

STATE OF CALIFORNIA

Energy Resources Conservation And Development Commission

DOCKET

08-AFC-13C

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In the Matter of:
The Petition to Amend relating to
the Calico Solar Power Project

Docket No. 08-AFC-13

PETITION TO INTERVENE BY BNSF RAILWAY COMPANY

May 12, 2011

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Pursuant to sections 1207 and 1712 of Title 20 of the California Code of Regulations, BNSF Railway Company ("BNSF") hereby respectfully petitions to intervene in this proceeding. Section 1207(a) provides that:

Any person may file with the Docket Unit or the presiding committee member a petition to intervene in any proceeding. The petition shall set forth the grounds for the intervention, the position and interest of the petitioner in the proceeding, the extent to which the petitioner desires to participate in the proceedings, and the name, address, and telephone number of the petitioner.

Section 1207(c) provides that the "presiding member may grant leave to intervene to any petitioner to the extent he deems reasonable and relevant...."

BNSF is one of two Class 1 railroads operating in California. BNSF's mainline, which is traversed by as many as 80 trains per day, carries interstate commerce from the ports of Los Angeles and Long Beach to U.S. Midwestern, Southwestern, and Eastern markets. The Commission certified the Calico Solar Project through its Final Decision, dated December 1, 2010. The approved Calico Solar Project (the "Approved Project") covers approximately 4604 acres and abuts portions of the BNSF mainline, which has operated at this location for over 100 years.

The Approved Project must employ over 26,000 SunCatchers to generate up to 663.5 MW of electric energy. The Final Decision contained a multitude of

Conditions of Certification to the Approved Project, many of which, including Soil&Water 1-15, have never been met.

On March 18, 2011, Applicant Calico Solar, LLC ("Calico Solar") filed a Petition to Amend ("Petition to Amend") the Final Decision and modify the Approved Project to eliminate tens of thousands of SunCatchers and replace them with tens of thousands of as-yet unidentified single-axis tracker photovoltaic panels. Additionally, the Petition to Amend seeks to modify in some instances and eliminate in other instances scores of Conditions of Certification mandated by the Final Decision. BNSF has significant concerns the proposed modifications to the construction and operation of the Approved Project in the Petition to Amend will adversely impact BNSF employees and operations, including imposing unacceptable safety risks to BNSF employees and operations and the surrounding environs.

In order that BNSF's concerns be heard, at the April 20, 2011, Informational Hearing, the CEC encouraged BNSF to intervene in this proceeding. As a threshold matter, the CEC has asked three questions to which BNSF would respond in the course of intervention: (1) whether the CEC has jurisdiction over the proposed amendment; (2) whether there should be evidentiary hearings in the amendment proceedings; and (3) what is the proper baseline for evaluation of the impacts of the proposed modifications.

Among the concerns and adverse impacts BNSF has identified are: (1) adverse impacts, including health impacts, from glare and glint on rail

employees, agents and contractors, and rail operations, including, but not limited to, a train crew's ability to accurately see and respond to signals; (2) an increase in storm-water runoff or sediment transport from the Project site and onto the BNSF Right-of-Way; (3) transmission line safety and nuisance (induction); (4) hazardous materials management (hydrogen and chemicals associated with the PV technology); (5) hydrology (subsidence); (6) continued access to the BNSF Right-of-Way for emergencies; and (7) sufficient funding in the LLC to construct, maintain and decommission the utility-scale solar project.

In addition, BNSF has the following concerns:

First, in its Petition to Amend, Calico Solar seeks to make significant changes to the Approved Project without providing an explanation for the necessity of the proposed modifications, or evidence supporting their position that such modifications should be permitted. This is not permissible. The power plant siting regulations (Title 20 California Code of Regulations, Division 2, "Siting Regulations"), which govern the CEC's approval of thermal energy projects, require a petition to amend to include a discussion of the necessity for the proposed modifications. 20 Cal.Code Regs. 1769(B). Where the modification is based on information that was known by the petitioner during the certification proceeding, the petition to amend must also include an explanation why the issue was not raised at that time. 20 Cal.Code Regs. 1769(C). Where the modification is based on new information that changes or undermines the assumptions, rationale, findings, or other bases of the final decision, the petition to amend must

include an explanation of why the change should be permitted. 20 Cal.Code Regs. 1769(D).

