

EVIDENTIARY HEARING  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of: )  
 )  
Calico Solar Project Complaint )  
and Investigation )  
\_\_\_\_\_ )

Docket No. 11-CAI-01

DOCKET	
11-CAI-01	
DATE	OCT 03 2011
REC'D	OCT 13 2011

CALIFORNIA ENERGY COMMISSION  
HEARING ROOM B  
1516 NINTH STREET  
SACRAMENTO, CALIFORNIA

MONDAY, OCTOBER 3, 2011

2:07 P.M.

JAMES F. PETERS CSR, RPR  
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**ORIGINAL**

APPEARANCES

COMMITTEE MEMBERS

Karen Douglas, Presiding Member

Robert Weisenmiller, Associate Member

HEARING OFFICERS, ADVISERS

Kourtney Vaccaro, Hearing Officer

Galen Lemei, adviser to Commissioner Karen Douglas

Eileen Allen, adviser to Commissioner Robert Weisenmiller

COMPLAINANT

Cynthia L. Burch, Esq.

Helen B. Kim, Esq.

Katten, Muchin, Rosenman, LLP

William L. Thorpe, Esq.

Fennemore Craig

RESPONDENT

Ella Foley Gannon, Esq.

Bingham McCutchen

Daniel O'Shea

Sean Gallagher

kRoad Power

INTERVENOR

Patrick Jackson

representing Patrick Jackson

ALSO PRESENT

Mr. Tom Budlong

Mr. Fred Stearn

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1 MS. FOLEY GANNON: Ella Foley Gannon counsel to  
2 Calico Solar. To my right is Dan O'Shea, and to his right  
3 is Sean Gallagher both of Calico Solar.

4 PRESIDING MEMBER DOUGLAS: Thank you. And  
5 Intervenor Patrick Jackson?

6 MR. JACKSON: Yes, I'm here. I could not hear  
7 the representative for BNSF Railway. I can hear Ms.  
8 Foley, but I couldn't hear BNSF.

9 HEARING OFFICER VACCARO: Why don't you give a  
10 test run, and maybe just keep that one. Since you have a  
11 lot of materials in front of you, maybe instead of using  
12 the one to your left, use the one to your right and move  
13 it a little bit closer to you.

14 MS. BURCH: Okay. Cynthia Burch for BNSF Railway  
15 and Helen Kim is on my right as well and Bill Thorpe is  
16 co-counsel.

17 Did you hear me, Mr. Jackson?

18 MR. JACKSON: Yes, I did.

19 Thank you.

20 PRESIDING MEMBER DOUGLAS: Great. The Public  
21 Adviser's Office is represented. Lynn Sadler is here in  
22 the room today. If any members of the public have  
23 questions about this proceeding or how they can engage in  
24 this proceeding, Ms. Sadler will be an invaluable resource  
25 to them.

1           Are there any representatives of State, local, or  
2 federal government agencies in the room or on the phone?

3           MR. BRIZZEE: This is Bart Brizzee calling from  
4 San Bernardino on the telephone.

5           PRESIDING MEMBER DOUGLAS: Good. Thank you.  
6           Anybody else from local, State, or federal  
7 agencies?

8           PRESIDING MEMBER DOUGLAS: Very well. With that,  
9 I'll turn this over to the Hearing Officer.

10          HEARING OFFICER VACCARO: Thank you.

11          Just by looking at a screen behind me, those of  
12 you on the phone don't know that it's there, but it gives  
13 me a sense of who might be calling in. I think there are  
14 a number of you and some of you who might be parties to  
15 the Calico Amendment proceeding who are on the line.

16          And we'd certainly like to hear from you today  
17 just before we get to public comment, but where we are  
18 today is having a hearing that involves three primary  
19 parties, BNSF Railway Company, Intervenor Patrick Jackson,  
20 and Calico Solar. And that's who we're going to hear from  
21 primarily. Those are the parties who did the briefings.  
22 Those are the parties who are prepared to give oral  
23 argument, present evidence, and discuss that evidence  
24 today. So the rest of you, we certainly would like to  
25 hear from you, but your turn will be near to the end of

1 the proceeding.

2 I think with that, I'll just give a little bit of  
3 background. I think all of you in the room understand  
4 while we're here, there may be some members of the public  
5 or others who might not understand exactly what's going on  
6 today.

7 As many of you might recall, in December of 2010,  
8 the Energy Commission approved the Calico Solar Project.  
9 The Application for Certification proceedings related to  
10 that project involved oral testimony, written documents  
11 that were also produced as evidence. And those  
12 proceedings and some of the oral and written documentary  
13 evidence are the subject of today's proceeding.

14 In particular, BNSF Railway Company submitted a  
15 complaint document alleging that during the AFC  
16 proceedings, Calico engaged in material misrepresentations  
17 to the Commission regarding the viability and availability  
18 of Stirling Systems SunCatchers. That is the primary  
19 focus of today's hearing.

20 However, by way of a recent order, the Committee  
21 also agreed to allow Intervenor Patrick Jackson's request  
22 for investigation to be merged into this proceeding,  
23 because he alleged substantially similar facts regarding  
24 the alleged misrepresentation.

25 We went ahead and had the parties, including Mr.



1 Jackson, submit hearing statements. Everyone submitted  
2 timely hearing statements and did exactly what the  
3 Committee asked. Those hearing statements are fairly  
4 interesting in one key respect though. And we're going to  
5 discuss that, I think, a little bit more fully. No  
6 witnesses were identified for anybody's case in chief. It  
7 appears that, instead, we're looking at a primarily  
8 document driven hearing today. Although, there were some  
9 reservations for rebuttal witnesses.

10 So I think the first thing I want to be clear on,  
11 and I'll do a Round Robin with the parties. Ms. Burch, is  
12 that correct, that there are no witnesses for BNSF's case  
13 in chief?

14 MS. BURCH: I would like to step back, if you  
15 will. We did not clearly understand what this hearing was  
16 set at, as -- if we looked at the other complaints that  
17 have been failed, and that you have hearings, pre-hearing  
18 conferences set for in the coming two weeks. We thought  
19 this was a prehearing conference and that you were asking  
20 for that information in the context of a prehearing  
21 conference. So that's a background for what we think is  
22 happening here today, and we're still a bit confused as to  
23 what's happening.

24 Secondly, we've explained that we think that the  
25 Commission has the ability to issue subpoenas here, and

1 that they're the right party given -- the right entity to  
2 issue the subpoenas to get the information that you need  
3 to identify the parties that should be called as  
4 witnesses, and witnesses that were non-parties.

5 We cannot do that. And we have hostile witnesses  
6 here. And so we are looking for your guidance as to how  
7 to best proceed on that front.

8 Also, I did identify our exhibits.

9 HEARING OFFICER VACCARO: Yes, you did. And you  
10 produced the hard copies, as well as electronic versions  
11 in advance, and the Committee always appreciates when that  
12 happens.

13 I think let me circle back to my threshold  
14 question. I think we did understand everything that you  
15 said, but the threshold question is, based on your hearing  
16 statement, it appears that BNSF has not identified any  
17 witnesses to give testimony for your case in chief today,  
18 is that correct?

19 MS. BURCH: We have identified Mr. Dachniwsky's  
20 declaration -- or verification of the complaint, so he  
21 would be -- his -- the complaint is under oath, so that is  
22 testimony.

23 HEARING OFFICER VACCARO: Yes, but no physical  
24 witnesses, correct? No persons that will sit at the table  
25 before us, is that correct?

1 MS. BURCH: That's correct.

2 HEARING OFFICER VACCARO: Thank you. Ms. Foley  
3 Gannon?

4 MS. FOLEY GANNON: We have no witnesses.

5 HEARING OFFICER VACCARO: Okay. Mr. Jackson, I  
6 just want to confirm as well that you do not indicate that  
7 there would be any witnesses giving testimony today, is  
8 that correct?

9 MR. JACKSON: I have no witnesses giving  
10 testimony today.

11 HEARING OFFICER VACCARO: Great. Thank you.

12 I think we'll move on to the next order of  
13 housekeeping, which is the tentative exhibit list that is  
14 before all of you. It's been distributed to the  
15 Committee, to the parties in advance of today's  
16 proceedings. Everyone's had an opportunity to take a look  
17 at that. Again, Ms. Burch, we did receive all of BNSF's  
18 documents well in advance.

19 Thank you.

20 Mr. Jackson, we received your electronic  
21 documents. However, we're still waiting the hard copies  
22 that were requested for delivery to the Hearing Advisor's  
23 Office. With that, are there any changes this afternoon  
24 to the tentative exhibit list?

25 Ms. Burch?

1 MS. BURCH: I'm not -- not today.

2 HEARING OFFICER VACCARO: Okay. Mr. Jackson?

3 MR. JACKSON: No, no changes.

4 HEARING OFFICER VACCARO: And I note that Calico  
5 did not submit any witness list or -- I mean, any excuse,  
6 me any exhibits or an exhibit list, is that correct, Ms.  
7 Foley Gannon.

8 MS. FOLEY GANNON: That's correct.

9 HEARING OFFICER VACCARO: Okay. I think in a  
10 typical proceeding, where we would begin, of course, is  
11 with opening statements and then telling the parties call  
12 your witnesses. That's not where we are today, obviously.  
13 I think we still want to hear opening statements,  
14 arguments. We need to go through the process of people  
15 moving their documents in and addressing any objections  
16 that there might be to the documents.

17 But I think, Ms. Burch, before we get there, I  
18 think it's probably important that we discuss just a bit  
19 more your concern with what today's proceeding is about,  
20 and what appears to be a potential disconnect between this  
21 being the day of the hearing, as opposed to a preliminary  
22 step to a hearing.

23 So, again, we heard you. We understood you, but  
24 I think maybe if you could explain what's the practical  
25 difference from your perspective? What would you have

1 done differently had you fully understood that today was,  
2 in fact, the hearing which is noticed in the Notice of  
3 Hearing that was going to be conducted today?

4 MS. BURCH: We believe that the complaints, as  
5 pled, is a basis for the Committee to rule in our favor.  
6 But if the Committee believes that additional information  
7 is needed, we would request you to use your subpoena power  
8 to get the type of information that we've identified in  
9 our prehearing statement, and then gather that, and then  
10 schedule at the next hearing to set up a briefing schedule  
11 and an opportunity to call those witnesses, look at that  
12 evidence, and be able to use it in this proceeding.

