

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
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**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

DOCKET**11-CAI-01**DATE Aug 12 2011RECD. Aug 12 2011

In the Matter of:)	Docket No. 11-CAI-01
)	
Complaint and Investigation)	STAFF RESPONSE
)	TO VERIFIED COMPLAINT TO
CALICO SOLAR PROJECT)	REVOKE CERTIFICATION
Calico Solar, LLC)	(CCR TITLE 20, § 1237)
_____)	

**I.
SUMMARY**

On June 8, 2011, BNSF Railway Company (BNSF) filed a document entitled “Verified Complaint to Revoke Certification” in the matter of the Calico Solar Project (Calico). The Complaint failed to specify whether that document was being filed pursuant to California Code of Regulations, Title 20, § 1231 or 1237.

On June 14, 2011, Chairman Robert Weisenmiller filed a scheduling order pursuant to California Code of Regulations, Title 20, § 1232 regarding the complaint. In that order, the Chairman ordered that the Complaint be treated as a document filed under Section 1231 and 1237. The Order directed BNSF to perfect its complaint within five days of the order. BNSF failed to do so. The Order also directed staff to investigate the allegations raised in the complaint as to whether Calico significantly failed to comply with the terms and conditions of the certification within 30 days after receipt of the perfected Complaint.

On July 12, 2011, BNSF filed a document entitled “Verified Complaint to Revoke Certification.” Like the former document filed on June 8, the subsequent Complaint failed to specify whether that document was being filed pursuant to California Code of Regulations, Title 20, § 1231 or 1237. The Complaint filed on July 12, 2011, fails to comply with the informational requirements for post-certification complaints under the California Energy Commission’s (Energy Commission) regulations and is therefore insufficient. (See, California Code of Regulations, Title 20, § 1237(a).)

Nevertheless, staff initiated an investigation into the underlying allegations raised in the “verified complaint.” After a thorough and exhaustive review of the 180 Conditions of Certification in the Energy commission’s Final Decision, staff has concluded that the Calico Solar Project is currently not in compliance with only one condition of

certification. Staff has further concluded that changed circumstances justify the deletion of that condition as requested by Calico in their Petition to Amend filed March 18, 2011. Staff therefore recommends that the "Verified Complaint to Revoke Certification" be dismissed as being insufficient, as well as lacking merit with respect to the allegations that Calico has significantly failed to comply with conditions of certification.

II.

BACKGROUND

On December 1, 2008, Stirling Energy Systems (SES) Solar Three, LLC and Stirling Energy Systems Solar Six, LLC (Applicant), submitted an Application for Certification (AFC) to the Energy Commission to construct a concentrated solar thermal power plant facility approximately 37 miles east of Barstow, in San Bernardino County.

The proposed project will be constructed on an approximate 4,613-acre site located in San Bernardino County, California. The project site is approximately 37 miles east of Barstow, 17 miles east of Newberry Springs, 57 miles northeast of Victorville, and approximately 115 miles east of Los Angeles (straight line distances). The Applicant has applied for a Right of Way (ROW) grant from the United States Bureau of Land Management (BLM) to construct and operate the CSP on BLM-managed public lands. CSP will use approximately 32 acre feet of water per year, produce a nominal 663.5 MW of electricity, and operate for a term of 40 years. The project is proposed for development in two phases. Phase I is located on approximately 1,876 acres. Phase II is located on approximately 2,737 additional acres. About 26,540 SunCatchers, configured in 442.5 MW groups of 60 SunCatchers will be constructed on the project site.

On October 28, 2010, at the regularly scheduled Business Meeting, the Energy Commission approved the Calico Solar Project.

III.

INVESTIGATION AND ANALYSIS

BNSF raises two allegations that are brought under Title 20, California Code of Regulations, § 1237. BNSF alleges that "there has been a 'significant failure' by the Applicant to comply with the terms or conditions of approval of the application as specified by the energy commission in its December 1, 2010 written decision" (Complaint, p.2, paragraph 2), and "the Applicant has no intention of complying with the terms and conditions of approval of the application" (Complaint, p. 8, paragraph 23) These allegations were analyzed by staff both on their sufficiency and on the merits of their claims. Staff concludes that the Complaint is insufficient, in that it fails to meet the requirements of Title 20, California Code of Regulations, § 1237(a). Further, based on its investigation into the substance of the allegations, staff concludes that the Complaint

is nevertheless without merit with respect to the allegation that Calico has significantly failed to comply with conditions of certification.

A. Sufficiency of the Complaint

Title 20, California Code of Regulations, § 1237(a), provides in relevant part:

Any person must file any complaint alleging noncompliance with a commission decision...solely in accordance with this section. All such complaints...shall include the following information:...

(3) a statement of facts upon which the complaint is based;...

(4) a statement indicating the statute regulation, order, decision, or condition of certification upon which the complaint is based;...

(7) a declaration under penalty of perjury by the complainant attesting to the truth and accuracy of the statement of facts upon which the complaint is based.

