# STATE OF CALIFORNIA

# ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

| In the Matter of: | DOCKET NO. 08-AFC-13C |
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| The Calico Solar Project Amendment | |

**BNSF RAILWAY COMPANY'S**
**REPLY BRIEF REGARDING JURISDICTION AND BASELINE**

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For BNSF Railway Company

## 1. INTRODUCTION

BNSF Railway Company ("BNSF") hereby submits this reply brief addressing the jurisdictional and baseline issues pursuant to the Committee Scheduling, Briefing, and Procedures Order, dated May 2, 2011 ("Scheduling Order"), issued by the Siting Committee of the California Energy Commission ("CEC") overseeing the Calico Solar LLC's Petition to Amend.

## 2. ANALYSIS OF ISSUES

### Issue 1.a

**Does the Energy Commission have authority to consider approval of the proposal to reduce electricity generated from Sun Catcher solar thermal technology from 663.5 MW to 100.5 MW?**

All parties appear to agree that the Commission's jurisdiction extends to a proposed amendment that merely reduces the size and scope of a thermal power project that had been properly certified through the Commission's application and certification process, so long as the approved project remains in compliance with its certification. As discussed in our opening brief and below, however, the Commission's December 1, 2010 certification decision was based on the faulty premise that the SunCatcher technology was commercially available and economically viable. Because it is undisputed that the SunCatcher technology was not then and is not now commercially available or economically viable, the Calico Solar Project was never properly certified, and this Commission, having been apprised of the commercial unavailability and economic non-viability of SunCatcher technology, must now withdraw its prior certification decision.

Furthermore, the unavailability of the SunCatcher technology is the applicant's stated basis for the amendment's proposed change in technology. If the technology were available there would be no basis for the amendment.

**Issue 1.b.**

> **Does the Energy Commission have authority to consider approval of the proposal to install photovoltaic (PV) facilities generating 563 MW on the Calico Solar Project site? If so, explain whether this is because 1) the PV facilities are part of a thermal power plant; 2) the PV facilities are either a related or appurtenant facility; or 3) the PV facilities are located on a site the CEC has licensed. Are there other grounds for the Energy Commission authority to consider approval of the project amendments? If so, please specify what that authority is and how it applies to the proposal.**

As set forth in our opening brief, BNSF still believes that the answer to this issue is, no. All parties agree that the Commission's jurisdiction is expressly limited under the Warren-Alquist Act to the construction and modification of thermal power plants over 50 MW. Cal.Pub.Res. Code §§ 25500, *et seq*. The Petition to Amend describes an initial facility of 275 MW of solar PV generation south of the BNSF mainline. That facility will have all of the requisite support structures located south of the BNSF mainline – to include the main services complex and the substation. At least two years later, the Petition to Amend describes another facility of 288 MW of solar PV generation, coupled with only 100.5 MW of solar thermal generation from SunCatchers. The SunCatcher aspect of the proposed PV Project is speculative at best because SunCatchers are not presently commercially available or economically viable and neither Calico Solar nor the CEC has any way of knowing when, if ever, they will be. Since SunCatchers are not commercially available or economically viable, the SunCatchers cannot serve as a legitimate basis for the Commission to exercise jurisdiction over the Petition to Amend. Indeed, all parties agree that a PV facility

– which is what the Petition to Amend proposes, absent the commercially unavailable or economically viable SunCatchers – clearly falls outside the Commission's jurisdiction.

Both the Commission Staff and Calico Solar maintain that, because the Commission certified the site (albeit without knowing that the SunCatcher technology was commercially unavailable or economically unviable), the Commission may retain jurisdiction over the site, regardless of what facilities, structures, and appurtenances are placed on the site. This position is not supported by either the implementing statute or case law. Calico Solar cites to inapplicable cases that stand for the unremarkable position that implementing statutes should be strictly construed. See Calico Solar's Opening Brief at pp. 4-5, citing *Security Pacific National Bank v. Wozab*, 51 Cal.3d 991 (1990) and *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal.App.4th 338 (2010). *Wozab* stands for the proposition that a bank's decision to set off $3,000 from a depositor's account does not preclude a subsequent action by the bank to foreclose a security interest on property. *Wozab,* 51 Cal.3d at 1005-1006. The fact that the California Supreme Court found that "the result advocated by the Wozabs – allowing them to evade their debt almost in its entirety – would be a gross injustice to the bank and a corresponding windfall to the Wozabs," has absolutely no application to the facts at issue before the Commission. *Id.* at 1005. *Singh* is similarly unpersuasive. That case involved claims by an undocumented alien relating to unpaid wages and other employment related claims. In finding that the trial court and jury did not err in awarding Singh unpaid wages, the court of appeal engaged in a general discussion of statutory construction. *Singh*, 186 Cal.App.4th at 362-365. While the language quoted by Calico Solar appears in the opinion, it is followed immediately with the following discussion:

> If the language is clear and a literal construction would not result in absurd consequences that the Legislature did not intend, the plain meaning governs. ( *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004), 34 Cal.4th 733, 21 Cal.Rptr.3d 676, 101 P.3d 563.) If the language is ambiguous, we may consider a variety of extrinsic aids, including the purpose of the statute, legislative history, and public policy. ( *Ibid*.)

*Singh*, 186 Cal.App.4th at 363.

The "clear and literal construction" of the implementing statute at bar – the Warren-Alquist Act -- leaves no doubt that photovoltaic solar technology does not fall within the Commission's exclusive jurisdiction. The Public Resources Code defines "thermal powerplant" as follows:

> "Thermal powerplant" means any stationary or floating electrical generating facility using <u>any source of thermal energy,</u> with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto . . .. "Thermal powerplant" <u>does not include any</u> wind, hydroelectric, <u>or solar photovoltaic</u> electrical generating facility.

Cal.Pub. Res. Code § 25120 (emphasis added).

All parties agree that PV facilities do not use thermal energy. Even Calico Solar concedes, as it must, that "Calico does not contend that a 'solar photovoltaic electrical generating facility' is within the Warren-Alquist Act's definition of a 'thermal powerplant.'" See Calico Solar's Opening Brief at p. 4, citing Cal.Pub.Res. Code §25120.

In a futile attempt to overcome the rules of strict construction and the express statutory exclusion of PV technology from the Commission's jurisdiction, Calico Solar argues that the Commission should construe its powers so "liberally" that it should ignore the Warren-Alquist Act's express exclusion of PV technology from the Commission's jurisdiction. See Calico Solar's Opening Brief at p. 5. Where, however, as here, the implementing statute expressly excludes PV technology, other general statutes, such as Public Resources Code Sections 25006

and 25008, cannot add back that which has been expressly excluded. *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal.4th 733, 21 Cal.Rptr.3d 676, 678-681 (2004).

In *Coalition of Concerned Communities*, the California Supreme Court reviewed the Court of Appeals' decision to uphold the trial court's finding that a proposed housing development in the Westchester-Playa del Rey area of Los Angeles did not fall within the provisions of the Mello Act. The Mello Act, codified at Government Code Section 65590(d), applies to proposed construction within coastal zones and contains certain requirements relating to affordable housing. The developer, Catellus, initially proposed building houses within the coastal zone. That initial proposal triggered the Mello Act. Because none of the proposed housing met the conditions of affordable housing in the Mello Act, the Coastal Commission denied Catellus the requisite coastal development permit. *Id.* at 677.

Because Catellus elected to revise the project, the trial court stayed an action filed by the plaintiffs. The revised project provided that all of the homes would be physically constructed outside the coastal zone, but certain access roads, a public park, and other infrastructure would be physically located within the coastal zone. The Coastal Commission issued a development permit, which was upheld by both the trial court and the court of appeals. *Id.* at 677-678.

In affirming the Court of Appeal, the Supreme Court noted that its "fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose." *Id.* at 679. The Supreme Court found that the implementing language in the Mello Act regarding "[n]ew housing developments constructed within the coastal zone," was ambiguous. *Id.* at 679.

Nonetheless, the Court upheld the Court of Appeal's determination that the Mello Act was inapplicable, finding that, "[n]o logical connection exists between the goal of encouraging the preservation or provision of affordable housing in the coastal zone and a development that includes no homes of any price range or any other amenities for the exclusive use of the homeowners, within that zone." *Id.* at 680.