13 HEARING OFFICER VACCARO: Okay. That makes  
14 sense. And I think, in part, just for the benefit of  
15 those who might not have been looking at some of the  
16 orders and the exchange of information among the parties  
17 and the Committee, I think you're really pulling sort of a  
18 thread that was in an order, where the Committee stated if  
19 it requires further investigation or further information,  
20 it would let the parties know before the close of today's  
21 proceeding, and would direct the parties accordingly. So  
22 I think that -- that sounds like what you're responding  
23 to, is that correct?

24 MS. BURCH: I saw that, and I thought that that  
25 was the point.

1 HEARING OFFICER VACCARO: Okay. Thank you. I  
2 think with that, we'll go ahead and start with BNSF.  
3 We've got an exhibit list. We have exhibits that, to my  
4 understanding, were not only served on the Committee, but  
5 let me verify, that were also served on the parties. I  
6 think with the exception of Exhibits 10 and 11, which were  
7 very large, but were identified to the parties. And you  
8 solicited -- I believe Ms. Burch, through Ms. Alexander of  
9 your office, solicited objections from the parties in  
10 advance of today's hearing.

11 So, Ms. Foley Gannon, does that ring any bells  
12 because you're frowning, so --

13 MS. FOLEY GANNON: I don't remember. I'm not  
14 sure what you're referencing when you're saying any  
15 objections? Any objections to the exhibits were asked for  
16 in advance?

17 HEARING OFFICER VACCARO: No. There was an  
18 Email. Ann Alexander, on behalf of BNSF, sends an Email  
19 late in the week last week. They submitted a number of  
20 documents electronically to the Energy Commission, the  
21 Committee, and I believe to all of the parties. But there  
22 were a few -- two exhibits, Exhibit 10 and 11, that  
23 apparently were getting kicked back in the Email because  
24 they were too large.

25 And Ms. Alexander sent an Email saying here's

1 what Exhibit 10 is. Here's what Exhibit 11 is. They're  
2 too big, but everybody knows what they are, and you know  
3 where to find them. Are there -- and she invited  
4 objections, at that point. That certainly doesn't mean  
5 that you're limited to responding in that Email, but I'm  
6 trying to confirm, one, that you received all exhibits,  
7 but for 10 and 11, and that you received Ms. Alexander's  
8 Email.

9 MS. FOLEY GANNON: I think we even got 10 and 11.  
10 I think it came through our system, so we have all the  
11 exhibits.

12 HEARING OFFICER VACCARO: Okay. Thank you.

13 Mr. Jackson, did you receive all of the exhibits  
14 as well?

15 MR. JACKSON: Except for 10 and 11, but I have  
16 access to them.

17 HEARING OFFICER VACCARO: Okay. Thank you.

18 And we asked Mr. Jackson to do the same thing  
19 that BNSF did. It's my understanding that all of Mr.  
20 Jackson's exhibits were filed and served as requested,  
21 with the exception of the hard copy, as I mentioned a few  
22 moments ago. Ms. Burch, did you receive all of those?

23 MS. BURCH: We did.

24 HEARING OFFICER VACCARO: Ms. Foley Gannon?

25 MS. FOLEY GANNON: We did.

1 HEARING OFFICER VACCARO: So at least we have no  
2 problems with whether or not we're talking about the same  
3 documents, and whether or not everyone received them. So  
4 with that housekeeping out of the way, Ms. Burch, why  
5 don't you go ahead and make your motion to have your  
6 documents admitted. You make your motion, but, of course,  
7 there's still going to be, I think, some discussion on  
8 some of the documents.

9 MS. BURCH: So I make my motion to amend evidence  
10 Exhibits 1 through 33 on BNSF's exhibit list.

11 (BNSF's Exhibits 1 through 33  
12 marked for identification.)

13 HEARING OFFICER VACCARO: Okay. I'm sorry. Ms.  
14 Kim, is there something you wanted to say?

15 MS. BURCH: She was asking if we were going to  
16 have opening statements before the evidence?

17 HEARING OFFICER VACCARO: No, because all you're  
18 doing -- you don't have any witnesses, as you had  
19 mentioned, to lay foundation or otherwise move these  
20 documents in. So it seems to me let's go ahead and do  
21 this in the order that makes sense, which is let's get the  
22 documents in, let's hear about the documents, and then  
23 we'll go ahead and allow you to make your arguments,  
24 because it appears that much of the argument is based --  
25 it's going to be somewhat, I think, repetitive of the



1 pleadings, perhaps pulling out some points that are more  
2 important for the Committee to understand the significance  
3 of documents. So let's deal with the documents first.

4 Ms. Foley Gannon, do you have any comments  
5 objections to any of these documents?

6 MS. FOLEY GANNON: Yes, we do. We object to the  
7 admittance of Item 22, 23, 24, 25, 27, 28, and, 29. And  
8 the basis -- I can go through each one of these, but the  
9 basis for the objection is similar in each case. These  
10 documents are mostly -- these are articles or other  
11 information about something that Tessera Solar did with  
12 other projects. And there are statements made in some of  
13 the submittals saying -- attributing these actions to the  
14 applicant.

15 As you're well aware, the applicant in this  
16 proceeding is Calico Solar, LLC. It is not Tessera Solar.  
17 We do not see any relevance in the documents about what  
18 Tessera Solar was or was not doing in other projects. So  
19 we would ask that they not be admitted.

20 HEARING OFFICER VACCARO: So to be clear, your  
21 objection is just a relevance objection then? I don't say  
22 "just" in a trivial manner, but it's a relevance  
23 objection?

24 MS. FOLEY GANNON: It's a relevance objection  
25 fundamentally, and then the characterization that it's

1 given in the documents about these -- attesting to what  
2 these represent, we also think is inaccurate.

3 HEARING OFFICER VACCARO: Okay. So now that your  
4 statement with respect to characterization is preserved in  
5 the record, and you've been able to at least say what you  
6 believe the problem is, then I think at its core we're  
7 down to a relevance objection then?

8 MS. FOLEY GANNON: That's correct.

9 HEARING OFFICER VACCARO: Okay. Ms. Burch.

10 MS. BURCH: We believe that what happened to the  
11 other SunCatcher project that was certified at the same  
12 time ours was, does go to the question of whether this  
13 technology is currently available. That project was sold  
14 on the heels of this one or right before it. The  
15 technology was changed. The applicant -- the purchaser  
16 there made a decision to request a termination of the  
17 Commission decision and the license based upon that they  
18 were going to change to photovoltaic technology. The  
19 Commissioner granted that decision on August 17th.

20 I would note that I believe it was 24 and 25 are  
21 decisions of the Commission. They're not newspaper  
22 articles.

23 So that is the basis for our introducing the  
24 -- what happened at Imperial into evidence in this  
25 proceeding. We believe they're relevant.

1 HEARING OFFICER VACCARO: I think, Mr. Jackson,  
2 you're the third party in this. I'm not sure whether or  
3 not you have a comment, but I notice that some of your  
4 exhibits I think are identical to BNSF's. All of the  
5 documents I think that Ms. Foley Gannon objected to are  
6 also contained in your exhibit list. So instead of  
7 waiting until we get to your exhibits, why don't we go  
8 ahead and address those now.

9 Before we do, Ms. Foley Gannon, do you have those  
10 by exhibit number with respect to Mr. Jackson's documents?

11 MR. JACKSON: I do. We are going to object to  
12 number 206, 207, 208, 209, 211, 212, and 213.

13 HEARING OFFICER VACCARO: Okay. Thank you. Mr.  
14 Jackson, would you like to respond?

15 MR. JACKSON: Yes, I would. I believe the  
16 documents that Calico is objecting to are relevant and  
17 they do establish a foundation. In this particular case,  
18 the issue is -- first of all, it goes to the applicant  
19 application, I recognize that kRoad Calico Solar, but not  
20 the applicant at the time of the applicant's application.

21 So what we're talking about is Tessera Solar,  
22 right. That was the applicant at that time. And these  
23 documents go to the commercial availability and the  
24 commercial viability of the SunCatcher technology. These  
25 documents show, I believe, that at the time of the

1 Commission's decision, there was serious questions, as  
2 evidenced by these documents, regarding the commercial  
3 viability and availability of SunCatchers.

4 I believe they show that -- let's put it this  
5 way, they should be considered, right, in the Commission's  
6 decision on this matter.

7 HEARING OFFICER VACCARO: Okay. Thank you, Mr.  
8 Jackson.

9 I think, Ms. Burch, you've said -- made your  
10 comments. Is there something else you want to add with  
11 respect to these particular exhibits.

12 MS. BURCH: Excuse me, I did miss that 23 was  
13 submitted by AES, so it, too, is not -- it is not a  
14 newspaper article. It is a request to terminate. And I  
15 would note that 24 and 25 are agency documents that the  
16 agency can take notice of itself, irrespective of  
17 whether...

18 HEARING OFFICER VACCARO: Okay. And I think  
19 right now, let's -- if we're sticking just to the  
20 relevance issue, because that's really all that the  
21 objection was, was to relevance. I think all of you are  
22 probably aware that in administrative proceedings, unlike  
23 civil proceedings, the admissibility standard is a bit  
24 more relaxed.

25 However, they both are similar in that the

1 foundational element is relevance. Without relevance, it  
2 doesn't matter how relaxed the standard is in an  
3 administrative proceeding, it's not going to come in.

4 I think perhaps reasonable minds can differ on  
5 whether or not the identified exhibits are relevant. In  
6 this case, the reasonable minds of the Committee are that  
7 these are relevant documents and they are going to be  
8 admitted.

9 MS. FOLEY GANNON: Can I make one further  
10 statement.

11 HEARING OFFICER VACCARO: Certainly.

12 MS. FOLEY GANNON: These documents -- what's at  
13 issue here in this case is a challenge as to what the  
14 applicant knew, short have known, didn't know at the time  
15 of certification.

16 Certification was in December of 2011. The dates  
17 of these events, these articles, these government actions,  
18 I think in the totality all postdate.

19 Well, 22, 23, 24, 25 all postdate, by at least  
20 two months or more, the date -- the salient time. So when  
21 we're looking at those and we're saying what did the  
22 applicant know or should have known during the  
23 certification proceedings, an article -- or a decision  
24 made by this Commission in August of 2011, I don't think  
25 speaks to that.

