

**STATE OF CALIFORNIA**

**ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

DOCKET NO. 08-AFC-13

In the Matter of:

The Calico Solar Project

**PETITION TO REVOKE  
CERTIFICATION AND TO STAY  
COMPLIANCE PROCEEDINGS  
PENDING ADJUDICATION OF  
THIS PETITION**

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

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

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

- (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant;

- (2) Any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision.

Cal.Pub.Res. Code § 25534(a).

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

previously issued in its Final Decision, effective December 1, 2010, on the ground that the Applicant's application and supplemental documentation contained material false statements regarding the commercial availability of SunCatchers for the Calico Solar Project.

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

4. Applicant represented that "Phase I," which included the emplacement of "approximately 20,000 SunCatcher dishes" would occur by 2010. See *id.* at p.2-3 [Project Objectives/Purpose and Need].

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

6. On May 14, 2010, in order to reduce the environmental impacts associated with bighorn sheep and desert tortoise movement corridor and to lessen potential impacts to two known sensitive plant species, Applicant submitted a Supplement to Application for Certification, under penalty of perjury, again representing that the project would utilize approximately 34,000 SunCatchers on a reduced project footprint of 7,130 acres. *See Exhibit B.*

7. On September 3, 2010, the Commission permitted Applicant to propose several reduced footprint project scenarios in order to reduce the Project's impacts to high quality habitat affecting desert tortoise and big horn sheep.

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

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

Exhibit D. The Applicant further stated that the reduced Project “will allow delivery of first power in a manner consistent with the PPA, and can accommodate phasing to meet SCE’s schedule for regional transmission upgrades.” *Id.*

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

11. The Calico Solar Project was certified by the Commission on December 1, 2010.

12. Thereafter, on December 24, 2010, Tessera Solar North America sold Applicant, Calico Solar, LLC (“Calico Solar”), to K Road Sun LLC. At that time, Tessera Solar announced that it had done so, because had it determined that “SunCatchers would not be commercially viable in the near term.” See Exhibit F. [CEC Calico Solar Amendment at page 3-1, §3.1.]

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

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

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

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

17. Instead, the commercial availability of SunCatchers is entirely dependent upon obtaining "investor financing," which, apparently, has not yet been obtained.

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

19. It has been manifestly unfair to put BNSF and other Intervenors whose interests are directly impacted by the Calico Solar Project in the untenable position of having to continue to protect their interests, without the Commission first requiring Applicant to demonstrate that the SunCatcher technology, upon which the Calico Solar Project and this Commission's jurisdiction is dependent, was and is, in fact, commercial viable and commercially available.


20. In addition, BNSF has been harmed and prejudiced by Applicant's submissions based upon a technology that is not now commercially viable and available. BNSF has expended and continues to expend substantial resources, both human and monetary, and to incur expert and legal fees to address significant health, environmental and operational concerns arising from the CEC's processing and approval of the Calico Solar SunCatcher Project. BSNF should not be required to take actions to ensure the safety of its employees, agents and operations against the effects of a hypothetical solar generation

facility dependent upon a technology that is not now commercial viable or available, even as we speak.

21. Since Applicant never had the ability to provide SunCatchers, the December 1, 2010 certification should be revoked, forthwith. Accordingly, BNSF requests that the Commission not only revoke its original December 1, 2010 certification of the Calico Solar Project, but also stay any and all proceedings in connection with Applicant's Petition to Amend, dated March 18, 2011, pending determination by the Commission of its jurisdiction to proceed and of the commercial viability and availability of SunCatchers.

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

June 30, 2011

  
Orest B. Dachniwsky  
Associate General Counsel  
BNSF Railway Company

## VERIFICATION

I, Orest B. Dachniwsky, hereby declare:

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

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

  
Orest B. Dachniwsky





BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
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**FOR THE CALICO SOLAR PROJECT  
AMENDMENT**

**Docket No. 08-AFC-13C  
PROOF OF SERVICE  
(Revised 6/7/2011)**

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**DECLARATION OF SERVICE**

I, Helen B. Kim, declare that on July 7, 2011, I served by U.S. mail and filed copies of the attached **Verified Petition to Revoke Certification and to Stay Compliance Proceedings Pending Adjudication of This Proceeding**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

**[[www.energy.ca.gov/sitingcases/calicosolar/compliance/index.html](http://www.energy.ca.gov/sitingcases/calicosolar/compliance/index.html)].**

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

**(Check all that Apply)**

**FOR SERVICE TO ALL OTHER PARTIES:**

- sent electronically to all email addresses on the Proof of Service list;
- by personal delivery;
- by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

**AND**

**FOR FILING WITH THE ENERGY COMMISSION:**

- delivering an original paper copy and sending one electronic copy by e-mail to the address below (**preferred method**);

**OR**

depositing in the mail an original and 12 paper copies, as follows:

**CALIFORNIA ENERGY COMMISSION**

Attn: Docket No. 08-AFC-13C  
1516 Ninth Street, MS-4  
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

  
\_\_\_\_\_  
Helen B. Kim  
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Attorneys for BNSF Railway Company