

CALIFORNIA ENERGY COMMISSION1516 NINTH STREET
SACRAMENTO, CA 95814-5512**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION****DOCKET****11-CAI-01**DATE SEP 28 2011RECD. SEP 28 2011

In the Matter of:)	Docket No. 11-CAI-01
)	
Complaint and Investigation)	STAFF ASESSMENT
)	OF BNSF'S VERIFIED COMPLAINT
CALICO SOLAR PROJECT)	AND OF CALICO'S ANSWER
Calico Solar, LLC)	(CCR TITLE 20, § 1231)
_____)	

**I.
SUMMARY**

On June 8, 2011, BNSF Railway Company (BNSF) filed a document entitled "Verified Complaint to Revoke Certification" in the matter of the Calico Solar Project (Calico). On June 14, 2011, Chairman Robert Weisenmiller filed a scheduling order pursuant to California Code of Regulations, Title 20, section 1232 regarding the complaint. In that Order, the Chairman directed that the Complaint be treated as a document filed under both sections 1231 and 1237. The Order directed BNSF to perfect its complaint within five days of the order. BNSF failed to do so. The Order also directed staff to investigate the allegations raised in the complaint as to whether Calico significantly failed to comply with the terms and conditions of the certification within 30 days after receipt of the perfected Complaint.

On July 12, 2011, BNSF filed a document entitled "Verified Complaint to Revoke Certification." Pursuant to the Committee's June 14 Order, staff conducted an investigation into the underlying allegations raised in the "verified complaint" regarding non-compliance with the conditions of certification under section 1237. On August 5, the Committee filed an Order requiring staff to prepare a written assessment of the Complaint and affirming staff's duty to conduct an investigation. On August 12, staff filed its Response to Verified Complaint to Revoke Certification, which included both a written assessment of the section 1237 portion of the complaint as well as staff's investigation and conclusions, and recommended that the complaint be dismissed for insufficiency as well as on its merits.

On September 12, the Committee issued an Order dismissing the section 1237 allegations in the Complaint finding that those allegations were insufficiently pleaded and that the single instance of non-compliance was not significant.

On September 19, the Committee filed a Notice of Hearing on BNSF's Verified Complaint. In preparation for that Hearing, staff submits this written assessment specifically as to the allegations of material false statements regarding the commercial viability and availability of SunCatchers for the Project.

II. BACKGROUND

On December 1, 2008, Stirling Energy Systems (SES) Solar Three, LLC and Stirling Energy Systems Solar Six, LLC (Applicant), submitted an Application for Certification (AFC) to the Energy Commission to construct a concentrated solar thermal power plant facility approximately 37 miles east of Barstow, in San Bernardino County.

The proposed project will be constructed on an approximate 4,613-acre site located in San Bernardino County, California. The project site is approximately 37 miles east of Barstow, 17 miles east of Newberry Springs, 57 miles northeast of Victorville, and approximately 115 miles east of Los Angeles (straight line distances). The Applicant has applied for a Right of Way (ROW) grant from the United States Bureau of Land Management (BLM) to construct and operate the CSP on BLM-managed public lands. CSP will use approximately 32 acre feet of water per year, produce a nominal 663.5 MW of electricity, and operate for a term of 40 years. The project is proposed for development in two phases. Phase I is located on approximately 1,876 acres, while Phase II is located on approximately 2,737 additional acres. Approximately 26,540 SunCatchers were proposed to be constructed at the project site.

On October 28, 2010, at the regularly scheduled Business Meeting, the Energy Commission approved the Calico Solar Project.¹

III. ASSESSMENT OF THE COMPLAINT

BNSF raises a single general allegation that is brought under Title 20, California Code of Regulations, section 1231. BNSF alleges that "the Applicant's application and supplemental documentation contained false statements regarding the commercial viability and availability of SunCatchers for the Calico Solar Project," and supports this

¹ Calico filed a petition to amend the AFC on March 25, 2011. Staff is currently assessing the proposed amendments.

assertion with numerous communications that took place at various times, before the Commission and in other forums.

The allegation was analyzed by staff both on its sufficiency and on the merits. Staff concludes that, depending on the factual findings made by the committee, the Complaint in this regard may not contain sufficient information to satisfy the pleading requirements of Title 20, California Code of Regulations, section 1231. Further, staff concludes that the allegations may be without merit, and that the hearing set for October 3, 2011 will be necessary to determine the truth of the allegation regarding material false statements.

