

**STATE OF CALIFORNIA****ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

In the Matter of:

The Calico Solar Project

DOCKET NO. 11-CAI-01

**BNSF'S RESPONSE TO CEC  
STAFF ASSESSMENT OF  
BNSF'S VERIFIED  
COMPLAINT TO REVOKE  
CERTIFICATION**

On September 29, 2011, the day after the parties filed their Hearing Statements, and after the CEC Staff had filed its Assessment of BNSF's Verified Complaint to Revoke Certification, Calico finally disclosed that, on September 22, 2011, Stirling Energy Systems, the manufacturer of the SunCatcher generation technology for the Calico Solar Project and Calico's former affiliate, had filed for liquidation under Chapter 7 of the United States Bankruptcy Code. Calico's delayed disclosure is yet another instance of Calico's "hide-the-ball" approach to this Commission and other parties.

But SES's dire financial condition and Calico's consequent inability to construct and emplace 26,450 SunCatchers for the Calico Solar Project, certified by this Commission, effective December 1, 2010, was known to Calico long before SES's bankruptcy filing on September 22, 2011.

On May 17, 2011, Dan O'Shea, Vice President of Calico and an employee of K Road testified under penalty of perjury, that he was aware, as early as "September or October 2010" that SunCatchers were not "commercially available" "on the schedule that Tessler Solar had thought they would be available." BNSF Complaint Ex. I at pp.69-70. By September and October 2010, K Road, "an independent power producer that develops, finances, constructs, owns and operates utility-scale renewable power facilities in the Southwest United States with a focus on PV solar" (<http://www.kroadpower.com>), was in negotiations to acquire Calico. In fact, K Road purchased Calico on December 24, 2010 and in an accompanying press release disclosed that an amendment would be sought to substitute PV technology for SunCatcher technology for at least part of the facility. Three months later, in March 2011, Calico filed its Petition to Amend, in which Calico sought to replace 85% of the SunCatchers with PV technology. In its Petition to Amend, Calico admitted that, "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." Petition to Amend, Sec.3, Necessity of the Modified Project, p. 3-1.

### **Additional Background**

On November 12, 2010, Tessera Solar's parent, NTR plc, filed its Annual Report and Financial Statements 2010, in which it confirmed that "it is now anticipated that the commercial roll-out of the SunCatcher will take place over a longer timeframe than previously envisaged." BNSF Exhibit 20, p. 79. In that very Annual Report, NTR disclosed that it had decided to "re-pace the utility scale roll-out of the SunCatcher technology until the current uncertainties in the funding markets are resolved." *Id.* p.108. In other words, Calico knew, at the very same time it was seeking certification from this Commission for a 663.5 MW solar generation facility dependent upon the construction and emplacement of 26,450 SunCatchers, that Calico had no reasonable expectation of fulfilling the terms of the certification it sought in the project description, and that the project description was no longer accurate. By September and October 2010, Calico and its owners also knew that, because SunCatchers would not be commercially available in the near future, Calico was in the process of being sold to a PV company and had no intention of building the project for which it was still seeking certification. Yet, in the Fall of 2010, Calico failed to disclose to the Commission its corporate parent's decision to "re-pace the utility scale roll-out of the SunCatcher technology," or its negotiations to sell Calico to a PV company,

and its plans to abandon the 100% SunCatcher Calico Solar Project in favor of a PV project

Instead, Calico and SES continued to make submissions to the Commission in September and October 2010, under penalty of perjury, in pursuit of certification by this Commission of a 663.6 MW solar energy facility, entirely dependent on the construction and emplacement of 26,450 SunCatchers. Calico sought, and the Commission accommodated, significantly abbreviated schedules for testimony, briefing, and factual determinations, based on the ongoing representations by Calico that SunCatchers were commercially available on the timeline necessary to obtain financing under the American Recovery and Reinvestment Act of 2009 ("ARRA"). As the Applicant's representative Felicia Bellows testified during the October 26, 2010 hearing on the PMPD, the Applicant did so in order to maintain its eligibility for significant financial incentives under ARRA. Under ARRA, renewable energy projects which began construction by December 31, 2010 were eligible for significant tax credits.