1           I think a application submitted in August by AES  
2 Solar, a separate company for a separate project, doesn't  
3 seek to what the applicant knew or not know at the time of  
4 certification.

5           And what Ms. Burch has stated is that the  
6 relevance here is about the current availability. I guess  
7 meaning the availability today. And again, I would ask to  
8 say that what they're saying is that the applicant was  
9 doing something wrong when the project was certified.

10           And so to be taking information that clearly  
11 post-dates us by a considerable period of, time, and to  
12 say that it's relevant to what's happening today, I don't  
13 think should be relevant to this proceeding.

14           HEARING OFFICER VACCARO: And I understand your  
15 position, and you've had more time to amplify and further  
16 explain that. And it's duly noted and in the record. I  
17 think what I would say is that the Committee is not going  
18 to debate the issue with any of the parties. Your  
19 concerns are noted. The Committee will admit the  
20 information.

21           And as with all evidence that's submitted into  
22 the record, the weighing of it, what its impact and import  
23 might be are matters for the Committee in looking at the  
24 totality of the case presented. But your concerns are  
25 duly noted and are going to have -- going to go ahead and

1 admit those documents and the Committee finds them to be  
2 relevant. So, Ms. Burch, Exhibits 1 through 33. They  
3 were offered. They're all admitted.

4 (BNSF's Exhibits 1 through 33  
5 were admitted.)

6 HEARING OFFICER VACCARO: Mr. Jackson.

7 MR. JACKSON: I make a motion that my Exhibits  
8 200 to 214 be admitted into evidence.

9 HEARING OFFICER VACCARO: I'm sorry, I didn't  
10 hear you at all, in terms of the numbers. And for the  
11 record, I really do prefer the parties to state clearly  
12 what numbers they're admitting, so if you would do it one  
13 more time, please.

14 MR. JACKSON: Okay. Yes. My exhibits 200  
15 through 214. I will do them individually, 200, 201, 202,  
16 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213,  
17 214.

18 (Intervenor Patrick Jackson's Exhibits 200  
19 through 214 marked for identification.)

20 HEARING OFFICER VACCARO: Okay. Thank you.  
21 We've just had a discussion where Ms. Foley Gannon  
22 specifically identified which of your exhibits her client  
23 objects to and on which grounds. You further amplified  
24 that, Ms. Foley Gannon, in giving final comments when we  
25 were discussing BNSF's exhibits.

1           Can we just call that a continuing objection as  
2 to these particular exhibits of Mr. Jackson's as well,  
3 which is 200, 206, 207, 208, 209, 211, 212, 213, or is  
4 there something more that you'd like to add by way of  
5 objection to the same documents that Mr. Jackson is  
6 submitting that BNSF just submitted?

7           MS. FOLEY GANNON: No. It's the same objection.  
8           Thank you.

9           HEARING OFFICER VACCARO: Were there any other  
10 documents that you objected to that Mr. Jackson is  
11 offering?

12          MS. FOLEY GANNON: No.

13          HEARING OFFICER VACCARO: Okay. Based on the  
14 same rationale given with respect to BNSF's documents that  
15 were at issue, all of Mr. Jackson's exhibits are deemed  
16 offered and admitted.

17           (Intervenor Patrick Jackson's Exhibits 200  
18 through 214 were admitted.)

19          HEARING OFFICER VACCARO: Typically, we'd say,  
20 BNSF, call your first witness, but we have none. So I  
21 think what we'll do is we'll have you do an opening  
22 statement. Mr. Jackson, you will follow and then Calico  
23 will have the opportunity to give their  
24 opening/rebuttal/responsive statement.

25           I do note, Ms. Foley Gannon, that you reserved



1 the right to offer witnesses to rebut testimony. It seems  
2 as though the only testimony we have would be what's  
3 contained in the documentary evidence before us. I don't  
4 know if you were going to call a witness to discuss, if  
5 you're engaging in any Q&A in that respect, or whether or  
6 not, at this point, you know that you're not going to be  
7 calling any witnesses.

8 MS. FOLEY GANNON: I have no plans to call  
9 witnesses.

10 HEARING OFFICER VACCARO: Okay. Thank you. So  
11 Ms. Burch.

12 MS. BURCH: Okay. We're here today on a  
13 complaint to revoke a certification by the Commission for  
14 the Calico Solar Project from last October and December  
15 1st.

16 And this complaint arose over time. As we began  
17 to realize, right after the October certification and then  
18 subsequently through the coming months, that there  
19 appeared to be evidence of the project having been on the  
20 market during that time, of it having been on the market  
21 to a PV company. And that the technology, the  
22 SunCatchers, at the very last day of hearing were being  
23 changed from a proposal to have -- basically, begin Phase  
24 1 with the totality of the Phase 1 SunCatchers to a very  
25 modified number about 100 -- I think 60 SunCatchers to be

1 installed by July.

2           And we watched what was happening on the NTR  
3 report, which is a parent company of Calico Solar. So  
4 they would have -- Calico would be imputed to have known  
5 what its owner was saying. And they said in a report in  
6 November that they were delaying -- in November, before  
7 the December certification, that they were delaying the  
8 commercial -- delaying the production of the SunCatchers,  
9 due to commercial availability.

10           We then found out that at the end of December, I  
11 believe it was December 23rd, we saw a press release  
12 announcing that the Power Purchase Agreement that the --  
13 had all been told was a solid basis for the financial  
14 viability of this project, had been canceled by Edison.

15           It seems highly unlikely, given the work that  
16 goes into Power Purchase Agreements, and the importance of  
17 it in this proceeding, that this occurred after December  
18 1, a mere three weeks later, that Edison canceled this  
19 agreement. And Calico Solar, one, didn't -- wasn't aware  
20 that this would be happening, and two, didn't have reason  
21 to believe it had some importance to this proceeding.

22           We then had the next day notice, that the project  
23 had been sold to kRoad Power, and that they were an entity  
24 focused on the development of projects, this photovoltaic  
25 technology. And it was announced that the bulk of the

1 project would be changed to photovoltaic. Again, a mere  
2 three weeks after this project was certified.

3           Then we learned in, I believe it was NTR, that  
4 they had stopped funding the SunCatcher portion of their  
5 business, SES. They were not going to put anymore new  
6 money into that technology. Unless third parties came in,  
7 they weren't going to.

8           With all of this information in hand, we went to  
9 a hearing before the Public Utilities Commission on an  
10 issue involving access for this facility, and decided to  
11 ask Mr. O'Shea, the representative of Calico Solar, if he  
12 had been aware of the commercial availability of --  
13 unavailability of this technology at the time that he --  
14 his company purchased the company? And he said, yes, he  
15 did know. And so we asked him, when did you know. And he  
16 said in September or October of 2010.

17           So with that information in hand, we went back  
18 and looked at it. We also had the benefit, at that point,  
19 of the petition to amend, which gave us a reason of  
20 commercial unavailability of the SunCatcher technology at  
21 this time. And we would note that in the regulations  
22 governing the CEC's proceedings, that in a petition to  
23 amend, the Commission must find that an entity didn't know  
24 or it didn't have reason to know of the cause for the  
25 amendment.

1           So with these pieces of information in hand, we  
2 brought them to the Commission in a complaint. We  
3 followed the process for bringing this to the Commission's  
4 attention. And the relief that we are requesting and that  
5 we believe the statute provides for is a revocation of the  
6 certification that was obtained through these  
7 misrepresentations. And that code section is in the  
8 brief.

9           I would like to go back to September 2010. I  
10 realize that Commissioner Byron and Commissioner Eggert  
11 aren't here today, but they were very involved. We were  
12 all very involved. We had hearings in September and  
13 October that were marathon sessions. If would you recall,  
14 on the 3rd -- I can remember these dates by my memory.

15           On the 3rd of September, the Friday before the  
16 labor day weekend, Commissioner Eggert issued a decision  
17 that he didn't think that they would be certifying this  
18 project, because of impacts, particularly to the  
19 endangered species. And he offered the ability to modify  
20 the project and come back with something.

21           Over that weekend, Calico came back, that very  
22 next Tuesday after Labor Day, with five proposals as to  
23 how to modify the project. And in it, they came up with  
24 forty some hundred -- 4,700-acre project.

25           It had 26,000 SunCatchers in it. It eliminated

1 600 acres of retention/detention debris basins, which very  
2 much concerned my client. It did not disclose that they  
3 were looking at a different technology. And that is very  
4 important to my client, because another critical concern  
5 to my client was glint and glare, and specific technology  
6 that one would be studying was critically important to  
7 analyzing that specific issue and went forward on the  
8 environmental analysis.

9 In fact, the technology was critical to know as  
10 to all of the environmental analysis, which have yet to be  
11 completed, and was now in flux, because of change in the  
12 project description.

13 So I would say, based upon the tremendous effort  
14 of the Commission staff at that time, who worked just as  
15 hard as all of the parties, Commissioner Eggert who sat  
16 through hearings that lasted till five in the morning,  
17 that we all, in good faith, believed we were looking at a  
18 SunCatcher project, and that that's what we were paying  
19 consultants to look at, and come in with comments. And we  
20 had consultants at these hearings.

21 And that -- but if we had known, at that time,  
22 that it was going to be changed to a PV facility,  
23 primarily a PV facility, that it would have been incumbent  
24 on the staff and the Commission to stop those proceedings  
25 and require that the -- what eventually did happen, that a

1 new project amendment be brought forward that would then  
2 be the basis for the continued environmental review and  
3 certification of the project.

4           If that had happened, some very critical things  
5 that happened this summer, spring and summer, would have  
6 occurred. Issues such as whether the CEC has continuing  
7 jurisdiction over the PV portion of the facility, who  
8 should be the lead agency, what actually would -- were the  
9 environmental issues that should be addressed, what was  
10 changing that we should be analyzing.

11           And unfortunately, none of those things occurred.  
12 Instead, we spent a good amount of our internal time, our  
13 people's time, flew them in from Texas, had them go to  
14 site visits, had them meet with staff at the Commission's  
15 request to explain our issues, and it turned out that it  
16 was all for not just three weeks after the Commission  
17 decision on this one.

18           So with that in mind, we believe that the staff,  
19 the Commissioners, and the parties were materially  
20 affected by this misrepresentation. And that it is the  
21 only recourse that you have, at this point, is to revoke  
22 their certification.

