

Decision 12-02-040 February 16, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Calico Solar, LLC,

Complainant,

vs.

BNSF Railway Company,

Defendant.

Case 10-10-015
(Filed October 21, 2010)

California Energy Commission DOCKETED 08-AFC-13C
TN # 66495 AUG 06 2012

ORDER MODIFYING DECISION (D.) 11-10-025
AND DENYING REHEARING, AS MODIFIED

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Decision (D.) 11-10-025 (or “Decision”) filed by BNSF Railway Company (“BNSF”).

On October 21, 2010, Tessera Solar LLC (“Tessera”) filed a Complaint against BNSF on behalf of its then subsidiary, Calico Solar LLP (“Calico”). The Complaint sought immediate temporary use of BNSF’s private at-grade rail crossing at Hector Station consistent with Public Utilities Code Section 7537.¹ On

¹ All subsequent Section references are to the Public Utilities Code unless otherwise stated. Section 7537 provides in pertinent part:

The owner of any lands along or through which any railroad is constructed or maintained, may have such...private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner....The commission shall have the authority to determine the necessity for any crossing....

(Pub. Util. Code, § 7537.)

December 3, 2010, the Complaint was amended to add Calico as a complainant, and to also request approval of a new permanent grade-separated bridge crossing at a different location.²

Both crossing approvals were sought in connection with development of the Calico Solar Project (“Project”), a utility scale solar power plant to be located in San Bernardino County, California. The Project is subject to licensing by the California Energy Commission (“CEC”),³ and was originally approved by the CEC in December 2010.⁴ CEC was the Lead Agency for the Project under CEQA.⁵ In March, 2011, Calico amended the Project proposal, approval of which is still pending before the CEC.⁶

Decision 11-10-025 (or “Decision”) approved both crossing requests. BNSF filed a timely application for rehearing alleging: (1) the Commission did not have authority to approve Calico’s use of BNSF’s Hector Station property; and (2) the Commission failed to fulfill its duty under CEQA to conduct environmental review. A response was filed by Calico.

We have carefully considered the arguments raised in the application for rehearing, and are of the opinion that good cause has been established to modify the Decision. In particular, we will modify the Decision to: (1) clarify the CEQA exemption relied on in approving Calico’s use of the Hector Station crossing; and (2) deny approval

² The Commission has authority over the construction and location of new rail crossings, including authority to require grade-separated crossings, where practicable, under Sections 1201 and 1202.

³ Pub. Res. Code, § 25540.6; CEQA Guidelines Section 15251(a) & (j). (Cal. Code of Regs., tit. 14, § 15251, subds. (a) & (j).)

⁴ CEC Decision approving the Calico Solar Project, dated December 2010 (“CEC 2010 Decision”), at p. 2, located at: <http://www.energy.ca.gov/2010publications/CEC-800-2010-012/CEC-800-2010-012.CMF.PDF>. As proposed, the Project would provide 663.5 megawatts (“MW”) of generation to be produced by solar collectors called “Suncatchers.” (See Exhibit (“Exh.”) 128, Attachment O, at p. 1-1 [Calico Petition to Amend, dated March 18, 2011].)

⁵ See CEC 2010 Decision, at p. 2. The Bureau of Land Management (“BLM”) was the Lead Agency for the Project under the National Environmental Protection Act (“NEPA”).

⁶ Exh. 128, Attachment O, at p. 1-1 [Calico Petition to Amend, dated March 18, 2011]. Project amendments would, among other things, allow up to 563 MW of total generation to be provided by photovoltaic (“PV”) technology.

of the new grade-separated crossing until we have fulfilled our obligation as a Responsible Agency under CEQA. In all other respects, we deny the application for rehearing of D.11-10-025, as modified herein, because no legal error has been shown.

II. DISCUSSION

A. Commission Authority to Approve Use of the Hector Station Crossing

BNSF contends that the Commission had no authority to approve Calico's use of the Hector Station rail crossing. It doesn't dispute our authority over private crossings under Section 7537. Instead, BNSF argues Hector Station is a "maintenance-of-way crossing" which is outside the Commission's Section 7537 jurisdiction.⁷ (Rhg. App., at pp. 8-10, citing *Siemens v. Union Pacific Railway Company* ("*Siemens*") [D.02-10-038] (2002) __ Cal.P.U.C.3d __.)

