EVIDENTIARY HEARING

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	Docket No. 11-CAI-01
Calico Solar Project Complaint	)	
and Investigation	)	
_____	)	

CALIFORNIA ENERGY COMMISSION

HEARING ROOM B

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

MONDAY, OCTOBER 3, 2011

2:07 P.M.

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Robert Weisenmiller, Associate Member

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INTERVENOR

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ALSO PRESENT

Mr. Tom Budlong

Mr. Fred Stearn

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PROCEEDINGS

PRESIDING MEMBER DOUGLAS: All right. Good afternoon. I'd like to welcome everybody to the Calico Solar Project Complaint and Investigation Hearing. This hearing is on BNSF Railway Company's verified complaint to revoke certification in the Calico Solar Project.

My name is Commissioner Karen Douglas. I'm the Presiding Member of this proceeding. To my left is my advisor, Galen Lemei. To my immediate right are Hearing Officer Kourtney Vaccaro. To her right, our Chairman, Robert Weisenmiller. And to his right Eileen Allen advisor to Chairman Weisenmiller's. Chairman Weisenmiller is the Associate Member on this Committee.

Let me ask the parties to identify themselves, beginning with BNSF Railway, please.

MS. BURCH: Cynthia Burch on behalf of BNSF Railway.

PRESIDING MEMBER DOUGLAS: Is your mic on?

If you could bring it closer to you when you speak.

MS. BURCH: I'm sorry. Cynthia Burch with BNSF. I have Helen Kim with me here from my firm, and Bill Thorpe is co-counsel.

PRESIDING MEMBER DOUGLAS: Thank you.

Calico.

MS. FOLEY GANNON: Ella Foley Gannon counsel to Calico Solar. To my right is Dan O'Shea, and to his right is Sean Gallagher both of Calico Solar.

PRESIDING MEMBER DOUGLAS: Thank you. And Intervenor Patrick Jackson?

MR. JACKSON: Yes, I'm here. I could not hear the representative for BNSF Railway. I can hear Ms. Foley, but I couldn't hear BNSF.

HEARING OFFICER VACCARO: Why don't you give a test run, and maybe just keep that one. Since you have a lot of materials in front of you, maybe instead of using the one to your left, use the one to your right and move it a little bit closer to you.

MS. BURCH: Okay. Cynthia Burch for BNSF Railway and Helen Kim is on my right as well and Bill Thorpe is co-counsel.

Did you hear me, Mr. Jackson?

MR. JACKSON: Yes, I did.

Thank you.

PRESIDING MEMBER DOUGLAS: Great. The Public Adviser's Office is represented. Lynn Sadler is here in the room today. If any members of the public have questions about this proceeding or how they can engage in this proceeding, Ms. Sadler will be an invaluable resource to them.

Are there any representatives of State, local, or federal government agencies in the room or on the phone?

MR. BRIZZEE: This is Bart Brizzee calling from San Bernardino on the telephone.

PRESIDING MEMBER DOUGLAS: Good. Thank you.

Anybody else from local, State, or federal agencies?

PRESIDING MEMBER DOUGLAS: Very well. With that, I'll turn this over to the Hearing Officer.

HEARING OFFICER VACCARO: Thank you.

Just by looking at a screen behind me, those of you on the phone don't know that it's there, but it gives me a sense of who might be calling in. I think there are a number of you and some of you who might be parties to the Calico Amendment proceeding who are on the line.

And we'd certainly like to hear from you today just before we get to public comment, but where we are today is having a hearing that involves three primary parties, BNSF Railway Company, Intervenor Patrick Jackson, and Calico Solar. And that's who we're going to hear from primarily. Those are the parties who did the briefings. Those are the parties who are prepared to give oral argument, present evidence, and discuss that evidence today. So the rest of you, we certainly would like to hear from you, but your turn will be near to the end of

the proceeding.

I think with that, I'll just give a little bit of background. I think all of you in the room understand while we're here, there may be some members of the public or others who might not understand exactly what's going on today.

As many of you might recall, in December of 2010, the Energy Commission approved the Calico Solar Project. The Application for Certification proceedings related to that project involved oral testimony, written documents that were also produced as evidence. And those proceedings and some of the oral and written documentary evidence are the subject of today's proceeding.

In particular, BNSF Railway Company submitted a complaint document alleging that during the AFC proceedings, Calico engaged in material misrepresentations to the Commission regarding the viability and availability of Stirling Systems SunCatchers. That is the primary focus of today's hearing.

However, by way of a recent order, the Committee also agreed to allow Intervenor Patrick Jackson's request for investigation to be merged into this proceeding, because he alleged substantially similar facts regarding the alleged misrepresentation.

We went ahead and had the parties, including Mr.

Jackson, submit hearing statements. Everyone submitted timely hearing statements and did exactly what the Committee asked. Those hearing statements are fairly interesting in one key respect though. And we're going to discuss that, I think, a little bit more fully. No witnesses were identified for anybody's case in chief. It appears that, instead, we're looking at a primarily document driven hearing today. Although, there were some reservations for rebuttal witnesses.

So I think the first thing I want to be clear on, and I'll do a Round Robin with the parties. Ms. Burch, is that correct, that there are no witnesses for BNSF's case in chief?

MS. BURCH: I would like to step back, if you will. We did not clearly understand what this hearing was set at, as -- if we looked at the other complaints that have been failed, and that you have hearings, pre-hearing conferences set for in the coming two weeks. We thought this was a prehearing conference and that you were asking for that information in the context of a prehearing conference. So that's a background for what we think is happening here today, and we're still a bit confused as to what's happening.

Secondly, we've explained that we think that the Commission has the ability to issue subpoenas here, and

that they're the right party given -- the right entity to issue the subpoenas to get the information that you need to identify the parties that should be called as witnesses, and witnesses that were non-parties.

We cannot do that. And we have hostile witnesses here. And so we are looking for your guidance as to how to best proceed on that front.

Also, I did identify our exhibits.

HEARING OFFICER VACCARO: Yes, you did. And you produced the hard copies, as well as electronic versions in advance, and the Committee always appreciates when that happens.

I think let me circle back to my threshold question. I think we did understand everything that you said, but the threshold question is, based on your hearing statement, it appears that BNSF has not identified any witnesses to give testimony for your case in chief today, is that correct?

MS. BURCH: We have identified Mr. Dachniwsky's declaration -- or verification of the complaint, so he would be -- his -- the complaint is under oath, so that is testimony.

HEARING OFFICER VACCARO: Yes, but no physical witnesses, correct? No persons that will sit at the table before us, is that correct?

MS. BURCH: That's correct.

HEARING OFFICER VACCARO: Thank you. Ms. Foley Gannon?

MS. FOLEY GANNON: We have no witnesses.

HEARING OFFICER VACCARO: Okay. Mr. Jackson, I just want to confirm as well that you do not indicate that there would be any witnesses giving testimony today, is that correct?

MR. JACKSON: I have no witnesses giving testimony today.

HEARING OFFICER VACCARO: Great. Thank you.

I think we'll move on to the next order of housekeeping, which is the tentative exhibit list that is before all of you. It's been distributed to the Committee, to the parties in advance of today's proceedings. Everyone's had an opportunity to take a look at that. Again, Ms. Burch, we did receive all of BNSF's documents well in advance.

Thank you.

Mr. Jackson, we received your electronic documents. However, we're still waiting the hard copies that were requested for delivery to the Hearing Advisor's Office. With that, are there any changes this afternoon to the tentative exhibit list?

Ms. Burch?

MS. BURCH: I'm not -- not today.

HEARING OFFICER VACCARO: Okay. Mr. Jackson?

MR. JACKSON: No, no changes.

HEARING OFFICER VACCARO: And I note that Calico did not submit any witness list or -- I mean, any excuse, me any exhibits or an exhibit list, is that correct, Ms. Foley Gannon.

MS. FOLEY GANNON: That's correct.

HEARING OFFICER VACCARO: Okay. I think in a typical proceeding, where we would begin, of course, is with opening statements and then telling the parties call your witnesses. That's not where we are today, obviously. I think we still want to hear opening statements, arguments. We need to go through the process of people moving their documents in and addressing any objections that there might be to the documents.

But I think, Ms. Burch, before we get there, I think it's probably important that we discuss just a bit more your concern with what today's proceeding is about, and what appears to be a potential disconnect between this being the day of the hearing, as opposed to a preliminary step to a hearing.

So, again, we heard you. We understood you, but I think maybe if you could explain what's the practical difference from your perspective? What would you have

done differently had you fully understood that today was, in fact, the hearing which is noticed in the Notice of Hearing that was going to be conducted today?

