

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

California Energy Commission

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**08-AFC-13C**

TN # 66494

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October 17, 2011

TO PARTIES OF RECORD IN CASE 10-10-015, DECISION 11-10-025

On September 12, 2011, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 15.5(a) of the Commission's Rules of Practice and Procedure provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

/s/ KAREN V. CLOPTON  
Karen V. Clopton, Chief  
Administrative Law Judge

KVC:gd2

Attachment

Decision 11-10-025 October 13, 2011

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Calico Solar, LLC,

Complainant,

vs.

BNSF Railway Company,

Defendant.

Case 10-10-015  
(Filed October 21, 2010)

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**DECISION GRANTING IN PART AND  
DENYING IN PART THE COMPLAINT OF CALICO SOLAR, LLC**

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**DECISION GRANTING IN PART AND  
DENYING IN PART THE COMPLAINT OF CALICO SOLAR, LLC**

**1. Summary**

This decision orders BNSF Railway Company to allow Calico Solar, LLC (Calico) immediate access to the Hector Station crossing for pre-construction activity related to the development of the Calico Solar Project, and to enter into an agreement for the construction of a permanent grade-separated crossing at milepost 710.8 conditioned on Calico's receipt of authority to construct from its permitting agencies. The proceeding is closed.

**2. Procedural Background**

Tessera Solar, LLC (Tessera) filed this complaint on October 21, 2010, requesting that the Commission require BNSF Railway Company (BNSF) to allow Calico Solar, LLC (Calico) (at the time, Tessera's wholly-owned subsidiary) immediate access to an at-grade crossing over a BNSF rail line to enable it to begin construction on a solar generation project. Calico's amended complaint, filed February 11, 2011,<sup>1</sup> elaborates that it also seeks an order requiring BNSF to provide Calico with a permanent, private, grade-separated bridge crossing. Calico brings this complaint pursuant to Pub. Util. Code § 7537,<sup>2</sup> which provides as follows:

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<sup>1</sup> By motion filed December 3, 2010, Tessera moved to amend its complaint to add Calico as a co-complainant and, by oral motion at the February 9, 2011, PHC, moved to withdraw from the proceeding. By oral ruling at the February 9, 2011, PHC, the ALJ granted these motions and, by written ruling filed February 11, 2011, the Chief ALJ recaptioned the proceeding to reflect the change in complainants.

<sup>2</sup> All future references are to the Public Utilities Code unless otherwise specified.

The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner. The owner or operator of the railroad shall construct and at all times maintain such farm or private crossing in a good, safe, and passable condition. The commission shall have the authority to determine the necessity for any crossing and the place, manner, and conditions under which the crossing shall be constructed and maintained, and shall fix and assess the cost and expense thereof.

At the November 30, 2010, prehearing conference (PHC), the assigned Administrative Law Judge (ALJ) set the time for filing concurrent briefs to address BNSF's jurisdictional challenges to the original complaint, as well as a second PHC to be conducted on December 27, 2010. In its answer filed December 6, 2010, BNSF denied the complaint and, by motion concurrently filed on December 6, 2010, BNSF moved to dismiss the complaint for the Commission's alleged lack of jurisdiction to grant the relief requested. On December 8 and December 15, 2010, respectively, BNSF and Calico filed concurrent opening and reply briefs on jurisdiction.

In response to the parties' joint request, the ALJ removed the second PHC from calendar to allow the parties to continue their settlement talks. By ruling dated January 18, 2011, the ALJ re-set the second PHC for February 9, 2011.

By oral ruling at the February 9, 2011, PHC, the ALJ ruled that the Commission has jurisdiction to hear the complaint and denied the motion to dismiss it. (ALJ, Tr. 129:5-21.)

In consideration of the filed pleadings and the discussions at the PHCs, the assigned Commissioner's and ALJ's March 9, 2011, scoping memo and ruling identified the following issues to be addressed in this proceeding:

1. Should BNSF be required to provide Calico with a temporary at-grade rail crossing to connect contiguous land granted to Calico by the federal Bureau of Land Management (BLM) for the purpose of constructing a solar generation project? If so, where should it be located, how should it be constructed to ensure safe use, what is the cost of preparing the crossing and who should pay it, when should the crossing be made available, and will railroad flaggers or other special procedures be necessary for its use?
2. Should BNSF be required to provide Calico with a permanent, grade-separated rail crossing, paid for by Calico, to connect contiguous land granted to Calico by the BLM for the purpose of constructing a solar generation project? If so, where should it be located, what is its anticipated cost, who will construct it, and what is a reasonable timeframe for completing it and making it available for Calico's use?

Evidentiary hearings were held on May 16 and 17, 2011. Calico and BNSF filed opening briefs on June 13, 2011, and reply briefs on July 13, 2011, upon which the record was submitted.

### **3. Permitting History**

By grant of a right of way issued in October 2010 and a license approved in December 2010, the BLM and the California Energy Commission (CEC), respectively, approved the proposed Calico Solar Project as a 663.5 megawatt

(MW) solar thermal project with the solar thermal systems located to the north and south of the BNSF railroad.<sup>3</sup>

Calico subsequently filed a “Form 299” with the BLM and a petition with the CEC to amend the Calico Solar Project to generate 100.5 MW using solar thermal technology and 563 MW using photovoltaic technology, as well as other changes. Phase 1 technology would be exclusively comprised of photovoltaic modules, almost all of which would be located south of the BNSF railroad. The remaining photovoltaic modules and the solar thermal systems would not be constructed until Phase 2. Other significant changes include a new access road outside of the project footprint, new placement of the photovoltaic modules and solar thermal systems, and a new sequence and timing of site development.<sup>4</sup>

Subsequent to the filing of Calico’s proposed project amendments, the CEC issued a Committee Ruling on Sierra Club’s Motion to Dismiss Calico Solar LLC’s Petition to Amend, dated July 1, 2011,<sup>5</sup> by which the CEC disclaims certification jurisdiction over the portion of Calico Solar Project that would be located south of the BNSF railroad.