1) Section 1237(a)(3)

Section 1237(a)(3) requires that the complainant include a statement of facts upon which the complaint is based. In the document filed on July 12, 2011 by BNSF entitled "Verified Complaint to Revoke Certification," the complainant makes two general allegations of non-compliance.

First, BNSF alleges that "there has been a 'significant failure' by the Applicant to comply with the terms or conditions of approval of the application as specified by the energy commission in its December 1, 2010 written decision." However, BNSF failed to provide a statement of facts in support of this assertion: indeed, the documents submitted by the complainant are completely void of any information in support of their allegation that any specific condition of certification has been violated.

Secondly, BNSF alleges that "the Applicant has no intention of complying with the terms and conditions of approval of the application." Once again, however, BNSF failed to provide any statement of facts beyond mere speculation that would support this assertion. In addition, BNSF takes the curious position that the Energy commission should punish the project owner for what it does (or does not) intend to do at some point in the future. This is contrary to the legal maxim "Actus non facit reum, nisi mens sit rea," or the intent and act must both concur to constitute a crime. Here it is not a "crime" of omission for which BNSF seeks to have the Certification revoked, but rather the intent to one day fail to comply with the terms and conditions of certification. Nor does

BNSF explain how Calico's alleged future intention to comply (or not) with the Conditions of Certification is currently ripe for consideration by the Energy commission.

Lacking a statement of facts upon which to base their allegations specific to the conditions of certification in the Energy commission's Decision in the instant matter, the complaint does not comply with § 1237(a)(3) and is insufficient.

2) Section 1237(a)(4)

Section 1237(a)(4) requires that the complainant include a statement indicating the statute regulation, order, decision, or *condition of certification* upon which the complaint is based. [Emphasis added] This section requires specificity in order for staff to be able to determine what conditions have been violated, if any.

Here, the complaint is silent as to which specific conditions have been violated. The burden of identifying which specific condition of certification has been violated lies with the complainant. The complaint must set forth the essential facts of the case with reasonable precision and with sufficient clarity and particularity so that the defense may be apprised of the nature, source and extent of the cause of action. Metzenbaum v. Metzenbaum (1948) 86 Cal.App. 2d, 750. It is not enough to allege, in blanket fashion, that the project owner is out of compliance with all of its conditions of certification without indicating which specific conditions are the subject of the complaint. Because the complaint lacks a statement indicating which conditions of certification have been violated, the complaint does not comply with § 1237(a)(3) and is insufficient.

3) Section 1237(a)(7)

Section 1237(a)(7) further requires that the complainant provide a declaration signed under penalty of perjury attesting to the truth and accuracy of the statement of facts upon which the complaint is based. Included in the Complaint docketed on July 12, 2011 is a declaration signed by Orest B. Dachniwsky, Associate General Counsel for BNSF. That declaration reads as follows:

"I declare under penalty of perjury *under the laws of the State of Texas* that the forgoing is true and correct, and that this verification was executed on June 30, 2011, at Ft. Worth, Texas." [Emphasis added]

California Code of Civil Procedure § 2015.5 provides that declarations required by any California statute, regulation, or ordinance that are made out of the State of California *must* state that such declaration is made "under the laws of the State of California":

Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration,

verification... (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California. (CCP § 2015.5, emphasis added)

In Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal.4th 601, 611, the Court held that the out-of-state declaration was invalid by "not stating" it was made under the laws of California:

"Far from being surplusage, the statutory phrase that petitioner ignored discloses California's interest in preventing and punishing perjury even as to documents signed outside the state. It seems clear that out-of-state declarations offend section 2015.5, and are not deemed sufficiently reliable for purposes of that statute, unless they follow its literal terms." 33 Cal.4th 601, 611.

The out-of-state declaration submitted by complainant BNSF was submitted as having been signed "under penalty of perjury under the laws of the State of Texas," not under the laws of the State of California as required by CCP § 2015.5. The Complaint is therefore insufficient pursuant to § 1237(a)(7).

Based on the foregoing, staff recommends that the committee determine that the complaint is insufficient pursuant to § 1237(a), and order that the complaint be dismissed pursuant to § 1237(e)(1) as set forth below in Section IV, "Recommendations." Staff further recommends that the committee also make a finding regarding the merits of the Complaint as discussed below.

B. Merits of the Complaint

Staff have concluded that the complaint filed by BNSF is insufficient, in that it does not set forth which specific conditions have been violated, does not contain a statement of facts indicating in what manner any of the conditions in the energy commission decision have been violated, nor is the complaint contain a declaration that conforms to California Code of Civil Procedure § 2015.5. Staff further has concluded that the allegation that "the Applicant has no intention of complying with the terms and conditions of approval of the application" is not ripe for consideration and wholly without merit, in that the assumed intent of the project owner is not relevant absent a specific act or failure to act (as discussed above). Nevertheless, the energy commission staff have conducted a review of all of the applicable conditions of certification in the Commission's Final Decision in accordance with the Siting Committee's Order filed August 5, 2011.