MS. BURCH: We believe that the complaints, as pled, is a basis for the Committee to rule in our favor. But if the Committee believes that additional information is needed, we would request you to use your subpoena power to get the type of information that we've identified in our prehearing statement, and then gather that, and then schedule at the next hearing to set up a briefing schedule and an opportunity to call those witnesses, look at that evidence, and be able to use it in this proceeding.

HEARING OFFICER VACCARO: Okay. That makes sense. And I think, in part, just for the benefit of those who might not have been looking at some of the orders and the exchange of information among the parties and the Committee, I think you're really pulling sort of a thread that was in an order, where the Committee stated if it requires further investigation or further information, it would let the parties know before the close of today's proceeding, and would direct the parties accordingly. So I think that -- that sounds like what you're responding to, is that correct?

MS. BURCH: I saw that, and I thought that that was the point.

HEARING OFFICER VACCARO: Okay. Thank you. I think with that, we'll go ahead and start with BNSF. We've got an exhibit list. We have exhibits that, to my understanding, were not only served on the Committee, but let me verify, that were also served on the parties. I think with the exception of Exhibits 10 and 11, which were very large, but were identified to the parties. And you solicited -- I believe Ms. Burch, through Ms. Alexander of your office, solicited objections from the parties in advance of today's hearing.

So, Ms. Foley Gannon, does that ring any bells because you're frowning, so --

MS. FOLEY GANNON: I don't remember. I'm not sure what you're referencing when you're saying any objections? Any objections to the exhibits were asked for in advance?

HEARING OFFICER VACCARO: No. There was an Email. Ann Alexander, on behalf of BNSF, sends an Email late in the week last week. They submitted a number of documents electronically to the Energy Commission, the Committee, and I believe to all of the parties. But there were a few -- two exhibits, Exhibit 10 and 11, that apparently were getting kicked back in the Email because they were too large.

And Ms. Alexander sent an Email saying here's

what Exhibit 10 is. Here's what Exhibit 11 is. They're too big, but everybody knows what they are, and you know where to find them. Are there -- and she invited objections, at that point. That certainly doesn't mean that you're limited to responding in that Email, but I'm trying to confirm, one, that you received all exhibits, but for 10 and 11, and that you received Ms. Alexander's Email.

MS. FOLEY GANNON: I think we even got 10 and 11. I think it came through our system, so we have all the exhibits.

HEARING OFFICER VACCARO: Okay. Thank you.

Mr. Jackson, did you receive all of the exhibits as well?

MR. JACKSON: Except for 10 and 11, but I have access to them.

HEARING OFFICER VACCARO: Okay. Thank you.

And we asked Mr. Jackson to do the same thing that BNSF did. It's my understanding that all of Mr. Jackson's exhibits were filed and served as requested, with the exception of the hard copy, as I mentioned a few moments ago. Ms. Burch, did you receive all of those?

MS. BURCH: We did.

HEARING OFFICER VACCARO: Ms. Foley Gannon?

MS. FOLEY GANNON: We did.

HEARING OFFICER VACCARO: So at least we have no problems with whether or not we're talking about the same documents, and whether or not everyone received them. So with that housekeeping out of the way, Ms. Burch, why don't you go ahead and make your motion to have your documents admitted. You make your motion, but, of course, there's still going to be, I think, some discussion on some of the documents.

MS. BURCH: So I make my motion to amend evidence Exhibits 1 through 33 on BNSF's exhibit list.

(BNSF's Exhibits 1 through 33
marked for identification.)

HEARING OFFICER VACCARO: Okay. I'm sorry. Ms. Kim, is there something you wanted to say?

MS. BURCH: She was asking if we were going to have opening statements before the evidence?

HEARING OFFICER VACCARO: No, because all you're doing -- you don't have any witnesses, as you had mentioned, to lay foundation or otherwise move these documents in. So it seems to me let's go ahead and do this in the order that makes sense, which is let's get the documents in, let's hear about the documents, and then we'll go ahead and allow you to make your arguments, because it appears that much of the argument is based -- it's going to be somewhat, I think, repetitive of the

pleadings, perhaps pulling out some points that are more important for the Committee to understand the significance of documents. So let's deal with the documents first.

Ms. Foley Gannon, do you have and comments objections to any of these documents?

MS. FOLEY GANNON: Yes, we do. We object to the admittance of Item 22, 23, 24, 25, 27, 28, and, 29. And the basis -- I can go through each one of these, but the basis for the objection is similar in each case. These documents are mostly -- these are articles or other information about something that Tessera Solar did with other projects. And there are statements made in some of the submittals saying -- attributing these actions to the applicant.

As you're well aware, the applicant in this proceeding is Calico Solar, LLC. It is not Tessera Solar. We do not see any relevance in the documents about what Tessera Solar was or was not doing in other projects. So we would ask that they not be admitted.

HEARING OFFICER VACCARO: So to be clear, your objection is just a relevance objection then? I don't say "just" in a trivial manner, but it's a relevance objection?

MS. FOLEY GANNON: It's a relevance objection fundamentally, and then the characterization that it's

given in the documents about these -- attesting to what these represent, we also think is inaccurate.

HEARING OFFICER VACCARO: Okay. So now that your statement with respect to characterization is preserved in the record, and you've been able to at least say what you believe the problem is, then I think at its core we're down to a relevance objection then?

MS. FOLEY GANNON: That's correct.

HEARING OFFICER VACCARO: Okay. Ms. Burch.

MS. BURCH: We believe that what happened to the other SunCatcher project that was certified at the same time ours was, does go to the question of whether this technology is currently available. That project was sold on the heels of this one or right before it. The technology was changed. The applicant -- the purchaser there made a decision to request a termination of the Commission decision and the license based upon that they were going to change to photovoltaic technology. The Commissioner granted that decision on August 17th.

I would note that I believe it was 24 and 25 are decisions of the Commission. They're not newspaper articles.

So that is the basis for our introducing the -- what happened at Imperial into evidence in this proceeding. We believe they're relevant.

HEARING OFFICER VACCARO: I think, Mr. Jackson, you're the third party in this. I'm not sure whether or not you have a comment, but I notice that some of your exhibits I think are identical to BNSF's. All of the documents I think that Ms. Foley Gannon objected to are also contained in your exhibit list. So instead of waiting until we get to your exhibits, why don't we go ahead and address those now.

Before we do, Ms. Foley Gannon, do you have those by exhibit number with respect to Mr. Jackson's documents?

MR. JACKSON: I do. We are going to object to number 206, 207, 208, 209, 211, 212, and 213.

HEARING OFFICER VACCARO: Okay. Thank you. Mr. Jackson, would you like to respond?

MR. JACKSON: Yes, I would. I believe the documents that Calico is objecting to are relevant and they do establish a foundation. In this particular case, the issue is -- first of all, it goes to the applicant application, I recognize that kRoad Calico Solar, but not the applicant at the time of the applicant's application.

So what we're talking about is Tessera Solar, right. That was the applicant at that time. And these documents go to the commercial availability and the commercial viability of the SunCatcher technology. These documents show, I believe, that at the time of the

Commission's decision, there was serious questions, as evidenced by these documents, regarding the commercial viability and availability of SunCatchers.

I believe they show that -- let's put it this way, they should be considered, right, in the Commission's decision on this matter.

HEARING OFFICER VACCARO: Okay. Thank you, Mr. Jackson.

I think, Ms. Burch, you've said -- made your comments. Is there something else you want to add with respect to these particular exhibits.

MS. BURCH: Excuse me, I did miss that 23 was submitted by AES, so it, too, is not -- it is not a newspaper article. It is a request to terminate. And I would note that 24 and 25 are agency documents that the agency can take notice of itself, irrespective of whether...

HEARING OFFICER VACCARO: Okay. And I think right now, let's -- if we're sticking just to the relevance issue, because that's really all that the objection was, was to relevance. I think all of you are probably aware that in administrative proceedings, unlike civil proceedings, the admissibility standard is a bit more relaxed.

However, they both are similar in that the

foundational element is relevance. Without relevance, it doesn't matter how relaxed the standard is in an administrative proceeding, it's not going to come in.

I think perhaps reasonable minds can differ on whether or not the identified exhibits are relevant. In this case, the reasonable minds of the Committee are that these are relevant documents and they are going to be admitted.

MS. FOLEY GANNON: Can I make one further statement.

HEARING OFFICER VACCARO: Certainly.