In this case, the Legislature's intent is clear: PV solar projects do not fall within the purview of the Commission. In addition, there is no logical connection here between the Commission's exclusive power to license and regulate thermal powerplants and the express language that excludes the Commission from any regulatory oversight over PV solar projects.

Both Staff and Calico Solar attempt to skirt this insurmountable roadblock by arguing that, once the site is certified, the Commission has authority to regulate and license anything within the site. See Staff Opening Brief at pp. 3-4, Calico Solar Opening Brief at pp. 5-9. Staff goes so far as to claim that the Petition to Amend presents the Commission with a situation that is "no different than a natural gas-fired power plant that has multiple turbine generators which can, and often do, operate independently." Staff Opening Brief at p. 5. This attenuated analogy is completely inappropriate. First, the Commission has jurisdiction over gas-fired power plants, regardless of how many turbines are involved, as long as the overall output exceeds 50MW. Second, here we have technology – PV solar technology – which the Commission expressly does not have jurisdiction over.

According to the Staff's position, once a "site" is approved, the Commission has jurisdiction and regulatory oversight over anything that is subsequently constructed within the site. Under the Staff's faulty logic, by simply

using commercially unavailable SunCatcher technology as a "hook" to justify this Commission's assertion of jurisdiction, Calico Solar could construct a golf course, put in an airport, build a hotel – all under the Commission's authorization – simply because they are all within the same original "site." This would clearly lead to "absurd consequences the Legislature did not intend." *Coalition of Concerned Communities*, 21 Cal.Rptr.3d at 679.

Moreover, Calico's and Staff's position does not follow the "plain and common sense meaning" of the implementing statute. *Id.* Section 25500 provides the Commission with "the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility." Cal.Pub.Res. Code §25500, emphasis added. All parties agree that "all sites and related facilities" must fit within the definition of "thermal powerplant." A site is a location that may contain a facility or a proposed facility. Cal.Pub.Res. Code §§ 25110, 25119. An "existing facility," however, must be a transmission line or thermal powerplant that has been constructed. All parties agree that the Petition to Amend does not propose any "change or addition to an existing facility." Rather, the Petition to Amend proposes "a change or addition to" a certified site where nothing currently exists and that which was certified cannot be built. Section 25500, however, does not provide jurisdiction to the Commission over a change or addition to a certified site. Thus, the Commission has jurisdiction over the proposed change or addition only if it falls within the definition of a thermal powerplant. Here, the Commission expressly does not have such jurisdiction.

Notably, neither Staff nor Calico Solar discusses the two cases that expressly address the Commission's limited jurisdiction, *Department of Water & Power v. Energy Resources Conservation & Dev. Com.*, 2 Cal.App.4th 206 (1991)

and *Public Utilities Com. v. Energy Resources Conservation & Dev. Com.*, 150 Cal.App.3d 437 (1984). See BNSF' Opening Brief at p. 9. Both of these cases clearly hold that the Commission's jurisdiction is limited to its statutory authority and expressly reject attempts to expand that jurisdiction. *DWP*, 2 Cal.App.4th at 222; *PUC*, 150 Cal.App.3d at 444.

Finally, it remains entirely speculative whether SunCatchers will ever be commercially available. Even assuming, *arguendo*, that the Commission accepts Staff's and Calico Solar's contorted jurisdictional analysis, that analysis is dependent on a completely untenable premise – namely that SunCatchers were and are commercially available and viable. The Commission therefore has no choice but to dismiss the Petition to Amend for lack of jurisdiction.