Second, Calico Solar seeks to delete or modify numerous Conditions of Certification which the Commission ordered after hearing extensive testimony by experts in the prior evidentiary hearings. In many instances, the Petition to Amend provides no new evidence for the reconsideration or elimination of those requirements, contrary to the requirements of the Siting Regulations. Agencies, intervenors and interested parties should not be put to the time and cost to again rehear these issues, in particular when the Applicant has failed to satisfy the basic requirements of the Siting Regulations.

Third, Calico Solar has not presented evidence supporting why prior findings of both the CEC and BLM should be overlooked to permit the development of a project utilizing an entirely different technology, without submitting a new application for certification. The prior CEC Staff Assessment, the BLM's DEIS/FEIS and the prior CEC and BLM's decisions evaluated the use of this site for a photovoltaic technology project as an alternative to a SunCatcher project and rejected it. The Petition to Amend ignores the prior analysis, seeking to characterize the substitution of photovoltaic technology at the site as a mere change in technology for the Approved Project. Contrary to the requirements of the Siting Regulations, they have provided no evidence to support their position. Summary conclusions will not suffice. Environmental impacts previously

identified in the CEC and BLM analyses of the photovoltaic technology project remain of significant concern to BNSF.

Fourth, in the Petition to Amend, Calico Solar requests the CEC change the construction of the grade separation over the BNSF Right-of-Way from Phase 1 to Phase 2, despite acknowledging that it will have need to access its operations north of the Right-of-Way during Phase 1 and will increase that usage once it commences build out of Phase 2. BNSF opposes this request and the shifting of the risks, costs and interference with its business operations to BNSF. Again, BNSF sees no basis in the Petition to Amend for the consideration of this request. Furthermore, if Calico Solar believes there is new evidence that the existing public access routes will not suffice until they have constructed the proposed grade-separation, then BNSF requests that the CEC analyze the inclusion of an interchange and an access road as originally proposed by Calico Solar. While the CEC does not have the authority to order BNSF to provide access to Calico Solar within the BNSF Right-of-Way, the CEC does have the authority and the responsibility to require Calico Solar to identify both an access route to and points of ingress to and egress from its proposed project location during both construction and operation. As discussed, in its 2008 application Calico Solar proposed to build a construction road which could also have ultimately served as an emergency vehicle access route. Without an explanation or analysis in the record, this road was eliminated as a project element. What did result from the prior proceedings, however, was a determination by the CEC that landowners

north of the BNSF Right-of-Way, which includes the portion of the Calico Solar project north of the BNSF Right-of-Way, have access to their properties. Calico Solar should not be permitted to shift the risks and costs associated with its project's operations to adjacent landowners and operations. Calico Solar is creating, through its choice of the lands it has made the subject of its application, the need to access BLM properties both north and south of the existing BNSF Right-of-Way.

Fifth, studies, including those required in Soil&Water Conditions 1-15 and the proposed Glare/Glint Study, need to be performed before the requested grade separation can be sited. Until September of 2010, Calico Solar had nearly 600 acres of its project dedicated to the control of storm water and sediment runoff onto, across and off of its site onto adjacent landowners. In September 2010, Calico Solar proposed to eliminate these controls. The Petition to Amend is predicated on the same assumption. The CEC, on December 1, 2010, conditioned its certification on the performance of the studies in Soil&Water 1-15 and the implementation of the mitigation measures. To date, Calico Solar has not commenced any of these studies and proposes yet again to obtain certification without first performing these studies. In light of the CEC's and the BLM's rejection of the solar project alternative which utilized photovoltaic technology and the failure of the Calico Solar to commence performance of these studies, BNSF believes it is incumbent on Calico Solar to conduct these studies and identify all project elements, prior to the Staff Assessment. The CEC, BLM, other