The proposed amendments are currently pending BLM and CEC approvals.

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<sup>3</sup> BLM Record of Decision, Publication Index Number BLM/CA/ES-2010-018+1793 (Department of Interior Control Number FES-10-30) (October 2010); CEC Decision CEC-800-2010-012-CMF (Docket Number 08-AFC-13) (December 2010).

<sup>4</sup> CEC’s Committee Ruling on Sierra Club’s Motion to Dismiss Calico Solar LLC’s Petition to Amend, dated July 1, 2011, at 2.

<sup>5</sup> BNSF’s July 13, 2011, request for official notice of the CEC’s Committee Ruling is granted.



#### **4. Requested Crossings**

For schematic purposes, the Calico Solar Project site is bisected on the east/west axis by the BNSF railroad, with US Highway 40 serving as the project's southern boundary and a Southern California Edison Company (SCE) transmission line serving as its eastern boundary. Hector Road runs midway through the northern half of the project site parallel to the BNSF railroad until, after exiting the west side of the project site, it turns south to cross the railroad over the Hector Station crossing, and continues south; a road designated as AF058 starts at the Hector Station and proceeds east into the project site alongside the railroad. Pisgah Substation Road runs along the eastern boundary of the project site, crossing the BNSF railroad at grade at milepost 708.2.

Calico requests temporary access over the existing Hector Station crossing or, in the alternative, over the existing Pisgah Substation Road crossing. Calico requests a permanent, grade-separated bridge crossing at milepost 710.8. Finally, as presented in its prepared direct testimony, Calico proposes to run a

waterline underneath the BNSF railroad at approximately milepost 710 to connect a well in the northern section of the project site to a service complex in the southern section.

**5. Does the Confidentiality and Reimbursement Agreement between the Parties Deprive the Commission of Jurisdiction to Hear the Complaint and Grant Relief Pursuant to Section 7537?**

BNSF argued in its briefs on jurisdiction that Calico is contractually barred from bringing this action. Specifically, BNSF cites to a Confidentiality and Reimbursement Agreement entered into by the parties which requires them to bring “any legal action or proceeding arising out of or in connection with this Agreement” in the Los Angeles Superior Court; BNSF argues that this requirement extends to any legal action related to “a roadway access agreement and/or a grade separated crossing” as described in the agreement’s recitals, as follows:

WHEREAS, Solar One is seeking to develop a solar power plant (the “Proposed Plant”) and desires to enter into an agreement with BNSF to analyze and determine whether or not there is an option, acceptable to both Parties, which may result in the provision of water from the Property, or other locations, to the Proposed Plant and to analyze and determine whether BNSF will agree to grant Solar One a roadway access agreement and/or a grade separated crossing (the “Analysis”).

(BNSF opening brief re jurisdiction, Attachment A, Exhibit A, at 1.)

BNSF's argument is without merit. This recital, or "whereas clause," is not an operating term of the contract:

A "formal statement . . . in order to explain the reasons upon which the transaction is founded" in a contract is a "recital," one type of which is called a "whereas clause." A "whereas clause . . . is not an essential part of the operating portions of the contract." [*Black's Law Dictionary* 879, 1101 (West abridged 6th ed. 1991).] While "recitals may be read in conjunction with the operative portions of a contract in order to ascertain the intention of the parties," *KMS Fusion, Inc. v. United States*, 36 Fed. Cl. 68, 77 (1996), "it is standard contract law that . . . [they] cannot create any right beyond those arising from the operative terms of the document." *Grynberg v. Federal Energy Regulatory Comm'n*, 315 U.S. App. D.C. 154, 71 F.3d 413, 416(D.C. Cir. 1995)."

(*Blackstone Consulting, Inc. v. United States*, 65 Fed. Cl. 463, 470 (Fed. Cl. 2005).)

As its name implies, the operative terms of the Confidentiality and Reimbursement Agreement concern the confidentiality and limitations of use of information exchanged between the parties for purposes of BNSF's conduct of an analysis, reimbursement of BNSF's costs of conducting that analysis, and boilerplate provisions governing those terms (including the forum selection clause). None of the operative terms mention a railroad crossing or otherwise affect Calico's right to seek a crossing pursuant to Section 7537.<sup>6</sup>

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<sup>6</sup> Paragraphs 11 ("Solar One Agreement to Transport Water Via BNSF") and 13 ("Acknowledgment and Understanding Regarding any Potential Transaction Involving the Property, or a Portion of the Property, and Water Sources Relating to the Property") of the agreement appear to potentially affect the parties' arrangement for the transport of water to the solar project. However, as we find Calico's request that the Commission order the installation of a waterline to be beyond the scope of the proceeding (see below), we do not reach the issue of whether the Confidentiality and Reimbursement Agreement bars that request.

**6. Is Calico the Owner of the Lands Upon which the Calico Solar Project is Sited?**

Section 7537 allows Calico private crossings over the railroad and railroad right of way if Calico owns the land along or through which the railroad is constructed or maintained, and if such crossings are reasonably necessary or convenient “for ingress to or egress from such lands or in order to connect such lands with other adjacent lands of the owner.” There is no dispute that the lands upon which the Calico Solar Project is sited are located on both sides of the BNSF railroad. However, BNSF asserts that Calico lacks standing to bring this complaint because it is not the “owner” of those lands.

