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August 26, 2011

DOCKET**11-CAI-01**

DATE AUG 26 2011
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Siting Committee
Kourtney Vaccaro, Hearing Officer
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814

Re: CALICO SOLAR PROJECT, DOCKET NO. 11-CAI-01
CALICO'S COMMENTS REGARDING STAFF RESPONSE TO
VERIFIED COMPLAINT TO REVOKE CERTIFICATION

Dear Hearing Officer Vaccaro:

Pursuant to Section 1237(d) of the CEC's regulations, Calico Solar, LLC (Calico) submits these comments on the August 12, 2011 Staff Response to Verified Complaint to Revoke Certification. Calico agrees with Staff that BNSF's Complaint warrants dismissal as it is insufficient under Section 1237(a) and should also be denied on the merits. Calico appreciates Staff's thorough and broad review of the Complaint and the Conditions of Certification.

I. PROCEDURAL HISTORY

On June 8, 2011, BNSF filed a document captioned as a "Verified Complaint to Revoke Certification" in Docket No. 08-AFC-13C. On June 9, 2011, the Chief Counsel's Office interpreted the filing as a complaint filed pursuant to Sections 1231 and 1237 and directed the docket office to open a new proceeding. The memorandum to the docket office, which was also sent to the service list, stated: "The Verified Complaint should not be docketed under 08-AFC-13C." Memorandum, p. 1. The Committee then issued a Service of Complaint and Scheduling Order on June 15, 2011. The order directed BNSF to correct deficiencies in its filing within 5 business days. BNSF ignored the Committee's June 15 order.

Rather than complying with the order, on July 7, 2011, BNSF served a "Petition To Revoke Certification And To Stay Compliance Proceedings Pending Adjudication Of This Petition," which was once again captioned in Docket No. 08-AFC-13, and which sought to stay consideration of the Petition to Amend in Docket No. 08-AFC-13. Calico understands that BNSF has withdrawn this filing. The document is not present in the log for either Docket 08-AFC-13C or Docket 11-CAI-01, but is posted on the Commission's website as a document related to Docket 08-AFC-13C (under "Intervenors' and Others' Documents").

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Then, on July 12, 2011, BNSF filed another document captioned as a “Verified Complaint to Revoke Certification.” On August 5, 2011, the Committee issued its order directing service of a complaint that was filed on “June 12, 2011” with the CEC’s Siting/Dockets Unit and on “June 20, 2011” with the CEC Chief Counsel. Calico believes these references to “June” are in error, and points out this discrepancy only because BNSF’s serial filings have created confusion. Hearing Officer Vaccaro served Calico with BNSF’s July 12, 2011 Complaint. Staff’s response also addresses the July 12, 2011 Complaint.

II. STAFF IS CORRECT THAT BNSF’S COMPLAINT FAILS TO MEET THE REQUIREMENTS OF SECTION 1237(A) AND SHOULD THEREFORE BE DISMISSED

A. BNSF’s Verification Is Invalid.

Staff correctly found that the verification of the July 12, 2011 “Verified Complaint to Revoke Certification” is legally insufficient. *See* Code of Civ. Proc. § 2015.5. BNSF has now provided an amended verification with its comments, BNSF points to no authority that allows it to cure the defect in the verification simply by way of filing a comment letter pursuant to Section 1237(d). BNSF’s comments and quotation from Section 1237(a)(7) appear to imply that Staff’s finding that BNSF did not comply with this section is simply a matter of Staff “complaining.” BNSF’s Comments to CEC Staff Report, p. 6. This is not the case. Section 2015.5 requires that a verification be made under penalty of perjury under the laws of the State of California whenever a verification is required “under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state.” This requirement supports the State’s interest in preventing and punishing perjury and ensures that out-of-state verifications are sufficiently reliable.

B. BNSF Failed to Provide Factual Support for its Allegations of Non-Compliance.

In its Report, Staff found that BNSF completely failed to provide any specific facts to support its sweeping allegations that Calico has significantly failed to comply with the terms and conditions of its license and that Calico has affirmatively stated that it will not comply with these conditions in the future. Staff is correct on both accounts. Staff is also correct that these failures require dismissal of the Complaint.¹ As found by Staff,

¹ It is hardly surprising that BNSF’s complaint did not track the requirements of Section 1237(a) as BNSF did not specify whether it was filing the complaint under Section 1231 or 1237 or some other unnamed provision. We agree with Chairman Weisenmiller’s determination that the verified complaint includes allegations which could, if correctly presented, fall under Sections 1231 or 1237. We commend the Committee and the Staff’s continued efforts to ensure a full consideration of issues raised in this proceeding despite BNSF’s continued inability to comply with the Committee’s orders and the Commission’s regulations.

