



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

DOCKET

11-CAI-01

DATE SEP 15 2011

RECD. SEP 15 2011

**FOR THE CALICO SOLAR PROJECT
COMPLAINT AND INVESTIGATION**

Docket Nos. 11-CAI-01

**COMMITTEE RULING CONDITIONALLY DISMISSING
BNSF RAILWAY COMPANY'S VERIFIED COMPLAINT
TO REVOKE CERTIFICATION, FILED ON AUGUST 25, 2011**

On or about July 12, 2011, BNSF Railway Company (BNSF) filed a *Verified Complaint to Revoke Certification* (Complaint) with the Energy Commission Siting/Dockets Unit. On or about July 14, 2011, the Siting/Dockets Unit submitted the Complaint to the Energy Commission Compliance Program Manager assigned to the Calico Solar Project (Docket No. 08-AFC-13). On or about July 20, 2011, BNSF filed the Complaint with the Energy Commission Chief Counsel.

The Complaint's primary allegations are: (1) Calico Solar, LLC's¹ "application and supplemental documentation contained material false statements regarding commercial viability and availability of SunCatchers for the Calico Solar Project" (hereinafter, the misrepresentation allegations) and (2) "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" (hereinafter, the compliance allegations). (Complaint, ¶ 2.) Invoking the Warren-Alquist Act at Public Resources Code section 25534, the Complaint seeks revocation of the Commission's December 2010 certification of the Calico Solar Project in connection with the misrepresentation and compliance allegations.

Staff's Response to Verified Complaint to Revoke Certification (Staff Report), dated August 12, 2011, alleged that Commission Staff and Calico surfaced BNSF's failure to file the Complaint with a legally-compliant declaration under penalty of perjury.² The declaration was made under the laws of Texas.

On August 25, 2011, in response to the Staff Report, BNSF filed a second *Verified Complaint to Revoke Certification* (Second Complaint). The Second Complaint was filed with a declaration made under the laws of California.

¹The Committee notes that Calico recently changed its name to K Road Calico, LLC.

²Calico also objected to the deficient declaration in *Calico's Comments Regarding Staff Response to Verified Complaint to Revoke Certification*, dated August 26, and Calico's *Answer to Verified Complaint to Revoke Certification*, dated September 1, 2011.

By an order dated September 12, 2011, the Committee evaluated the Staff's claims regarding the declaration. The Committee concurred with Staff's assessment but found that the defect was cured when BNSF filed the Second Complaint with the new declaration. Regarding the cured defect and any differences between the two complaints, the Committee said:

We agree that the declaration submitted with the Complaint did not comply with Code of Civil Procedure section 2015.5, as it was not made under the laws of the State of California. As demonstrated by the facts, this defect was not fatal. First, although Commission Staff and Calico objected to the declaration's deficiencies they both proceeded to respond to the Complaint on its merits without expressly preserving the objections. Second, the defect was effectively cured by BNSF's filing of the Second Complaint.^[fn] As stated above, there are no readily apparent substantive differences between the allegations of the two complaints. However, it is only the second complaint that is associated with a declaration under penalty of perjury under the laws of the State of California.

We also note that the transmittal email accompanying BNSF's service of the Second Complaint further suggests there are no substantive differences between the two complaints. The email states in pertinent part: "In response to the CEC Staff's objection to the BNSF verification previously submitted, attached herewith is BNSF's Verified Complaint to Revoke Certification with a new BNSF verification pursuant [to] California law." (August 24, 2000 email from Helen Kim.)

Thus, the Second Complaint – except for the declaration under penalty of perjury – appears superfluous. If, however, BNSF can show that the complaints are substantively different, the Committee will review and take action on the Second Complaint as a pleading separate and distinct from the Complaint. BNSF has until noon on Friday, September 23, 2011, to make such a showing. If BNSF fails to strictly comply with the stated requirements and deadline, the Second Complaint shall be deemed dismissed effective 12:01 p.m. on Friday, September 23, 2011.

IT IS SO ORDERED.

Dated: September 15, 2011, at Sacramento, California.



KAREN DOUGLAS
Commissioner and Presiding Member
Siting Committee



ROBERT B. WEISENMILLER
Chair and Associate Member
Siting Committee



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**Docket Nos. 11-CAI-01
(Revised 9/15/11)**

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DECLARATION OF SERVICE

I, RoseMary Avalos, declare that on September 15, 2011, I served and filed copies of the COMMITTEE RULING CONDITIONALLY DISMISSING BNSF RAILWAY COMPANY'S VERIFIED COMPLAINT TO REVOKE CERTIFICATION, FILED ON AUGUST 25, 2011, dated September 15, 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:
[\[http://www.energy.ca.gov/sitingcases/calicosolar/investigate/index.html\]](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

Sacramento, CA 95814-5512

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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.

Original Signed By:

RoseMary Avalos

Hearing Advisers Office