MS. FOLEY GANNON: These documents -- what's at issue here in this case is a challenge as to what the applicant knew, short have known, didn't know at the time of certification.

Certification was in December of 2011. The dates of these events, these articles, these government actions, I think in the totality all postdate.

Well, 22, 23, 24, 25 all postdate, by at least two months or more, the date -- the salient time. So when we're looking at those and we're saying what did the applicant know or should have known during the certification proceedings, an article -- or a decision made by this Commission in August of 2011, I don't think speaks to that.

I think a application submitted in August by AES Solar, a separate company for a separate project, doesn't seek to what the applicant knew or not know at the time of certification.

And what Ms. Burch has stated is that the relevance here is about the current availability. I guess meaning the availability today. And again, I would ask to say that what they're saying is that the applicant was doing something wrong when the project was certified.

And so to be taking information that clearly post-dates us by a considerable period of, time, and to say that it's relevant to what's happening today, I don't think should be relevant to this proceeding.

HEARING OFFICER VACCARO: And I understand your position, and you've had more time to amplify and further explain that. And it's duly noted and in the record. I think what I would say is that the Committee is not going to debate the issue with any of the parties. Your concerns are noted. The Committee will admit the information.

And as with all evidence that's submitted into the record, the weighing of it, what its impact and import might be are matters for the Committee in looking at the totality of the case presented. But your concerns are duly noted and are going to have -- going to go ahead and

admit those documents and the Committee finds them to be relevant. So, Ms. Burch, Exhibits 1 through 33. They were offered. They're all admitted.

(BNSF's Exhibits 1 through 33 were admitted.)

HEARING OFFICER VACCARO: Mr. Jackson.

MR. JACKSON: I make a motion that my Exhibits 200 to 214 be admitted into evidence.

HEARING OFFICER VACCARO: I'm sorry, I didn't hear you at all, in terms of the numbers. And for the record, I really do prefer the parties to state clearly what numbers they're admitting, so if you would do it one more time, please.

MR. JACKSON: Okay. Yes. My exhibits 200 through 214. I will do them individually, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214.

(Intervenor Patrick Jackson's Exhibits 200 through 214 marked for identification.)

HEARING OFFICER VACCARO: Okay. Thank you. We've just had a discussion where Ms. Foley Gannon specifically identified which of your exhibits her client objects to and on which grounds. You further amplified that, Ms. Foley Gannon, in giving final comments when we were discussing BNSF's exhibits.

Can we just call that a continuing objection as to these particular exhibits of Mr. Jackson's as well, which is 200, 206, 207, 208, 209, 211, 212, 213, or is there something more that you'd like to add by way of objection to the same documents that Mr. Jackson is submitting that BNSF just submitted?

MS. FOLEY GANNON: No. It's the same objection.

Thank you.

HEARING OFFICER VACCARO: Were there any other documents that you objected to that Mr. Jackson is offering?

MS. FOLEY GANNON: No.

HEARING OFFICER VACCARO: Okay. Based on the same rationale given with respect to BNSF's documents that were at issue, all of Mr. Jackson's exhibits are deemed offered and admitted.

(Intervenor Patrick Jackson's Exhibits 200 through 214 were admitted.)

HEARING OFFICER VACCARO: Typically, we'd say, BNSF, call your first witness, but we have none. So I think what we'll do is we'll have you do an opening statement. Mr. Jackson, you will follow and then Calico will have the opportunity to give their opening/rebuttal/responsive statement.

I do note, Ms. Foley Gannon, that you reserved

the right to offer witnesses to rebut testimony. It seems as though the only testimony we have would be what's contained in the documentary evidence before us. I don't know if you were going to call a witness to discuss, if you're engaging in any Q&A in that respect, or whether or not, at this point, you know that you're not going to be calling any witnesses.

MS. FOLEY GANNON: I have no plans to call witnesses.

HEARING OFFICER VACCARO: Okay. Thank you. So Ms. Burch.

MS. BURCH: Okay. We're here today on a complaint to revoke a certification by the Commission for the Calico Solar Project from last October and December 1st.

And this complaint arose over time. As we began to realize, right after the October certification and then subsequently through the coming months, that there appeared to be evidence of the project having been on the market during that time, of it having been on the market to a PV company. And that the technology, the SunCatchers, at the very last day of hearing were being changed from a proposal to have -- basically, begin Phase 1 with the totality of the Phase 1 SunCatchers to a very modified number about 100 -- I think 60 SunCatchers to be

installed by July.

And we watched what was happening on the NTR report, which is a parent company of Calico Solar. So they would have -- Calico would be imputed to have known what its owner was saying. And they said in a report in November that they were delaying -- in November, before the December certification, that they were delaying the commercial -- delaying the production of the SunCatchers, due to commercial availability.

We then found out that at the end of December, I believe it was December 23rd, we saw a press release announcing that the Power Purchase Agreement that the -- had all been told was a solid basis for the financial viability of this project, had been canceled by Edison.

It seems highly unlikely, given the work that goes into Power Purchase Agreements, and the importance of it in this proceeding, that this occurred after December 1, a mere three weeks later, that Edison canceled this agreement. And Calico Solar, one, didn't -- wasn't aware that this would be happening, and two, didn't have reason to believe it had some importance to this proceeding.

We then had the next day notice, that the project had been sold to kRoad Power, and that they were an entity focused on the development of projects, this photovoltaic technology. And it was announced that the bulk of the

project would be changed to photovoltaic. Again, a mere three weeks after this project was certified.

Then we learned in, I believe it was NTR, that they had stopped funding the SunCatcher portion of their business, SES. They were not going to put anymore new money into that technology. Unless third parties came in, they weren't going to.

With all of this information in hand, we went to a hearing before the Public Utilities Commission on an issue involving access for this facility, and decided to ask Mr. O'Shea, the representative of Calico Solar, if he had been aware of the commercial availability of -- unavailability of this technology at the time that he -- his company purchased the company? And he said, yes, he did know. And so we asked him, when did you know. And he said in September or October of 2010.

So with that information in hand, we went back and looked at it. We also had the benefit, at that point, of the petition to amend, which gave us a reason of commercial unavailability of the SunCatcher technology at this time. And we would note that in the regulations governing the CEC's proceedings, that in a petition to amend, the Commission must find that an entity didn't know or it didn't have reason to know of the cause for the amendment.

So with these pieces of information in hand, we brought them to the Commission in a complaint. We followed the process for bringing this to the Commission's attention. And the relief that we are requesting and that we believe the statute provides for is a revocation of the certification that was obtained through these misrepresentations. And that code section is in the brief.

I would like to go back to September 2010. I realize that Commissioner Byron and Commissioner Eggert aren't here today, but they were very involved. We were all very involved. We had hearings in September and October that were marathon sessions. If would you recall, on the 3rd -- I can remember these dates by my memory.

On the 3rd of September, the Friday before the labor day weekend, Commissioner Eggert issued a decision that he didn't think that they would be certifying this project, because of impacts, particularly to the endangered species. And he offered the ability to modify the project and come back with something.

Over that weekend, Calico came back, that very next Tuesday after Labor Day, with five proposals as to how to modify the project. And in it, they came up with forty some hundred -- 4,700-acre project.

It had 26,000 SunCatchers in it. It eliminated

600 acres of retention/detention debris basins, which very much concerned my client. It did not disclose that they were looking at a different technology. And that is very important to my client, because another critical concern to my client was glint and glare, and specific technology that one would be studying was critically important to analyzing that specific issue and went forward on the environmental analysis.

In fact, the technology was critical to know as to all of the environmental analysis, which have yet to be completed, and was now in flux, because of change in the project description.

So I would say, based upon the tremendous effort of the Commission staff at that time, who worked just as hard as all of the parties, Commissioner Eggert who sat through hearings that lasted till five in the morning, that we all, in good faith, believed we were looking at a SunCatcher project, and that that's what we were paying consultants to look at, and come in with comments. And we had consultants at these hearings.

And that -- but if we had known, at that time, that it was going to be changed to a PV facility, primarily a PV facility, that it would have been incumbent on the staff and the Commission to stop those proceedings and require that the -- what eventually did happen, that a

new project amendment be brought forward that would then be the basis for the continued environmental review and certification of the project.

If that had happened, some very critical things that happened this summer, spring and summer, would have occurred. Issues such as whether the CEC has continuing jurisdiction over the PV portion of the facility, who should be the lead agency, what actually would -- were the environmental issues that should be addressed, what was changing that we should be analyzing.