Siemens is not analogous. That case involved a complaint by homeowners against Union Pacific Railroad Company ("UP"). However, unlike the complaint here, the homeowners were not seeking use of the railroad's crossing. They wanted UP's crossing removed.⁸ We merely said that ordering removal of UP's own private crossing on its own rail property was beyond the scope of Section 7537 since it only addresses matters concerning requests for purposes of "ingress to or egress from" adjacent properties of a landowner.⁹

BNSF also contends the Decision resulted in an unlawful taking or control of its station property. BNSF argues that such interfere with its rail operations is

⁷ BNSF also states that Hector Station crossing is not subject to our jurisdiction under Sections 1201 and 1202. (Rhg. App., at p. 9.) However, nothing in the Decision purported to rely on Sections 1201 or 1202 for authority over the private crossing. Those statutes apply to the Commission's exclusive jurisdiction over public railroad crossings. (See Pub. Util. Code, §§ 1201 & 1202. See also e.g., *Los Angeles Railway Corp. v. Los Angeles* (1940) 16 Cal.2d 779, 785; *City of San Mateo v. Railroad Commission of California* (1937) 9 Cal.2d 1, 5-6; *City of Union City v. Southern Pacific Company* (1968) 261 Cal.App.2d 277, 279.)

⁸ *Siemens*, *supra*, D.02-10-038s, at p. 2 (slip op.).

⁹ *Id.* at pp. 3-4 (slip op.).

preempted by federal law under the Interstate Commerce Commission Termination Act (“Act”).¹⁰ (Rhig. App., at pp. 10-13, relying on 49 U.S.C.A. § 10501(b) and *Union Pacific Railroad Company v. Chicago Transit Authority* (“*Union Pacific*”) (7th Cir. 2011) 647 F.3d 675; *City of Lincoln v. Surface Transportation Board* (“*City of Lincoln*”) (8th Cir. 2005) 414 F.3d 858.)¹¹

We are aware that the Act confers exclusive jurisdiction over the regulation of rail transportation to the Surface Transportation Board (“Board”). However, actions such as the one challenged here (i.e., resolution of a crossing dispute), are within State authority as long as the State’s action would not unreasonably interfere with rail operations/transportation, or cause an undue safety risk.¹²

In resolving the instant dispute, we held that the temporary immediate use of the Hector Station crossing was reasonably necessary for pre-construction purposes. However, only consistent with Calico’s historical use of the crossing.¹³ Despite BNSF’s continued claims of interference, no evidence showed that the authorized level of use will actually interfere with BNSF’s current or future rail operations.¹⁴

¹⁰ Article III, Section 3.5 of the California Constitution acts, among other things, to prevent an administrative agency from refusing to implement a statute on federal preemption grounds, unless an appellate court has first determined that such implementation is prohibited by federal law or regulations. (See e.g., *Burlington Northern and Santa Fe Railway Company et al. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887-888.) No appellate determination has found that Commission resolution of private rail crossing disputes (per Section 7537) is prohibited by federal law. Accordingly, it was lawful for the Commission to render a determination regarding Calico’s request.

¹¹ BNSF also cites *City of Auburn v. The United States Government and The Surface Transportation Board* (“*City of Auburn*”) (9th Cir. 1998) 154 F.3d 1025. (Rhig. App., at p. 11.) However, it does so only for the purpose of illustrating general federal preemption principles.

¹² See e.g., *Franks Investment Company LLC v. Union Pacific Railroad Company* (“*Franks Investment Co.*”) (2010) 593 F.3d 404, 412-413; *New Orleans & Gulf Railway Company v. Barrois* (“*Barrois*”) (2008) 533 F.3d 321, 332-333.

¹³ D.11-10-025, at pp. 16-19, 21, 29 [Conclusion of Law Numbers 8, 9 & 10], pp. 31-32 [Ordering Paragraph Number 3], & Attachment A. See also e.g., Exh. 3, Attachments 1 & 2 [Past agreements re: Calico use of the Hector Station crossing]; Exh. 102, at pp. 5-7 [Description of Calico past use of the Hector Station crossing].

¹⁴ In addition, we imposed a number of conditions and procedures to prevent any disruption of BNSF’s operations and to avoid any undue safety risk. (See D.11-10-025, at pp. 21, 31-32 [Ordering Paragraph Number 3] [Conditions and procedures to limit the frequency and type of use, and require safety measures such as training, daylight only use, advance notice of use, and the use of flag persons.])