**Issue 1.c.**

> **May the Energy Commission act as the lead agency to perform the required CEQA evaluation over both the solar thermal and photovoltaic components of the proposed project modifications? Are there any legal impediments to such an approach?**

Again, the Commission's jurisdiction is exclusive, but limited. As discussed above, we do not believe the Commission has jurisdiction, and therefore cannot act as lead agency. Notwithstanding Calico Solar's arguments regarding "hybrid" electrical generation facilities and the provisions of Public Resources Code Section 25519(c), the Commission has exclusive jurisdiction over thermal powerplant projects – not over thermal powerplant projects and something else. To act otherwise would completely eviscerate the express limitation by the Legislature that precludes jurisdiction over PV solar technology. Under the "hybrid" and Section 25519(c) analysis proposed by Calico Solar, a developer could propose a "project" that includes a thermal powerplant, a golf course, a

hotel, and an airport. Under Calico Solar's analysis, the Commission would perform Warren-Alquist Act environmental review over the thermal powerplant and act as lead agency applying CEQA over the golf course, hotel and airport. That would be nonsensical. The "project" subject to Commission jurisdiction and certification proceedings would be the thermal powerplant and it would be segregated from the golf course/hotel/airport project.

Similarly, the proposed PV solar project is a separate project from the proposed amended SunCatcher project. The proposed PV solar project is not necessary for the proposed amended SunCatcher project. The fact that the proposed PV solar project may utilize some of the same infrastructure does not make the proposed amended SunCatcher project dependent on the proposed PV Project.

Finally, as discussed above, the Commission's jurisdiction over the proposed amended SunCatcher project is dependent on the false assumption that SunCatchers are commercially available and viable. As discussed in BNSF's Opening Brief, this is clearly not true. As such, the Commission cannot act as lead agency. To find otherwise would be to encourage Calico Solar and other developers to engage in a bait-and-switch game.

It should be noted the proper lead agency can consider prior work performed at the proposed PV site. That lead agency, however, must independently perform all of the requirements under CEQA. Their review, as further discussed below, should utilize, as baseline conditions, the site as it exists at the time of Notice of Preparation, or if no Notice of Preparation is issued, at the time environmental review is commenced. CEQA Guidelines sec. 15125(a).

**Issue 1.d.**

**In the Energy Commission's consideration of the proposed amendment to its permit, what are the Energy Commission's responsibilities under CEQA with respect to the proposal to install PV facilities?**

As set forth above, the Commission has no jurisdiction. Accordingly, it has neither authority nor responsibility to consider the proposed amendment under CEQA.

**Issue 1.e.**

**Are there any other considerations relevant to the Energy Commission's jurisdiction with respect to the proposal?**

At this time, BNSF is aware of no other considerations that would be relevant to the Commission's jurisdiction with respect to the Petition to Amend. BNSF will respond further if and when additional relevant information is obtained.

**Issue 2.a.**

**What is the appropriate baseline on environmental conditions on which to base the Energy Commission's CEQA analysis, and why?**

As a threshold matter, it should be noted that the evaluation of the environmental impacts of the Initial Project is incomplete. As previously discussed, the appropriate baseline for evaluation of the impacts of the PV Project is the physical conditions of the desert floor as they exist today. It does not include the potential impacts resulting from the hypothetical development of the Initial Project. In its opening brief, Staff correctly quotes the California Supreme Court when it states that "neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline."

*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 328. But both Staff and Calico Solar fail to acknowledge the key significance of the following sentence in the Court's opinion, which states that an agency's discretion lies in "exactly how the existing physical conditions without the project *can most realistically be measured*." *Id.* This determination of the agency is reviewed for support by substantial evidence. *Id.* As has been discussed, development of the Initial Project is speculative at best. In fact, there has been no substantive review of key environmental considerations such as stormwater runoff and sediment transport across the project site and onto the BNSF Right-of-Way, and adverse impacts, including health impacts, on BNSF's employees, agents and contractors, and critical rail operations from glare and glint from the SunCatchers. Thus, using as a baseline the hypothetical physical conditions which would result from that development cannot be said to be a *realistic* baseline from which impacts of the PV Project can be measured.

Calico asserts that the proper baseline is the approved project, and that it does not matter whether the approved project has been constructed. Calico Solar relies on *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 for the proposition that in reviewing an amendment to a prior permit, an agency is authorized to review only the incremental change which would result from the modified project. However, two factors are key to this determination: 1) the new project must in fact be simply a modification of the prior project; and 2) the original project must have been subjected to complete environmental review so

that the baseline conditions with the original project can actually be known. Neither of these factors is present here.