And unfortunately, none of those things occurred. Instead, we spent a good amount of our internal time, our people's time, flew them in from Texas, had them go to site visits, had them meet with staff at the Commission's request to explain our issues, and it turned out that it was all for not just three weeks after the Commission decision on this one.

So with that in mind, we believe that the staff, the Commissioners, and the parties were materially affected by this misrepresentation. And that it is the only recourse that you have, at this point, is to revoke their certification.

And we would also note that we think this is a critical issue for the pending motion to amend their certification.

I would like to then move to just last week. Just last week, we were working, frankly, almost around the clock again, responding to the 15-day notice periods we believe are in the certification conditions, to an infiltration report, a geomorphic report, and a geotechnical report. We had consultants fly in from other parts of the country. We worked till late at night giving comments, and we submitted them in time.

And we all had hearing statements due on Wednesday, last Wednesday. This bankruptcy, we learned about on Thursday, took place prior to the 22nd of September, a week ahead of time. Again, if we had known that the project could very well change again. In fact, there is no commercial availability of this technology at this time. There wasn't back then, according to kRoad's own -- you know, own testimony, and there isn't now, then we wouldn't have expended that effort now.

So we would ask you to not only -- well, I have two requests. Let me just tell you what, I think, they are. One is that -- and this is where the AES issue does come into play. AES stepped up and said we're going to have a photovoltaic project, and we're asking you to terminate our certification, and we're asking you to terminate our license.

And I assume -- I don't represent them, so I

1 don't know, but I assume they're going to file an
2 application with the appropriate State agency.
3 And if kRoad were to follow that example in this
4 situation, then they would be terminating this
5 certification. And the reason why we immediately sent the
6 Commission a request to continue the hearing was because
7 we believed that such a decision by kRoad, which would
8 seem to certainly be one of the reasonable options here,
9 would mean that this complaint could be dismissed. We'd
10 withdraw it, if the need being requested is revocation.
11 If it's terminated, it doesn't need to be revoked.
12 And so we are asking that the hearing and the --
13 or the work on this proceeding be continued until kRoad
14 makes a decision as to what it's going to do now that it
15 doesn't have a -- clearly, unequivocal, it doesn't have a
16 commercially available technology.
17 Secondly, we would ask -- and I bring it up here,
18 because you are our Commissioners in both proceedings, but
19 I would ask that you stay, stay -- clearly stay any
20 further work in the pending motion to amend, so that we do
21 not have to expend resources until we know what's going to
22 happen with the kRoad decision.
23 And lastly, if you decide -- if in this time
24 period, you decide it's appropriate, if you agree, if you
25 would -- if, in that time fame, they do not withdraw their

petition to amend, or they are moving on, we would ask that you go forward with this complaint, and that you subpoena Calico Solar, or its consultants, because they have no employees, according to the testimony that we've submitted here, they never did, and apparently they don't know. Tessera Solar, who did have employees and who was a parent of Calico, NTR who was the parent and SES, its other subsidiary was doing.

We would ask that you contact and subpoena Edison to find out when they knew, what they knew, and why did they cancel the Power Purchase Agreement the day before the sale even took place?

Because we think there are going to be facts uncovered here that fully support Mr. O'Shea's statement that they knew back in September and October that this technology was not commercially available.

That is our opening statement.

HEARING OFFICER VACCARO: Thank you. Ms. Foley Gannon, I indicated awhile ago that we'd have BNSF go, then Mr. Jackson, and then you could respond, but there was quite a bit stated. I don't know, organizationally, what your preference would be to hear everything and respond, or if you'd like to respond in kind.

MS. FOLEY GANNON: To get the opportunity to talk twice, I guess I'll take that.

(Laughter.)

MS. FOLEY GANNON: But actually coming before you today, I'm in sort of an unusual position, because I'm almost speechless. You're going to hear a lot from me, but I'm also speechless because when I read these complaints, and I read all the things that were submitted and the thousands of pages of exhibits, and I look at what's being claimed here, it's really hard to know how to defend against this.

How do I prove a negative? How do I prove what Calico Solar really knew, really meant, and really intended when it was coming before this Commission?

I can point to the fact that Calico Solar spent tens of millions of dollars in approving a project, and that it was not doing that as a sham. It was not doing that to deceive the Commission or the Committee. Calico Solar wanted to build a SunCatcher project. Calico Solar spent years planning for a SunCatcher project. Calico Solar sought certification for a SunCatcher project.

That project was certified and eventually the project was sold. But it was a SunCatcher project that was sold. It was not a PV project. It was not another technology project. It was a SunCatcher project.

And if you take it at its essence, these representations about material misrepresentations made by

Calico really do come down to a claim that, at some point in this proceedings, Calico Solar decided that it was not going to build a SunCatcher project, and that it had an obligation to come to you and to tell you that it was -- that that was its intent.

I want to tell you right now that this is just frankly not true. There's no evidence this. And there's no evidence of it, because it's not true.

Calico Solar was trying to proceed with its project. There was no fraudulent inducement here. It's hardly surprising that much of the evidence that is pointed to by BNSF or by Mr. Jackson go to saying that Calico Solar brought you information about SunCatchers. That was the project.

Calico Solar brought you information about how SunCatchers were performing at that time. That was the technology. There's nothing surprising about any of this information. The project -- Calico Solar brought you a schedule that it was proposing to proceed on. That was a schedule that it hoped to proceed on.

Right now, Calico Solar would much rather be building the SunCatcher project than being before you today. But financial realities change what the outcome of the Calico Solar project was.

In the end of the day, the project needed to be

sold, because there was not sufficient financing. I don't think it will be surprising to any of you or to anybody in this room that financing is necessary for large scale solar projects, or any large scale power plant project, and that financing is not, I don't think ever, obtained before a permit is issued by this agency, and by other agencies.

Calico needed financing for the project, and financing was also needed for the development of the SunCatcher.

The fact that the failure to obtain this financing for the project or for the SunCatcher ended up changing the project also is not a unique situation. As recently as August 24th, 2011, STA, the developer of the Blythe Project, came before this Commission and asked for an amendment to its project. At that time, the amendment it was seeking was for the gen-tie line and for some facility designs of the substation, I believe.

Before you considered the amendment, STA told you that they were changing their technology to PV, but they asked you to proceed with consideration of that amendment at that time irregardless of this change. And they told you that they would come and talk to you about the permitting as it developed. And did this Commission revoke the certification of Blythe?

No.

Did the Commission ask exactly when did you know that you didn't have financing? Exactly when did you know that the realities of the solar technology -- solar thermal versus PV had shifted such that a project that you had planned for was not going to make economic sense?

No.

What you did was you thanked them for going on with the project, and you approved the amendment. And it's not just solar thermal that has these types of problems. There are many gas projects that -- plants that have been approved by this Commission, having been considered by this Commission, and have later not been built because financing was not available at some point in time.

What is unique is the request that's being made here by BNSF and Mr. Jackson. They are asking that you ask an applicant to provide you information about exactly where they are in financing a project or in the technology during the certification proceedings. And if there is some uncertainty, I don't know what the line is that they're saying, somewhere between a hundred percent certain that you can do it and a hundred percent that you're not going to do it, where is that line?

We don't know what they're saying. But they're

asking at some point you have to start inquiring for the applicant to tell you what is the financial structure, where are they in the project? We think it's inappropriate and it's not consistent with your regulations, with the Warren Alquist Act or with good policy.

In the complaint, neither BNSF nor Mr. Jackson point to a single misstatement that was made.

HEARING OFFICER VACCARO: Sorry, Ms. Foley Gannon. You can go off the record.

(Thereupon a discussion occurred off the record.)

HEARING OFFICER VACCARO: Back on the record. Sorry for the interruption.

MS. FOLEY GANNON: No problem.

In their complaint, BNSF has not pointed to a single statement that it can show is false or that was material to this proceedings -- the siting proceedings for the Calico Solar Project.

They have the burden of proof here. They have brought this complaint. They need to point to us and tell us what is the statement? Again, as I said, I'm trying to defend against a negative here. Are we supposed to be trying to prove that every statement we made is true? It was done under sworn testimony. It was true when it was

said, and we have attested to that.

When we go through and we look at the story that is told by these binders and binders of exhibits that have been submitted by the BNSF and by Mr. Jackson, it really tells a very simple story, a story which does not support the allegations that Calico has made misrepresentations to this Committee or has fraudulently induced the Commission to approve the project.

