



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

COMPLAINT & INVESTIGATION
CALICO SOLAR PROJECT
CALICO SOLAR, LLC

DOCKET Nos. 11-CAI-01
11-CAI-04

COMMITTEE ORDER
REGARDING
PATRICK C. JACKSON'S AMENDED REQUEST FOR INVESTIGATION

Background

Complaint Proceeding in Docket No. 11-CAI-01

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.) Calico received service of the Complaint and submitted a responsive answer on or about September 1, 2011.

On September 19, 2011, the Committee gave notice that it will conduct a hearing on October 3, 2011, to address the Complaint's misrepresentation allegations.

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

Jackson's Amended Petition to Intervene and Amended Request for Investigation

On or about August 10, 2011, Patrick C. Jackson filed a *Petition to Intervene* (Petition) in the proceedings initiated by the Complaint. He filed a *Request for Investigation* on or about August 13, 2011. Calico opposed both pleadings.

By an order dated September 9, 2011, the Committee determined that the Petition and Request for Investigation did not satisfy applicable pleading requirements of the Commission Regulations.² The Committee gave Mr. Jackson an opportunity to amend or supplement the documents, which he accepted. On September 14, 2011, Mr. Jackson submitted an *Amended Petition to Intervene* (Amended Petition) and an *Amended Request for Investigation* (Amended Request). The Committee granted the Amended Petition on September 16, 2011.

The Amended Request references the Complaint's misrepresentation allegations and alleges additional facts relating to the claim that Calico made material false statements regarding the availability of SunCatchers during the Calico Solar Project application for certification (AFC) proceedings. The Amended Petition and Amended Request contain identical allegations regarding Calico's alleged misrepresentations.

The Amended Request is the subject of this order.

Discussion

The Committee finds that the Amended Request satisfies the applicable pleading requirements. Typically, such a finding would trigger expected compliance with various service and other procedural requirements of the Commission Regulations. However, the Amended Request raises additional issues for Committee resolution because Mr. Jackson:

- (1) Filed the Amended Request with actual knowledge of the pending Complaint proceeding and presumed knowledge of the regulatory duties and deadlines applicable to the Complaint proceeding,
- (2) Bases the Amended Request in part on the Complaint's misrepresentation allegations, and
- (3) Alleges facts in the Amended Request that echo the Complaint's contention that Calico made material false statements regarding the availability of SunCatchers during the Calico Solar Project AFC proceedings.

² All references to regulations are to California Code of Regulations, Title 20, unless otherwise specified.

The Committee imputes no untoward motives to Mr. Jackson and instead, interprets his actions as an attempt to ensure a full airing of BNSF's misrepresentation allegations and his own similar allegations. Even so, by filing the Amended Request after the Complaint preceding began, Mr. Jackson created the unavoidable circumstance of initiating a redundant parallel proceeding with additional deadlines and duties under Sections 1232 through 1234.³ This circumstance requires the Committee to balance reasonable disposition of the Amended Request against principles of judicial economy and efficiency and fairness.

When, as here, separate pleadings against the same defendant share common facts and allege the same conduct, it is incumbent upon the tier of fact to consider and apply principles of fairness and judicial economy to the extent allowed. Under Section 1203, the Committee may regulate the conduct of proceedings and hearings and, for good cause shown, shorten or lengthen the time required for compliance with any provision of the Commission Regulations. (§ 1203, subds. (c), (f).) In view of Section 1203 and the facts presented, judicial economy and efficiency and fairness compel Committee evaluation of the related claims and Calico's defenses in one proceeding. Although Mr. Jackson alleges somewhat different facts than those contained in the Complaint, both pleadings essentially allege that Calico made material false statements during the Calico Solar Project AFC proceedings. Moreover, both pleadings are singularly focused on whether Calico made misrepresentations regarding the availability of SunCatchers.

Thus, the Amended Request is hereby consolidated with the pending Complaint proceeding (Docket No. 11-CAI-01) to promote a full and fair hearing of all of the facts related to the material false statement claims and, avoid unnecessary duplication and delay.