In its motion to dismiss the complaint, BNSF asserted that Calico is not the “owner” of the lands upon which the Calico Solar Project is located because Calico merely holds a right of way grant from the BLM for the site. As was ruled at the February 9, 2011, PHC, this right of way grant confers on Calico ownership rights sufficient to entitle it to a railroad crossing pursuant to Section 7537. (ALJ, Tr. 107-108.) The right of way grant gives Calico the right to use and occupy the described public lands to construct, operate and maintain, and decommission a solar electric generation project through 2039. In so doing, the right-of-way lease/grant gives Calico the authority to use the land as needed to develop the project. Such use reasonably includes seeking to obtain a railroad crossing pursuant to Section 7537.

In its opening brief, BNSF asserts that Calico has no current property interest to support its complaint for access across the BNSF railroad because the BLM has not issued a notice to proceed, which is a prerequisite to Calico’s authorization to do any ground disturbance on the project site. To the contrary, Calico’s authority to proceed with construction is not determinative of its

property interest in the lands. While Calico's authority to proceed with construction is relevant to the question of whether it reasonably requires a railroad crossing, it is not determinative of its standing to seek it.

BNSF argues that Calico has no existing property interest because its right of way grant is not "operative" according to a statement in a BLM filing to the United States District Court, for which BNSF moved for judicial notice by motion filed June 9, 2011. BNSF's motion for judicial notice is denied and its argument is accorded no weight. Although the existence of BLM's filing is judicially noticeable pursuant to Evidence Code § 452(d), BNSF improperly offers it for purposes of relying on the substance of the statements made in the filing. "There exists a mistaken notion that this means taking judicial notice of the existence of facts asserted in every *document* of a court file, including *pleadings* and *affidavits*. However, a court *cannot* take judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file. A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the *truth* of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." (*Sosinsky v. Grant* (1992) 6 Cal.App.4<sup>th</sup> 1548, 1564-1569, emphasis in original, citing and following 2 *Jefferson's California Evidence Benchbook* (2d ed. 1982), § 47.2, at 1757).<sup>7</sup>

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<sup>7</sup> In any event, BNSF's argument characterizing Calico's right of way grant as not "operative," and conferring no existing property interest is contradicted by the BLM's statement elsewhere in its filing that "the approved [right of way] grant remains in effect until and unless the Application for Amendment is approved or denied." (Request for Judicial Notice (June 9, 2011), Ex. B, ¶ 16.) This apparent contradiction serves to highlight the inappropriateness of taking judicial notice of hearsay.

For all these reasons, we affirm the ALJ's prior ruling that Calico is the owner of the lands upon which the Calico Solar Project is sited, for purposes of seeking a railroad crossing pursuant to Section 7537.

**7. Should BNSF be Required to Provide Calico with a Temporary At-Grade Rail Crossing to Connect Contiguous Land Granted to Calico by the BLM?**

**7.1. The Commission has Jurisdiction to Authorize a Temporary At-Grade Railroad Crossing at Hector Station and Pisgah Substation.**

BNSF argues that the Commission lacks jurisdiction to authorize the Hector Station or Pisgah crossing because they are not located on, and do not directly connect, Calico's lands. BNSF argues that Section 7537, on its face, limits authorized crossings to those that are located contiguous to the owner's land.

BNSF's argument is without merit. Section 7537 provides in pertinent part:

The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner.

It does not require a *crossing* to be located contiguous to the lands for which ingress to, egress from, or connection between is sought; it merely requires that the crossing be *reasonably necessary or convenient* for such purpose.

BNSF argues that, in defining the issues in the proceeding as whether BNSF should be required to provide a crossing "to connect contiguous land" granted to Calico, the assigned Commissioner's scoping memo reflects BNSF's position that Section 7537 does not authorize the Hector or Pisgah crossings. To

the contrary, the scoping memo uses the word “contiguous” to accurately describe the lands that Calico seeks to connect; it does not use the word “contiguous” to describe the authorized location of a crossing that would connect them.

BNSF argues that the Commission is without jurisdiction to authorize Calico’s use of the Hector Road crossing (as well as .25 miles of BNSF’s Hector Station property and another 1.4 miles of BLM Open Road AF058 that weaves in and out of BNSF right of way along the railroad between BNSF’s Hector Station property and the western edge of the project site) because it is BNSF’s own private crossing which it uses for maintenance of way (and BNSF’s private right of way along BLM Open Road AF058). BNSF cites to *Siemens v. Union Pacific Railroad Company* (2002) Decision (D.) 02-10-038 at 3 for the suggestion that the Commission has previously acknowledged its lack of jurisdiction over private crossings. BNSF misreads *Siemens*. *Siemens* does not address the Commission’s authority to compel railroads to allow reasonably necessary and convenient access over a railroad’s private crossings; rather, it concerns the Commission’s authority to bar the railroad’s own activity on its own private crossings, and finds that Section 7537 does not confer such authority on the Commission.

Nevertheless, BNSF’s argument raises the valid question of whether Section 7537 authorizes the Commission to require the railroad to allow access over its own private crossing (and its other rights of way) in lieu of requiring the construction of a new private crossing. We conclude that, to the extent that it is reasonably necessary and convenient for the railroad to allow access over its own private crossing (and its other rights of way), the Commission has the authority pursuant to Section 7537 to require it to do so. The fact that the crossing is over a railroad’s private right of way is not a basis upon which to deny this

Commission authority as, indeed, *all* railroad crossings necessarily cross a railroad's private right of way.