Finally, the cases BNSF relies on are not persuasive. They both involve condemnation of rail property, which was never an issue in this proceeding. Further, BNSF established no such condemnation or interference with rail operations here.¹⁵

B. CEQA Review

1. Temporary Use of the Hector Station Crossing

BNSF contends the Decision erred in finding that the Hector Station crossing was exempt from CEQA review. BNSF argues CEQA was required because Calico's "proposed private crossing" is part of a larger project (i.e, the Calico Solar Project). Accordingly, BNSF argues the Commission must fulfill its duty under CEQA to analyze the environmental impacts of Calico's proposal.¹⁶ (Rhg. App., at pp. 14-15, relying on *In the Matter of the Application of the San Francisco Bay Area Rapid Transit District for an Order Authorizing Construction of an Elevated Railroad Station Crossing Above BART Tracks and the Tracks of the Peninsula Corridor Joint Powers Board, Centered on Mileposts 13.62* ("In re SF BART") [D.03-06-063] (2003) __ Cal.P.U.C.3d __, 2003 Cal. PUC LEXIS 357.) This argument is without merit.

BNSF's reliance on *In re SF BART* is flawed. That case involved construction of a new rail crossing as part of a larger BART extension project.¹⁷ *In re SF BART* would be relevant if Calico had proposed construction of a new crossing at Hector Station. However, it did not. It only requested use of an existing crossing, and that was

¹⁵ BNSF also argues the Decision ran counter to law by allowing Calico to use a maintenance road in BNSF's right-of-way. (Rhg. App., at pp. 12-13, citing *Soo Line Railroad Company v. City of Saint Paul* ("Soo Line") (D. Minn. 2010) 2010 U.S. Dist LEXIS 59971; and *H.A. & L.D. Holland Company v. Northern Pacific Railway Company* ("Northern Pac. Rwy.") (Wash. N.D. 1913) 208 F. 598.) We disagree. As already discussed, this proceeding involved temporary joint use of a crossing, with no disturbance to BNSF's rail operations. Nothing in these cases would prohibit the use of a maintenance road under such circumstances.

¹⁶ BNSF also argues we must act as the Lead Agency for CEQA (Rhg. App., at p. 15, relying on CEQA Guideline Section 15253(c)(2).) That is incorrect. The CEC is the Lead Agency for CEQA review of the Calico Solar Project. Thus, even if Commission CEQA review were required, the Commission would be a Responsible Agency. (See e.g., CEQA Guideline Section 15381.)

¹⁷ *In re SF BART, supra*, [D.03-06-063] at pp. 1-2 (slip op.).

all the Decision granted. BNSF offers no authority to establish that CEQA review is required in these circumstances.¹⁸

Nevertheless, our review suggests the facts are more suited to the use of different CEQA exemption than were used in D.11-10-025. In particular, the facts support a conclusion that use of Hector Station is not a “project” subject to environmental review under CEQA. Guideline 15378(a) defines a “project” as an action which:

...has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment...

(Cal. Code of Regs., tit. 14, § 15378(a).)

As discussed above, there is nothing to suggest there will be any direct or reasonably foreseeable indirect change in the environment from Calico’s use of Hector Station. In addition, Guideline 15061 provides:

(b) A project is exempt from CEQA if:

(3) ...Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

(Cal. Code of Regs., tit. 14, § 15061(b)(3).)¹⁹

Thus, even if the use were a project, it would still be exempt since nothing in the record for this proceeding showed Calico’s use will have any significant effect on the environment. Therefore, we will modify D.11-10-025 accordingly as set forth in the Ordering Paragraphs of this Order.

2. Approval of a New Permanent Grade-Separated Bridge Crossing at Milepost 710.8

BNSF contends the Decision erred because it failed to conduct the requisite environmental review prior to approving the new grade-separated bridge crossing. Like its argument above, BNSF contends the crossing is part of the larger Calico Solar Project,

¹⁸ There is also no evidence to show that use of the Hector Station crossing was part of the larger Calico Solar Project review.

¹⁹ See also *Apartment Association of Greater Los Angeles v. City of Los Angeles* (2nd Dist. 2001) 90 Cal.App.4th 1162, 1171; *No Oil Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.

thus the Commission must fulfill its legal obligations under CEQA to analyze the relevant environmental impacts. (Rhg. App., at pp. 14-15, citing *In Re SF BART*, *supra*, [D.03-06-063].) In this instance we agree.

Construction of the new grade-separated bridge crossing is component of the Calico Solar Project, and it is subject to environmental review requirements.²⁰ Thus, *In re SF BART* is relevant and establishes that in such circumstances we must act as a Responsible Agency under CEQA before approving the crossing. Accordingly, we will modify the Decision to deny approval of the new bridge crossing at this time. Calico may resubmit its request as an application for approval after the CEC has completed its environmental review.

III. CONCLUSION

For the reasons stated above, D.11-10-025 is modified as discussed herein and specified below. The application for rehearing of D.11-10-025, as modified, is denied because no legal error has been shown.

