

STATE OF CALIFORNIA
Energy Resources Conservation and
Development Commission

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In the Matter of:

Complaint and Investigation

CALICO SOLAR PROJECT
Calico Solar, LLC

Docket No. 11-CAI-01

ANSWER TO VERIFIED COMPLAINT TO REVOKE CERTIFICATION

September 1, 2011

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STATE OF CALIFORNIA

**Energy Resources Conservation and
Development Commission**

In the Matter of:

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ANSWER TO VERIFIED COMPLAINT TO REVOKE CERTIFICATION

Pursuant to the Committee Order of August 5, 2011, K Road Calico Solar LLC responds to the allegations in BNSF's "Verified Complaint to Revoke Certification" as follows:

I. BNSF'S COMPLAINT

On July 12, 2011, after two prior filings that did not comply with the Commission's regulations and orders, BNSF filed an improperly verified document captioned as a "Verified Complaint to Revoke Certification." On August 5, 2011, the Committee issued its order directing service of this complaint, and Hearing Officer Vaccaro served Calico with BNSF's July 12, 2011 Complaint.

BNSF's Complaint alleges that "the Applicant's application and supplemental documentation contained material false statements regarding the commercial viability and availability of SunCatchers for the Calico Solar Project, and/or that there has been a 'significant failure' by Applicant to comply with the terms or conditions of approval of the application as specified by the Commission in its December 1, 2010 written decision." Complaint ¶ 2. As Staff observed in its Staff Response to Verified Complaint to Revoke

Certification (“Staff Response”), “[t]he Complaint failed to specify whether that document was being filed pursuant to California Code of Regulations, Title 20, § 1231 or 1237.” Staff Response at 1. The Committee’s Service of Complaint and Scheduling Order of June 15, 2011 construed BNSF’s “material false statements” allegation as a claim that falls under the Commission’s procedures pursuant to Section 1231, 20 CCR § 1231, and construed BNSF’s allegation regarding a significant failure to comply with the terms and conditions of the Commission’s decision to be a claim that falls under Section 1237, 20 CCR § 1237(a).

Pursuant to the Committee’s direction and 20 CCR § 1737(b), Staff investigated BNSF’s Complaint with respect to the allegation that there has been a “significant failure” to comply with the terms and conditions of the Commission’s decision approving the Calico Solar Project. After its investigation, Staff recommended dismissal of this claim. Staff Response at 7-8. Staff made this recommendation after it responded to the vagueness of BNSF’s allegations by conducting a broad investigation into Calico’s compliance in the technical areas of “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).” *Id.* at 5-6. In commenting on the Staff Response, BNSF did not identify any compliance “failures” in any of these areas, nor did BNSF contest Staff’s finding that the compliance issue identified in respect to REL-1 is not “significant.” Instead, BNSF complained that Staff had “misread” BNSF’s complaint, and clarified that all of its allegations concern the

“commercial availability or economic viability of SunCatchers.” BNSF’s Comments to CEC Staff Report Regarding BNSF’s Verified Complaint to Revoke Certification (“BNSF’s Comments”) at 5.

BNSF has not provided any basis for its claim that Calico is out of compliance with any of the specific terms and conditions of the Calico Solar Project site certification. For the reasons stated below, BNSF’s claim that Calico made “material false statements” in the pre-certification proceedings is equally devoid of merit. All of BNSF’s claims are meritless on their face and accordingly, BNSF’s Complaint should be dismissed.

A. BNSF’s Complaint and BNSF’s Explanation of Its Complaint Make It Clear that BNSF’s Allegations Regarding “Material False Statements” Concern Matters of Opinion that Cannot Be the Basis for a Claim Pursuant to Public Resources Code § 25534(a).

BNSF is seeking to collaterally attack the Commission’s site certification decision by alleging that Calico made “material false statements” in the proceedings leading to the approval of the Calico Solar Project. Complaint ¶ 1; *see* Pub. Res. Code. § 25534(a)(1); 20 CCR § 1231. In essence, BNSF’s allegation is based on a claim that because Calico knew that the viability of the Project was dependent on “future contingent events such as obtaining investor financing and a full transmission build out” (Complaint ¶24), the statements describing the Project quoted in the Complaint were “false.” Under this logic, the mere fact that SunCatchers were not off-the-shelf technology that was immediately available at the time that the Commission certified the Project would serve as a basis for revoking the Project’s certification. This argument is wholly lacking in legal support and would be contrary to CEC and energy development practices.

BNSF’s attempts to find support for its allegation by reading implied representations into Calico’s pre-certification testimony and then characterize those implied representations as “false statements.” This maneuver fails for at least three reasons. First, implied representations are not “false statements” because they do not involve affirmative

statements at all. Even if this were not the case the supposedly implied “false statements” about the “commercial viability and availability of SunCatchers” are non-existent. It is hardly surprising that BNSF cannot cite any pre-certification representations discussing the “commercial viability and availability of SunCatchers” in its Complaint,¹ because Calico has never stated or implied in any way that SunCatchers can be obtained as off-the-shelf technology that is immediately “available.” It is not uncommon or in any way improper for power generation facilities to use custom technology, technology that is otherwise made to order, or innovative new technology, nor is it uncommon or improper for energy projects to require financing. Further, as is true with all technologies that need to be manufactured according to specifications, both the “commercial viability” and the future “availability” of the technology are contingent matters that will be affected by future events. Calico has never represented that there were no contingencies affecting the “viability” of the Calico Solar Project, nor has Calico ever represented that there are no contingencies affecting the “availability” of SunCatchers for the project. Ultimately, no energy project developer can competently make such unequivocal representations, nor is any such representation required by the Warren-Alquist Act.

¹ BNSF’s complaint fails to meet the pleading standards for misrepresentation claims. Section 25534(a) only allows for the reopening of final decisions upon a showing that the Applicant affirmatively made a “material false statement,” a showing that sounds in fraud. It is extremely well established in California, and for that matter in other jurisdictions, that allegations of misrepresentations that sound in fraud are not treated liberally, and must be pleaded with particularity as to each and every element of the charge. *La Vista Cemetery Assn. v. American Sav. & Loan Assn.*, 12 Cal.App.3d 365, 369 (1970) (“[I]t is essential that the facts and circumstances which constitute actual fraud should be set forth with particularity in order to enable the court to determine whether, on the facts pleaded, there is any foundation for the charge.”); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (if “the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ [then] the pleading of that claim as a whole must satisfy the particularity requirement . . .”). If an affirmative “false statement” were not required by Section 25534(a), the time limit imposed by 20 CCR § 1720(a) for correcting an “error in fact” in a Commission decision would be read out of existence, and a petitioner could always simply claim that the evidence relied upon by the Commission was a “false statement.” Section 25534(a)(1) complaint proceedings do not create a forum for permanent re-litigation of disputed factual issues, or for otherwise negating a decision that is now res judicata simply by claiming testimony was “false.”

Second, even if BNSF had alleged that Calico made actual “false statements” regarding the “commercial viability” and the future “availability” of SunCatchers, the statements at issue would be statements regarding future events, not misrepresentations of facts. Both the “commercial viability” and the future “availability” of SunCatchers are matters of opinion and business judgment that can only ever be proven “true” or “false” by hindsight. As the Public Utilities Commission has noted, predictions about the viability of RPS projects are necessarily imperfect judgments about a “qualitative state.” CPUC D.09-06-018, at 23 (concurring with comments from SCE).² It is well established that representations of opinion generally, and among them, predictions about future events that cannot be proven true or false at the time the statements are made, are not actionable “false statements” as a matter of law. *See Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells*; 86 Cal.App.4th 303, 308, 309-10 (2000) (“The law is quite clear that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action . . . It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.”) (internal quotations omitted).³

Third, BNSF focuses on statements regarding scheduling, and appears to suggest that various statements about the proposed project development schedule somehow constituted sworn warranties that there are not project development contingencies that could require schedule changes. *E.g.*, Complaint ¶ 7 (“Applicant represented that construction was tentatively scheduled to occur over an approximate three-year period

² Available at http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/102099.pdf.

³ *See generally Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp.*, 784 F.2d 674, 679 (5th Cir. 1986) (Explaining the reasoning behind the well established rule, noting that a business prediction regarding future events is *neither* true nor false at the time it is made, and noting that unlike a prediction, “[a] statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification.”).

beginning in 2010 through 2012 for Phase 1, and a two-year period between 2013 and 2015 for Phase 2, assuming Southern California Edison completed the full transmission build-out necessary for Phase 2 by December 31, 2013”).⁴ However, nothing in the Warren-Alquist Act suggests that Section 25534(a)(1) provides a means of collaterally attacking a site certification merely by reading an implied representation about a project’s planned development – including the viability of the currently proposed project schedule – into an applicant’s project description. Although many projects go forward as proposed, many do not, and some projects require modifications to go forward.⁵ The policing mechanism that the Warren-Alquist Act establishes for viability is the imposition – *after* certification – of prospective and *objective* construction deadlines, not retrospective and subjective inquiries into applicants’ business plans that may be subject to future contingencies. *See* Pub. Res. Code § 25534(c) through (i); 20 CCR § 1720.3. For all of these reasons, BNSF’s complaint is utterly meritless on its face.

B. BNSF’s Complaint Fails Because BNSF Has Declined to Allege Any Type of Cognizable “Materiality.”

Section 25534(a)(1) applies to pre-certification “material false statements.” In two places, BNSF’s Complaint simply states, without more, that the unidentified “false statements” regarding the “commercial viability and availability of SunCatchers” were material. Complaint ¶¶ 2 & 22. BNSF does not endeavor to explain why. *La Vista Cemetery Assn.*, 12 Cal.App.3d at 369 (“general allegations” are insufficient to meet the

⁴ Some of BNSF’s allegations also attempt to distort the very statements BNSF quotes about scheduling uncertainties. BNSF transforms a statement about delays in light of transmission – “it makes no sense to put them up until the transmission is ready” – into an affirmative statement that construction utilizing SunCatchers would certainly begin by July 2011. Complaint ¶¶ 11, 12. BNSF’s reading of Calico’s testimony is unreasonable.

⁵ *See* Power Plant Projects Since 1996, Updated: September 1, 2011, http://www.energy.ca.gov/sitingcases/all_projects.html (showing approved projects either on hold or canceled after certification).

burden of particularity in misrepresentation claims). To the extent that BNSF explains the significance of its claim in other allegations, BNSF does not cite any governing law, regulation, or standard, nor any issue of health, safety, or environmental impacts that flows from its allegations. Instead, BNSF simply assumes that a project applicant must be required to demonstrate that technology is currently “commercially viable and commercially available, and not reliant upon future contingent events, such as obtaining investor financing and a full transmission build-out.” Complaint ¶ 24. There is no basis in law for BNSF’s demand, which derives from BNSF’s already rejected argument that the Commission’s jurisdiction depends upon a project’s commercial viability “not only throughout the certification process, but thereafter.”⁶

C. A Concrete Post-Certification Claim Cannot Be Discerned From BNSF’s Complaint, and BNSF Has Confirmed that No Cognizable Claim Is Present.

BNSF’s complaint makes the conclusory assertion that “the Applicant has no intention of complying with the terms and conditions of approval of the application,” and BNSF’s Comments inexplicably states that the Petition to Amend “constitutes confirmation of Calico’s stated intention not [to] comply with the CEC Decision and Certification.” BNSF’s Comments at 3. As Staff points out, BNSF’s Complaint fails to meet the pleading and informational requirements of 20 CCR § 1237 and “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.” Staff Response at 3. Calico cannot be faulted for a compliance “failure” that has not occurred.⁷ *Id.* At 3-4.

⁶ BNSF’s Opening Brief RE Jurisdiction and Baseline (Docket 08-AFC-13C) at 6-7, available at http://www.energy.ca.gov/sitingcases/calicosolar/compliance/others/2011-05-24_BNSFs_Opening_Brief_re_Jurisdiction_and_Baseline.pdf.

⁷ BNSF’s apparent claim in its comments on the Staff Response that no “actus reus” need be required because the Commission’s regulations are not criminal laws is silly. The requirement of an “actus reus,” whether that term is used or not, is simply a requirement that there be an actual “failure” to comply with the terms and conditions of the decision. *See* Pub. Res. Code § 25534(a)(2). A significant “failure” is required for liability under Section 25534(a)(2).

Staff's investigation 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 at 6. With respect to Condition REL-1, Staff concluded that compliance issues with REL-1 do not amount to a "significant failure" to comply with the terms and conditions of the Commission's decision. BNSF's Comments did not taken issue with this conclusion, and instead asserted that Staff should have investigated the "commercial viability and availability of SunCatchers" as a compliance failure, once again without identifying any requirement with which Calico is out of compliance. BNSF Comments at 6.

With respect to the compliance failure identified by Staff, Calico again 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 reliability report was due under the 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 to try to obtain and provide the relevant data, if possible.

Staff concluded that 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 at 7. This is because the interim compliance issue with REL-1 "will not result in any harm to the environment, nor will it result in a violation of any law, ordinance, regulation, or standard." *Id.* BNSF's comments regarding the Staff Response

provide no reason to conclude otherwise. Therefore, BNSF's allegations should be dismissed.

D. The Complaint Was Improperly Verified

Staff correctly found that the verification of the July 12, 2011 "Verified Complaint to Revoke Certification" is legally insufficient. Staff Report at 4-5; *see also* Code of Civ. Proc. § 2015.5. BNSF has now provided an amended verification with its comments. However, 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). On this basis alone, the Committee may dismiss BNSF's Complaint.

II. CALICO'S SPECIFIC RESPONSES TO BNSF'S ALLEGATIONS

The Committee Order of August 5, 2011, states that Calico's answer should include "An admission or denial of each material allegation." For the reasons set forth above, none of the 26 paragraphs in BNSF's complaint contain any material allegations against Calico, but Calico nonetheless provides its specific responses to each paragraph of BNSF's complaint as follows below:

1. Answering Paragraph 1, BNSF quotes section 25534 of the Warren-Alquist Act, which speaks for itself and is the best evidence of its contents.
2. Answering Paragraph 2, BNSF is characterizing and summarizing its own meritless legal request, which Calico denies to the extent that any response is required.
3. Answering Paragraph 3, Calico admits that the Applicant's address is correctly stated, but as indicated in a letter from Mr. Daniel J. O'Shea docketed in this proceeding on August 31, 2011, Applicant's name has changed to K Road Calico Solar LLC.