23           And we would also note that we think this is a  
24 critical issue for the pending motion to amend their  
25 certification.

1           I would like to then move to just last week.  
2 Just last week, we were working, frankly, almost around  
3 the clock again, responding to the 15-day notice periods  
4 we believe are in the certification conditions, to an  
5 infiltration report, a geomorphic report, and a  
6 geotechnical report. We had consultants fly in from other  
7 parts of the country. We worked till late at night giving  
8 comments, and we submitted them in time.

9           And we all had hearing statements due on  
10 Wednesday, last Wednesday. This bankruptcy, we learned  
11 about on Thursday, took place prior to the 22nd of  
12 September, a week ahead of time. Again, if we had known  
13 that the project could very well change again. In fact,  
14 there is no commercial availability of this technology at  
15 this time. There wasn't back then, according to kRoad's  
16 own -- you know, own testimony, and there isn't now, then  
17 we wouldn't have expended that effort now.

18           So we would ask you to not only -- well, I have  
19 two requests. Let me just tell you what, I think, they  
20 are. One is that -- and this is where the AES issue does  
21 come into play. AES stepped up and said we're going to  
22 have a photovoltaic project, and we're asking you to  
23 terminate our certification, and we're asking you to  
24 terminate our license.

25           And I assume -- I don't represent them, so I

1 don't know, but I assume they're going to file an  
2 application with the appropriate State agency.

3           And if kRoad were to follow that example in this  
4 situation, then they would be terminating this  
5 certification. And the reason why we immediately sent the  
6 Commission a request to continue the hearing was because  
7 we believed that such a decision by kRoad, which would  
8 seem to certainly be one of the reasonable options here,  
9 would mean that this complaint could be dismissed. We'd  
10 withdraw it, if the need being requested is revocation.  
11 If it's terminated, it doesn't need to be revoked.

12           And so we are asking that the hearing and the --  
13 or the work on this proceeding be continued until kRoad  
14 makes a decision as to what it's going to do now that it  
15 doesn't have a -- clearly, unequivocal, it doesn't have a  
16 commercially available technology.

17           Secondly, we would ask -- and I bring it up here,  
18 because you are our Commissioners in both proceedings, but  
19 I would ask that you stay, stay -- clearly stay any  
20 further work in the pending motion to amend, so that we do  
21 not have to expend resources until we know what's going to  
22 happen with the kRoad decision.

23           And lastly, if you decide -- if in this time  
24 period, you decide it's appropriate, if you agree, if you  
25 would -- if, in that time fame, they do not withdraw their



1 petition to amend, or they are moving on, we would ask  
2 that you go forward with this complaint, and that you  
3 subpoena Calico Solar, or its consultants, because they  
4 have no employees, according to the testimony that we've  
5 submitted here, they never did, and apparently they don't  
6 know. Tessera Solar, who did have employees and who was a  
7 parent of Calico, NTR who was the parent and SES, its  
8 other subsidiary was doing.

9 We would ask that you contact and subpoena Edison  
10 to find out when they knew, what they knew, and why did  
11 they cancel the Power Purchase Agreement the day before  
12 the sale even took place?

13 Because we think there are going to be facts  
14 uncovered here that fully support Mr. O'Shea's statement  
15 that they knew back in September and October that this  
16 technology was not commercially available.

17 That is our opening statement.

18 HEARING OFFICER VACCARO: Thank you. Ms. Foley  
19 Gannon, I indicated awhile ago that we'd have BNSF go,  
20 then Mr. Jackson, and then you could respond, but there  
21 was quite a bit stated. I don't know, organizationally,  
22 what your preference would be to hear everything and  
23 respond, or if you'd like to respond in kind.

24 MS. FOLEY GANNON: To get the opportunity to talk  
25 twice, I guess I'll take that.

1 (Laughter.)

2 MS. FOLEY GANNON: But actually coming before you  
3 today, I'm in sort of an unusual position, because I'm  
4 almost speechless. You're going to hear a lot from me,  
5 but I'm also speechless because when I read these  
6 complaints, and I read all the things that were submitted  
7 and the thousands of pages of exhibits, and I look at  
8 what's being claimed here, it's really hard to know how to  
9 defend against this.

10 How do I prove a negative? How do I prove what  
11 Calico Solar really knew, really meant, and really  
12 intended when it was coming before this Commission?

13 I can point to the fact that Calico Solar spent  
14 tens of millions of dollars in approving a project, and  
15 that it was not doing that as a sham. It was not doing  
16 that to deceive the Commission or the Committee. Calico  
17 Solar wanted to build a SunCatcher project. Calico Solar  
18 spent years planning for a SunCatcher project. Calico  
19 Solar sought certification for a SunCatcher project.

20 That project was certified and eventually the  
21 project was sold. But it was a SunCatcher project that  
22 was sold. It was not a PV project. It was not another  
23 technology project. It was a SunCatcher project.

24 And if you take it at its essence, these  
25 representations about material misrepresentations made by

1 Calico really do come down to a claim that, at some point  
2 in this proceedings, Calico Solar decided that it was not  
3 going to build a SunCatcher project, and that it had an  
4 obligation to come to you and to tell you that it was  
5 -- that that was its intent.

6 I want to tell you right now that this is just  
7 frankly not true. There's no evidence this. And there's  
8 no evidence of it, because it's not true.

9 Calico Solar was trying to proceed with its  
10 project. There was no fraudulent inducement here. It's  
11 hardly surprising that much of the evidence that is  
12 pointed to by BNSF or by Mr. Jackson go to saying that  
13 Calico Solar brought you information about SunCatchers.  
14 That was the project.

15 Calico Solar brought you information about how  
16 SunCatchers were performing at that time. That was the  
17 technology. There's nothing surprising about any of this  
18 information. The project -- Calico Solar brought you a  
19 schedule that it was proposing to proceed on. That was a  
20 schedule that it hoped to proceed on.

21 Right now, Calico Solar would much rather be  
22 building the SunCatcher project than being before you  
23 today. But financial realities change what the outcome of  
24 the Calico Solar project was.

25 In the end of the day, the project needed to be

1 sold, because there was not sufficient financing. I don't  
2 think it will be surprising to any of you or to anybody in  
3 this room that financing is necessary for large scale  
4 solar projects, or any large scale power plant project,  
5 and that financing is not, I don't think ever, obtained  
6 before a permit is issued by this agency, and by other  
7 agencies.

8 Calico needed financing for the project, and  
9 financing was also needed for the development of the  
10 SunCatcher.

11 The fact that the failure to obtain this  
12 financing for the project or for the SunCatcher ended up  
13 changing the project also is not a unique situation. As  
14 recently as August 24th, 2011, STA, the developer of the  
15 Blythe Project, came before this Commission and asked for  
16 an amendment to its project. At that time, the amendment  
17 it was seeking was for the gen-tie line and for some  
18 facility designs of the substation, I believe.

19 Before you considered the amendment, STA told you  
20 that they were changing their technology to PV, but they  
21 asked you to proceed with consideration of that amendment  
22 at that time irregardless of this change. And they told  
23 you that they would come and talk to you about the  
24 permitting as it developed. And did this Commission  
25 revoke the certification of Blythe?

1           No.

2           Did the Commission ask exactly when did you know  
3 that you didn't have financing? Exactly when did you know  
4 that the realities of the solar technology -- solar  
5 thermal versus PV had shifted such that a project that you  
6 had planned for was not going to make economic sense?

7           No.

8           What you did was you thanked them for going on  
9 with the project, and you approved the amendment. And  
10 it's not just solar thermal that has these types of  
11 problems. There are many gas projects that -- plants that  
12 have been approved by this Commission, having been  
13 considered by this Commission, and have later not been  
14 built because financing was not available at some point in  
15 time.

16           What is unique is the request that's being made  
17 here by BNSF and Mr. Jackson. They are asking that you  
18 ask an applicant to provide you information about exactly  
19 where they are in financing a project or in the technology  
20 during the certification proceedings. And if there is  
21 some uncertainty, I don't know what the line is that  
22 they're saying, somewhere between a hundred percent  
23 certain that you can do it and a hundred percent that  
24 you're not going to do it, where is that line?

25           We don't know what they're saying. But they're

1 asking at some point you have to start inquiring for the  
2 applicant to tell you what is the financial structure,  
3 where are they in the project? We think it's  
4 inappropriate and it's not consistent with your  
5 regulations, with the Warren Alquist Act or with good  
6 policy.

7 In the complaint, neither BNSF nor Mr. Jackson  
8 point to a single misstatement that was made.

9 HEARING OFFICER VACCARO: Sorry, Ms. Foley  
10 Gannon. You can go off the record.

11 (Thereupon a discussion occurred  
12 off the record.)

13 HEARING OFFICER VACCARO: Back on the record.  
14 Sorry for the interruption.

15 MS. FOLEY GANNON: No problem.

16 In their complaint, BNSF has not pointed to a  
17 single statement that it can show is false or that was  
18 material to this proceedings -- the siting proceedings for  
19 the Calico Solar Project.

20 They have the burden of proof here. They have  
21 brought this complaint. They need to point to us and tell  
22 us what is the statement? Again, as I said, I'm trying to  
23 defend against a negative here. Are we supposed to be  
24 trying to prove that every statement we made is true? It  
25 was done under sworn testimony. It was true when it was

1 said, and we have attested to that.

2           When we go through and we look at the story that  
3 is told by these binders and binders of exhibits that have  
4 been submitted by the BNSF and by Mr. Jackson, it really  
5 tells a very simple story, a story which does not support  
6 the allegations that Calico has made misrepresentations to  
7 this Committee or has fraudulently induced the Commission  
8 to approve the project.

9           Instead, it tells a story of a company that was  
10 developing an innovative technology, and a company who had  
11 spent over \$100 million in trying to bring this technology  
12 to mass production. This company --

13           MS. BURCH: Excuse me, but I object to the  
14 testimony that's being given here. It's not supported by  
15 any evidence --

16           HEARING OFFICER VACCARO: Ms. Burch. Ms. Burch,  
17 what, I think, if we -- excuse me, Ms. Foley Gannon, if we  
18 go back to what I said in the very beginning. This is  
19 pretty much argument. You've submitted your testimony.  
20 You've made argument. Ms. Foley Gannon is making  
21 argument. Your objection is noted, but she will continue  
22 her statement. When she's finished, if there's something  
23 that you wish to stay, you may. But this is argument, it  
24 is not testimony. She is not sworn, just as you weren't  
25 sworn. You gave opinions and made a number of allegations

1 as well. Ms. Foley Gannon gets equal time to do the same.

