

DOCKET

11-CAI-01

DATE AUG 19 2011

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STATE OF CALIFORNIA

**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

In the Matter of:

The Calico Solar Project

DOCKET NO. 11-CAI-01

**BNSF'S COMMENTS TO CEC
STAFF REPORT REGARDING
BNSF'S VERIFIED COMPLAINT
TO REVOKE CERTIFICATION**

Intervenor BNSF Railway Company ("BNSF") submits the following comments to the CEC Staff Response to BNSF's Verified Complaint to Revoke Certification.

A. Applicant's Anticipatory Repudiation and Intention Not To Comply With Certification, Effective December 1, 2010

First, Staff contends BNSF has "failed to provide a statement of facts" to support its assertion that "the Applicant has no intention of complying with the terms and conditions of approval of the application" or of Calico's "'significant failure' ... 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." Staff Report at p.3.

Staff completely misreads BNSF's Verified Complaint. The Verified Complaint clearly alleges that in the Energy Commission's decision, effective December 1, 2010, the Commission approved Calico's application to construct and

operate a 663.5MW utility-scale SunCatcher facility comprised of 26,540 SunCatchers, configured in 442.5 MW groups of 60 SunCatchers ... on the project site, with Phase 1a to consist of "60 SunCatchers configured in a single group and much of the support facilities," "Phase 1b and Phase 2 ... [to] contain the remaining 26,390 SunCatchers arranged in 1.5 MW solar groups of 60 SunCatchers per group, bringing the Calico Solar Project to its net nominal generating capacity of 663.5 MW." BNSF Verified Complaint ¶ 14.

Barely three weeks later, Calico's owner, Tessera Solar North America, sold Calico to a company focusing on photo-voltaic ("PV") power, K-Road Power. Tessera also announced, at the time of the sale, that "SunCatchers would not be commercially viable in the near term," thereby repudiating the very approval that Calico had just obtained. *Id.* ¶ 15.

BNSF's Verified Complaint also alleges that Calico's now-Vice President, Daniel O'Shea, was aware as early as September or October 2010, that SunCatchers were not "commercially available." *Id.* ¶¶ 17-18. BNSF not only alleges this, under penalty of perjury, but annexed the sworn testimony of Mr. O'Shea attesting to the commercial inviability and unavailability of SunCatchers.

BNSF also alleged that, nearly contemporaneously with Tessera Solar's announcement that "SunCatchers would not be commercially viable in the near term," Southern California Edison announced the termination of its power purchase

agreement with Calico, thereby making the entire project economically unviable.
Id. ¶ 15.

If Tessera's public announcement concerning the "commercial unavailability" of SunCatchers were not sufficient, by itself, then Applicant's March 2011 filing of a Petition to Amend to convert the project to 85% PV technology constitutes confirmation of Calico's stated intention not comply with the CEC Decision and Certification, effective December 1, 2010. Indeed, it is precisely because SunCatchers are not now commercially available or economically viable that Calico filed its Petition to Amend, seeking to convert its 663 MW SunCatcher project to a project that is 563 MW PV and only 100.5 MW SunCatchers. In its Petition to Amend, Calico also seeks to delay the construction of SunCatchers until Phase 2, rather than Phase 1, as originally approved by the Energy Commission in its December 1, 2010 certification.

Staff's Report wholly ignores Applicant's post-certification public announcements and sworn testimony that SunCatchers are not commercially available nor economically viable, and the impact of Southern California Edison's termination of the power purchase agreement on the entire project.

Instead, Staff contends that Calico's announcements and sworn testimony regarding the commercial unavailability and economic non-viability of SunCatchers and its intention not to build the approved 663.5 MW SunCatcher

project approved by the Energy Commission in its December 1, 2010 certification should be treated by BNSF and the Energy Commission as "mere speculation." Staff Report at 3. Staff even contends that Calico's actions must rise to the level of a "crime" (*id.*) in order for the Energy Commission to revoke its December 1, 2010 certification of the 663.5 MW SunCatcher project, pursuant to Public Resources Code § 25534(a).

Not surprisingly, Staff cites no support for its position that Calico's actions must constitute a "crime" to warrant revocation. There is no such requirement under Public Resources Code § 25534(a) or CCR § 1237(a). Nor is there any reason why, as Staff suggests, that the Energy Commission should simply ignore Calico's public announcements regarding the commercial unavailability and economic unviability of SunCatchers and its stated intention not to build the 663.5 MW SunCatcher project that was approved in the Energy Commission's December 1, 2010 decision and certification.

But there is no dispute that Calico has announced that it cannot and will not construct the 663.5 MW SunCatcher project approved in the Energy Commission's December 1, 2010 certification, and that Calico has abandoned the approved 663.5 MW SunCatcher project in favor of the new project described in its Petition to Amend as 563 MW single-axis tracker PV panels and only 100.5 MW of SunCatchers.

Moreover, in its report, Staff makes no attempt to investigate the commercial availability or economic viability of SunCatchers, and whether it is even worthwhile for the Energy Commission to expend any more resources on this Calico project, given Calico's sworn testimony regarding the commercial unavailability and economic non-viability of SunCatchers at this time. After all, at the time of the Energy Commission's December 1, 2010 certification, Calico had a power agreement with Southern California Edison and, with that power agreement, the commercial availability and economic viability of SunCatchers was assumed. But there is no longer any basis for such an assumption.

Thus, ironically, BNSF agrees with Staff that "circumstances have changed since the project was licensed that make it difficult, if not impossible, for Calico to comply" with the Energy Commission's December 1, 2010 certification. The most basic of the "terms" of the Energy Commission's December 1, 2010 certification was approval of a 663.5 MW SunCatcher project. Due to "changed circumstances," however, including Tessera's announcement of the "commercial unavailability" of SunCatchers, Mr. O'Shea's sworn testimony concerning the lack of commercial viability of SunCatchers, and Calico's renouncement of any intention to build a 663.5 MW SunCatcher project, it is now "impossible" for Calico to comply with the Energy Commission's December 1, 2010 Certification.


For that reason, the Energy Commission's December 1, 2010 certification should be revoked immediately, as the Energy Commission is authorized to do under Section 25534(a) of the Public Resources Code for "any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision."

B. BNSF's Compliance with CCR § 1237(a).

California Code of Regulations, Section 1237(a), requires 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." In support of its Verified Complaint to Revoke Certification, BNSF provided the declaration of Orest B. Dachniwsky, who is employed in BNSF's principal offices located in Ft. Worth, Texas.

Staff complains that Mr. Dachniwsky's verification was submitted under penalty of perjury under the laws of the State of Texas, rather than California. BNSF herewith submits a new verification from Mr. Dachniwsky, this time under the law of California.

August 19, 2011


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DECLARATION OF SERVICE

I, Helen B. Kim, declare that on August ~~25~~, 2011, I served by U.S. mail and filed copies of the attached **BNSF's Comments to CEC Staff Report Regarding BNSF's Verified Complaint to Revoke Certification**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/calicosolar/compliance/index.html].**

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

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

- sent electronically to all email addresses on the Proof of Service list;
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- delivering an original paper copy and sending one electronic copy by e-mail to the address below (**preferred method**);

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CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 11-CAI-01
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

_____/s/_____
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**FOR THE CALICO SOLAR PROJECT
COMPLAINT AND INVESTIGATION**

Docket No. 11-CAI-01

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