Thus, Calico was pressing this Commission and the parties to complete its environmental review under CEQA based on an inaccurate project description. It is elementary that "[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (3rd Dist. 1977) 71 Cal.App. 3d 185, 193. It is not plausible that the

CEC Staff would have continued to process and finalize the environmental analysis of a project that was infeasible and already in the process of being abandoned. It is inconceivable that, if the Commission had known that the project description had changed and the environmental review was systemically flawed, it would have proceeded to certification.

**Staff Assessment of BNSF Complaint and Calico Answer**

The Staff Assessment of BNSF's Complaint concludes that BNSF's statement of facts "may be deficient." Staff reasons that, "there is no question that the Commission decision contemplates the use of SunCatchers but the decision is not predicated on the *immediate* availability or the *immediate* commercial viability of that technology." CEC Staff Assessment at p.4.

Similarly, the CEC Staff's Assessment of Calico's Answer concludes that "if it could be shown 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." CEC Staff Assessment at p.7. The CEC Staff further concludes that, "if it could be shown that the respondent [Calico] knew during the underlying 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." *Id.*

BNSF respectfully submits that the CEC Staff's Assessment analyzes the wrong question. The issue isn't whether Calico knew that SunCatcher technology was "immediately available" or "would not be available at some point in the future." The issue is whether, in September and October 2010, when Calico was seeking certification from this Commission of a Calico Solar Project based on 100% SunCatcher technology, Calico knew that it would be changing the project description and that it would not or could not construct and emplace the 26,450 SunCatchers.

As stated above, the evidence overwhelmingly demonstrates that, in September or October 2010, Calico and its owners were very well aware that the project description was inaccurate and that the SunCatcher technology would not and could not be available for the Calico Solar Project, because they were already in negotiations to sell Calico to a PV company and knew that the Calico Solar Project, for which they were seeking certification, was based on a project description that Calico would never construct.

Thus, the proper inquiry for this Commission is whether Calico misled the Commission and CEC Staff in their environmental review and in issuing the certification by affirmatively misrepresenting material facts or failing to disclose material information to the Commission.

BNSF respectfully submits that its Verified Complaint demonstrates that Calico did both: it both made affirmative misrepresentations of material fact to this Commission and failed to disclose material information in its possession during the application proceeding. For example, on October 26, 2010, Felicia Bellows expressly testified, in connection with Calico's proposed revisions to Phase I, that SunCatchers would be on-line as early as July 29, 2011. As Ms. Bellows stated, under penalty of perjury: "From a financial – from a financial, capital perspective, it makes no sense to put them [SunCatchers] up until the transmission is ready. So the earliest transmission's going to be ready is 7/31/2011, so you're not going to see SunCatchers until, you know, 7/29."

The clear import of Ms. Bellows' testimony was that, subject to "transmission readiness," Calico could construct and emplace SunCatchers by July 29, 2011. But, if Mr. O'Shea's sworn testimony is true – *i.e.*, that Calico knew, "in September or October 2011," that SunCatchers were not "commercially available" – then Ms. Bellows' testimony that SunCatchers could be in place as early as July 29, 2011 was demonstrably false.

Likewise, in Calico's October 25, 2010 comments to the Presiding Member's Proposed Decision ("PMPD") for the Calico Solar Project, Calico re-affirmed the multiple references in the PMPD that the Calico Solar Project would include installation of 26,450 SunCatchers. BNSF Complaint Ex. F.

Specifically, Calico argued, in its comments to the PMPD, that the inclusion of detention basins or other flood control devices would not cause "a significant decrease in the number of SunCatcher units or the power output." *Id.* at 17. In other words, Calico expressly led the Commission and other parties to believe that it was still capable of constructing and emplacing 26,450 SunCatchers pursuant to the project description, for which Calico sought certification from this Commission.

