

**STATE OF CALIFORNIA**

**ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

In the Matter of:  
  
The Calico Solar Project

DOCKET NO. 11-CAI-01  
  
**VERIFIED COMPLAINT TO  
REVOKE CERTIFICATION**

Intervenor BNSF Railway Company ("BNSF") submits the following complaint:

1. Section 25534(a) of the Public Resources Code provides:

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

- (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant;
- (2) Any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision.

Cal.Pub.Res. Code § 25534(a).

2. Pursuant to Section 25534(a)(1), BNSF hereby requests that the California Energy Commission (the "Commission") revoke the certification

previously issued in its Final Decision, effective December 1, 2010, on the ground that the Applicant's application and supplemental documentation contained material false statements regarding the commercial viability and availability of SunCatchers for the Calico Solar Project, and/or that there has been a "significant failure" by Applicant to comply with the terms or conditions of approval of the application as specified by the Commission in its December 1, 2010 written decision.

3. Applicant is Calico Solar, LLC, c/o Daniel J. O'Shea, Managing Director, 2600 10th Street, Suite 635, Berkeley, CA 94710. Email address: [dano@kroadpower.com](mailto:dano@kroadpower.com). Telephone: 510-981-1656.

4. Applicant originally proposed an 850 MW utility-scale solar thermal project using a wholly new, untested at utility scale, "SunCatcher" technology. In its original application, dated December 2008, Applicant represented that the project would use 34,000 individual SunCatchers on approximately 8,230 acres. Specifically, the Application states that a "500MW Phase I of the Project will consist of approximately 20,000 SunCatcher dishes located on approximately 5,838 acres. The 350MW Phase II of the Project will consist of approximately 14,000 SunCatcher dishes located on approximately 2,392 acres." Application at p.1-3 [Executive Summary], annexed as Exhibit A.

5. Applicant represented that "Phase I," which included the

emplacement of "approximately 20,000 SunCatcher dishes" would occur by 2010. See *id.* at p.2-3 [Project Objectives/Purpose and Need].

6. Applicant further represented that "Phase II," which included the emplacement of "approximately 14,000 SunCatcher dishes" would occur by 2014. See *id.* at p.2-2 [Project Objectives/Purpose and Need].

7. On May 14, 2010, in order "to reduce the environmental impacts associated with bighorn sheep and desert tortoise movement corridor" and to lessen "potential impacts to two known sensitive plant species," Applicant submitted a Supplement to Application for Certification, under penalty of perjury, representing that the project would utilize approximately 34,000 SunCatchers on a reduced project footprint of 7,130 acres. See Exhibit B at p. 1-4, 1-6. Applicant represented that construction was tentatively scheduled to occur over an approximate three-year period beginning in 2010 through 2012 for Phase 1, and a two-year period between 2013 and 2015 for Phase 2, assuming Southern California Edison completed the full transmission build-out necessary for Phase 2 by December 31, 2013. See *id.*, Report of Well Installation, Sampling and Aquifer Testing attached as Exhibit B to Supplemental Application for Certification, at 1-1.

8. On September 3, 2010, the Commission permitted Applicant to propose several reduced footprint project scenarios in order to further reduce the

Project's impacts to high quality habitat affecting desert tortoise and big horn sheep.

9. In response, on September 10, 2010, Applicant submitted an Updated Reduced Project Boundary Scenarios, under penalty of perjury, representing that the project would utilize 26,540 SunCatchers on a reduced project footprint of 4,613 acres. See Exhibit C [Applicant's Submittal of Updated Reduced Project Boundary Scenarios 5.5 and 6 Information, p.3, fig. 17 and p.9, Solar Layout-Scenario 5.5.]

10. In its Testimony with Exhibits for Scenarios 5.5 and 6, submitted under penalty of perjury on September 13, 2010, Applicant proposed a revised Project phasing of Phase 1, which would initially include the installation of 60 SunCatcher pedestals as part of Phase 1a. See Testimony of Felicia Bellows, p.2, annexed as Exhibit D.

11. On October 26, 2010, Ms. Bellows expressly testified, in connection with the proposed revisions to Phase 1, 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 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." See

Exhibit E, Transcript of October 26, 2010 Continuation of Committee Conference on Presiding Member's Proposed Decision, at p. 90.

12. However, as we describe below, by at least late October 2010, Applicant knew that SunCatchers would not be available by July 2011. Yet, they continued to make representations to the Commission that they planned to construct and emplace SunCatchers as part of the approved Calico Solar Project.

13. In the Applicant's Comments on the Presiding Member's Proposed Decision ("PMPD") for the Calico Solar Project, submitted under penalty of perjury on October 25, 2010, the Applicant stated: "While inclusion of detention basins or some other form of flood control devices may reduce the amount of developable land on the Project site, it would not cause a "significant decrease" in the number of SunCatcher units or the power output." See Applicant's Comments on PMPD, annexed as Exhibit F, at p. 17. The Applicant thereby reaffirmed the multiple references in the PMPD that the Project would include installation of 26,450 SunCatchers. *See id.*

14. The Calico Solar Project was initially certified by the Commission on October 28, 2010 and finally certified effective December 1, 2010. The Commission determined, "The Application for Certification of the Calico Solar Project as described in this Decision is hereby approved and a certificate to construct and operate the project is hereby granted." *See Exhibit G, Final*

Decision, Adoption Order at p. 2. The Commission determined that "[a]bout 26,540 SunCatchers, configured in 442.5 MW groups of 60 SunCatchers will be constructed on the project site." *See id.*, Introduction at p. 2. The Commission determined that Phase 1 of the construction would take place during the first 26 months, with Phase 2 taking place during construction months 32-60. *Id.*, Soil & Water Resources, at p. 11. "Phase 1a would consist of 60 SunCatchers configured in a single group and much of the support facilities. Phase 1b and Phase 2 would contain the remaining 26,390 SunCatchers arranged in 1.5-MW solar groups of 60 SunCatchers per group, bringing the CSP [Calico Solar Project] to its net nominal generating capacity of 663.5 MW." *Id.*, Project Description p. 18.