Instead, it tells a story of a company that was developing an innovative technology, and a company who had spent over $100 million in trying to bring this technology to mass production. This company --

MS. BURCH: Excuse me, but I object to the testimony that's being given here. It's not supported by any evidence --

HEARING OFFICER VACCARO: Ms. Burch. Ms. Burch, what, I think, if we -- excuse me, Ms. Foley Gannon, if we go back to what I said in the very beginning. This is pretty much argument. You've submitted your testimony. You've made argument. Ms. Foley Gannon is making argument. Your objection is noted, but she will continue her statement. When she's finished, if there's something that you wish to stay, you may. But this is argument, it is not testimony. She is not sworn, just as you weren't sworn. You gave opinions and made a number of allegations

as well. Ms. Foley Gannon gets equal time to do the same.

MS. FOLEY GANNON: The company, and it was referenced by BNSF, which is NTR, which was the parent company of Stirling Energy Systems, or SES, the developer of the SunCatcher. Through SES, they set up a demonstration facility, called the Maricopa Plant, to see if the SunCatcher would produce. As evidence was entered in the certification proceedings, the initial production at the Maricopa Plant was very promising.

NTR and SES attempted to find funding for the SunCatcher, and that didn't happen. It didn't happen on the time frame that they were hoping it would happen. So they found it difficult to proceed with the SunCatcher development on the schedule that had been proposed. And that's all there is to it.

Does this evidence show that Calico never intended to use the SunCatcher on this project?

No.

Does this evidence show that Calico knew that the SunCatcher was not available or would not be commercially viable?

No.

It simply shows that financing can alter the timing of employment of a technology.

The evidence also shows, as this Committee is

well aware, that Calico's parent company sold the Calico Solar Project in late 2011, December 4th, 2011. Does that fact show that Calico's parent company was considering a sale during the permitting process? Does the fact that Calico's parent was considering the sale of the project show that Calico never intended to build this SunCatcher project or the project that was approved?

No. It simply shows that Tessera Solar, Calico's previous parent, was not in a position to finance the construction of this project.

Again, BNSF and Mr. Jackson have to show some statement that was made during the certification that was false and was material, but the quotes that they have provided in their documentation do not say either what they say that they say and they certainly do not prove that there is any false statement.

Let's take example of BNSF quotes, which they claim demonstrate that Calico affirmatively stated to the Commission that it would be placing SunCatchers on the site by July of 2011. And Ms. Burch referred too this again, saying that Calico had affirmatively told the Committee we are going to be putting on SunCatchers by July of 2011. And this is in paragraph 11 of their complaint.

BNSF quotes testimony of Ms. Bellows, which

states that, "The earliest SunCatchers would be installed on the site would be by July 29, 2011". However, rather than being an affirmative promise that SunCatchers could be installed in July of 2011, if you look at the content in which the statement was presented and the testimony around it, it's actually answering a question that says how can we be sure you won't put SunCatchers on during Phase 1A, meaning that you will not put SunCatchers on before July of 2011.

So rather than being a promise to install SunCatchers by a certain point, it's actually a promise just the opposite, not to do that. And actually just following the statement that was quoted by BNSF, there is a statement that I made in response to a request from CURE's attorney. And I said that we wouldn't object to having a restriction that says Phase 1A will not include the placement of any SunCatchers on poles. So that's what that was about, not at all what BNSF is indicating it's about.

And the next, I think, sort of more direct quote, other than quotes from the ASE and other things that is noted by BNSF that's in paragraph 15 of their complaint. And this one I think is really just astonishing. It's incorrect in who is saying a quote. It's incorrect in when the quote was said, and the quote is even provided

incorrectly.

And this is in paragraph 15 where they say, "Just three weeks later on December 24th, 2010, Tessera Solar North America consummated sale of the applicant Calico Solar, LLC to kRoad Sun, a subsidiary of kRoad Power, which was a company that focused on PV power. And at that time, Tessera Solar announced that it had done so, because it had determined that SunCatchers would not be commercially viable in the near term".

So let's break this down. First, the quote says that this statement was made by Tessera Solar. It was not. That was a statement that was made by Calico Solar in its request for amendment. That's a reference document. That's who saying it. Is Calico Solar not Tessera Solar.

Secondly, when was it set? They say it was set at the time of the sale, December 24th, 2011. It was not set on December 24th, 2011. It was set in March when the petition to amend was submitted. And then kind of most shockingly, it's also not a correct quote. The amendment does not say that the SunCatchers would not be commercially viable in the near term, but rather it says I would quote - and I refer you to the exhibit that's referenced by BNSF to clarify this - "The SunCatcher would not be commercially available in the near term", not that

they wouldn't be viable, but they wouldn't be available in the near term.

It is not Calico Solar who made false statements to the Commission. It is BNSF who is making false statements to you in these proceedings.

And finally, in paragraph 18, BNSF cites a statement made by Dan O'Shea. And you heard Ms. Burch describe this statement and refer to it many times this afternoon in her opening statement. And it's before the CPUC. And what they're claiming that the statement says is that they knew that the SunCatchers were not available when they were buying the project.

First off, Mr. O'Shea was speaking about what he thought might have been a basis for the sale of Tessera. He was not apart of Calico at that time. He does not say that he knew what Calico knew. He does not make any representations about what Calico told him. And he does not say that they are not commercially available.

He says they are not commercially available on Tessera's schedule, on the schedule that was proposed. And we acknowledge that. We acknowledge that there was changes in timing, but that is not the same thing as saying that a technology was not available or that they knew that at that time.

And to compound this further, in their comments

on the Staff Assessment, BNSF quotes us again many times. And they say that -- again, interprets this as saying Mr. O'Shea said that Calico knew that the SunCatchers were not available. Again this is just not true. That's not what the quote says. And that's not what Mr. O'Shea says.

So the totality of the evidence that's been submitted by BNSF fails to make a prima facie case that Calico made any misrepresentations to the Committee -- to this Committee, material or otherwise.

They can't point to a single statement which said they can make a prima facie case that is false or that it's material.

Therefore, we ask you, we plead with you, to please dismiss this complaint and dismiss this complaint today. We think that a further inquiry into what Calico knew or should have known at the time of, there is no basis for making that further inquiry. It would set a dangerous precedent. It would require you to look into each applicant and see what is the financial situation.

And I would like to speak just briefly also to the statements that Ms. Burch made about SES's bankruptcy and the recent filing.

We did inform the Commission of SES's bankruptcy. We submitted a letter on Thursday. We found out about it the following Friday, and I was actually out of town. We

submitted it. We also were working busily on other things, so we submitted a letter in due course. We didn't feel that we were sitting on something or hiding something. We actually brought it to your attention. We were the ones who put it in, and said hey, you might want to know about this.

And, you know, we don't exactly what it means for the project to say that it unequivocally shows that this technology is not available. It's not true. There are -- there's another producer of dish technology. We don't know. We don't know what we're going to be doing. We're going to be thinking about it. We are going to be getting back to you. We told you about it, because we wanted you to know this could impact the project absolutely, but we do not think it should impact these proceedings.

These proceedings are about what we knew during the siting certification. At that time, again, we were seeking to permit a project. We got that project permitted, and it was sold. That's the totality of the story.

So, please, dismiss this complaint.

Thank you.

HEARING OFFICER VACCARO: Ms. Burch.

MS. BURCH: Does Mr. Jackson want to say anything?

HEARING OFFICER VACCARO: Well, I think, since I -- he does and he will, but I sort of corrected myself awhile back, saying because you had laid out so many different issues, I gave Calico the opportunity of responding directly before engaging with Mr. Jackson.

While Ms. Foley Gannon was speaking, if you recall, you objected and had some concern with respect to the content of her argument. I asked you to wait. Let her finish, just as we allowed you to make your argument.

If there is a reply that you would like to make at this time, you're certainly welcome to do so. If you would rather have Mr. Jackson, Ms. Foley Gannon address his concerns so that you have time to maybe organize, that's fine as well.

Otherwise, let's hear from you, and then we will move forward. At the end of the day, however, Calico will get the final word in this proceeding.

MS. BURCH: Okay. I would like to address, first of all, the requirement of the CEC that the commercial availability of the generation technology be demonstrated, frankly, not just in the siting procedure, but in the Notice of Intention to File stage. It is a required finding to proceed.

So I would cite section 1721, "The purpose of a notice is that supporting documentation as may be filed

concurrently with the notice, is to provide the Commission, interested agencies, and interested members of the public, with an informative document, which does all of the following:"

And I'm going to jump down to number five, "Describe the commercial availability of generation technologies proposed in the notice (if not already determined to be commercially available by the Commission); discusses the economic comparability of the proposals based upon the comparative generation costs available to the applicant, and explains the impact of the proposed facilities on the overall reliability of the service area system".