But, if Mr. O'Shea's sworn testimony is true – *i.e.*, that Calico knew, "in September or October 2011," that SunCatchers were not "commercially available" – then Calico knew, when it submitted its comments to the PMPD, that it had no ability to construct and emplace 26,450 SunCatchers pursuant to the project description certified by this Commission, because SunCatchers would not be "commercially available." BNSF Complaint Ex, I at pp. 69-70.

Indeed, the misrepresentations in Calico's submissions to the Commission in the Fall of 2010 were systemic and permeated every written submission and oral hearing, because every statement they made, both written and oral, was for certification and CEQA approval of a project description that was based on 100% SunCatcher technology; yet Calico knew at that time that that SunCatcher project would never be built and could never be built, because Calico and its owners were already in negotiations to convert the majority of the Calico Solar Project to



an entirely different PV project, which is an entirely different CEQA project with different impacts to evaluate. Calico and its owners knew, in the Fall of 2010, that SunCatchers were not and would not be commercially available and that the Calico Solar Project could never get the investor financing necessary to manufacture SunCatchers, because the SunCatcher technology was already economically unviable – it was simply too expensive compared to the continually decreasing and lower price of PV technology. Calico and its owners knew this in the Fall of 2010, yet they continued to make sworn submissions to this Commission to obtain certification of a project they knew they'd never build.

We note that Calico K Road's Hearing Statement, dated September 28, 2011, does not deny that Calico knew, "in September or October 2011" that SunCatchers would not be "commercially available." Nor do they deny that Calico failed to timely disclose this information to the Commission and the other parties.

Instead, Calico takes the incredible position that it was entitled to mislead this Commission regarding the commercial availability of SunCatchers, as long as Calico did not make an affirmative misrepresentation regarding the commercial availability of SunCatchers in the near term. Calico Hearing Statement at 8 ("general impressions or implications which could be drawn from

evidence presented by an applicant do not rise to the level of “statement” for purposes of Section 25534(a)(1).”).

But "concealment is a species of fraud or deceit." *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal.App.4th 858, 868 (2008) (citing Civil Code section 1710 subdivision 3, which defines deceit as "the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact...”).

Calico further argues that BNSF fails to identify any omission of material fact by Calico. But as BNSF has already demonstrated, Calico made numerous affirmative misrepresentations; all of their submissions in the Fall of 2010 were predicated on a SunCatcher project that they knew they'd never build.

And BNSF has already identified numerous omissions of material fact by Calico:

- Calico failed to disclose, prior to this Commission's December 1, 2010 certification, that SunCatchers were not commercially available or economically viable.
- Calico failed to disclose that, by the Fall of 2010, that Calico and its owners were in negotiations to sell Calico to a PV company.
- Calico failed to disclose that, by the Fall of 2010, Calico's project description was inaccurate because Calico had no intention in the

Fall of 2010 of building the project for which it was seeking certification.

- Calico failed to disclose that, by the Fall of 2010, Calico knew it would never comply with REL-1, because it was in negotiations to sell Calico on terms that would effectively render compliance with REL-1 impossible.
- Calico failed to disclose that, by the Fall of 2010, Calico knew that the power purchase agreement, which was material to any certification of the project, would be cancelled, because Calico was in the process of being sold to a PV company due to the commercial unavailability and economic unviability of SunCatcher technology.

It is indisputable that these omissions of fact by Calico were material and induced the Commission to continue and finalize its environmental review of a 100% SunCatcher project and to issue its certification based thereon, effective December 1, 2010. If Calico had advised the Commission in the Fall of 2010 that SunCatchers were neither commercially available nor viable or that Calico was seeking to be sold to a PV company, would this Commission have issued its certification, effective December 1, 2010? If the Commission had known that Calico's project description was inaccurate, that the environmental impacts could not yet be determined, and that its continued representations as late as October

2010 that it planned to construct and emplace 26,450 SunCatchers were false, would this Commission have issued its certification, effective December 1, 2010? If the Commission had known that Calico had no intention of complying with Condition of Certification REL-1 or that the power purchase agreement with SCE would be terminated, because Calico was in the process of negotiating a sale of Calico due to the commercial unavailability of SunCatchers, would the Commission have issued its certification, effective December 1, 2010?