Title 20, California Code of Regulations, section 1231, provides in relevant part:

Any person, including but not limited to commission staff or the owner or operator of a power plant...may file a complaint alleging a violation of a statute, regulation, order, program, or decision adopted...by the commission.

(b) The Complaint...shall include:

(1) the name address, and telephone number of the person filing the complaint (complainant)...;

Here, the Complaint includes the required contact information.

(2) the name address, and telephone phone number of the person allegedly violating the statute, regulation, order, or decision (respondent)...;

Here, the Complaint includes the contact information for the respondent as required under Section (b)(2).

(3) a statement of facts upon which the complaint...is based...;

Pursuant to Section (b)(3), the complainant includes several communications, both before the Commission as well as before other entities, regarding the future commercial viability and availability of SunCatchers, the technology at issue. Allegation 22 sums up the allegation of the Complainant in this regard: "Applicant's misrepresentations concerning its ability to obtain 26,450 SunCatchers was and is a material fact that, standing alone, requires revocation."

Allegations 4 through 14 in the Verified Complaint acknowledge that Tessera Solar North America provided the AFC information. This information demonstrates that the project owner anticipated using a certain number of SunCatchers at some time in the future, and includes testimony provided to the Commission under penalty of perjury.

Complainant includes several allegations that they assert demonstrates that the information provided by Respondent regarding the commercial viability and availability of SunCatchers, detailed in allegations 4 through 14, constitutes material false statements. Allegation 15 acknowledges the sale of the project to K-Road Power, along with a statement from Tessera that the "SunCatchers would not be available in the near term." [Exhibit H] Allegation 18 includes a statement from K-Road's vice president before the Public Utilities Commission that "he was aware in 'September or October' 2010 that SunCatchers were not 'commercially available,'" [Exhibit I] while allegation 19 criticizes Respondent for not apprising the Commission of this statement "in subsequent submissions." Allegation 20 calls into question the timing of the commercial availability of the Suncatchers, and acknowledges that the Respondent stated that they "expect SunCatchers to be commercially available 24 months after securing investor financing." [Exhibit J] Allegation 21 acknowledges that the commercial viability and availability of SunCatchers is dependent on investor financing, which has not been obtained.

The statement of facts provided by complainant may be deficient. Staff is of the opinion that the information provided by complainant merely demonstrates the belief by the respondent that the SunCatchers would be available at some time in the future, and that availability was dependent on investor financing. There is no question that the Commission decision contemplates the use of SunCatchers, but the decision is not predicated on the *immediate* availability or *immediate* commercial viability of that technology. The underlying statements upon which the complainant relies may be matters of opinion regarding future events, and are therefore, in the view of staff, not representations (or misrepresentations) of fact. However, this matter should be resolved by findings of fact by the committee at the hearing set for October 3, 2011

(4) a statement indicating the statute regulation, order, decision, or condition of certification upon which the complaint...is based...;

The complainant has raised allegations of material false statements, and cites California Public Resources Code section 25534. That section provides in relevant part:

(a)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.

Complainant has satisfied this requirement by indicating that the commission should take action pursuant to section 25534.

(5) the action the complainant...desires the commission to take;

The complainant has requested that the Commission revoke the certification previously issued in its Final Decision, effective December 1, 2010.

(6) the authority under which the commission may take the action requested;

As noted above, the complainant cites to California Public Resources Code section 25534, under which the Commission may revoke the certification for the facility.

(7) a statement by the complainant...specifically listing the names and addresses of any other individuals, organizations, and businesses which complainant...knows or has reason to believe would be affected by the relief sought; and

Complainant identifies "BNSF and other Intervenors whose interests are directly impacted by the Calico Solar Project," but fails to list the names and addresses of any other individuals, organizations, or businesses that complainant knows or has reason to believe would be affected by the revocation of certification for the project. However, Staff assumes that BNSF is referring to the intervenors in the original AFC proceeding.

(8) a declaration under penalty of perjury by the complainant...attesting to the truth and accuracy of any factual allegations contained in the complaint.

As discussed in the Staff Response to Verified Complaint to Revoke Certification filed August 12, included in the Complaint docketed on July 12, 2011 was a declaration signed by under the laws of the State of Texas, contrary to the provisions of California Code of Civil Procedure s 2015.5 which provides that such declarations must state that it is made "under the laws of the State of California." Staff notes that on August 25, complainant filed a second complaint that included a declaration filed under the laws of the State of California, and that the Committee's September 12 Order found that the defect in the complaint was cured by the subsequent filing.