This isn't about tomorrow. It's not about off the shelf. It's very straightforward. It says, "Describe the commercial availability". It's not future. It's not hypothetical. You have to establish this. And I can only assume that at the time they made their notice of intention, that they must have met that standard.

But what is very clear is that it changed over time. And I believe that there -- they've admitted that in many ways. I would note that the purpose of this is to consider the economic -- this is B7 within the same regulation, "To consider the economic financial, rate, system reliability and service implications of the

proposed facilities in coordination with the PUC or with the Board of directors of the appropriate body who is a utility".

And then it says 8, "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, and the suitability of proposed sites to accommodate the facilities, and to eliminate from further consideration and commitment of resources any site and related facility found to be unsuitable, unneeded, or otherwise unacceptable". Those are the regulations of this Commission. This is a threshold determination.

I would also note that in Appendix B, which is a document that must be filled out at the Notice of Intention stage, and which has all kind of critical information that's going to be needed in the future in the Environmental Impact Analysis.

It states -- and I apologize, I just noted it's on page 3 of 23 of the current appendix. It says in D, "Information for projects with which completed the underlying process. Two, updates of any significant information which has changed since the Commission's final decision on the NOI".

After this stage, you're going to decide on the

proceeding. Every document that they purport to rely on is supposed to be presented under oath, under oath. One can only assume that is so you can rely on what is being said to you.

On September 10th, they submitted an updated application, where they radically changed the footprint of their facility, radically changed how they were going to proceed in phasing. And they did not let you know that the economic viability of this project had changed. And it was known, at that time, and there is unrebutted testimony, evidence in this record that that is what was happening. They knew it and it's unrebutted.

You can rule in our favor on this complaint, simply based on the unrebutted testimony. I would also submit to you that I can read the testimony around the statements of Mr. O'Shea, the statements of Ms. Bellows. But if you -- rather than carry that out here, we can put it in our closing brief. But there is no question that we accurately cited everything that we did, and its implication.

I would also like to say that in terms of a dangerous precedent, the dangerous precedent here is that there is a lack of candor by applicants to this Committee. That, in fact, there's an argument in the papers of Calico -- kRoad Calico Solar that an omission of

information is not an affirmative misrepresentation and is not covered by this statute.

Omissions are every bit a lack of candor and credibility, and affirmance of an oath, as a affirmative representation. And every time in their documents they use the word SunCatcher. Every time the PMPD said SunCatcher. They could have stepped up and said, you know what, that technology has fallen behind economically. It is no longer competitive. The only -- who we are talking to is a photovoltaic company that can produce energy at a much lower cost that the utilities will purchase. They didn't tell anyone that. They didn't tell anybody anything about what they were doing.

So I think the dangerous precedent here is that this Commission with the evidence before it, the admission by the company that is currently owning this project and was in the process of buying it, at that time, admits that it knew at that time, and it had to get that information from somewhere, because Tessera Solar and NTR were the sole -- according to them, the sole and exclusive source of SunCatcher technology, that it was commercially not available at all.

So I would definitely say the precedent here, and why we're still here talking about this and the importance of it and the impact on the parties and the Commission and

Commission staff is to bring home how this actually played out here. And it was -- it's a very great miscarriage of justice here.

On burden of proof, the applicant continues to carry the burden of burden that their technology is commercially viable. We don't carry that burden. What we came forward was to show you the information that we had, give that to the Commission. We believe they carry the burden. It's unrebutted that they didn't have commercially available technology. They didn't have it then, and they don't have it now.

HEARING OFFICER VACCARO: Thank you, Ms. Burch.

I think, at this time, we'll hear from Mr. Jackson, if you're still on the line. Are you there?

MR. JACKSON: Yes, I'm still on the line.

HEARING OFFICER VACCARO: Okay. We can hear you very well. Are you able to hear me pretty well without -- with or without the static?

MR. JACKSON: I hear you fine.

HEARING OFFICER VACCARO: Okay. So I think you've heard how this proceeding has progressed so far. This is now your opportunity, Mr. Jackson, to basically summarize and explain your position. I think you've noticed that Ms. Burch and Ms. Foley Gannon were actually very succinct, and did so with respect to their points

fairly briefly.

So let's continue with that trend, if we can. Of course, say all that you need to say. I'm not trying to prevent you from doing that, but I think we've had some good modeling that all the points can be made succinctly and fairly briefly.

MR. JACKSON: Yes, I will be brief. And my statement that I prepared, what I will do is I will focus strictly on the issue at hand, and that is BNSF's complaint wishes to revoke the certification quote, "On the grounds that the applicant's application supplemental documentation contained material false statements regarding the commercial viability and availability of SunCatchers for the Calico Solar Project".

What appears to be the issue is, is material false statements. And I believe the record and the evidence is clear, from the outset, from the Application for Certification, there was statements as to the availability and viability of the project. And those are reflected in what is stated about construction.

On the application for certification back in December of 2008, page 3-58, it states, "Construction traffic is anticipate to commence during the last quarter of 2010", et cetera, et cetera. Then it goes on and throughout the supplemental documents, throughout this

entire proceeding, some of it has been introduced as exhibits today in this proceedings, the applicant continued to represent that construction would commence in 2010.

Specifically, in February 2010, the applicant's submittals of the Calico Solar construction milestones schedule and project layout figures indicated to start Phase 1 construction starting October 2010 with the first units on line in July 2011.

In addition to that, in May 2010, in the Application for Certification the amendment, it states, "Construction is tentatively scheduled to occur over an approximate three-year period, beginning in 2010 through 2012, et cetera, et cetera.

In the applicant's Phase 1A information in August of 2010, it also states that, "Ground disturbance would start in 2010".

In August of 2010, this is shortly before the Commission's decision, the applicant submitted the numbers of employees and numbers and types of equipment for October, November, December 2010, indicating that the project was going to start construction in 2010, including the amendment based on 3-1 that states -- excuse me, the petition to amend, states, "While the Commission decision envisioned construction commencing at the end of 2010, the

applicant's amendment would allow construction to begin in late 2011".

The significant words there is, "The Commission's decision envision construction commencing in 2010". Here the point is, is that in order to start construction, you have to have a commercially and available and viable project, like two SunCatchers.

So by constantly referring to the construction schedule, the documents represent that those -- that the SunCatchers were commercially available and viable at that time.

Of significant note, Mr. O'Shea's statement alluding to the sale of the project in September and October, the evidence that I submitted indicates that the SunCatchers -- that the market knew that the SunCatchers were not commercially viable. I've quoted in my document the astronomical costs, you know, for the Maricopa Power Project in June, which was known in June of 2010, would certainly have been a red flag to anybody in the industry who was considering purchasing 26,540 SunCatchers.

Moreover, when it was referring to the applicant's other projects, these are clear examples that the market knew, that the applicant knew, that everybody knew, of course, except for the Commission, that there was significant problems directly related with the

availability and the viability and, of course, the financing of the project.

I believe the evidence is clear, which I originally started out to request an investigation, leads me to believe that even at this point in time, there's enough evidence for the certification to be revoked, and I move it do so.

I also add is that the burden of proof, as stated in California Code of Regulations, is on the applicant. And the applicant has not provided any proof to rebut BNSF's complaint, that it show, in fact, that SunCatchers were commercially available and viable at the time of the Commission's decision.

That's all I have to say.

HEARING OFFICER VACCARO: Thank you, Mr. Jackson.

Ms. Foley Gannon.

MS. FOLEY GANNON: Thank you. I'll start where Mr. Jackson ended. The burden of proof. Absolutely, in a siting proceeding, the applicant has the burden of proof of demonstrating that the meet all the requirements of the Warren Alquist Act to merit a siting. Absolutely. Do not disagree with that one bit.

In a complaint proceedings, that's not the case. We have the burden of proof -- they have the burden of proving that we have made a statement which is false and

material. If they do that, then we would have the burden of proving why either one of those things is just not true. Either we didn't make the statement, it wasn't false, or it wasn't material to the proceedings.

In their complaint and in the evidence cited, again, they have not pointed to a single statement, which they have demonstrated as false. That's simply because there were no false statements made.

I can't offer you evidence that shows that every statement that was made was true. That's not reasonable, and that certainly isn't what is called for or contemplated by your regulations. Therefore, I would -- and I hope maybe you would provide clarity on this, that in a complaint proceeding, the party bringing the complaint has the burden of meeting the minimum requirements of showing that there has -- that the allegations in the complaint merit some action that's being asked for them to take.