³ By way of background, Section 1232 provides in pertinent part:

(a) Within 30 days after the receipt by the Chief Counsel of a complaint or request for investigation, the committee, or if none has been assigned, the chairman, shall:

(1) dismiss the matter upon a determination of of insufficiency or lack of merit of the pleadings, specifying whether the dismissal is with or without prejudice; or

(2) serve the complaint or request for investigation by certified mail, return receipt requested, upon the respondent.

Section 1233 requires the respondent (here, Calico) to submit an answer within 21 days after service of a complaint or request for investigation. The corresponding hearing must be "scheduled to commence no sooner than 21 days after the receipt of the answer and no later than 90 days after the receipt by the General Counsel of the complaint or request for investigation." (§ 1234.)

The Committee's acceptance of the Amended Request is limited. Exercising its authority under Section 1203 and seeking to avoid prejudice to Calico, the Committee hereby modifies and shortens the procedures and timelines of Sections 1232 through 1234 as applied to the Amended Request as follows:

- Electronic service of this order and attached Amended Request on Calico, with confirmation of receipt requested, shall satisfy the service requirement of Section 1234.
- Should Calico choose to answer the Amended Request, it shall have until 3 p.m. on Friday, September 30, 2011 to file, serve, and docket the answer. As an alternative to, or in addition to, submitting a written answer, Calico may submit responsive oral testimony during the October 3, 2011 hearing.
- Because Mr. Jackson has Intervenor status in the Complaint proceeding and the Petition contains the same factual allegations in the Amended Request, he may examine witnesses regarding these allegations regardless of whether Calico submits an answer to the Amended Request.

Regarding the Amended Request's plea for an investigation by Commission Staff, the Committee affirms that it – not Staff– is the fact-finder in this matter and that the adjudicatory process is the means for investigating the allegations of the Amended Request. Before the close of the October 3 hearing, the Committee will advise the parties if further hearing or investigation is warranted. If, before the close of the October 3 hearing, the Committee determines that it needs additional information, then it will direct the parties (and possibly Commission Staff) to provide such information through discovery or otherwise.

IT IS SO ORDERED.

Dated: September 26, 2011 at Sacramento, California.



KAREN DOUGLAS
Commissioner and Presiding Member
Siting Committee



ROBERT B. WEISENMILLER
Chair and Associate Member
Siting Committee

DOCKET

11-CAI-04

DATE SEP 14 2011

RECD. SEP 14 2011

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:

Calico Solar Project
Complaint and Investigation

Docket Nos. 11-CAI-01
11-CAI-04

**AMENDED REQUEST FOR
INVESTIGATION**

September 14, 2011

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STATE OF CALIFORNIA

**State Energy Resources
Conservation and Development Commission**

In the Matter of:

Calico Solar Project
Complaint and Investigation

Docket Nos. 11-CAI-01
11-CAI-04

**AMENDED REQUEST FOR
INVESTIGATION**

1. On or about July 12, 2011, BNSF Railway Company (BNSF) filed a *Verified Complaint to Revoke Certification* (BNSF's Complaint)¹ with the Energy Commission Siting/Dockets Unit.

2. 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).

3. On or about July 20, 2011, BNSF filed the Complaint with the Energy Commission Chief Counsel.

4. BNSF's Complaint is incorporated in this Amended Request for Investigation by reference.

5. BNSF's Complaint states and alleges in part:

¹ BNSF filed a second complaint on or about August 25, 2011. The Committee has taken no action to date on the pleading. (*Committee Order Regarding Patrick C. Jackson's Petition to Intervene and Request for Investigation*, Docket Nos. 11-CAI-01 & 11-CAI-04, September 9, 2011)

Pursuant to Section 25534(a)(1), BNSF hereby requests that the California Energy Commission (the "Commission") revoke the certification previously issued in its Final Decision, effective December 1, 2010, on the ground 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, . . . [Emphasis added]

(Complaint, p. 2)

6. BNSF's allegation (Allegation) is predicated on Section 25534(a)(1) of the Public Resources Code which provides:

The commission may, after one or more hearings, amend the conditions of, or revoke the certification for, any facility for any of the following reasons:

- (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant.