2 MS. FOLEY GANNON: The company, and it was  
3 referenced by BNSF, which is NTR, which was the parent  
4 company of Stirling Energy Systems, or SES, the developer  
5 of the SunCatcher. Through SES, they set up a  
6 demonstration facility, called the Maricopa Plant, to see  
7 if the SunCatcher would produce. As evidence was entered  
8 in the certification proceedings, the initial production  
9 at the Maricopa Plant was very promising.

10 NTR and SES attempted to find funding for the  
11 SunCatcher, and that didn't happen. It didn't happen on  
12 the time frame that they were hoping it would happen. So  
13 they found it difficult to proceed with the SunCatcher  
14 development on the schedule that had been proposed. And  
15 that's all there is to it.

16 Does this evidence show that Calico never  
17 intended to use the SunCatcher on this project?

18 No.

19 Does this evidence show that Calico knew that the  
20 SunCatcher was not available or would not be commercially  
21 viable?

22 No.

23 It simply shows that financing can alter the  
24 timing of employment of a technology.

25 The evidence also shows, as this Committee is



1 well aware, that Calico's parent company sold the Calico  
2 Solar Project in late 2011, December 4th, 2011. Does that  
3 fact show that Calico's parent company was considering a  
4 sale during the permitting process? Does the fact that  
5 Calico's parent was considering the sale of the project  
6 show that Calico never intended to build this SunCatcher  
7 project or the project that was approved?

8 No. It simply shows that Tessera Solar, Calico's  
9 previous parent, was not in a position to finance the  
10 construction of this project.

11 Again, BNSF and Mr. Jackson have to show some  
12 statement that was made during the certification that was  
13 false and was material, but the quotes that they have  
14 provided in their documentation do not say either what  
15 they say that they say and they certainly do not prove  
16 that there is any false statement.

17 Let's take example of BNSF quotes, which they  
18 claim demonstrate that Calico affirmatively stated to the  
19 Commission that it would be placing SunCatchers on the  
20 site by July of 2011. And Ms. Burch referred too this  
21 again, saying that Calico had affirmatively told the  
22 Committee we are going to be putting on SunCatchers by  
23 July of 2011. And this is in paragraph 11 of their  
24 complaint.

25 BNSF quotes testimony of Ms. Bellows, which

1 states that, "The earliest SunCatchers would be installed  
2 on the site would be by July 29, 2011". However, rather  
3 than being an affirmative promise that SunCatchers could  
4 be installed in July of 2011, if you look at the content  
5 in which the statement was presented and the testimony  
6 around it, it's actually answering a question that says  
7 how can we be sure you won't put SunCatchers on during  
8 Phase 1A, meaning that you will not put SunCatchers on  
9 before July of 2011.

10 So rather than being a promise to install  
11 SunCatchers by a certain point, it's actually a promise  
12 just the opposite, not to do that. And actually just  
13 following the statement that was quoted by BNSF, there is  
14 a statement that I made in response to a request from  
15 CURE's attorney. And I said that we wouldn't object to  
16 having a restriction that says Phase 1A will not include  
17 the placement of any SunCatchers on poles. So that's what  
18 that was about, not at all what BNSF is indicating it's  
19 about.

20 And the next, I think, sort of more direct quote,  
21 other than quotes from the ASE and other things that is  
22 noted by BNSF that's in paragraph 15 of their complaint.  
23 And this one I think is really just astonishing. It's  
24 incorrect in who is saying a quote. It's incorrect in  
25 when the quote was said, and the quote is even provided

1 incorrectly.

2           And this is in paragraph 15 where they say, "Just  
3 three weeks later on December 24th, 2010, Tessera Solar  
4 North America consummated sale of the applicant Calico  
5 Solar, LLC to kRoad Sun, a subsidiary of kRoad Power,  
6 which was a company that focused on PV power. And at that  
7 time, Tessera Solar announced that it had done so, because  
8 it had determined that SunCatchers would not be  
9 commercially viable in the near term".

10           So let's break this down. First, the quote says  
11 that this statement was made by Tessera Solar. It was  
12 not. That was a statement that was made by Calico Solar  
13 in its request for amendment. That's a reference  
14 document. That's who saying it. Is Calico Solar not  
15 Tessera Solar.

16           Secondly, when was it set? They say it was set  
17 at the time of the sale, December 24th, 2011. It was not  
18 set on December 24th, 2011. It was set in March when the  
19 petition to amend was submitted. And then kind of most  
20 shockingly, it's also not a correct quote. The amendment  
21 does not say that the SunCatchers would not be  
22 commercially viable in the near term, but rather it says I  
23 would quote - and I refer you to the exhibit that's  
24 referenced by BNSF to clarify this - "The SunCatcher would  
25 not be commercially available in the near term", not that

1 they wouldn't be viable, but they wouldn't be available in  
2 the near term.

3           It is not Calico Solar who made false statements  
4 to the Commission. It is BNSF who is making false  
5 statements to you in these proceedings.

6           And finally, in paragraph 18, BNSF cites a  
7 statement made by Dan O'Shea. And you heard Ms. Burch  
8 describe this statement and refer to it many times this  
9 afternoon in her opening statement. And it's before the  
10 CPUC. And what they're claiming that the statement says  
11 is that they knew that the SunCatchers were not available  
12 when they were buying the project.

13           First off, Mr. O'Shea was speaking about what he  
14 thought might have been a basis for the sale of Tessera.  
15 He was not apart of Calico at that time. He does not say  
16 that he knew what Calico knew. He does not make any  
17 representations about what Calico told him. And he does  
18 not say that they are not commercially available.

19           He says they are not commercially available on  
20 Tessera's schedule, on the schedule that was proposed.  
21 And we acknowledge that. We acknowledge that there was  
22 changes in timing, but that is not the same thing as  
23 saying that a technology was not available or that they  
24 knew that at that time.

25           And to compound this further, in their comments

1 on the Staff Assessment, BNSF quotes us again many times.  
2 And they say that -- again, interprets this as saying Mr.  
3 O'Shea said that Calico knew that the SunCatchers were not  
4 available. Again this is just not true. That's not what  
5 the quote says. And that's not what Mr. O'Shea says.

6 So the totality of the evidence that's been  
7 submitted by BNSF fails to make a prima facie case that  
8 Calico made any misrepresentations to the Committee -- to  
9 this Committee, material or otherwise.

10 They can't point to a single statement which said  
11 they can make a prima facie case that is false or that  
12 it's material.

13 Therefore, we ask you, we plead with you, to  
14 please dismiss this complaint and dismiss this complaint  
15 today. We think that a further inquiry into what Calico  
16 knew or should have known at the time of, there is no  
17 basis for making that further inquiry. It would set a  
18 dangerous precedent. It would require you to look into  
19 each applicant and see what is the financial situation.

20 And I would like to speak just briefly also to  
21 the statements that Ms. Burch made about SES's bankruptcy  
22 and the recent filing.

23 We did inform the Commission of SES's bankruptcy.  
24 We submitted a letter on Thursday. We found out about it  
25 the following Friday, and I was actually out of town. We

1 submitted it. We also were working busily on other  
2 things, so we submitted a letter in due course. We didn't  
3 feel that we were sitting on something or hiding  
4 something. We actually brought it to your attention. We  
5 were the ones who put it in, and said hey, you might want  
6 to know about this.

7           And, you know, we don't exactly what it means for  
8 the project to say that it unequivocally shows that this  
9 technology is not available. It's not true. There are --  
10 there's another producer of dish technology. We don't  
11 know. We don't know what we're going to be doing. We're  
12 going to be thinking about it. We are going to be getting  
13 back to you. We told you about it, because we wanted you  
14 to know this could impact the project absolutely, but we  
15 do not think it should impact these proceedings.

16           These proceedings are about what we knew during  
17 the siting certification. At that time, again, we were  
18 seeking to permit a project. We got that project  
19 permitted, and it was sold. That's the totality of the  
20 story.

21           So, please, dismiss this complaint.

22           Thank you.

23           HEARING OFFICER VACCARO: Ms. Burch.

24           MS. BURCH: Does Mr. Jackson want to say  
25 anything?

1 HEARING OFFICER VACCARO: Well, I think, since  
2 I -- he does and he will, but I sort of corrected myself  
3 awhile back, saying because you had laid out so many  
4 different issues, I gave Calico the opportunity of  
5 responding directly before engaging with Mr. Jackson.

6 While Ms. Foley Gannon was speaking, if you  
7 recall, you objected and had some concern with respect to  
8 the content of her argument. I asked you to wait. Let  
9 her finish, just as we allowed you to make your argument.

10 If there is a reply that you would like to make  
11 at this time, you're certainly welcome to do so. If you  
12 would rather have Mr. Jackson, Ms. Foley Gannon address  
13 his concerns so that you have time to maybe organize,  
14 that's fine as well.

15 Otherwise, let's hear from you, and then we will  
16 move forward. At the end of the day, however, Calico will  
17 get the final word in this proceeding.

18 MS. BURCH: Okay. I would like to address, first  
19 of all, the requirement of the CEC that the commercial  
20 availability of the generation technology be demonstrated,  
21 frankly, not just in the siting procedure, but in the  
22 Notice of Intention to File stage. It is a required  
23 finding to proceed.

24 So I would cite section 1721, "The purpose of a  
25 notice is that supporting documentation as may be filed

1 concurrently with the notice, is to provide the  
2 Commission, interested agencies, and interested members of  
3 the public, with an informative document, which does all  
4 of the following:"

5           And I'm going to jump down to number five,  
6 "Describe the commercial availability of generation  
7 technologies proposed in the notice (if not already  
8 determined to be commercially available by the  
9 Commission); discusses the economic comparability of the  
10 proposals based upon the comparative generation costs  
11 available to the applicant, and explains the impact of the  
12 proposed facilities on the overall reliability of the  
13 service area system".

14           This isn't about tomorrow. It's not about off  
15 the shelf. It's very straightforward. It says, "Describe  
16 the commercial availability". It's not future. It's not  
17 hypothetical. You have to establish this. And I can only  
18 assume that at the time they made their notice of  
19 intention, that they must have met that standard.