4. Answering Paragraph 4 through 15, BNSF is characterizing the record before the Commission prior to the approval of the Calico Solar Project, which speaks for itself and is the best evidence of its contents.

5. Answering Paragraph 15, Calico admits that K Road Sun LLC, a subsidiary of K Road Power, acquired Calico on December 24, 2010. Calico denies the remaining allegations in Paragraph 15, and notes that BNSF is attempting to mislead by crop quoting the Petition to Amend. The sentence BNSF alludes to states: “Because the SunCatchers would not be commercially available in the near term, K Road determined that for the project to be viable, a portion of the technology would need to be replaced with a technology that was currently commercially available and able to attract financing.” *See* Exhibit H to BNSF’s Verified Complaint [Calico Solar Petition to Amend at page 3-1, §3.1]

6. Answering Paragraph 16, Calico admits that Southern California Edison (SCE) terminated a prior PPA for the Calico Solar Project, and denies the remaining allegations in Paragraph 16.

7. Answering Paragraph 17, Calico lacks sufficient information to confirm what BNSF is or is not aware of, and on that basis Calico denies the allegations in Paragraph 17.

8. Answering Paragraph 18, Calico denies these allegations and notes that the May 17, 2011 CPUC Transcript actually states:

Q ... [O]ne of the issues was whether or not it was commercially viable to utilize SunCatchers, right?

A I think commercially available.

Q Commercially available?

A Yes. They weren't available on the schedule that Tessera Solar had thought they would be available.

Exhibit I to BNSF's Verified Complaint to Revoke Certification [Public Utility Commission Hearing Transcript, May 17, 2011] at 69.

9. Answering Paragraph 19, Calico denies that it failed to provide any information required under the Warren-Alquist Act and the Commission's Regulations, and denies BNSF's remaining allegations in Paragraph 19.

10. Answering Paragraph 20, BNSF is misquoting Calico's Reply Brief on Jurisdiction, which speaks for itself. BNSF is also mistakenly attributing to Calico statements that were made to Calico by SES. As is shown from Calico's Reply Brief on baseline and jurisdiction issues, SES has stated:

SES delayed the high volume commercial deployment of the SunCatcher in response to uncertain capital markets and in order to secure the additional time needed to obtain a strategic investor. SES is currently in discussions with potential investors with technical and financial capabilities to launch high volume production and continue the development of future products. SES' current plans contemplate having SunCatchers commercially available approximately 24 months from the time that a transaction with a strategic investor closes.

Calico Solar, LLC Reply Brief on Jurisdiction, Exhibit J. Calico denies the remaining allegations in Paragraph 20.

11. Calico denies the allegations in Paragraph 21 on the basis that the allegation is incorrect and misleading, and on the basis that Calico lacks sufficient information to confirm or deny the allegation. Calico Solar LLC is not responsible for nor involved with obtaining investor financing required to manufacture SunCatcher technology.

12. Answering Paragraph 22 through 26, Calico denies all of BNSF's allegations.

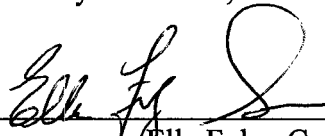
13. Calico denies all allegations not specifically admitted above.

III. REQUEST FOR DISMISSAL

BNSF has filed a Complaint that is invalid on its face and warrants no action by the Commission. Calico requests dismissal of the Complaint with prejudice.

Date: September 1, 2011

Respectfully submitted,



Ella Foley Gannon

Attorneys for K Road Calico Solar LLC,
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VERIFICATION

I, William Kriegel, declare:

I am an officer of K Road Calico Solar LLC, a Delaware limited liability company, formerly known as Calico Solar, LLC, which is the Defendant in the above-entitled action. I have been authorized to make this verification on its behalf.

I have read the foregoing ANSWER TO VERIFIED COMPLAINT TO REVOKE CERTIFICATION and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Dillon, Montana on September 1, 2011.



William Kriegel



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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, Margaret Pavao, declare that on September 1, 2011, I served and filed copies of the attached Answer to Verified Complaint to Revoke Certification, dated September 1, 2011. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulations, 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 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 email addresses on the Proof of Service list;
- Served by delivering on this date, either personally, or for mailing with the United States 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 "email preferred."

AND

FOR FILING WITH 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
Attn: Docket No. 11-CAI-01
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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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Michael J. Levy, Chief Counsel
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I declare under penalty of perjury under the laws of the State of California that 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.