7. On June 14, 2011, Chairman Robert Weisenmiller filed *Service of Complaint and Scheduling Order* (Order) relating to BNSF's Complaint. The Order directed Energy Commission staff to investigate allegations raised in the Complaint as to whether Calico significantly failed to comply with the terms and conditions of certification. The Order did not direct Energy Commission staff to investigate BNSF's Allegation the "Applicant's application and supplemental documentation contained material false statements."

8. California Code of Regulations, Title 20, Section 1231 provides:

Any person may . . . file a request for investigation, including a request for a jurisdictional determination regarding a proposed or existing site and related facilities.

9. Pursuant to Title 20, CCR, Section 1231, I request the California Energy Commission investigate BNSF's Allegation the "Applicant's application and supplemental documentation contained material false statements regarding the commercial viability and

availability of SunCatchers for the Calico Solar Project.”

10. I respectfully request the California Energy Commission conduct a thorough investigation into BNSF’s Allegation the “Applicant’s application and supplemental documentation contained material false statements regarding the commercial viability and availability of SunCatchers for the Calico Solar Project” based on the statement of facts and evidence contained in BNSF’s Complaint.

11. I respectfully request the California Energy Commission conduct a thorough investigation into BNSF’s Allegation the “Applicant’s application and supplemental documentation contained material false statements regarding the commercial viability and availability of SunCatchers” on the following grounds:

- a. The Applicant’s application and supplemental documentation contained material statements asserting to the commercial viability and availability of SunCatchers but on July 28, 2009, before the House Select Committee on Energy Independence and Global Warming, Sean Gallagher, Vice President of Marketing and Regulatory Affairs, Tessera Solar, testified in pertinent part:

Tessera Solar, headquartered in Houston, Texas, was formed to be the exclusive developer and operator of the SunCatcher™ Power System developed by our sister company, Stirling Energy Systems, headquartered in Scottsdale, Arizona. In May 2008, the NTR, an Irish renewable energy development company, invested \$100 million into Stirling Energy Systems, and created Tessera Solar as the project development arm of the business.²

² Testimony of Sean Gallagher, Vice President of Marketing and Regulatory Affairs, Tessera Solar Before the House Select Committee on Energy Independence and Global Warming, July 28, 2009, p. 1.

The changes that have wracked the financial sector in the past year have created significant challenges for financing renewable power plants. Congress responded to these challenges by creating the Department of Energy's loan guarantee programs, and the Treasury grant in lieu of investment tax credits. These programs will be critical in the next two years for projects like ours – and others in the solar industry to obtain the financing necessary to construct projects. In order to take advantage of these incentives the Administration will need to take the following steps to allow companies like ours to move these projects forward, create jobs and generate carbon free electricity:

- *Issue effective regulations for the Department of Energy section 1703 and 1705 loan guarantee programs that are consistent with commercial banking practices and successful loan guarantee programs like the Export-Import Bank of the United States and the Overseas Private Investment Corporation (OPIC), which have both been successful from a risk management perspective. Absent loan guarantees, our projects and others like them face an impossible task finding financing due to the battered credit markets, and the unwillingness of private lenders to take risks on new technologies.³ [Emphasis added]*

- b. The Applicant's application and supplemental documentation contained material statements asserting to the commercial viability and availability of SunCatchers but on November 12, 2010, between the dates the California Energy Commission Committee issued its first and final Notice of Decision, NTR plc, parent company of Stirling Energy Systems, Inc. and Tessera Solar North America, Inc., released its *Annual Report & Financial Statements 2010* (NTR's 2010 Annual Report) which states in pertinent part:

In response to the general economic environment and in particular the challenging funding climate, it is now

