Project Manager
e-mail service preferred
choffman@energy.state.ca.us

Jennifer Jennings
Public Adviser
e-mail service preferred
publicadviser@energy.state.ca.us

*indicates change

DECLARATION OF SERVICE

I, Jeff Speir, declare that on June 3, 2011, I served by U.S. mail and filed copies of the attached Reply Re Jurisdiction, dated June 3, 2011. The original document, filed with the Docket Unit, 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/compliance/index.html].

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

FOR SERVICE TO ALL OTHER PARTIES:

X sent electronically to all email addresses on the Proof of Service list;

____ by personal delivery;

X by delivering on this date, for mailing with the United States 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 "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

X delivering an original paper copy and sending one electronic copy by e-mail to the address below (***preferred method***);

OR

____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-13C
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury 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.

/s/ Jeff Speir

*indicates change