20           But what is very clear is that it changed over  
21 time. And I believe that there -- they've admitted that  
22 in many ways. I would note that the purpose of this is to  
23 consider the economic -- this is B7 within the same  
24 regulation, "To consider the economic financial, rate,  
25 system reliability and service implications of the



1 proposed facilities in coordination with the PUC or with  
2 the Board of directors of the appropriate body who is a  
3 utility".

4           And then it says 8, "To prevent any needless  
5 commitment of financial resources and regulatory effort  
6 prior to a determination of the basic acceptability of and  
7 need for the proposed facilities, and the suitability of  
8 proposed sites to accommodate the facilities, and to  
9 eliminate from further consideration and commitment of  
10 resources any site and related facility found to be  
11 unsuitable, unneeded, or otherwise unacceptable". Those  
12 are the regulations of this Commission. This is a  
13 threshold determination.

14           I would also note that in Appendix B, which is a  
15 document that must be filled out at the Notice of  
16 Intention stage, and which has all kind of critical  
17 information that's going to be needed in the future in the  
18 Environmental Impact Analysis.

19           It states -- and I apologize, I just noted it's  
20 on page 3 of 23 of the current appendix. It says in D,  
21 "Information for projects with which completed the  
22 underlying process. Two, updates of any significant  
23 information which has changed since the Commission's final  
24 decision on the NOI".

25           After this stage, you're going to decide on the

1 proceeding. Every document that they purport to rely on  
2 is supposed to be presented under oath, under oath. One  
3 can only assume that is so you can rely on what is being  
4 said to you.

5           On September 10th, they submitted an updated  
6 application, where they radically changed the footprint of  
7 their facility, radically changed how they were going to  
8 proceed in phasing. And they did not let you know that  
9 the economic viability of this project had changed. And  
10 it was known, at that time, and there is unrebutted  
11 testimony, evidence in this record that that is what was  
12 happening. They knew it and it's unrebutted.

13           You can rule in our favor on this complaint,  
14 simply based on the unrebutted testimony. I would also  
15 submit to you that I can read the testimony around the  
16 statements of Mr. O'Shea, the statements of Ms. Bellows.  
17 But if you -- rather than carry that out here, we can put  
18 it in our closing brief. But there is no question that we  
19 accurately cited everything that we did, and its  
20 implication.

21           I would also like to say that in terms of a  
22 dangerous precedent, the dangerous precedent here is that  
23 there is a lack of candor by applicants to this Committee.  
24 That, in fact, there's an argument in the papers of  
25 Calico -- kRoad Calico Solar that an omission of

1 information is not an affirmative misrepresentation and is  
2 not covered by this statute.

3 Omissions are every bit a lack of candor and  
4 credibility, and affirmance of an oath, as a affirmative  
5 representation. And every time in their documents they  
6 use the word SunCatcher. Every time the PMPD said  
7 SunCatcher. They could have stepped up and said, you know  
8 what, that technology has fallen behind economically. It  
9 is no longer competitive. The only -- who we are talking  
10 to is a photovoltaic company that can produce energy at a  
11 much lower cost that the utilities will purchase. They  
12 didn't tell anyone that. They didn't tell anybody  
13 anything about what they were doing.

14 So I think the dangerous precedent here is that  
15 this Commission with the evidence before it, the admission  
16 by the company that is currently owning this project and  
17 was in the process of buying it, at that time, admits that  
18 it knew at that time, and it had to get that information  
19 from somewhere, because Tessera Solar and NTR were the  
20 sole -- according to them, the sole and exclusive source  
21 of SunCatcher technology, that it was commercially not  
22 available at all.

23 So I would definitely say the precedent here, and  
24 why we're still here talking about this and the importance  
25 of it and the impact on the parties and the Commission and

1 Commission staff is to bring home how this actually played  
2 out here. And it was -- it's a very great miscarriage of  
3 justice here.

4 On burden of proof, the applicant continues to  
5 carry the burden of burden that their technology is  
6 commercially viable. We don't carry that burden. What we  
7 came forward was to show you the information that we had,  
8 give that to the Commission. We believe they carry the  
9 burden. It's unrebutted that they didn't have  
10 commercially available technology. They didn't have it  
11 then, and they don't have it now.

12 HEARING OFFICER VACCARO: Thank you, Ms. Burch.

13 I think, at this time, we'll hear from Mr.  
14 Jackson, if you're still on the line. Are you there?

15 MR. JACKSON: Yes, I'm still on the line.

16 HEARING OFFICER VACCARO: Okay. We can hear you  
17 very well. Are you able to hear me pretty well without --  
18 with or without the static?

19 MR. JACKSON: I hear you fine.

20 HEARING OFFICER VACCARO: Okay. So I think  
21 you've heard how this proceeding has progressed so far.  
22 This is now your opportunity, Mr. Jackson, to basically  
23 summarize and explain your position. I think you've  
24 noticed that Ms. Burch and Ms. Foley Gannon were actually  
25 very succinct, and did so with respect to their points

1 fairly briefly.

2           So let's continue with that trend, if we can. Of  
3 course, say all that you need to say. I'm not trying to  
4 prevent you from doing that, but I think we've had some  
5 good modeling that all the points can be made succinctly  
6 and fairly briefly.

7           MR. JACKSON: Yes, I will be brief. And my  
8 statement that I prepared, what I will do is I will focus  
9 strictly on the issue at hand, and that is BNSF's  
10 complaint wishes to revoke the certification quote, "On  
11 the grounds that the applicant's application supplemental  
12 documentation contained material false statements  
13 regarding the commercial viability and availability of  
14 SunCatchers for the Calico Solar Project".

15           What appears to be the issue is, is material  
16 false statements. And I believe the record and the  
17 evidence is clear, from the outset, from the Application  
18 for Certification, there was statements as to the  
19 availability and viability of the project. And those are  
20 reflected in what is stated about construction.

21           On the application for certification back in  
22 December of 2008, page 3-58, it states, "Construction  
23 traffic is anticipate to commence during the last quarter  
24 of 2010", et cetera, et cetera. Then it goes on and  
25 throughout the supplemental documents, throughout this

1 entire proceeding, some of it has been introduced as  
2 exhibits today in this proceedings, the applicant  
3 continued to represent that construction would commence in  
4 2010.

5           Specifically, in February 2010, the applicant's  
6 submittals of the Calico Solar construction milestones  
7 schedule and project layout figures indicated to start  
8 Phase 1 construction starting October 2010 with the first  
9 units on line in July 2011.

10           In addition to that, in May 2010, in the  
11 Application for Certification the amendment, it states,  
12 "Construction is tentatively scheduled to occur over an  
13 approximate three-year period, beginning in 2010 through  
14 2012, et cetera, et cetera.

15           In the applicant's Phase 1A information in August  
16 of 2010, it also states that, "Ground disturbance would  
17 start in 2010".

18           In August of 2010, this is shortly before the  
19 Commission's decision, the applicant submitted the numbers  
20 of employees and numbers and types of equipment for  
21 October, November, December 2010, indicating that the  
22 project was going to start construction in 2010, including  
23 the amendment based on 3-1 that states -- excuse me, the  
24 petition to amend, states, "While the Commission decision  
25 envisioned construction commencing at the end of 2010, the

1 applicant's amendment would allow construction to begin in  
2 late 2011".

3           The significant words there is, "The Commission's  
4 decision envision construction commencing in 2010". Here  
5 the point is, is that in order to start construction, you  
6 have to have a commercially and available and viable  
7 project, like two SunCatchers.

8           So by constantly referring to the construction  
9 schedule, the documents represent that those -- that the  
10 SunCatchers were commercially available and viable at that  
11 time.

12           Of significant note, Mr. O'Shea's statement  
13 alluding to the sale of the project in September and  
14 October, the evidence that I submitted indicates that the  
15 SunCatchers -- that the market knew that the SunCatchers  
16 were not commercially viable. I've quoted in my document  
17 the astronomical costs, you know, for the Maricopa Power  
18 Project in June, which was known in June of 2010, would  
19 certainly have been a red flag to anybody in the industry  
20 who was considering purchasing 26,540 SunCatchers.

21           Moreover, when it was referring to the  
22 applicant's other projects, these are clear examples that  
23 the market knew, that the applicant knew, that everybody  
24 knew, of course, except for the Commission, that there was  
25 significant problems directly related with the

1 availability and the viability and, of course, the  
2 financing of the project.

3 I believe the evidence is clear, which I  
4 originally started out to request an investigation, leads  
5 me to believe that even at this point in time, there's  
6 enough evidence for the certification to be revoked, and I  
7 move it do so.

8 I also add is that the burden of proof, as stated  
9 in California Code of Regulations, is on the applicant.  
10 And the applicant has not provided any proof to rebut  
11 BNSF's complaint, that it show, in fact, that SunCatchers  
12 were commercially available and viable at the time of the  
13 Commission's decision.

14 That's all I have to say.

15 HEARING OFFICER VACCARO: Thank you, Mr. Jackson.  
16 Ms. Foley Gannon.

17 MS. FOLEY GANNON: Thank you. I'll start where  
18 Mr. Jackson ended. The burden of proof. Absolutely, in a  
19 siting proceeding, the applicant has the burden of proof  
20 of demonstrating that the meet all the requirements of the  
21 Warren Alquist Act to merit a siting. Absolutely. Do not  
22 disagree with that one bit.

23 In a complaint proceedings, that's not the case.  
24 We have the burden of proof -- they have the burden of  
25 proving that we have made a statement which is false and



1 material. If they do that, then we would have the burden  
2 of proving why either one of those things is just not  
3 true. Either we didn't make the statement, it wasn't  
4 false, or it wasn't material to the proceedings.

5 In their complaint and in the evidence cited,  
6 again, they have not pointed to a single statement, which  
7 they have demonstrated as false. That's simply because  
8 there were no false statements made.

9 I can't offer you evidence that shows that every  
10 statement that was made was true. That's not reasonable,  
11 and that certainly isn't what is called for or  
12 contemplated by your regulations. Therefore, I would --  
13 and I hope maybe you would provide clarity on this, that  
14 in a complaint proceeding, the party bringing the  
15 complaint has the burden of meeting the minimum  
16 requirements of showing that there has -- that the  
17 allegations in the complaint merit some action that's  
18 being asked for them to take.

