



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

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

Docket Nos. 11-CAI-01

**COMMITTEE RULING ON BNSF RAILWAY COMPANY'S COMPLAINT
ALLEGATIONS THAT CALICO SOLAR, LLC FAILED TO COMPLY WITH
CONDITIONS OF CERTIFICATION**

Background

On or about July 12, 2011, BNSF Railway Company (BNSF) filed a *Verified Complaint to Revoke Certification* (Complaint) with the Energy Commission Siting/Dockets Unit. On or about July 14, 2011, the Siting/Dockets Unit submitted the Complaint to the Energy Commission Compliance Program Manager assigned to the Calico Solar Project (Docket No. 08-AFC-13). On or about July 20, 2011, BNSF filed the Complaint with the Energy Commission Chief Counsel.

The Complaint's primary allegations are: (1) Calico Solar, LLC's¹ "application and supplemental documentation contained material false statements regarding commercial viability and availability of SunCatchers for the Calico Solar Project" (hereinafter, the misrepresentation allegations) and (2) "there has been a 'significant failure' by Applicant to comply with the terms or conditions of approval of the application as specified by the Commission in its December 1, 2010 written decision" (hereinafter, the compliance allegations). (Complaint, ¶ 2.) Invoking the Warren-Alquist Act at Public Resources Code section 25534,² the Complaint seeks revocation of the Commission's December 2010 certification of the Calico Solar Project in connection with the misrepresentation and compliance allegations.

By an order dated August 5, 2011, the Siting Committee directed completion of several actions and affirmed Energy Commission Staff's duty under Section 1237³ to

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

² Public Resources section 25534, subdivision (a)(1) and (a)(2) allow the Commission to revoke certification if it finds that a project applicant or owner made a material false statement in connection with an application for certification or finds that there has been a significant failure to comply with the terms or conditions of approval set forth in the Commission's written decision.

³ All regulatory references are to Title 20 of the California Code of Regulations unless otherwise specified.

investigate the Complaint's compliance allegations. The August 5 order also directed service of the the Complaint on Calico and required Calico to answer the Complaint's allegations independent of Staff's investigation of the compliance allegations. Calico answered the Complaint.

As shown by the discussion below, this ruling and the following discussion pertains solely to the compliance allegations and does not address the merits of the misrepresentation allegations. The Committee will address the misrepresentation allegations in an upcoming hearing.

With respect to the compliance allegations, Energy Commission Staff completed an investigation and issued a corresponding document entitled *Staff's Response to Verified Complaint to Revoke Certification* (Staff Report) on August 12, 2011. Both Calico and BNSF filed timely responses to the Staff Report.

On August 25, 2011, BNSF filed a second complaint (Second Complaint) containing misrepresentation and compliance allegations against Calico. Except as discussed below, the Committee has neither made determinations about nor taken action on the Second Complaint.

The Staff Report

The Staff Report concludes that the Complaint is facially deficient. First, says Staff, the Complaint was accompanied by a declaration made under penalty of perjury under Texas laws. Staff asserts that under Section 1231 and California Code of Civil Procedure section 2015.5, because the declaration was executed in Texas it had to state that it was made under the laws of the State of California. Staff next asserts that BNSF failed to identify a single condition of certification allegedly violated by Calico.

Despite these concerns, Commission Staff investigated Calico's compliance with each condition of certification in the December 2010 Decision certifying the Calico Solar Project.

Staff found that Calico has not complied with Condition of Certification REL-1 (REL-1), which provides in pertinent part:

REL-1 From the time of the Energy Commission's adoption of this condition of certification to the start of commercial operation of the Calico Solar Project, or to the closure of the Maricopa Plant, whichever occurs earlier, the project owner shall obtain and provide to the CPM quarterly data sets of reliability and maintenance data from the Maricopa Plant, including the following:

- a) logs of equipment failure data and operational data for all major equipment, including power conversion units, drive mechanisms, and controls. These logs shall include major equipment and plant availability factors, and major equipment and plant forced outage rates, including their causes and durations
- b) plant operating logs showing dates and times of dispatch, and power level of dispatch

(December 2010 Commission Decision, Reliability, p. 7.)

Staff attributes Calico's failure to submit any of the required quarterly reports to circumstances that have "changed since the project was licensed that make it difficult, if not impossible, for Calico to comply with the reporting requirements of this Condition. Due to a change in ownership of the project, Calico no longer has access to the Maricopa project data that is the subject of Condition of Certification REL-1. Staff notes that Calico has sought to remedy this inability to supply the required data in its Petition to Amend dated March 18, 2011." (Staff Report, p. 7.) Staff recommends no further action regarding REL-1 in light of the pending Petition to Amend.

The Staff Report concludes that BNSF's pleading is without merit and "there is no significant failure" by Calico to comply with the conditions of certification.

BNSF's Comments on the Staff Report

BNSF's comments on the Staff Report reportedly include a new declaration made under the laws of the State of California.⁴ Further responding to the Staff Report, BNSF asserts that "Staff completely misreads BNSF's Verified Complaint" because the Complaint alleges facts regarding the availability of SunCatchers and Calico's knowledge thereof, that support its claims that by around October 2010 Calico did not intend to, and would not, comply with the conditions of certification. BNSF contends that Staff improperly ignored these allegations.