**7.2. Calico's Request for a Temporary Railroad Crossing is Timely.**

Calico asserts that it needs temporary access to the northern portion of the project site to comply with conditions to the certification authority granted by the CEC, to complete the clearance of endangered desert tortoise and install desert tortoise exclusion fencing on the project site as required prior to any construction, to conduct necessary well tests and build monitoring wells, to run the waterline to supply water to the south side of the project site, to perform survey work, to construct the permanent grade-separated crossing, and for ordinary business purposes such as bringing workers, investors, and government personnel to the site.

BNSF argues that Calico's request for a temporary railroad crossing is premature because Calico does not have current authority, pursuant to a prerequisite Notice to Proceed from the BLM, to proceed with construction. To the contrary, Calico has identified a current, reasonable need for a crossing in order to conduct at least some pre-construction activity that does not appear to require the BLM's Notice to Proceed, such as conducting necessary well tests, performing survey work, and bringing investors and government personnel to the site. Furthermore, nothing in the record suggests that Calico's use of the requested Hector Station or Pisgah Substation crossings is subject to the CEC's or the BLM's approval; thus, it is not apparent that the Commission's determination with respect to Calico's request for temporary access will be materially informed by any further, future action by those agencies.



For all these reasons, we find that Calico's request for a temporary railroad crossing is timely.

**7.3. Commission Enforcement of Section 7537 does not Trigger California Environmental Quality Act (CEQA).**

BNSF argues that the Commission may not authorize a railroad crossing pursuant to Section 7537 without first conducting an environmental review pursuant to CEQA. As Calico rightly counters, the Commission's adjudication of a complaint pursuant to Section 7537 does not trigger CEQA.

Section 7537 grants landowners the right to reasonably necessary and convenient crossings constructed by the railroad. While Section 7537 *authorizes* the Commission to determine the necessity for any crossing and the conditions and cost of its construction, it does not require Commission action in order for an adjacent landowner to obtain and a railroad to construct a private railroad crossing. Thus, normally, there is no CEQA review of private crossings pursuant to Section 7537. Likewise, CEQA review is not triggered if the Commission is required to enforce Section 7537 and vindicate the landowner's rights. (*See* 14 Cal. Code Regs. § 15321 (CEQA review is not required for "enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency"); *Pacific Water Conditioning Assn., Inc. v. City Council*, 73 Cal.App.3d 546, 555 (1977) (enforcement of statute falls outside of CEQA). Said differently, a Commission determination regarding what the railroad

should have done without the Commission's intervention is not a "project" pursuant to CEQA Guideline 15378(a).<sup>8</sup>

**7.4. There is, at Present, no Reasonable Access to the Northern Portion of the Calico Solar Project.**

Calico asserts that, at present, there is no reasonable access to the northern portion of the project site for purposes of conducting necessary pre-construction and construction work, as well as for the permanent operation of the project. While public access routes would allow Calico to access its site from the east at Ludlow and from the west at Newberry Springs, Calico asserts that these routes are impractical. Specifically, access from Ludlow, which is approximately 17 miles east of the project site, would entail travel along several unconnected BLM Open Routes and some non-specific routes, i.e., unpaved, sandy routes through washes, for approximately eight to 10 miles through the Pisgah Crater Area of Critical Environmental Concern and then another six miles before reaching the project site. Access from Newberry Springs, to the west of the project site, would entail travel over 15 miles of unpaved, sandy BLM access routes that one of Calico's witnesses described as "undulating and heavily wash-boarded" and that caused his four-wheel drive vehicle to fish-tail and created the potential for the vehicle to get stuck in the sand. (Exhibit 2, 19-21; Exhibit 5, 1:23-2:2.)

BNSF asserts that Calico does not reasonably need a railroad crossing for its pre-construction activities because the project site is currently accessible from Newberry Springs Road by other than heavy vehicles, and the only access

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<sup>8</sup> It should be noted that, in any event, the agencies responsible for permitting the Calico Solar Project have conducted or will conduct any required environmental review pursuant to CEQA and the National Environmental Protection Act.

needed now is for general surveying work which does not require heavy vehicles. To the contrary, the record evidence demonstrates that access to the project site from Newberry Springs is inconvenient and dangerous, even for a four-wheel drive vehicle. We find that, at present, there is no reasonable access to the northern portion of the Calico Solar Project site for Calico's pre-construction activity.

**7.5. The Hector Station Crossing is Reasonably Necessary and Convenient for Purposes of Calico's Near-Term Pre-Construction Use.**

Calico seeks temporary access over the Hector Station crossing (or, alternatively, over the Pisgah Substation crossing) in the near term for purposes of conducting survey work and well tests, to build monitoring wells, and for ordinary business purposes such as bringing workers, investors and government personnel to the site, and over the longer term in order to clear endangered desert tortoise and install desert tortoise exclusion fencing and to construct a waterline and a permanent grade-separated crossing. Calico asserts that the Hector Station crossing is well-suited to this usage because it has already been upgraded (at Calico's expense) for Calico's use, and Calico has used it safely for years. BNSF argues that safety concerns militate against Calico's forecasted use of the Hector Station crossing.