19 Mr. Jackson and Ms. Burch said that there's  
20 unrefuted proof that material misrepresentations were made  
21 to this Commission. I am totally at a loss for what that  
22 unrefuted testimony is. I read through these complaints.  
23 I've looked at each statement that they say. What is the  
24 unrefuted testimony?

25 And it seems to me, because everyone keeps

1 talking about it, it's Mr. O'Shea's testimony before the  
2 CPUC. And so maybe we just spend another couple of  
3 minutes thinking about what did that testimony show? What  
4 does that testimony mean? What was the context of that  
5 testimony given in?

6           The question was put to Mr. O'Shea what he knew  
7 when he was entering into the initial conversations with  
8 Calico Solar about selling the project. Again, this is a  
9 time when there was -- this was not exclusive  
10 negotiations. This was a discussion that was happening  
11 between a potential buyer and a potential seller.

12           Mr. O'Shea says that he thought that the sale  
13 might have had something to do with the fact that the  
14 SunCatchers may not be available on the schedule that  
15 Tessera was anticipating. That's it.

16           That certainly is not saying Calico Solar knew  
17 that the SunCatchers were not available, that the  
18 SunCatchers would not be available, that the SunCatchers  
19 were not viable, that they would never be viable.

20           Simply because that is not what Calico Solar  
21 thought at that time, and that is not any representation  
22 that was made, that was not what was known in the press,  
23 that was not what was known by anybody. The Commission  
24 didn't know that, as well as the applicant didn't know  
25 that.

1           The applicant was working diligently to try to  
2 get a project approved. The applicant wanted to see this  
3 project approved. It wanted to see this project  
4 developed. After it was approved, there were things that  
5 happened. And there had been discussions before it was  
6 approved, but we didn't know what was going to happen with  
7 the project. We were trying to get the project into a  
8 place where it could be built, so that we could have this  
9 important solar project being developed in California.  
10 That's what we were working towards. That's what we were  
11 doing.

12           And so I go back to -- I don't know -- I really  
13 am at a loss of what is this unrebutted testimony. I  
14 don't see it. And as I said, when we walked through the  
15 complaint, the only specific statements that they have  
16 presented are either taken out of context, they're  
17 misrepresentations, or they're misquotes. They are not  
18 evidence that we make misrepresentations at all. And I,  
19 therefore, would ask that you reject this.

20           One other point I would like to make is that Ms.  
21 Burch raised in the beginning of her last round of  
22 speaking, that the regulations require that an applicant  
23 in an AFC proceeding present information about the  
24 commercial availability of the technology. That is in the  
25 NOI proceedings.

1           But as you well know, you don't do NOI providings  
2 for solar thermal projects or for most projects that come  
3 before you today. So applicants do not present  
4 information about the commercial availability of the  
5 technology. Applicants do submit information about  
6 reliability. But as the Commission explained in this  
7 decision on this project, what they're really looking at  
8 more is about the effect of the reliability of the  
9 technology on the grid, on the utility.

10           And information was submitted about the  
11 reliability of the technology during these proceedings.  
12 It was sworn statements that could be relied on, that were  
13 relied on and there was a decision made.

14           So yes, she has scored some language from a  
15 regulation that doesn't apply to these proceedings. When  
16 you go through what applies to the AFC's proceedings,  
17 that's not required. And I don't know of another  
18 proceedings where you're asking for that to be presented.

19           In closing, I'd like to say, you know, again  
20 unique -- we're not unique. Unfortunately, this is a very  
21 financially turbulent time. There are things in general  
22 in the financial market and particularly in the solar  
23 industry where things are changing quickly.

24           Calico Solar tried to get this project permitted  
25 in time, that it could begin construction, that it could

1 get funding through ARRA, that it could move forward with  
2 this project. It invests -- as I said, they invested tens  
3 of millions of dollars in trying to carry out these  
4 efforts. This was not a sham. This was a legitimate  
5 effort. It was an effort that ultimately didn't work out  
6 exactly as the project was planned.

7           And so when the project was sold on December 23rd  
8 following certification, there was a decision to request  
9 an amendment. And that's the appropriate way to come back  
10 to you if there's a change in the project. That's what  
11 Blythe did. That's what they told you they're going to do  
12 with their PV. That's what projects do before you all the  
13 time.

14           So there is nothing that demonstrates because we  
15 need an amendment or because something changed in the  
16 project, that that meant there was something wrong during  
17 the proceedings. It's not unique. We did not lie, and  
18 this complaint should be dismissed.

19           Thank you.

20           HEARING OFFICER VACCARO: Mr. Jackson, just as  
21 Ms. Burch had an opportunity to rebut or respond to Ms.  
22 Foley Gannon's comments, you have that same opportunity.  
23 And if you notice, Ms. Burch, didn't go through her whole  
24 initial argument again. She kept it to summary points  
25 that addressed Mr. Foley Gannon's comments. That would be

1 helpful if you would do the same.

2 MR. JACKSON: Yes. My wife asks me to brief all  
3 the time.

4 (Laughter.)

5 MR. JACKSON: Yes. I'll be brief. I would just  
6 like the Commission to make note of the construction  
7 schedule that was supposed -- that was supposed to be  
8 proposed throughout this entire application process.

9 Thank you.

10 HEARING OFFICER VACCARO: Thank you, Mr. Jackson.

11 I think what I'd like to do now is go off the  
12 record for Five minutes. It is 3:25 by the clock in the  
13 room. At 3:30 we will go back on the record. All of the  
14 parties, should they wish to, will have no more than, and  
15 I really mean it, no more than two minutes, if there is a  
16 final statement, because I will cut you off at two minutes  
17 once we come back from going off the record.

18 (Thereupon a recess was taken.)

19 HEARING OFFICER VACCARO: Back on the record.

20 Everyone, thank you. That was five minutes exactly.

21 We're at 3:30, so I appreciate that.

22 Ms. Burch, if there's anything further that you'd  
23 like to say, two minutes starts now.

24 MS. BURCH: Okay. I have three points.

25 Sorry. Okay, three points.

1           First, the issue here was not the market. This  
2 market has been tough absolutely. The issue here was the  
3 cost per watt of the SunCatcher technology versus the PV  
4 technology. It had fallen to the PV was about 350, they  
5 say at that time, and their technology was anywhere  
6 between 4 and 650.

7           Secondly, they issued a -- they being kRoad, who  
8 is Calico Solar. As you will recall, they did not do a  
9 transfer here. They are kRoad. kRoad is Calico. They  
10 announced -- went on their -- at their press release that  
11 they were going to replace 750 megawatts of this facility  
12 with PV, December 24th, not three months later on December  
13 24th.

14           Thirdly, the most remarkable thing about this  
15 hearing is that it's about material misrepresentation.  
16 And there was not one witness, not one document put in  
17 place today by Calico saying we didn't do that.

18           So I would say that is a significant statement.

19           HEARING OFFICER VACCARO: Thank you, Ms. Burch.  
20 Thank you for sticking to the time limit.

21           Mr. Jackson.

22           MR. JACKSON: The record is clear. The evidence  
23 is overwhelming. I'm confident the Commission will make  
24 the appropriate decision.

25           Thank you.

1 HEARING OFFICER VACCARO: Thank you. Ms. Foley  
2 Gannon, two minutes.

3 MS. FOLEY GANNON: Thank you. It was not a  
4 mystery to the Committee or to the Commission that the  
5 SunCatcher technology was under development at the same  
6 time as the solar project. There was a great deal of  
7 evidence put on about the demonstration project at  
8 Maricopa, about reliability, there was cross-examining,  
9 there was a lot of witnesses, a lot of discussion. There  
10 were findings made on that.

11 So this was not something that was hidden from  
12 the Committee -- or the Commission, and the Committee and  
13 the Commission was well aware of that.

14 Calico Solar again tried to bring this project  
15 forward. It sought to get this project permitted and to  
16 get it built. Financing is what made that not happen the  
17 way it was planned. But again, it's not that they gave up  
18 on the technology. SES continued to try to get financing  
19 for the technology. And Calico Solar continued to include  
20 the SunCatcher in its project.

21 This is not saying that they thought it was  
22 unviable when it was -- the project was approved. It's  
23 not saying they thought that it would not be available.  
24 It might not be available on the schedule that was  
25 proposed, but they did believe that it would be available



1 and it would be viable and they were speaking to continue  
2 this with the project.

3           To ask why we brought no witnesses and why we put  
4 on no exhibits? We didn't see the case to respond to. We  
5 don't see the quote that says here's a statement that you  
6 made that is -- that is false, and that is a  
7 misrepresentation. Therefore, there was nothing for us to  
8 put on. We are here to rebut something that was put on.  
9 And they didn't make a prima facie case, so therefore we  
10 have no witnesses. That' all that that meant.

11           Thank you.

12           HEARING OFFICER VACCARO: Thank you.

13           I think I appreciate that everyone stuck to the  
14 two minutes. Perhaps it seemed a bit arbitrary. It  
15 wasn't. I mean, there was quite a bit of briefing on the  
16 documents that have been submitted on this matter. The  
17 oral argument refreshingly was not just a rehash of what's  
18 already been submitted. I think it focused on key points.  
19 It clarified and underscored key points, I think, that  
20 each party probably needed and wanted to make.

21           The Committee does have some thoughts and some  
22 comments and will be sharing those with all of you in just  
23 a few moments. But we'll do that after taking the public  
24 comments, because there are some individuals on the line.  
25 And I think it's important that we hear from them should

1 they have any comments.

2 A number of people are on the line, but it  
3 doesn't mean that you wish to speak. It is always  
4 difficult to navigate phone traffic. I'm going to do my  
5 best. So why don't we go ahead and start with the first  
6 individual who might wish to make a public comment.  
7 Please identify yourself, your affiliation and please make  
8 a brief comment.

9 And I'm hearing silence.

10 MR. STEARN: I have a comment.

11 HEARING OFFICER VACCARO: Who is this?

12 MR. STEARN: Fred Stearn from Newberry Springs.

13 Just an interested party. No affiliation.

14 And my comment would be if there's any -- I've  
15 listened to this, and other hearings before it. If  
16 there's any questions in the Commission's mind as to  
17 what's going on here, my suggestion is to issue or permit  
18 issuance of subpoenas to the relevant parties, relevant  
19 experts, and relevant witnesses. And that concludes my  
20 comment.