BNSF's Complaint does not reference *any* particular condition that Calico has failed to satisfy, but rather includes a blanket statement that Calico is out of compliance and intends to remain so. This statement does not meet the requirements of Section 1237(a).

In its comments on the Staff Report, BNSF claimed that Staff's attempt to discern meaning from its generalized and sweeping Complaint resulted in a "complete misread[ing] of BNSF's Verified Complaint." BNSF's Comments, p. 1. BNSF then explained that its allegations of non-compliance are wholly based on claims that SunCatchers may not be commercially available and that the project may not be economically viable. As Staff correctly found, these allegations have nothing to do with whether Calico is currently in compliance with the Commission's decision or whether it will be in compliance with applicable conditions some time in the future.

BNSF is correct that events which have transpired since issuance of the Commission's Decision have led Calico to propose modifications "to the project design, operation, [and] performance requirements. *See* 20 CCR § 1769(a)(1). Therefore, consistent with the procedures provided in Section 1769, Calico filed a Petition to Amend the Calico Solar Project on March 22, 2011. BNSF did not and cannot cite any support for the absurd proposition that a request to amend a license, filed under the provision of the Commission's Regulations, is evidence that a project owner will not comply with a commission decision and that the license should be revoked.² If the Commission accepted BNSF's interpretation, which is not made pursuant to any legal authority or practical rationale, it would mean that an applicant could never request changes to a Commission's decision post certification.

III. STAFF IS CORRECT IN CONCLUDING THAT BNSF'S COMPLAINT IS WITHOUT MERIT

Because BNSF failed to cite any specific condition with which Calico has failed to comply, CEC Staff from each technical area conducted a full investigation of Calico's compliance with all the conditions of certification and determined that BNSF's claim of non-compliance is wholly without merit. Staff found that "of the 180 separate Conditions of Certification, staff has identified only one Condition that Calico has been unable to comply with." Staff Response, p. 6. With respect to that Condition, REL-1, Calico notes that the only reason why it has not yet provided data related to the Maricopa facility to the Compliance Project Manager is that it does not have the relevant data. As was described in its Petition to Amend, the Calico Solar Project is no longer owned by Tessera Solar, the owner and operator of Maricopa Solar, and therefore, Calico Solar is not able to access the logs and detailed reliability and maintenance data. Accordingly, in the Petition to Amend filed prior to the date when the first report was due under the

² BNSF's bizarre reference to "anticipatory repudiation" of a Commission decision can be deemed BNSF's recognition that it has absolutely no authority for its assertion. *See* BNSF's Comments to CEC Staff Report, p. 1.

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Conditions of Certification, Calico asked to be relieved of this condition. Recognizing that this request has not yet been considered by the Commission, Calico has communicated with the operator of the Maricopa facility regarding the type of data that is required. Calico will continue working with the operator of the Maricopa Facility in Calico's attempt to obtain and provide the relevant data, if possible.

Calico agrees with Staff's conclusion that the failure to provided the data required under REL-1 should not be considered a "significant failure to comply with the terms and conditions" of Commission's Decision on the Calico Solar Project. Staff Response, p. 7. We further note that BNSF's Complaint made no mention of REL-1, and BNSF's comment letter disclaims any particular interest in Calico's compliance with this condition. Thus, BNSF's allegations that Calico has significantly failed to comply with the Commission's Decision should be dismissed.

IV. CONCLUSION

Calico agrees with Staff that BNSF's Complaint should be dismissed as insufficient and lacking in merit. Calico notes that much of Staff's reasoning applies to BNSF's assertions which the Committee has deemed claims pursuant to Section 1231. The July 12, 2011 Complaint fails to state any cognizable legal claim pursuant to *either* Section 1231 *or* Section 1237. Calico will address the entirety of the Complaint in its answer.

Sincerely yours,



Ella Foley Gannon



**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, Marsha Curtis, declare that on August 26, 2011, I served and filed copies of the attached **Calico's Comments Regarding Staff Response to Verified Complaint to Revoke Certification**, dated August 26, 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: [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;
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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**
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CALIFORNIA ENERGY COMMISSION – DOCKET UNIT

Attn: Docket No. 11-CAI-01
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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.