Equally important, BNSF strongly disagrees with Calico's suggestion that an applicant is entitled to fraudulently obtain certification of a solar energy generation facility when it knows that the technology in the project description it has proposed will not be commercial available. Indeed, the Commission's regulations establish a procedure by which there is to be an initial determination of such critical information as "the commercial availability of the generation technologies proposed." 20 Cal. Code Regs. § 1721(a)(6). An application proceeding cannot even commence in the absence of determinations by the Commission on such key issues.

Moreover, this Commission has a legal obligation "to consider the economic, financial, rate, system reliability, and service implications of the proposed facilities " and to "prevent any needless commitment of financial resources and regulatory effort prior to a determination of the basic acceptability

of, and need for, the proposed facilities." *Id.* § 1721(b)(7), (8). Thus, the commercial availability of SunCatchers is as relevant today as it was in December 1, 2011. If the Commission becomes aware **at any point in time** that the "commercial availability of the generation technology proposed" has been compromised, this Commission has a legal obligation to "prevent any needless commitment of financial resources and regulatory effort" in an application or compliance proceeding. *Id.* § 1721(b)(7), (8).

Once Calico knew no later than "September or October 2010" (BNSF Complaint Ex. I) that it could no longer vouch for the commercial availability of SunCatcher technology described in its project description, Calico had an affirmative obligation to disclose that material change in information to the Commission and the parties, and to refrain from making any further representations that would mislead the Commission and other parties to believe that SunCatchers remained commercially available, as required by Calico's project description.

Yet, it is indisputable that, in September and October 2010, Calico failed to disclose that SunCatchers were commercially unavailable. To the contrary, it continued to make affirmative representations intended to mislead this Commission to believe that Calico's project description, which required the

construction and emplacement of 25,450 SunCatchers, was accurate and what Calico intended to build.

It is also indisputable that, in September and October 2010, Calico was in active negotiations to sell Calico to K Road, a company known for its investments in PV technology – indeed, a sale driven by the fact that SunCatchers were not commercially available in the near term. A switch from SunCatcher technology is clearly a material change in the project description.

Further, it is indisputable that Calico knew, or should have known, that its intended sale to a PV-generation company, driven by the commercial unavailability of SunCatchers, would cause the cancellation of the power purchase agreement with Southern California Edison ("SCE"). Clearly, the existence of the SCE power purchase agreement was a material factor in the certification of the Calico Solar Project.

In conclusion, BNSF respectfully submits that its Verified Complaint and exhibits, all obtained from publicly available information, has provided the Commission with sufficient evidence that Calico made affirmative and systemic misrepresentations and omitted material facts to the Commission during the application proceeding to lead the Commission and parties to believe that Calico's project description was accurate, that SunCatchers were commercially

available, and that Calico had the ability to construct and emplace 26,450 SunCatchers.

In the event that the Commission believes additional evidence is necessary, the Commission should authorize an investigation to obtain information that is not available to non-Calico parties regarding whether Calico committed a fraud on the Commission in obtaining certification by misrepresenting the commercial availability and viability of SunCatchers, Calico's ability to construct and emplace 25,450 SunCatchers, concealing the negotiations in the Fall of 2010 to sell Calico to a PV company, and the circumstances leading to the termination of the power purchase agreement with SCE.

Dated: September 30, 2011

\_\_\_\_\_/s/  
Cynthia Lea Burch  
Helen B. Kim  
Katten Muchin Rosenman LLP

Attorneys for Intervenor BNSF Railway Company