³ *Id.*, p. 6.

anticipated that the commercial roll-out of the SunCatcher will take place over a longer timeframe than previously envisaged. As a consequence, an impairment charge has arisen on the Group's intellectual property and contract based assets of €84,561,000. The net impact, after tax and minority interests, is a charge of €33,292,000.⁴

c: NTR's 2010 Annual Report also states in pertinent part:

Since the year end, the Group has undertaken a number of actions in response to the global economic challenges including the decision by SES to re-pace the utility scale roll-out of the SunCatcher technology until the current uncertainties in the funding markets are resolved.⁵

d: NTR's 2010 Annual Report also states in pertinent part:

The issue facing SES is the current state of capital markets, in particular the scale and risk tolerance of capital available in the private equity market. In my review of 2009 I noted, and I quote "notwithstanding the strength of the Group's balance sheet, the scale of the opportunity available to our businesses will mean that those businesses will require access to new sources of third party equity capital in order to ensure that they meet their full potential".

Despite the significant advances made by SES in the commercialisation of the SunCatcher, the likely timing within which a third party strategic investor and project capital is secured has been affected by prevailing capital market uncertainties. Accordingly, while continuing to seek a strategic partner, SES expects that commercialisation of the SunCatcher will require a longer timeframe than previously envisaged. The business will be restructured to take account of this longer timeframe for SunCatcher commercialisation.⁶

e. NTR's 2010 Annual Report also states NTR's loss ("Segmental earnings

⁴ NTR - Annual Report & Financial Statements 2010, p. 79.

⁵ *Id.*, p. 108.

⁶ *Id.*, Chairman's Statement, p. 6;

from continuing operations before interest, tax, depreciation, amortization, share based payments and impairment charges”) for its Solar Segment were (€31,183,000) for the fiscal year ending March 31, 2009, and (€64,219,000) for the fiscal year ending March 31, 2010.⁷ [Emphasis added]

f. The Applicant’s application and supplemental documentation contained material statements asserting to the commercial viability and availability of SunCatchers but *NTR plc Reports Financial Results for Year Ended 31 March 2011, Dublin, August 2, 2011* states in pertinent part:

- i. *NTR has decided to fully write down its solar investment, significantly contributing to Group attributable losses of €280.2 million. This follows the decision earlier in the year to limit funding to its solar business, Stirling Energy Systems (SES), as it has not yet succeeded in attracting third-party investment.*⁸ [Emphasis added]
- ii. NTR reports “Impairment and fair value charges of €195.7 million, of which €132.7 million is attributable to shareholders . . . [including] Solar write-downs [of] €42.4 million”.⁹

12. The preceding facts are clear evidence the Applicant’s application and supplemental documentation contained material statements asserting to the commercial viability and availability of SunCatchers but the parent company of the Applicant had over €137.8 million in losses attributable to SunCatcher technology.

13. I respectfully request the California Energy Commission conduct a thorough

⁷ *Id.*, p. 63.

⁸ *NTR plc Reports Financial Results for Year Ended 31 March 2011, Dublin, August 2, 2011*, p 1.

⁹ *Id.*, p. 2.

investigation into BNSF's Allegation and consider as additional evidence as to the commercial viability and availability of SunCatchers for the Calico Solar Project the:

- a. Applicant's sale of the Calico Solar Project, "[b]ecause 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."¹⁰ [Emphasis added]
- b. Applicant's sale of its Imperial Valley Solar Project (formerly SES Solar Two Project) in Imperial Valley, California.
- c. California Energy Commission's termination of its Commission Decision and license for the Imperial Valley Solar Project as the buyer, AES Solar, decided to change the technology for the project from solar thermal to photovoltaic.
- d. cancellation of the Applicant's proposed 200-megawatt concentrating solar plant in Sun Luis Valley, Colorado.
- e. cancellation of the Applicant's proposed 250-megawatt Phoenix, Arizona, landfill solar power project.
- f. cancellation of the Applicant's proposed 27-megawatt solar power project in Marfa, Texas.
- g. commercial viability and reliability of the Applicant's Maricopa Power Plant in Phoenix, Arizona.