21 Thank you very much.

22 HEARING OFFICER VACCARO: Thank you.

23 Would anyone else like to make a public comment  
24 at this time?

25 Hearing silence.

1           Okay. I'll ask again, is there anyone who wishes  
2 to make a public comment at this time?

3           I'm hearing none.

4           I think so what that does is it moves us closer  
5 to the adjournment. And I will look to Commissioner  
6 Douglas, if you'd like me to make the next statements.

7           PRESIDING MEMBER DOUGLAS: Yes.

8           HEARING OFFICER VACCARO: I figured that was the  
9 case.

10          PRESIDING MEMBER DOUGLAS: I'll surprise you.

11          MR. BUDLONG: Hello.

12          HEARING OFFICER VACCARO: There were --

13          PUBLIC ADVISER KIM: I heard a hello.

14          HEARING OFFICER VACCARO: Hello? Is someone  
15 trying to speak?

16          MR. BUDLONG: Yeah. Tom Budlong.

17          HEARING OFFICER VACCARO: Hello, Mr. Budlong.  
18 Could you speak up just a little bit, please. And you  
19 wish to make a comment at this time?

20                 Mr. Budlong, I don't know if you can hear me, but  
21 we can't hear you. It appears that you possibly hit the  
22 mute button on your telephone.

23          MR. BUDLONG: No. All right. Can you hear me  
24 now?

25          HEARING OFFICER VACCARO: We can hear you now.

1 MR. BUDLONG: Okay. Very good. I got the right  
2 button here. It's a toggle. I had it the wrong way.

3 I'm speaking as an individual, of course, here.  
4 I was an intervenor on the Imperial project, and that's  
5 how I got familiar with the SunCatcher technology.

6 I listened to what you're saying here, and  
7 there's a lot of question of what I hear is what did the  
8 SunCatcher people know and what they didn't know. As if  
9 knowing is a binary condition, you either do or you do not  
10 know -- you didn't know.

11 During the Imperial proceedings, it was obvious,  
12 looking into SunCatchers, that it was a technology in  
13 development, and that it was a long difficult development.  
14 It had been going on for something like 25 years, starting  
15 a long time ago. And a lot of people have been trying to  
16 develop SunCatchers into commercial production without  
17 being able to do it.

18 So it was pretty much obvious during that time  
19 that this was in development, not in production, and that  
20 the SunCatcher, at that time, certainly wasn't ready for  
21 prime time.

22 There was also a question, if you put up the 60  
23 units in Maricopa, and say those are working fine, is it  
24 prudent to then expand it to multiple thousands. At the  
25 time of Imperial, there were talking about something like

1 over 100,000 were being made. And that's considered not a  
2 prudent thing to do based on 60, in a rather controlled  
3 environment and putting them in an environment having  
4 spanned out into Calico. We're talking about like 30  
5 thousand, 40,000 or 60,000. It is an imprudent thing to  
6 do is to expand that, even though it would slowly get your  
7 confidence up with that much money, putting a whole bunch  
8 of these in the field based on a few months of a 60-unit  
9 operation, expecting them to last for 40 years and  
10 operating economically.

11 So I'd like the SunCatcher people to pushing  
12 into --

13 HEARING OFFICER VACCARO: You're starting to fade  
14 just a bit, Mr. Budlong. Our court reporter is having  
15 difficulty hearing you, so if you could project just a  
16 little bit more. You don't need to repeat what you've  
17 said, but your next word, if you would please project,  
18 we'd greatly appreciate it.

19 MR. BUDLONG: Okay. I'll do that.

20 HEARING OFFICER VACCARO: Much better.

21 MR. BUDLONG: I will do my best here.

22 So in my mind, and to an awful lot of observers,  
23 this has been an experimental project all along. It's  
24 interesting to go back to Dr. Barry Butler's posted  
25 testimony in front of the PUC in 2006, where he said, yes,

1 this is a good technology and eventually it's going to be  
2 able to come on, but it's going to take a lot of  
3 development to do that.

4 I think that we've seen that in this hearing. If  
5 you can ignore the idea of either they knew or they didn't  
6 know, which is a binary operation, and consider that  
7 knowing or not knowing is what it is, is there -- is it  
8 reasonable to expect that this is going to come into  
9 some -- come into fruition.

10 There's always some doubt in your mind at how  
11 much confidence do you have in it. And I think that if  
12 you got down into the very bottom of the minds of the  
13 SunCatcher people, you would find that even they weren't  
14 terribly confident.

15 But, of course, a company has to put its best  
16 foot forward. And so for Calico, for the SunCatcher  
17 people to keep saying, yes, we are going -- we are  
18 commercially available, I would expect that. That doesn't  
19 mean that's really the truth.

20 And a number of people have blamed the financing,  
21 and lack of financing, inability to get financing as the  
22 reason for the demise of this project. But that treats  
23 financing as another binary thing. And then as you sit  
24 around in the afternoon and wait if the phone rings and  
25 behold we've got financing. No. What you have to look at

1 is why didn't they get financing?

2 I can well imagine that they've been trying to  
3 get financing to push the project further for quite some  
4 time, and they couldn't get anybody to take the bait. If  
5 these are private financiers, they're very careful about  
6 their money. They want their money back, plus some return  
7 on it.

8 And if it looks like a doubtful project, and  
9 they're not going to get their money back, and there's too  
10 much risk compared to the reward, they're going to -- not  
11 going to get any financing. And I think that's probably  
12 why there was no financing on it. So to say financing  
13 killed it because they couldn't get financing you have to  
14 say, well, why didn't they get financing?

15 And why they didn't get financing, because they  
16 couldn't convince anybody that the project was viable and  
17 it really was a commercially available project.

18 So I would have to side on the side of Pat  
19 Jackson and BNSF, and say, no, Calico was not being fully  
20 honest by not putting forward the fact that this really is  
21 an iffy thing, and would have -- and it very well, might  
22 not fail, and its development has not been completed.

23 I think that if they were truly honest about  
24 things, they would have said, "Yeah, we do have some more  
25 development to do". I think I read in one of the

1 documents where -- in fact in the Staff Assessment where  
2 it talks about -- let me see if I can find that.

3 HEARING OFFICER VACCARO: One more minute, Mr.  
4 Budlong.

5 MR. BUDLONG: Yeah. It says, "The underlying  
6 statements upon which the complainant relies may be  
7 matters of opinion regarding future events, and therefore  
8 are not representations of fact".

9 Well, the whole world is matters of opinion, and  
10 not representations of fact. The only fact they could  
11 have come up with was we've already installed 100,000  
12 SunCatchers and they will work. And so it comes down to  
13 ifs, and matter of opinion and human judgment to say, no,  
14 this thing was not well enough to develop to be a viable  
15 project, something that you can rely on, and something  
16 that you can build a project on.

17 So I appreciate your listening to me.

18 HEARING OFFICER VACCARO: Thank you for your  
19 comments, Mr. Budlong.

20 Is there anyone else who would like to make a  
21 public comment at this time?

22 I'm hearing none. So unless I am interrupted, I  
23 think that's the end of public comment.

24 What I was starting to say, before we heard from  
25 Mr. Budlong, is that there's been quite a bit in terms of



1 the oral argument and the documents that have been  
2 submitted to the Committee. The parties, I think, have  
3 done -- and when I say that, I mean the folks represented  
4 by attorneys as well as Mr. Jackson who's representing  
5 himself, have done, I think, what is a very good job of  
6 zealous advocacy for your positions.

7 I think you all seem to believe that this is  
8 readily and easily decided on your particular pleading or  
9 on your particular point of view. I think what the  
10 Committee sees though is that this is a matter that it  
11 needs to consider with now the benefit of your oral  
12 argument today.

13 As the Committee sits here today, it doesn't need  
14 anymore information. It doesn't need further inquiry. It  
15 does not believe that any further discovery is warranted,  
16 but with the qualifier, as the Committee sits here today.  
17 The Committee is going to undertake to submit the proposed  
18 decision that's required by the regulations. And it's  
19 specifically regulation 1235 gives the Committee 21 days  
20 after today to submit a proposed decision for Commission  
21 consideration. That is the Committee's goal today.

22 If there is something in the process that causes  
23 the Committee to believe that it needs further information  
24 or additional information, it will stay true to the order  
25 that was issued that said it will let the parties know

1 that, and then give directives for the parties and  
2 potentially staff to assist the Committee if it needs any  
3 further assistance.

4 But as we sit here today, 21 days from today is  
5 the 24th, that is when you can expect to see the last  
6 possible day that you can expect to see a proposed  
7 decision from this Committee.

8 So I'm going to turn it over to Commissioner  
9 Douglas, but thank you all. I mean, this is just -- for  
10 me personally, I don't speak on behalf of the  
11 Commissioners in this regard, but thank you for keeping  
12 your points pointed, not going over and rehashing  
13 everything, but making it, I think, more clarifying and  
14 illuminating to all of us in moving forward with a  
15 decision on this matter.

16 PRESIDING MEMBER DOUGLAS: Thank you. I think  
17 that both of us join our Hearing Officer on that last  
18 comment. And this was well and thoroughly argued. This  
19 hearing was helpful for us, so we appreciate it. We'll  
20 look forward to certainly moving forward as quickly as we  
21 can to get out a proposed decision. And as Hearing  
22 Officer Vaccaro said, the Committee, at this time, we  
23 don't see a need for additional information.

24 Any comments?

25 ASSOCIATE MEMBER WEISENMILLER: No.

1           PRESIDING MEMBER DOUGLAS: All right. So with  
2 that, thank you. We're adjourned.

3           (Thereupon the Calico Solar Project hearing  
4 adjourned at 3:46 p.m.)

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## CERTIFICATE OF REPORTER

I, JAMES F. PETERS, a Certified Shorthand Reporter of the State of California, and Registered Professional Reporter, do hereby certify:

That I am a disinterested person herein; that the foregoing California Energy Resources Conservation and Development Commission hearing was reported in shorthand by me, James F. Peters, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed, under my direction, by computer-assisted transcription;

I further certify that I am not of counsel or attorney for any of the parties to said meeting nor in any way interested in the outcome of said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of October, 2011.



JAMES F. PETERS, CSR, RPR

Certified Shorthand Reporter

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