Mr. Jackson and Ms. Burch said that there's unrefuted proof that material misrepresentations were made to this Commission. I am totally at a loss for what that unrebutted testimony is. I read through these complaints. I've looked at each statement that they say. What is the unrefuted testimony?

And it seems to me, because everyone keeps

talking about it, it's Mr. O'Shea's testimony before the CPUC. And so maybe we just spend another couple of minutes thinking about what did that testimony show? What does that testimony mean? What was the context of that testimony given in?

The question was put to Mr. O'Shea what he knew when he was entering into the initial conversations with Calico Solar about selling the project. Again, this is a time when there was -- this was not exclusive negotiations. This was a discussion that was happening between a potential buyer and a potential seller.

Mr. O'Shea says that he thought that the sale might have had something to do with the fact that the SunCatchers may not be available on the schedule that Tessera was anticipating. That's it.

That certainly is not saying Calico Solar knew that the SunCatchers were not available, that the SunCatchers would not be available, that the SunCatchers were not viable, that they would never be viable.

Simply because that is not what Calico Solar thought at that time, and that is not any representation that was made, that was not what was known in the press, that was not what was known by anybody. The Commission didn't know that, as well as the applicant didn't know that.

The applicant was working diligently to try to get a project approved. The applicant wanted to see this project approved. It wanted to see this project developed. After it was approved, there were things that happened. And there had been discussions before it was approved, but we didn't know what was going to happen with the project. We were trying to get the project into a place where it could be built, so that we could have this important solar project being developed in California. That's what we were working towards. That's what we were doing.

And so I go back to -- I don't know -- I really am at a loss of what is this unrebutted testimony. I don't see it. And as I said, when we walked through the complaint, the only specific statements that they have presented are either taken out of context, they're misrepresentations, or they're misquotes. They are not evidence that we make misrepresentations at all. And I, therefore, would ask that you reject this.

One other point I would like to make is that Ms. Burch raised in the beginning of her last round of speaking, that the regulations require that an applicant in an AFC proceeding present information about the commercial availability of the technology. That is in the NOI proceedings.

But as you well know, you don't do NOI providings for solar thermal projects or for most projects that come before you today. So applicants do not present information about the commercial availability of the technology. Applicants do submit information about reliability. But as the Commission explained in this decision on this project, what they're really looking at more is about the effect of the reliability of the technology on the grid, on the utility.

And information was submitted about the reliability of the technology during these proceedings. It was sworn statements that could be relied on, that were relied on and there was a decision made.

So yes, she has scored some language from a regulation that doesn't apply to these proceedings. When you go through what applies to the AFC's proceedings, that's not required. And I don't know of another proceedings where you're asking for that to be presented.

In closing, I'd like to say, you know, again unique -- we're not unique. Unfortunately, this is a very financially turbulent time. There are things in general in the financial market and particularly in the solar industry where things are changing quickly.

Calico Solar tried to get this project permitted in time, that it could begin construction, that it could

get funding through ARRA, that it could move forward with this project. It invests -- as I said, they invested tens of millions of dollars in trying to carry out these efforts. This was not a sham. This was a legitimate effort. It was an effort that ultimately didn't work out exactly as the project was planned.

And so when the project was sold on December 23rd following certification, there was a decision to request an amendment. And that's the appropriate way to come back to you if there' a change in the project. That's what Blythe did. That's what they told you they're going to do with their PV. That's what projects do before you all the time.

So there is nothing that demonstrates because we need an amendment or because something changed in the project, that that meant there was something wrong during the proceedings. It's not unique. We did not lie, and this complaint should be dismissed.

Thank you.

HEARING OFFICER VACCARO: Mr. Jackson, just as Ms. Burch had an opportunity to rebut or respond to Ms. Foley Gannon's comments, you have that same opportunity. And if you notice, Ms. Burch, didn't go through her whole initial argument again. She kept it to summary points that addressed Mr. Foley Gannon's comments. That would be

helpful if you would do the same.

MR. JACKSON: Yes. My wife asks me to brief all the time.

(Laughter.)

MR. JACKSON: Yes. I'll be brief. I would just like the Commission to make note of the construction schedule that was supposed -- that was supposed to be proposed throughout this entire application process.

Thank you.

HEARING OFFICER VACCARO: Thank you, Mr. Jackson.

I think what I'd like to do now is go off the record for Five minutes. It is 3:25 by the clock in the room. At 3:30 we will go back on the record. All of the parties, should they wish to, will have no more than, and I really mean it, no more than two minutes, if there is a final statement, because I will cut you off at two minutes once we come back from going off the record.

(Thereupon a recess was taken.)

HEARING OFFICER VACCARO: Back on the record. Everyone, thank you. That was five minutes exactly. We're at 3:30, so I appreciate that.

Ms. Burch, if there's anything further that you'd like to say, two minutes starts now.

MS. BURCH: Okay. I have three points.

Sorry. Okay, three points.

First, the issue here was not the market. This market has been tough absolutely. The issue here was the cost per watt of the SunCatcher technology versus the PV technology. It had fallen to the PV was about 350, they say at that time, and their technology was anywhere between 4 and 650.

Secondly, they issued a -- they being kRoad, who is Calico Solar. As you will recall, they did not do a transfer here. They are kRoad. kRoad is Calico. They announced -- went on their -- at their press release that they were going to replace 750 megawatts of this facility with PV, December 24th, not three months later on December 24th.

Thirdly, the most remarkable thing about this hearing is that it's about material misrepresentation. And there was not one witness, not one document put in place today by Calico saying we didn't do that.

So I would say that is a significant statement.

HEARING OFFICER VACCARO: Thank you, Ms. Burch. Thank you for sticking to the time limit.

Mr. Jackson.

MR. JACKSON: The record is clear. The evidence is overwhelming. I'm confident the Commission will make the appropriate decision.

Thank you.

HEARING OFFICER VACCARO: Thank you. Ms. Foley Gannon, two minutes.

MS. FOLEY GANNON: Thank you. It was not a mystery to the Committee or to the Commission that the SunCatcher technology was under development at the same time as the solar project. There was a great deal of evidence put on about the demonstration project at Maricopa, about reliability, there was cross-examining, there was a lot of witnesses, a lot of discussion. There were findings made on that.

So this was not something that was hidden from the Committee -- or the Commission, and the Committee and the Commission was well aware of that.

Calico Solar again tried to bring this project forward. It sought to get this project permitted and to get it built. Financing is what made that not happen the way it was planned. But again, it's not that they gave up on the technology. SES continued to try to get financing for the technology. And Calico Solar continued to include the SunCatcher in its project.

This is not saying that they thought it was unviable when it was -- the project was approved. It's not saying they thought that it would not be available. It might not be available on the schedule that was proposed, but they did believe that it would be available

and it would be viable and they were speaking to continue this with the project.

To ask why we brought no witnesses and why we put on no exhibits? We didn't see the case to respond to. We don't see the quote that says here's a statement that you made that is -- that is false, and that is a misrepresentation. Therefore, there was nothing for us to put on. We are here to rebut something that was put on. And they didn't make a prima facie case, so therefore we have no witnesses. That' all that that meant.

Thank you.

HEARING OFFICER VACCARO: Thank you.

I think I appreciate that everyone stuck to the two minutes. Perhaps it seemed a bit arbitrary. It wasn't. I mean, there was quite a bit of briefing on the documents that have been submitted on this matter. The oral argument refreshingly was not just a rehash of what's already been submitted. I think it focused on key points. It clarified and underscored key points, I think, that each party probably needed and wanted to make.

The Committee does have some thoughts and some comments and will be sharing those with all of you in just a few moments. But we'll do that after taking the public comments, because there are some individuals on the line. And I think it's important that we hear from them should

they have any comments.

A number of people are on the line, but it doesn't mean that you wish to speak. It is always difficult to navigate phone traffic. I'm going to do my best. So why don't we go ahead and start with the first individual who might wish to make a public comment. Please identify yourself, your affiliation and please make a brief comment.

And I'm hearing silence.

MR. STEARN: I have a comment.

HEARING OFFICER VACCARO: Who is this?

MR. STEARN: Fred Stearn from Newberry Springs. Just an interested party. No affiliation.

And my comment would be if there's any -- I've listened to this, and other hearings before it. If there's any questions in the Commission's mind as to what's going on here, my suggestion is to issue or permit issuance of subpoenas to the relevant parties, relevant experts, and relevant witnesses. And that concludes my comment.

Thank you very much.