14. A thorough investigation into BNSF's allegation is necessary for the Parties,

¹⁰ Petition to Amend, p. 3-1

Intervenors, interested agencies, entities and persons and the public to better understand and fully participate in this proceeding and the ongoing Compliance Proceeding.

15. The Parties affected by this Amended Request for Investigation are listed on the attached Proof of Service list for this proceeding.

16. I intend to introduce evidence to support the statement of facts in this Amended Request for Investigation after my petition to intervene is granted as provided by California Code of Regulations, Title 20, Sections 1211 and 1723.5.

17. I reserve the right to file a complaint after the California Energy Commission's investigation.

18. I am filing this Amended Request for Investigation. My name is Patrick C. Jackson. My address is 600 N. Darwood Avenue, San Dimas, CA 91773. Telephone Number: (909) 599-9914. E-Mail address: ochsjack@earthlink.net.

19. The Applicant is Calico Solar, LLC,¹¹ c/o Daniel O. O'Shea, Managing Director, 2600 10th Street, Suite 635, Berkeley, CA 94710. Telephone Number: (510) 981-1656. E-Mail address: dano@kroadpower.com.

20. The statement of facts contained in my original Request for Investigation and *Patrick C. Jackson's Rebuttal Comments to Calico Solar, LLC's Objection to Mr. Patrick C. Jackson's (1) Petition to Intervene and (2) Request for Investigation* are incorporated in this Amended Request for Investigation by reference.

21. The Committee has the authority to conduct an investigation and act on this request for investigation pursuant to Public Resources Code, Sections 25218(e) and 25534(a)(1) and California Code of Regulations, Title 20, Sections 1230, 1232, 1233.5, 1234 and 1235.

¹¹ On or about August 31, 2011, Calico Solar, LLC, changed its name to K Road Calico, LLC.

22. The Declaration of Service and the Proof of Service list located on the web page for this Proceeding are attached.

23. I, Patrick C. Jackson, declare under penalty of perjury under the laws of the State of California all statements made in this document are true, correct and complete to the best of my knowledge and belief and this document was executed on September 14, 2011, at San Dimas, California.

Original Signed By

Patrick C. Jackson

STATE OF CALIFORNIA

State Energy Resources
Conservation and Development Commission

In the Matter of:

Calico Solar Project
Complaint and Investigation

Docket Nos. 11-CAI-01
11-CAI-04

**DECLARATION OF SERVICE
AMENDED REQUEST FOR
INVESTIGATION**

I, **Patrick C. Jackson**, declare that on **September 14, 2011**, I served and filed copies of the attached **Amended Request for Investigation**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service located on the web page for this project at: <http://www.energy.ca.gov/sitingcases/calicosolar>

The document has been sent to Michael J. Levy, all 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.

FOR SERVICE TO THE APPLICANT AND ALL OTHER PARTIES:

XX sent electronically to all e-mail addresses on the Proof of Service and

XX by depositing in the United States mail at **San Dimas, California**, with first-class postage thereon fully prepaid and addressed as provided on the attached Proof of Service list to the mailing addresses shown on the Proof of Service list.

FOR FILING WITH THE ENERGY COMMISSION AND CHIEF COUNSEL:

XX sending the original signed document and one electronic copy, mailed and e-mailed respectively, to the addresses below:

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

September 14, 2011

Date

Original Signed By

Patrick C. Jackson



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

**Docket Nos. 11-CAI-01
11-CAI-04**

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INTERESTED

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

APPLICANT/RESPONDENT

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DECLARATION OF SERVICE

I, Maggie Read, declare that on September 26, 2011, I served and filed copies of the attached Committee Order Regarding Patrick C. Jackson's Amended Request for Investigation, dated September 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: [<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:

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

X 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:

X 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
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:

California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
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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: _____
Maggie Read
Hearing Advisers Office