Calico's Comments on the Staff Report

Calico concurs with the Staff Report's conclusions that (1) the Complaint is legally insufficient for failing to include a legally-compliant declaration under penalty of perjury under the laws of the State of California, (2) the Complaint fails to identify and particular condition or conditions allegedly violated by Calico, and (3) Calico has not complied with REL-1. Regarding REL-1 Calico says: "Calico Power is no longer owned by Tessera Solar, the owner and operator of Maricopa Solar, and therefore, Calico Solar is not able to access the logs and detailed reliability and maintenance data." (Calico's Comments

⁴ However, neither the email transmitting the comments to the Committee and parties nor the docketed material in this proceeding shows that this declaration was ever served or filed in connection with BNSF's comments.

Regarding Staff Response to Verified Complaint to Revoke Certification, p. 3.) Calico notes that it previously raised this issue in its Petition to Amend filed in March 2011, where it asks the Commission to relieve it of its obligations under REL-1.

BNSF's Second Complaint

The Committee's comparison of allegations in BNSF's two complaints reveals no obvious substantive differences between them except that the Second Complaint is accompanied by a declaration explicitly made under the laws of the State of California.

Discussion

We agree that the declaration submitted with the Complaint did not comply with Code of Civil Procedure section 2015.5, as it was not made under the laws of the State of California. As demonstrated by the facts, this defect was not fatal. First, although Commission Staff and Calico objected to the declaration's deficiencies they both proceeded to respond to the Complaint on its merits without expressly preserving the objections. Second, the defect was effectively cured by BNSF's filing of the Second Complaint.⁵ As stated above, there are no readily apparent substantive differences between the allegations of the two complaints. However, it is only the second complaint that is associated with a declaration under penalty of perjury under the laws of the State of California.

Turning to the Complaint's merits, we find that even under the most liberal construction of the Complaint's allegations, the Complaint does not identify any particular condition of certification allegedly violated by Calico or allege specific facts supporting a noncompliance claim. Even assuming the truth of BNSF's claim that by October 2010 Calico had no intention of moving forward with proposed project (and any resulting conditions of certification), at most, it shows that Calico would not pursue the approved Calico Solar Project and accordingly, would not satisfy the related conditions of certification. Such a scenario greatly varies from those contemplated by Section 1237, which focuses on alleged "noncompliance with a commission decision." By definition, "noncompliance" is a failure or refusal to comply. As applied to Commission-mandated conditions of certification, "noncompliance" is reasonably interpreted to mean a failure or refusal to comply with conditions when a project owner is, or has begun, exercising its development rights under a Commission-issued certification. Accordingly, Staff properly excluded discussion of the misrepresentation allegations from the Staff Report.

⁵ We note Calico's contention that a subsequent declaration under California laws does not cure the initial defect; however, Calico cites no legal authority that precludes the Committee from exercising its discretion and authority under provisions that include Section 1203 to allow BNSF to cure the defect.

Thus, we find that BNSF has failed to satisfy its burden of stating facts sufficient to warrant a Section 1237 investigation. As allowed by Section 1237, this finding is sufficient to support dismissal of the Complaint. (§1237, subd. (e).) However, in view of additional facts presented by the Staff Report and Calico's response to the Staff Report, dismissal is inappropriate given Staff and Calico's independent representations that Calico has not complied with REL-1.

The Staff Report and Calico's responsive comments collectively explain that this noncompliance is due to circumstances beyond Calico's control, but they differ in their proposed remedies. Moreover, they contend that Calico's omissions are not a significant failure to comply. A complete failure to comply is necessarily a significant failure. However, based on the information presented by Staff and Calico, it appears that they are alleging that the failure to comply with the REL-1 reporting requirements is not significant in terms of its impact. We agree, as explained below.

The reliability discussion in Calico Solar Project Decision explains that several assumptions and projections regarding plant maintainability and availability were informed in part by the Maricopa plant's operations. The Decision states in pertinent part:

... The applicant claims that it has used, and will continue to use, lessons learned from the Maricopa Plant to incorporate engineering and maintenance improvements into the Calico Solar Project. (8/4/10 RT 180.). The Applicant's revised data from the Maricopa Plant demonstrates an availability factor based on a limited number of operational hours. The long-term availability factor will be determined only with more operational experience of this technology. Staff proposed, and the Applicant has not contested, a condition requiring periodic reports of the reliability and maintenance data from the Maricopa plant, which we adopt as Condition of Certification REL-1, below.

(December 2010 Commission Decision, pp. 2-4.)

The information presented in connection with the 1237 investigation does not explain why the information sought by REL-1 is no longer relevant; however, we reasonably infer that the information once thought useful for the operation of the Calico Solar Project might have limited value as applied to the modified project proposed by Petition to Amend. Thus, Calico's noncompliance with REL-1 -- which required reliability-related data but imposed no duty to avoid or lessen identified environmental impacts or to comply with laws, ordinances, regulations or standards -- is not significant and no sanctions are warranted. (Pub. Resources Code, § 25534, subdivision (a)(2).)

Even so, the Siting Committee has no independent authority to relieve Calico of its obligations under REL-1 or relieve the Commission's compliance Staff of its duties under Section 1769 to evaluate a request for deletion or suspension of a condition of certification . Furthermore, such a request must be approved by the full Commission.

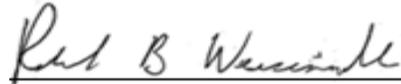
If Staff determines that the Petition to Amend contains the information required by Section 1769, Staff shall perform the required evaluation by the end of October 2011 and submit a recommendation to the full Commission.

IT IS SO ORDERED.

Dated: September 12, 2011, at Sacramento, California.



KAREN DOUGLAS
Commissioner and Presiding Member
Siting Committee



ROBERT B. WEISENMILLER
Chair and Associate Member
Siting Committee