Calico's forecasted use of the Hector Station crossing is significantly greater than its historic use. Calico used the Hector Station crossing from May 2008 through September 2010 pursuant to the 2008 Agreement for Private Crossing between BNSF and Calico's predecessor SES Solar One LLC, which allowed five crossings per month for six months by four-by-four trucks for land survey and the drilling of a test well, and two daily crossings of construction vehicles and eight daily crossings of water trucks to allow for the drilling of a

water well. (Exhibit 3, at 3 and Attachment 1.) Calico forecasts using the temporary crossing for the same general purposes and at the same general frequency and volume as specified in the 2008 agreement, as well as for desert tortoise clearance and fencing and the construction of access roads, a permanent bridge crossing, and a waterline. Desert tortoise clearance and fencing is forecasted to require 18 weekly round-trip crossings over a two-week period in the near term, and 22 weekly round-trip crossings over an eight-week period beginning in April 2013. Access road construction will require 26 weekly round-trip crossings over a two-week period beginning in July 2013 and bridge construction, which will also begin in July 2013, will require 68 weekly round-trip crossings over a 13-week period. Construction of a waterline, forecasted to take place in the near-term over a three-week period, will require 39 weekly round-trip crossings. Many of these crossings will be by large, heavy-duty construction vehicles. (Exhibit 1, Attachment 4, attached to this decision.)

As BNSF points out, private at-grade crossings are not appropriate for frequent use. (Exhibit 126, at 5.) Calico's continued usage at historic levels, as well as its forecasted increased duration, frequency, and vehicular form of usage, increases the potential for collisions and damage. Furthermore, BNSF has a particular interest in limiting access to the Hector Station crossing because it is located in its private railroad maintenance station. (Calico/Dali, Tr. 221:22-28, 223.) On the other hand, the construction of a new temporary at-grade crossing cannot reasonably meet Calico's near-term needs, especially as its location cannot be established until the location of a permanent grade-separated crossing is established, which cannot be done until after certain environmental studies, including hydrology studies, glare and glint studies, and grading and design plans, have been performed. (Calico/O'Shea, Tr. 109-110.) Under these

circumstances, it is reasonably necessary and convenient to allow Calico to use the Hector Station crossing for the limited frequency of crossings by light-weight vehicles that it was historically authorized pursuant to the 2008 Agreement for Private Crossing.<sup>9</sup>

However, it is not reasonably necessary or convenient to allow Calico to use the Hector Station crossing for construction purposes. The Hector Station crossing was not constructed or modified for this purpose. While the 2008 Agreement for Private Crossing required Calico's predecessor to pay for modifications to the crossing in order to accommodate its usage, that usage consisted of relatively infrequent crossings by lightweight vehicles for limited duration. The Hector Station crossing was not built or modified to accommodate Calico's longer-term, higher-frequency use by heavy-duty construction vehicles. Furthermore, Calico does not propose to begin construction activity, other than the waterline, until Phase 1 nears completion (Calico/O'Shea, Tr. 112), which is apparently anticipated to begin April 2013 (Exhibit 1, Attachment 4). A permanent grade-separated crossing can be completed within four to five

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<sup>9</sup> BNSF argues that Calico has not shown that the Hector Station crossing is reasonably necessary because there is no record regarding the navigability of BNSF Open Road AF058 leading from the Hector Station crossing to the solar project site, as Calico's witnesses Dali and O'Shea testified that they have never travelled it. (BNSF opening brief, at 33.) Given that Calico used the Hector Station crossing for 28 months for purposes of accessing the solar project development area and requests to continue to use it for this purpose, it is reasonable to presume that it is sufficiently navigable for Calico's purposes. BNSF also argues that Calico's historic usage of BNSF Open Road AF058, if any, was unauthorized because the road weaves in and out of BNSF's right of way. (BNSF reply brief, at 14.) This argument does not inform the question of whether Calico's future use of the crossing and associated roadway is reasonably necessary and convenient, although it does point to the need to direct BNSF to allow Calico to use BNSF's right of way to the extent necessary to use BLM Open Route AF058.

months after its location is established to accommodate this use. (Exhibit 2, at 3:1-2.) Under these circumstances, Calico's use of the Hector Station crossing for its heavy-duty construction purposes of constructing access roads or the permanent at-grade crossing is not reasonably necessary or convenient.

For these reasons, we find that the Hector Station crossing is reasonably necessary and convenient for Calico's pre-construction use, limited to the frequency and type of vehicles identified by Calico as necessary for the following purposes as shown in the attachment to this decision: periodic well monitoring; packer test; surveys, site and security inspections; installation of monitoring wells; desert tortoise clearance and temporary fencing installation; and installation of a pump station. This decision does not authorize Calico's use of the Hector Station crossing for the vehicular trips identified by Calico as necessary for the following purposes as shown in the attachment to this decision: construction of a waterline,<sup>10</sup> construction of temporary access roads or construction of a permanent grade-separated.

#### **7.6. The Pisgah Crossing is not Available to Calico.**

Calico asserts that, as an alternative to the Hector Station crossing, Calico can safely use the crossing at Pisgah Road. This is a private, at-grade crossing at milepost 708.2 north of the Pisgah Substation granted to Southern California Edison Company (SCE) for maintenance of its transmission lines and for BLM's

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<sup>10</sup> Although Calico identifies the construction of a waterline as a near-term purpose, it presumably is the same waterline that Calico proposes to install under BNSF's railroad and for which it seeks a Commission order. In the absence of Calico's current authority to install the waterline, and as Calico's request for a Commission order is beyond the scope of the proceeding as discussed below, this decision does not authorize Calico's use of the Hector Station crossing for this purpose.

access to BLM-administered lands north of the railroad. BNSF opposes Calico's use of the Pisgah at-grade crossing for many of the same reasons it opposes Calico's use of the Hector Station at-grade crossing, as well as for the added safety concern that the southern approach to Pisgah is at an angle that would cause a driver's vision to be obscured.