15. Just three weeks later, on December 24, 2010, Tessera Solar North America consummated its sale of Applicant, Calico Solar, LLC ("Calico Solar"), to K Road Sun LLC, a subsidiary of K-Road Power, which is a company that focuses on PV power. At that time, Tessera Solar announced that it had done so, because had it determined that "SunCatchers would not be commercially viable in the near term." See Exhibit H. [CEC Calico Solar Amendment at page 3-1, §3.1.]

16. Nearly contemporaneously therewith, Southern California Edison announced the termination of its power purchase agreement with Applicant.

17. In addition, BNSF has recently learned that Applicant was aware, long before the Calico Solar Project was certified on December 1, 2010, that SunCatchers were not commercially viable or commercially available.

18. On May 17, 2011, in a proceeding before the California Public Utilities Commission, Daniel O'Shea, now Vice President of Applicant, testified that he was aware in "September or October" 2010 that SunCatchers were not "commercially available." See Transcript, dated May 17, 2011 ("May 17, 2011 Tr."), attached hereto as Exhibit I, at 69-70.

19. Yet, in September and October 2010, when Applicant made its subsequent submissions, under penalty of perjury, attesting to Applicant's anticipated use of 26,450 SunCatchers, Applicant failed to apprise the Commission of the commercial inviability and unavailability of the SunCatcher technology prior to the Commission's certifications on either October 28, 2010 or December 1, 2010.

20. As recently as June 3, 2011, Applicant confirmed that SunCatchers are not now commercially viable or available. As Applicant stated in its brief to the Commission on the issue of jurisdiction, "We expect SunCatchers to be commercially available 24 months after securing investor financing," Calico Solar, LLC Reply Brief on Jurisdiction, annexed as Exhibit J, at p. 3. In other words, the SunCatchers are not now commercially available.

21. Instead, the commercial viability and availability of SunCatchers is entirely dependent upon obtaining "investor financing," which, upon information and belief, Applicant has not yet been obtained.

22. Applicant's misrepresentations concerning its ability to obtain 26,540 SunCatchers was and is a material fact that, standing alone, requires revocation of the Commission's December 1, 2010 certification of the Calico Solar Project.

23. In addition, Applicant's conduct since the Commission's December 1, 2010 certification and its filing of a March 18, 2011 Petition to Amend make clear that Applicant has no intention of complying with the terms and conditions of approval of the application, as specified by the Commission in its written decision.

24. It has been manifestly unfair to put BNSF and other Intervenors whose interests are directly impacted by the Calico Solar Project in the untenable position of having to continue to protect their interests, without the Commission first requiring Applicant to demonstrate that the SunCatcher technology, upon which the Calico Solar Project and this Commission's jurisdiction is dependent, was and is, in fact, commercially viable and commercially available, and not reliant upon future contingent events, such as obtaining investor financing and a full transmission build-out.

25. In addition, BNSF has been harmed and prejudiced by Applicant's submissions based upon a technology that is not now commercially viable and available. BNSF has expended and continues to expend substantial resources, both human and monetary, and to incur expert and legal fees to address significant health, environmental and operational concerns arising from the Commission's processing and approval of the Calico Solar SunCatcher Project.

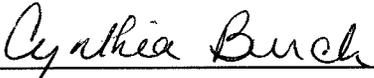
BNSF should not be required to take actions to ensure the safety of its employees, agents and operations against the effects of a hypothetical solar generation facility dependent upon a technology that is not commercially viable or available, even as we speak.

26. Since Applicant never had, and does not have, the ability to provide utility-scale SunCatchers, the December 1, 2010 certification should be revoked, forthwith. Accordingly, BNSF requests that the Commission revoke its December 1, 2010 certification of the Calico Solar Project.

WHEREFORE, BNSF respectfully requests that the Commission revoke its December 1, 2010 certification of the Calico Solar Project on the ground that Applicant made numerous material misrepresentations in its Application and its supplemental submissions regarding the commercial viability and availability of SunCatchers and that the SunCatcher technology was, and still is, commercially unviable and commercially unavailable, and/or that there has been a "significant

failure" by Applicant to comply with the terms or conditions of approval of the application as specified by the Commission in its December 1, 2010 written decision.

June 30, 2011

  
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Cynthia Lea Burch  
Katten Muchin Rosenman LLP

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Attorneys for Intervenor BNSF Railway Company

## VERIFICATION

I, Orest B. Dachniwsky, hereby declare:

I am Associate General Counsel for Intervenor BNSF Railway Company ("BNSF"). I have read the attached Verified Complaint, and know the contents thereof, and am informed and believe that the same is true. I am authorized to make this verification on behalf of BNSF.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct, and that this verification was executed on June 30, 2011 at Ft. Worth, Texas.

  
Orest B. Dachniwsky