HEARING OFFICER VACCARO: Thank you.

Would anyone else like to make a public comment at this time?

Hearing silence.

Okay. I'll ask again, is there anyone who wishes to make a public comment at this time?

I'm hearing none.

I think so what that does is it moves us closer to the adjournment. And I will look to Commissioner Douglas, if you'd like me to make the next statements.

PRESIDING MEMBER DOUGLAS: Yes.

HEARING OFFICER VACCARO: I figured that was the case.

PRESIDING MEMBER DOUGLAS: I'll surprise you.

MR. BUDLONG: Hello.

HEARING OFFICER VACCARO: There were --

PUBLIC ADVISER KIM: I heard a hello.

HEARING OFFICER VACCARO: Hello? Is someone trying to speak?

MR. BUDLONG: Yeah. Tom Budlong.

HEARING OFFICER VACCARO: Hello, Mr. Budlong. Could you speak up just a little bit, please. And you wish to make a comment at this time?

Mr. Budlong, I don't know if you can hear me, but we can't hear you. It appears that you possibly hit the mute button on your telephone.

MR. BUDLONG: No. All right. Can you hear me now?

HEARING OFFICER VACCARO: We can hear you now.

MR. BUDLONG: Okay. Very good. I got the right button here. It's a toggle. I had it the wrong way.

I'm speaking as an individual, of course, here. I was an intervenor on the Imperial project, and that's how I got familiar with the SunCatcher technology.

I listened to what you're saying here, and there's a lot of question of what I hear is what did the SunCatcher people know and what they didn't know. As if knowing is a binary condition, you either do or you do not know -- you didn't know.

During the Imperial proceedings, it was obvious, looking into SunCatchers, that it was a technology in development, and that it was a long difficult development. It had been going on for something like 25 years, starting a long time ago. And a lot of people have been trying to develop SunCatchers into commercial production without being able to do it.

So it was pretty much obvious during that time that this was in development, not in production, and that the SunCatcher, at that time, certainly wasn't ready for prime time.

There was also a question, if you put up the 60 units in Maricopa, and say those are working fine, is it prudent to then expand it to multiple thousands. At the time of Imperial, there were talking about something like

over 100,000 were being made. And that's considered not a prudent thing to do based on 60, in a rather controlled environment and putting them in an environment having spanned out into Calico. We're talking about like 30 thousand, 40,000 or 60,000. It is an imprudent thing to do is to expand that, even though it would slowly get your confidence up with that much money, putting a whole bunch of these in the field based on a few months of a 60-unit operation, expecting them to last for 40 years and operating economically.

So I'd like the SunCatcher people to pushing into --

HEARING OFFICER VACCARO: You're starting to fade just a bit, Mr. Budlong. Our court reporter is having difficulty hearing you, so if you could project just a little bit more. You don't need to repeat what you've said, but your next word, if you would please project, we'd greatly appreciate it.

MR. BUDLONG: Okay. I'll do that.

HEARING OFFICER VACCARO: Much better.

MR. BUDLONG: I will do my best here.

So in my mind, and to an awful lot of observers, this has been an experimental project all along. It's interesting to go back to Dr. Barry Butler's posted testimony in front of the PUC in 2006, where he said, yes,

this is a good technology and eventually it's going to be able to come on, but it's going to take a lot of development to do that.

I think that we've seen that in this hearing. If you can ignore the idea of either they knew or they didn't know, which is a binary operation, and consider that knowing or not knowing is what it is, is there -- is it reasonable to expect that this is going to come into some -- come into fruition.

There's always some doubt in your mind at how much confidence do you have in it. And I think that if you got down into the very bottom of the minds of the SunCatcher people, you would find that even they weren't terribly confident.

But, of course, a company has to put its best foot forward. And so for Calico, for the SunCatcher people to keep saying, yes, we are going -- we are commercially available, I would expect that. That doesn't mean that's really the truth.

And a number of people have blamed the financing, and lack of financing, inability to get financing as the reason for the demise of this project. But that treats financing as another binary thing. And then as you sit around in the afternoon and wait if the phone rings and behold we've got financing. No. What you have to look at

is why didn't they get financing?

I can well imagine that they've been trying to get financing to push the project further for quite some time, and they couldn't get anybody to take the bait. If these are private financiers, they're very careful about their money. They want their money back, plus some return on it.

And if it looks like a doubtful project, and they're not going to get their money back, and there's too much risk compared to the reward, they're going to -- not going to get any financing. And I think that's probably why there was no financing on it. So to say financing killed it because they couldn't get financing you have to say, well, why didn't they get financing?

And why they didn't get financing, because they couldn't convince anybody that the project was viable and it really was a commercially available project.

So I would have to side on the side of Pat Jackson and BNSF, and say, no, Calico was not being fully honest by not putting forward the fact that this really is an iffy thing, and would have -- and it very well, might not fail, and its development has not been completed.

I think that if they were truly honest about things, they would have said, "Yeah, we do have some more development to do". I think I read in one of the

documents where -- in fact in the Staff Assessment where it talks about -- let me see if I can find that.

HEARING OFFICER VACCARO: One more minute, Mr. Budlong.

MR. BUDLONG: Yeah. It says, "The underlying statements upon which the complainant relies may be matters of opinion regarding future events, and therefore are not representations of fact".

Well, the whole world is matters of opinion, and not representations of fact. The only fact they could have come up with was we've already installed 100,000 SunCatchers and they will work. And so it comes down to ifs, and matter of opinion and human judgment to say, no, this thing was not well enough to develop to be a viable project, something that you can rely on, and something that you can build a project on.

So I appreciate your listening to me.

HEARING OFFICER VACCARO: Thank you for your comments, Mr. Budlong.

Is there anyone else who would like to make a public comment at this time?

I'm hearing none. So unless I am interrupted, I think that's the end of public comment.

What I was starting to say, before we heard from Mr. Budlong, is that there's been quite a bit in terms of

the oral argument and the documents that have been submitted to the Committee. The parties, I think, have done -- and when I say that, I mean the folks represented by attorneys as well as Mr. Jackson who's representing himself, have done, I think, what is a very good job of zealous advocacy for your positions.

I think you all seem to believe that this is readily and easily decided on your particular pleading or on your particular point of view. I think what the Committee sees though is that this is a matter that it needs to consider with now the benefit of your oral argument today.

As the Committee sits here today, it doesn't need anymore information. It doesn't need further inquiry. It does not believe that any further discovery is warranted, but with the qualifier, as the Committee sits here today. The Committee is going to undertake to submit the proposed decision that's required by the regulations. And it's specifically regulation 1235 gives the Committee 21 days after today to submit a proposed decision for Commission consideration. That is the Committee's goal today.

If there is something in the process that causes the Committee to believe that it needs further information or additional information, it will stay true to the order that was issued that said it will let the parties know

that, and then give directives for the parties and potentially staff to assist the Committee if it needs any further assistance.

But as we sit here today, 21 days from today is the 24th, that is when you can expect to see the last possible day that you can expect to see a proposed decision from this Committee.

So I'm going to turn it over to Commissioner Douglas, but thank you all. I mean, this is just -- for me personally, I don't speak on behalf of the Commissioners in this regard, but thank you for keeping your points pointed, not going over and rehashing everything, but making it, I think, more clarifying and illuminating to all of us in moving forward with a decision on this matter.

PRESIDING MEMBER DOUGLAS: Thank you. I think that both of us join our Hearing Officer on that last comment. And this was well and thoroughly argued. This hearing was helpful for us, so we appreciate it. We'll look forward to certainly moving forward as quickly as we can to get out a proposed decision. And as Hearing Officer Vaccaro said, the Committee, at this time, we don't see a need for additional information.

Any comments?

ASSOCIATE MEMBER WEISENMILLER: No.

PRESIDING MEMBER DOUGLAS: All right. So with that, thank you. We're adjourned.

(Thereupon the Calico Solar Project hearing adjourned at 3:46 p.m.)

CERTIFICATE OF REPORTER

I, JAMES F. PETERS, a Certified Shorthand Reporter of the State of California, and Registered Professional Reporter, do hereby certify:

That I am a disinterested person herein; that the foregoing California Energy Resources Conservation and Development Commission hearing was reported in shorthand by me, James F. Peters, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed, under my direction, by computer-assisted transcription;

I further certify that I am not of counsel or attorney for any of the parties to said meeting nor in any way interested in the outcome of said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of October, 2011.

_____

JAMES F. PETERS, CSR, RPR
Certified Shorthand Reporter
License Number 10063