agencies, intervenors and interested parties need a project, not a process, on which to evaluate and comment. There is no legal or rational basis to proceed on the processing of this Petition to Amend in the absence of these studies, their conclusions and their recommendations. In the FEIS, the BLM concluded “the utility-scale solar PV technology was eliminated from detailed analysis because it would require the entire site to be graded. This would result in a greater effect on biological and cultural resources than the Calico Solar Project, which would not require grading the entire site. It would therefore have greater environmental effects than the Proposed Action.” In light of this finding, and absent the studies required by the Conditions of Certification, there is simply no factual basis to conclude the Amended Project will have no adverse impact on the environment or that it can be mitigated. Local hydrology will be impacted by Calico Solar's proposed grading changes. Prior studies have found the Calico Solar Project footprint will drain onto the BNSF Right-of-Way from both the north and the south. The increase in soil disturbance associated with the construction, operation, maintenance and decommissioning of a utility-scale photovoltaic technology solar facility could have significant adverse impacts on the BNSF Right-of-Way.

Sixth, BNSF is concerned that Calico Solar has adequate funds to construct, operate, and ultimately decommission any project approved by the Commission that modifies the Approved Project. Calico Solar is a single purpose entity whose sole function is to construct, operate, and ultimately decommission any project approved by the Commission. On December 24, 2010, Tessera Solar North

America sold Calico Solar to K Road Sun LLC because it determined that “SunCatchers would not be commercially viable in the near term.” [Petition to Amend at page 3-1, §3.1.] The Petition to Amend does not demonstrate that K Road Sun LLC has sufficient capital to construct, operate, and ultimately decommission¹ any project approved by the Commission. Nor is there any information at present in the Petition to Amend to support the requisite findings that: (1) photovoltaic panels are presently commercially available in adequate numbers and at a commercially viable price; and (2) SunCatchers will be commercially available within the timelines called for in the Petition to Amend and SunCatchers will be available at a commercially viable price.

BNSF will continue to identify areas of concern as more information becomes available.

BNSF supports the development of clean energy, and supports the Commission’s objectives of bringing these important projects online. It is critically important, however, that proper studies be conducted to ensure that the proposed Project be sited and mitigated to avoid any adverse impacts to the BNSF right-of-way.

For the foregoing reasons, BNSF respectfully requests that the Commission grant its petition to intervene in this proceeding, and allow BNSF to participate as

¹ The Commission should ensure that Calico Solar has and maintains sufficient funds to maintain and decommission any approved Project – regardless of whether that occurs at the life-cycle end of project or earlier because of a lack of commercial viability. BNSF suggests that the Project owner be required to create a trust containing such funds, the trust potentially being funded by the revenue stream from a Power Purchase Agreement, but in any event at all times being sufficient to cover the cost of maintaining and decommissioning any and all phases of the project then on site.

a party in all phases of the proceeding. Filings should be served on BNSF through counsel: Cynthia L. Burch, Helen B. Kim and Anne Alexander at Katten Muchin Rosenman LLP, 2029 Century Park East, Los Angeles, California 90067. Telephone: 310.788.4400.

Dated: May 12, 2011

Respectfully submitted,

/s/

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**FOR THE CALICO SOLAR PROJECT
AMENDMENT**

**Docket No. 08-AFC-13C
PROOF OF SERVICE
(Revised 5/9/2011)**

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DECLARATION OF SERVICE

I, Anne Alexander, declare that on 5/12/2011 I served by U.S. mail and filed copies of the attached BNSF's Petition to Intervene, dated, 5/12/2011. 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:

- sent electronically to all email addresses on the Proof of Service list;
- by personal delivery;
- 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:

- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

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

CALIFORNIA ENERGY COMMISSION

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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.