Although the PV Project has been presented to the CEC as a modification of the Initial Project, it is in fact a new project. The *Benton* Court makes clear that the determination of whether a project is a new project or a modification of an existing project is not to be based solely on the agency's characterization of its action. "[T]o consider this fact alone as determinative of the scope of the project for purposes of CEQA review would constitute a triumph of form over substance." *Benton*, 1475-76. In *Benton*, under a mitigated negative declaration, a property owner had secured approval to construct a winery on its 856-acre site. Within nine months of the approval, the property owner had acquired an additional 120 acres adjacent to the original winery site, and had applied for another use permit to relocate the winery buildings to a new location within its enlarged property. By the time the County began environmental review of the new proposal, the property owner had already begun construction on the winery buildings in the originally approved location.

Although the applicant requested a new use permit for the relocation of these facilities within the overall winery project, the Court of Appeal determined that, for purposes of CEQA review, the County had effectively treated the property owner's request for a new use permit as a modification of the existing approval, which it found to be appropriate. Focusing on the fact that the property owner had already begun construction and therefore had vested rights in the original permit to

develop the winery, the Court rejected the petitioners' argument that environmental review of the entire project must be re-done. The applicant testified that the function of the two wineries was identical, and the petitioners could not demonstrate that any potential impacts from the new proposal required complete environmental review.

The proper application of the precedent in the *Benton* case will result in the opposite conclusion under the present facts. First, the SunCatcher and PV technologies are not identical. In fact, utility-scale projects using either technology are treated as alternatives to each other. The are not the same project. Second, as previous analysis in both the SA/DEIS and the FEIS demonstrate, however, PV technology will result in different impacts than SunCatcher technology. Calico Solar asserts, without any evidentiary support, that its PV project will have less impact than that previously analyzed by both BLM and the CEC.

Similarly, in *Temecula Band* of *Luiseno Mission Indians v. Rancho California Water District* (2010) 50 Cal.Rptr.2d 769, which Calico Solar also cites, the Court of Appeal reviewed the approval of a negative declaration for the relocation and shortening of one pipeline that was part of a previously approved water reservoir project which entailed construction of approximately 38 wells, 2 pump stations, 24 miles of pipeline, and a 187–acre recharge area. Because the pipeline relocation was deemed a "mere modification to an earlier project," the Court upheld the water district's action. *Id.* at 777.

Here, in contrast, it is clear that the project which has been proposed as a modification of the Initial Project is actually a new project, and it must be treated as such. If the only modification proposed by Calico Solar were the relocation of the main services complex south of the railroad, *Benton* and *Temecula* may lend more support to Calico Solar's position. However, Calico Solar proposes to develop a project that involves an entirely different technology from the Initial Project. It is BNSF's understanding that the PV Project involves different solar collectors and conversion units, different types of structures and supports, different construction techniques, different maintenance activities, different water use and different chemical use, in addition to the relocation of certain facilities. The two technologies do not interact with each other, and the do not even produce the same type of current. Other changes proposed under the PV Project include: 1) delaying the construction of the proposed grade separation; 2) placing private at-grade crossings in a BNSF station or in the BNSF Right-of-Way; 3) driving construction vehicles within the BNSF Right-of-Way for approximately 1.5 miles for approximately 2.5 years; and 4) placing a waterline under the BNSF Right-of-Way. So different is the PV Project from the Initial Project that the CEC does not even have jurisdiction over the PV Project, as discussed above.

As noted above, the PV Project was rejected as an alternative because it would have greater environmental effects than the Initial Project, as it would involve grading of the entire site. Calico Solar Final Environmental Impact Statement, August 6, 2010 ("FEIS"), at p. 2-53. There is no basis in Calico Solar's

amendment, other than an unsupported conclusion, that the proposed PV facility will not have this impact. The changes in Calico Solar's proposal are so great that the PV Project must be deemed a new project.

Also, Calico Solar cannot rely on *Benton* because the validity of the certification for the Initial Project is uncertain. In that case, the County counsel pointed out that the applicant could not be prohibited from moving forward with its initial proposal. In contrast, as was discussed in BNSF's Opening Brief, BLM has issued no Notice to Proceed, and has issued two Notices of Intent to Terminate Calico Solar's ROW. It cannot conduct ground-disturbing activities prior to the issuance of the Notice to Proceed. This fact, coupled with Calico Solar's admission the SunCatcher is not commercially available or viable, make it clear they are not able to proceed with the Initial Project. Calico Solar has no existing right to move forward under either its existing ROW or CEC Certification. In fact, Calico Solar, did not proceed forward even under Phase 1A of the CEC Certification by year-end 2010, prior to the sale of the project by Tessera Solar to K Road.

Finally, as has been established, Calico Solar does not intend to construct the Initial Project as the SunCatcher is not commercially available or economically viable, nor may Calico Solar proceed under the original certification because it is out of compliance for failure to properly prepare various studies, reports and plans required by the original Conditions of Certification. Calico Solar is also precluded from proceeding under the originally issued ROW, because it is conditioned upon

the development of the project as described in the Plan of Development, i.e., the 663.5MW all-SunCatcher project.

Staff erroneously relies on *Communities for a Better Environment* for the proposition that the baseline is not rigid. However, the Supreme Court in that case did not conclude that "an increased use of equipment was to be evaluated as part of the project and as part of the baseline setting," as asserted by Staff. Rather, in that case, the Supreme Court concluded the air district had abused its discretion in using the maximum permitted use as a baseline, as the applicant's proposal could not "be characterized as merely the modification of a previously analyzed project … or the continued operation of [the previously analyzed project]…" *Communities for a Better Environment*, at 326. Much like the facts here, "the [new project] proposed adding a new refining process to the facility, requiring the installation of new equipment as well as the modification and significantly increased operation of other equipment." *Communities for a Better Environment* endorsed the use of a baseline consisting of the reasonably foreseeable conditions on the expected date of project approval under limited circumstances. However, the key is "reasonably foreseeable." As has been stated, the development of the Initial Project is speculative at best, and it therefore cannot be deemed "reasonably foreseeable" that the physical conditions at the time of consideration of the PV Project include construction of the Initial Project.

For the reasons elaborated above, Calico Solar lacks substantial evidence that the site conditions that would result from development of the Initial Project

are a *realistic* measurement of the site conditions without the PV project. The baseline must reflect the "real conditions on the ground" to avoid "illusory comparisons that can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts." *Communities for a Better Environment*, 48 Cal 4th 310, 321. Thus, the baseline cannot include Initial Project and must be the physical conditions on the site as it exists today.

**Issue 2.b.**

**Are any of the conditions identified in CEQA Guidelines section 15162 present? If so, what are they, and which portions of the Energy Commission's December 2010 Calico Solar Project decision would the Commission be required to re-evaluate?**

CEQA Guidelines section 15162 governs the preparation of subsequent EIRs. It applies in those situations "[w]hen an EIR has been certified". CEQA Guidelines §15162. In this case, no EIR has been prepared for the PV Project. First, the PV Project cannot be treated as "a mere modification" of the Initial Project. It is clear that the prior environmental processes, both federal and state, evaluated the siting of a utility-scale PV facility at this location as an *alternative project* to the Initial Project. It cannot now be characterized as "a mere modification" of the Initial Project. Second, Calico Solar never performed several critical baseline studies. There has been no evaluation of the Initial Project's impacts on several key environmental considerations, including but not limited to, soil and water resources and glare and glint. Finally, Calico Solar's failure to

perform various studies, reports and plans required under the December 1, 2010 certification makes the validity of that certification uncertain. Therefore, it cannot be said that any EIR or CEQA-equivalent document has been properly certified with respect to the proposed PV Project. The guideline, therefore, would not apply. BNSF has, however, identified in the response to Issue 2.a. in its Opening Brief, some of the major environmental issues the appropriate lead agency should evaluate in performing an environmental review of the proposed utility-scale PV Project. Additional issues have been identified in its Petition to Intervene. The PV Project is by definition a separate project and requires a complete environmental review under CEQA.

## CONCLUSION

For the foregoing reasons, BNSF respectfully requests that the Commission:

1. Dismiss the Petition to Amend for lack of jurisdiction; and
2. Withdraw the Commission Decision previously issued on December 1, 2010, in light of the evidence that SunCatchers were not then and are not now commercially available.

June 3, 2011

/s/

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