Regardless of its physical suitability, there is no evidence that the Pisgah crossing is available to Calico. It is a private at-grade crossing, presumably governed by agreements between BNSF and SCE and between BNSF and the BLM, pursuant to paragraph 7.2 of General Order 75-D. Calico's request to use SCE's and the BLM's private crossing necessarily requires their concurrence.<sup>11</sup>

Calico asserts that BNSF does not have standing to raise objections to its use of the Pisgah crossing on behalf of SCE, citing to *MCI Telecommunications Corp. v. Pacific Bell* (1995) D.95-05-020, 59 CPUC2d 665 at 686 for this proposition. Calico misses the point of D.95-05-020, which determined that MCI is without standing to challenge certain Pacific Bell practices for being in violation of the implied-in-law covenant of good faith and fair dealing between Pacific Bell and Pacific Bell's customers. The case before us presents the entirely different circumstances in which Calico seeks to interject itself into the private agreement between SCE and BNSF. It is Calico who lacks standing to enforce - or modify -- SCE's rights under the terms of that agreement.

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<sup>11</sup> Section 7537 gives the Commission jurisdiction over BNSF, but not SCE or the BLM.

**7.7. How should this Crossing be Constructed or Modified to Ensure Safe Use by Calico?**

No modifications are required to the Hector Station crossing to ensure safe use by Calico for the limited purposes identified above. Calico proposes, and we require, the following procedures to apply:

- All Calico contractors and personnel using the crossing shall complete the BNSF Contractor Safety Orientation and Operation Lifesaver training.
- Calico shall consolidate trips (i.e., vanpool and convoy) to minimize the number of crossings.
- Crossings shall be restricted to daylight hours.
- A flag person is required for crossings of vehicles that exceed 10,001 pounds Gross Vehicle Weight.
- Calico shall provide the local roadmaster with at least seven days' advance notice of the need for a flag person.

**8. Should BNSF be Required to Provide Calico with a Permanent At-Grade Rail Crossing to Connect Contiguous Land Granted to Calico by the BLM?**

**8.1. Calico's Request for a Permanent Railroad Crossing is Timely.**

Calico seeks a permanent grade-separated railroad crossing with a bridge at milepost 710.8, as approved by the CEC in the permitting process (contingent on completion of additional hydrological studies.) BNSF supports the immediate construction of a permanent grade-separated crossing at a location to be determined after the critical hydrology studies, glare and glint studies, and grading and design plans have been performed. However, BNSF argues that Calico's request for this crossing is premature as Calico is not currently



authorized by the BLM to construct its proposed crossing. Furthermore, BNSF argues that, in view of the CEC's Committee Ruling on Sierra Club's Motion to Dismiss Calico Solar LLC's Petition to Amend, by which the CEC disclaims certification jurisdiction over the portion of Calico Solar Project that would be located south of the BNSF railroad, Calico is no longer an "owner" of any portion of the right of way south of the BNSF railroad for purposes of Section 7537.

Calico argues that there is no impediment to its requested permanent crossing because BNSF originally selected the location based on safety considerations, and the location was also identified in the CEC's December 2010 certification decision. Calico concedes that the CEC's approval of the project with the bridge at that location is contingent on completion of additional hydrological studies, but argues that, if the CEC or other permitting authority ultimately determines that the bridge must be moved, this Commission can issue a subsequent order reflecting such CEC action.

There is no apparent value to withholding consideration of Calico's request for a permanent at-grade crossing at milepost 710.8 pending final approvals. The record enables the determination of whether, if it is finally approved by the necessary permitting agencies, the requested crossing is reasonably necessary and convenient. The Commission can, and by this decision does, order the construction of the permanent crossing contingent on such final approvals.

**8.2. Where should the Permanent Crossing be Located, what is its Anticipated Cost, who will Construct it, and what is a Reasonable Timeframe for Completing it and Making it Available for Calico's Use?**

The permanent grade-separated crossing should be located at milepost 710.8, conditioned on Calico obtaining the necessary authorizations from the permitting agencies to construct it at this location. The undisputed anticipated cost of the permanent at-grade crossing is \$5 million to \$6 million dollars. It is undisputed that Calico should pay for the crossing and construct it, subject to and in accordance with best construction practices and consistent with BNSF's standards and protocols for grade-separated crossings. Such standards and procedures include but are not limited to a proper insurance policy covering construction and BNSF's right to inspect the bridge and ensure it complies with BNSF's safety requirements.

The permanent at-grade crossing should be completed within five months after Calico's request, which shall not be made until Calico has received the necessary authorizations to construct it from the permitting agencies.

**9. Calico's Request for a Commission Order Allowing it to Install a Waterline Underneath the Railroad is beyond the Scope of the Proceeding.**

Calico asserts that it requires access to water in order to build and operate its solar project, and seeks a Commission order allowing it to install a waterline underneath the railroad in order to transport water from a well located in the northern section of the project site to a service complex in the southern section. BNSF argues that the Commission is without authority to order the proposed waterline because it would cross under the railroad, not "over" it as specified in

Section 7537, and that Calico's request is beyond the scope of the proceeding as determined by the scoping memo.

Calico's request for a waterline is beyond the scope of this proceeding. Nothing in Tessera's original complaint, Calico's amended complaint, or any of its representations at the PHCs or in its other prehearing filings gave notice that Calico seeks relief beyond, first, temporary access over an existing at-grade crossing and, second, a permanent, private bridge crossing. As Calico stated, under the heading "The Complaint Seeks Narrowly-Framed Relief:"

The complaint in this proceeding requests two items of relief. First, the Calico Parties request that the Commission order BNSF to provide a temporary crossing for construction and tortoise translocation in the immediate term – the Hector Road crossing. Second, the complaint requests that the Commission require BNSF to process the pending requests for crossings, so that the Calico Parties will not need the Hector Road crossing, and so that ultimately there will be a grade-separated crossing connecting the pieces of the [Calico Solar Project] site bisected by BNSF's tracks.