CONCLUSION

Here, depending on the factual findings that the committee will make at the hearing set in this matter, complainant BNSF may have provided insufficient information to support its claim that respondent has made material false statements. Staff is also concerned

that BNSF has failed to list the names and addresses of any other individuals, organizations, or businesses that complainant knows or has reason to believe would be affected by the revocation of certification for the project. If the Committee finds that there is insufficient information to support the assertion that the respondent's application and supplemental documentation contained material false statements regarding the commercial viability and availability of SunCatchers for the Calico Solar Project, staff recommends that the Committee dismiss the complaint.

IV.

ASSESSMENT OF CALICO'S ANSWER

In its Answer dated September 1, respondent Calico Solar Project denies each of the allegations concerning material false statements raised by complainant. Additionally, respondent has included points and authorities to refute the assertion that the original application and supplemental documentation contained false statements regarding the commercial viability and availability of SunCatchers for the Calico Solar Project.² The answer also includes a declaration, signed under penalty of perjury under the laws of the state of California. The pleading requirements of California Public Resources Code Section 1233 therefore appear to have been met.

Respondent characterizes complainant's allegations of material false statements as a collateral attack on the original decision. This characterization is incorrect. California Public Resources Code section 25534 specifically allows for the revocation of a facility's certification where the Commission finds that there has been any "material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant." (Pub.Res.Code section 25534 (a)(1)) Whether the underlying decision is based on a material false statement is a question of fact that, under the provisions of section 25534, must be brought post certification.

A review of the points and authorities submitted by respondent demonstrate ample support for the position that the statements made during the course of the underlying licensing proceeding are not "material false statements" as alleged by the complainant. As pointed out by the respondent, "the mere fact that SunCatchers were not off-the-

² The Committee issued an Order on September 12, 2011, dismissing the allegations in the Complaint that respondent failed to comply with the Conditions of Certification.

shelf technology that was immediately available at the time the Commission certified the Project would serve as a basis for revoking the Project's certification...would be contrary to CEC and energy development practices." (Answer, p.3) Also, the information provided by complainant in the underlying proceeding demonstrates the

belief by the respondent that the SunCatchers would be available at some time in the future, and that the future availability of this technology was dependent on investor financing. The Commission decision was not predicated on the *immediate* availability or *immediate* commercial viability of SunCatcher technology. On their face, the underlying statements upon which the complainant relies may be matters of opinion regarding future events, and would therefore not be considered representations of fact.

However, if it could be shown that the respondent knew during the underlying licensing proceeding that the SunCatcher technology would not be available at some point in the future, then the Commission could find that such a statement to the contrary could be materially false. This does not appear to be a likely scenario, considering that the technology was already being employed at the Maricopa facility near Phoenix, Arizona.

Likewise, if it could be shown that the respondent knew during the underlying licensing proceeding that the SunCatcher technology would not be commercially viable at some point in the future, then the Commission could find that such a statement made by the respondent to the contrary would be materially false. Here, staff cannot comment on what the respondent knew of the commercial viability of this technology during this time period.

Per the terms of Condition of Certification REL-1, Calico was required to "obtain and provide to the CPM quarterly data sets of reliability and maintenance data from the Maricopa Plant." No such quarterly reports have been submitted by Calico, due to circumstances that have changed since the project was licensed that make it difficult for respondent to comply with the reporting requirements of this condition. While staff has concluded that the failure to provide this information does not amount to a significant failure to comply with the facility's certification³, that information could be dispositive on the issue of what respondent knew during the underlying licensing proceeding regarding the commercial viability of the SunCatcher technology based on the performance of that technology at the Maricopa facility. Absent that information, staff cannot comment on what the respondent knew of the commercial viability of this technology during this time beyond those statements that were made in the underlying licensing proceeding.

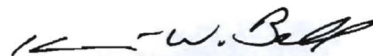
³ The Committee Order dated September 12 found that the non-compliance with REL-1 was not significant.

V.
RECOMMENDATION

Staff recommends that pursuant to Title 20, California Code of Regulations, section 1234, the Committee conduct the hearing set for October 3, 2011, and that both the complainant and respondent be given the opportunity to present evidence and arguments in support of their respective positions.

Date: September 28, 2011

Respectfully Submitted,



Kevin W. Bell
Senior Staff Counsel



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

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

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DECLARATION OF SERVICE

I, Rhea Moyer, declare that on September 28, 2011, I served and filed copies of the attached Energy Commission Staff's Assessment of BNSF's Verified Complaint and of Calico's Answer (CCR Title 20 § 1231), dated September 28, 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:

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.

/s/ Rhea Moyer

Rhea Moyer