The Commission's final decision consists of 180 individual Conditions of Certification across all of the various technical areas. Each of these Conditions of Certification was reviewed by energy commission staff for each technical area. Including the following: Project Alternatives; Compliance; Engineering (including Facility Design, Power Plant

Efficiency, Power Plant Reliability, Transmission System Engineering, and Transmission System Safety and Nuisance); Public Health and Safety (including GHG Emissions, Air Quality, Public Health, Worker safety and Fire Protection, Hazardous Materials Management, and Waste Management); Environmental Assessment (including Biological Resources, Soil and Water Resources, Cultural Resources, and Geological and Paleontological Resources); Local Impact Assessment (including Land Use, Traffic and Transportation, Socioeconomics, Noise and Vibration, and Visual Resources).

With the understanding that the project owner will not begin constructing the facility until 2012, of the 180 separate Conditions of Certification, staff has identified only one Condition that Calico has been unable to comply with. Reliability-1 (REL-1) provides as follows:

REL-1 From the time of the Energy Commission's adoption of this condition of certification to the start of commercial operation of the Calico Solar Project, or to the closure of the Maricopa Plant, whichever occurs earlier, the project owner shall obtain and provide to the CPM quarterly data sets of reliability and maintenance data from the Maricopa Plant, including the following:

- a) logs of equipment failure data and operational data for all major equipment, including power conversion units, drive mechanisms, and controls. These logs shall include major equipment and plant availability factors, and major equipment and plant forced outage rates, including their causes and durations
- b) plant operating logs showing dates and times of dispatch, and power level of dispatch

During the first two years of the commercial operation of the Calico Solar Project, the project owner shall maintain quarterly data sets of reliability and maintenance data, including the information specified in paragraphs a) and b) above, for the Calico Solar Project and make the information available to the CPM upon request.

Verification: On a quarterly basis, the project owner shall submit the Maricopa project data described in paragraphs a) and b) above, to the CPM, and shall make the Calico Solar Project data available to the CPM upon request.

Staff notes that this condition was added after the evidentiary hearing by the Committee assigned to the Calico Licensing Proceeding, and placed upon Calico a reporting obligation. Per the terms of the Condition, Calico was required to submit a quarterly report in April (for the time period covering the first quarter of 2011) and July (for the time period covering the second quarter of 2011). No such quarterly reports have been submitted by Calico.

However, staff also notes that circumstances have changed since the project was licensed that make it difficult, if not impossible, for Calico to comply with the reporting requirements of this Condition. Due to a change in ownership of the project, Calico no longer has access to the Maricopa project data that is the subject of Condition of Certification REL-1. Staff notes that Calico has sought to remedy this inability to supply the required data in its Petition to Amend dated March 18, 2011.

The failure to provide the data as required by this condition appears to be due to circumstances presently beyond the control of the project owner. Most importantly, this failure will not result in any harm to the environment, nor will it result in a violation of any law, ordinance, regulation, or standard. Only the Energy commission's Condition of Certification REL-1 is affected by this, a circumstance that the project owner is seeking to remedy by way of a timely filed Petition to Amend. Staff therefore recommends no further action pending the approval of the Petition to Amend.

Based on the foregoing, the pleadings filed by BNSF are without merit with respect to both the allegation that there has been a significant failure by Calico to comply with the conditions of certification and the allegation that Calico does not intend to comply with the conditions of certification.

IV.

RECOMMENDATIONS

Title 20, California Code of Regulations, § 1237(e) sets forth the actions that the committee must take upon issuance of the staff report:

Within 30 days after issuance of the staff report, the committee shall:

- (1) dismiss the complaint upon a determination of insufficiency of the complaint or lack of merit;
- (2) issue a written decision presenting its findings, conclusions, or order(s) after considering the complaint, staff report, and any submitted comments; or
- (3) conduct hearings to further investigate the matter and then issue a written decision.

As to the complaint filed by BNSF on July 12, 2011 entitled "Verified Complaint to Revoke Certification," staff recommends that the energy commission make a determination of insufficiency, and find that the complaint lacks merit. Staff recommends that the complaint in the instant matter be dismissed on both of those grounds in accordance with § 1237(e)(1).



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

Docket No. 11-CAI-01

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DECLARATION OF SERVICE

I, Chester Hong, declare that on August 12, 2011, I served and filed copies of the attached **STAFF RESPONSE TO VERIFIED COMPLAINT TO REVOKE CERTIFICATION (CCR TITLE 20, § 1237**, dated August 12, 2011. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [<http://www.energy.ca.gov/sitingcases/calicosolar/investigate/index.html>].

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

(Check all that Apply)

For service to all other parties:

Served electronically to all e-mail addresses on the Proof of Service list;

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

AND

For filing with the Docket Unit at the Energy Commission:

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

by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT

Attn: Docket No. 11-CAI-01

1516 Ninth Street, MS-4

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

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s/
CHESTER HONG