(Calico Brief Re Jurisdiction, December 8, 2010, at 2.) The below-grade waterline is patently outside the scope of this narrowly-framed relief. While the record suggests that Calico decided that it needed a waterline in December 2010 when it filed its requests to amend its solar project with the CEC and the BLM (Calico/O'Shea, Tr. 75), Calico did not seek to amend its complaint or the scoping memo to include this new matter. Calico first raised the matter in its prepared direct testimony served on April 1, 2011, without seeking leave to do so.

The determination of issues in the scoping memo and the requirement that parties adhere to it are not mere technicalities: Timely hearing of the issues enables the Commission to develop the necessary record for their timely

resolution. In this regard, BNSF's testimony that it cannot determine whether Calico's waterline proposal is acceptable until Calico submits an application for it (Exhibit 126, at 10) is well-taken; on this record, neither can the Commission.

For these reasons, Calico's testimony and argument on this matter is beyond the scope of the proceeding and accorded no weight, and its untimely request that the Commission order the installation of a waterline is denied, without prejudice.<sup>12</sup>

## **10. Assignment of Proceeding**

Mark J. Ferron is the assigned Commissioner and Jessica Hecht is the assigned ALJ and the presiding officer in this proceeding.

### **Findings of Fact**

1. Calico has a right of way grant from the BLM that gives Calico the right to use and occupy the following described public lands to construct, operate and maintain, and decommission a solar electric generation project through 2039.

2. None of the operative terms of the "Confidentiality and Reimbursement Agreement" between the parties concern Calico's requested railroad crossing or otherwise affect Calico's right to seek a crossing pursuant to Section 7537.

3. Calico has a current, reasonable need for a crossing in order to conduct pre-construction activity that does not require the BLM's Notice to Proceed with project construction, such as conducting necessary well tests, performing survey work, and bringing investors and government personnel to the site.

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<sup>12</sup> As a result, we do not reach the issue of whether the Commission has the authority to order a waterline pursuant to Section 7537. However, we strongly encourage the parties to negotiate a solution on this issue.

4. Access to the northern portion of the Calico Solar Project site from Ludlow, which is approximately 17 miles east of the project site, would entail travel along several unconnected BLM Open Routes and some non-specific routes, i.e., unpaved, sandy routes through washes, for approximately eight to 10 miles through the Pisgah Crater Area of Critical Environmental Concern and then another six miles before reaching the project site.

5. Access to the northern portion of the Calico Solar Project site from Newberry Springs, to the west of the project site, would entail travel over 15 miles of unpaved, sandy BLM access routes that create the potential for vehicles to get stuck in the sand.

6. Calico used the Hector Station crossing from May 2008 through September 2010 pursuant to the 2008 Agreement for Private Crossing between BNSF and Calico's predecessor SES Solar One LLC, which allowed five crossings per month for six months by four-by-four trucks for land survey and the drilling of a test well, and two daily crossings of construction vehicles and eight daily crossings of water trucks to allow for the drilling of a water well.

7. Calico forecasts using the temporary crossing in the near term for the same general purposes and at the same general frequency and volume as specified in the 2008 agreement.

8. Calico forecasts using the temporary crossing in September 2011 for the installation of a waterline and associated pump station and desert tortoise clearance and fencing, and beginning in April 2013 for additional desert tortoise clearance and fencing and the construction of temporary access roads and a permanent grade-separated crossing. Desert tortoise clearance and fencing is forecasted to require 18 weekly round-trip crossings over a two-week period in September 2011 and 22 weekly round-trip crossings over an eight-week period

beginning in April 2013; access road construction will require 26 weekly round-trip crossings over a two-week period beginning in July 2013 and bridge construction, which will also begin in July 2013, will require 68 weekly round-trip crossings over a 13-week period; and construction of a waterline, forecasted to take place in the near-term over a three-week period, will require 39 weekly round-trip crossings. Many of these crossings will be by large, heavy-duty construction vehicles.

9. Private at-grade crossings are not appropriate for frequent use.

10. BNSF has a particular interest in limiting access to the Hector Station crossing because it is located in its private railroad maintenance station.

11. The Hector Station crossing was not built or modified to accommodate Calico's longer-term, higher-frequency use by heavy-duty construction vehicles.

12. Calico does not propose to begin construction activity, other than the waterline, until Phase 1 nears completion, which is apparently anticipated to begin April 2013.

13. A permanent grade-separated crossing can be completed within four to five months after its location is established to accommodate this use.

14. The Pisgah crossing is a private crossing granted to SCE and, presumably, the BLM.

15. The construction of a new temporary at-grade crossing cannot reasonably meet Calico's near-term needs.

16. Calico is not currently authorized by the BLM to construct its proposed permanent grade-separated crossing.

17. The CEC approved the Calico Solar Project with the permanent grade-separated crossing at milepost 710.8 contingent on completion of additional hydrological studies.

18. If the CEC ultimately determines that the bridge must be moved, this Commission can issue a subsequent order reflecting such CEC action.

19. There is no apparent value to withholding consideration of Calico's request for a permanent at-grade crossing at milepost 710.8 pending its final approvals.

20. The record enables the determination of whether the requested crossing, if finally approved by the necessary permitting agencies, is reasonably necessary and convenient.

21. The anticipated cost of the permanent at-grade crossing is \$5 million to \$6 million dollars.

### **Conclusions of Law**

1. Calico is the owner of the lands upon which the Calico Solar Project is sited, for purposes of seeking a railroad crossing pursuant to Section 7537.

2. The "Confidentiality and Reimbursement Agreement" entered into by the parties does not deprive the Commission of jurisdiction to hear the complaint and grant relief pursuant to Section 7537.

3. Section 7537 does not require a *crossing* to be located contiguous to the lands for which ingress to, egress from, or connection between is sought; it merely requires that the crossing be *reasonably necessary or convenient* for such purpose.

4. To the extent that it is reasonably necessary and convenient for the railroad to allow access over its own private crossing (and its other rights of way), the Commission has the authority pursuant to Section 7537 to require it to do so.

5. Calico's request for a temporary railroad crossing is timely.

6. The Commission's enforcement of Section 7537 does not trigger CEQA.

7. Calico has a reasonable need for a railroad crossing to access the northern portion of the Calico Solar Project site.

8. It is reasonably necessary and convenient to allow Calico to use the Hector Station crossing, along with BNSF's right of way within BLM Open Road AF058, for Calico's pre-construction use, limited to the frequency and type of vehicles identified by Calico as necessary for the following purposes as shown in the attachment to this decision: periodic well monitoring; packer test; surveys, site and security inspections; installation of monitoring wells; desert tortoise clearance and temporary fencing installation; and installation of a pump station.

9. The following procedures should apply to Calico's use of the Hector Station crossing:

- All Calico contractors and personnel using the crossing shall complete the BNSF Contractor Safety Orientation and Operation Lifesaver training.
- Calico shall consolidate trips (i.e., vanpool and convoy) to minimize the number of crossings.
- Crossings shall be restricted to daylight hours.
- A flag person is required for crossings of vehicles that exceed 10,001 pounds Gross Vehicle Weight.
- Calico shall provide the local roadmaster with at least seven days' advance notice of the need for a flag person.

10. Calico's use of the Hector Station crossing for its heavy-duty construction purposes of constructing access roads or the permanent at-grade crossing is not reasonably necessary or convenient.

11. The Pisgah crossing is not available to Calico.



12. There is no apparent value to withholding consideration of Calico's request for a permanent at-grade crossing at milepost 710.8 pending final approvals.

13. Calico's request for a permanent grade-separated railroad crossing at milepost 710.8 is timely.

14. A permanent grade-separated crossing should be located at milepost 710.8, conditioned on Calico obtaining the necessary authorizations from the permitting agencies to construct it at this location.

15. Calico should pay for the crossing and construct it, subject to and in accordance with best construction practices and consistent with BNSF's standards and protocols for grade-separated crossings. Such standards and procedures include but are not limited to a proper insurance policy covering construction and BNSF's right to inspect the bridge and ensure it complies with BNSF's safety requirements.

16. The permanent at-grade crossing should not be constructed until and unless Calico has received the necessary authorizations to construct it from the permitting agencies.

17. Calico's request for a Commission order allowing it to install a waterline underneath the railroad is beyond the scope of the proceeding.

18. To facilitate timely completion of the required agreements and related work pursuant to those agreements, today's decision should be effective immediately.

19. This proceeding should be closed.

**O R D E R**

**IT IS ORDERED** that:

1. BNSF Railway Company's June 9, 2011, request for judicial notice of the Bureau of Land Management's June 6, 2011, brief to the United States District Court for the Central District of California and Declaration of James Stobaugh is denied.

2. BNSF Railway Company's July 13, 2011, request for judicial notice of the California Energy Commission's Committee Ruling on Sierra Club's Motion to Dismiss Calico Solar LLC's Petition to Amend, dated July 1, 2011, is granted.

3. BNSF Railway Company shall enter into an agreement allowing Calico Solar, LLC to use the Hector Station crossing, along with BNSF Railway Company's right of way within Bureau of Land Management Open Road AF058, for Calico Solar, LLC's pre-construction use, limited to the frequency and type of vehicles identified by Calico Solar, LLC as necessary for the following purposes as shown in the attachment to this decision: periodic well monitoring, packer test, surveys, site and security inspections, installation of monitoring wells, desert tortoise clearance and temporary fencing installation, and installation of a pump station. The following procedures shall apply to Calico Solar, LLC's use of the Hector Station crossing:

- All Calico Solar, LLC contractors and personnel using the crossing shall complete the BNSF Railway Company Contractor Safety Orientation and Operation Lifesaver training.
- Calico Solar, LLC shall consolidate trips (i.e., vanpool and convoy) to minimize the number of crossings.
- Crossings shall be restricted to daylight hours.

- A flag person is required for crossings of vehicles that exceed 10,001 pounds Gross Vehicle Weight.
- Calico Solar, LLC shall provide the local roadmaster with at least seven days' advance notice of the need for a flag person.

4. BNSF Railway Company shall enter into an agreement with Calico Solar, LLC for the construction of a permanent grade-separated crossing located at milepost 710.8, conditioned on Calico Solar, LLC obtaining the necessary authorizations from the permitting agencies to construct it at this location. Calico Solar, LLC shall pay for the crossing and construct it, subject to and in accordance with best construction practices and consistent with BNSF Railway Company's standards and protocols for grade-separated crossings. Such standards and procedures include but are not limited to a proper insurance policy covering construction and BNSF Railway Company's right to inspect the bridge and ensure it complies with BNSF Railway Company's safety requirements.

5. Case 10-10-015 is closed.

This order is effective today.

Dated October 13, 2011, at San Francisco, California.

[D1110025 Attachment A](#)