THEREFORE, IT IS ORDERED that:

D.11-10-025 is modified as follows:

a. The Summary Section on page 1 is modified to read:

“This decision orders BNSF Railway Company to allow Calico Solar, LLC (Calico) immediate access to the Hector Station crossing for pre-construction activity related to the development of the Calico Solar Project. Approval of the new grade-separated bridge crossing is denied until the Commission has fulfilled its obligation as a Responsible Agency under the California Environmental Quality Act (CEQA). Calico may resubmit its request for approval of the new grade separated crossing after the Lead Agency has completed its final environmental review.”

b. The title of Section 7.3 on page 14 is modified to read:

²⁰ See CEC 2010 Decision, at p. 18 [Project Description], Finding of Fact Number 4. See also e.g., Exh. 128, Attachment O [Calico Petition to Amend], at p. 2-2, & Figures 2-1 & 2-1.

“Use of the Hector Station Crossing is Exempt From CEQA Review”

- c. The text of Section 7.3 on pages 14-15 is deleted and replaced as follows:

“BNSF argues the Commission may not authorize a railroad crossing pursuant to Section 7537 without first conducting an environmental review pursuant to CEQA. That is incorrect.

CEQA requires environmental review for actions deemed to be “projects.” (CEQA Guideline Section 15378(a).) In this instance, Calico’s use of the Hector Station involves no new construction or modification. In addition, the approved temporary use is consistent with Calico’s past use of the crossing. Thus, the use is not a “project” since it will not have a direct physical change or reasonably foreseeable indirect change on the environment. Even if it were a “project”, BNSF did not establish that Calico’s use will have any significant environmental effect. Thus, it is also exempt under CEQA Guideline Section 15061(b)(3).

- d. Modify the title of Section 8 on page 21, to replace the words “At-Grade” with “Grade-Separated.”
- e. The last paragraph on page 22 is deleted and replaced as follows:

“In cases such as this, where the Commission is asked to approve construction of a new rail crossing, the Commission typically acts as a Responsible Agency under CEQA (CEQA Guideline Section 15096.) That statute requires the Commission to consider the environmental document prepared by the Lead Agency before rendering any determination. (CEQA Guideline Section 15096(a) & (f).)

The new grade-separated crossing is part of the Calico Solar Project, which is subject to review by the CEC as the Lead Agency for CEQA. However, as already noted the CEC has not completed its environmental review of the proposed Project amendments. Therefore, there is no final environmental document for the Commission to consider at this time and any immediate approval would be premature. For that reason, we must deny approval of the new grade-separated crossing until we can fulfill our duty as a

Responsible Agency under CEQA. Calico may resubmit its request for approval as an application, along with the CEC's final environmental document, after the CEC has completed its environmental review."

- f. Section 8.2 on page 23, addressing the cost and timeframe for completing the new grade-separated crossing is deleted.
- g. Finding of Fact Number 17 on page 27 is modified to read:

"The CEC approved the original Calico Solar Project, including the new grade-separated bridge crossing at milepost 710.8, in December 2010.
- h. Finding of Fact Number 18 on page 28 is modified to read:

"In March 2011, Calico filed its Petition to Amend the Calico Solar Project with the CEC."
- i. Finding of Fact Number 19 on page 28 is modified to read:

"The CEC has not completed its Lead Agency CEQA review of the amended Calico Solar Project."
- j. Finding of Fact Number 20 on page 28 is modified to read:

"CEQA Guideline Section 15096 establishes requirements for Responsible Agencies under CEQA."
- k. Conclusion of Law Number 6 on page 28 is modified to read:

"Calico's use of the Hector Station crossing is exempt from CEQA review pursuant to CEQA Guideline Section 15378(a) and/or Section 15061(b)(3)."
- l. Conclusion of Law Number 12 on page 30 is modified to read:

"Pursuant to CEQA Guideline Section 15096 the Commission, as a Responsible Agency under CEQA, must consider the environmental document of a Lead Agency before making any determination."
- m. Conclusion of Law of Fact Number 13 on page 30 is modified to read:

"Calico's request for approval of a new permanent grade-separated crossing at milepost 710.8 is premature."
- n. Conclusion of Law Number 14 on page 30 is modified to read:

“The Commission cannot consider Calico’s request for approval of the new grade-separated crossing until it has fulfilled its duty as a Responsible Agency under CEQA and reviewed the final environmental document of the CEC.”

- o. Conclusion of Law Number 15 on page 30 is deleted.
- p. Conclusion of Law Number 16 on page 30 is deleted.
- q. Ordering Paragraph Number 4 on page 32 is modified to read:

“Calico Solar LLC’s request for approval of a new grade-separated crossing is denied, without prejudice.

The application for rehearing of D.11-10-025, as modified, is denied.

This order is effective today.

Dated February 16, 2012, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners