



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Tessera Solar,

Complainant,

CASE No. C1010015

vs.

BNSF Railway Company

Defendant.

**ANSWER OF BNSF RAILWAY COMPANY
TO COMPLAINT OF TESSERA SOLAR**

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**ANSWER OF BNSF RAILWAY COMPANY
TO COMPLAINT OF TESSERA SOLAR**

Pursuant to Rule 4.4 of the Rules of Practice of the California Public Utilities Commission (Commission), defendant BNSF Railway Company ("BNSF") submits this Answer to the Complaint, filed with the Commission by Tessera Solar ("Tessera Solar") on October 21, 2010 and pursuant to the Instructions to Answer, filed on November 4, 2010. BNSF submits this Answer without waiving its objections as to jurisdiction and standing, of which BNSF specifically reserves and regarding which BNSF has filed a Motion to Dismiss.

1. Summary of Answer

According to Tessera Solar's Complaint, Tessera Solar seeks two specific forms of relief:

1. Ensure that, should the CEC permit the project, BNSF allow temporary access for desert tortoise translocation and construction necessary to access ARRA funding.

2. Require BNSF to approve the previously filed crossing and access requests in a normal, timely, and non-discriminatory manner.

[See Attachment B to Complaint.]

The Complaint itself fails to further describe or explain what "temporary access" Tessera Solar seeks. Nor does the Complaint attach the alleged "previously filed crossing and access requests." During the Prehearing Conference on November 30, 2010, Tessera Solar stated its position. Tessera Solar stated that it seeks orders for two private crossings: (1) one "temporary crossing at Hector Road"; and (2) one permanent grade-separated crossing east of Hector Road. [11/30/2010 TR at 6:17-7:7, 56:10-18, 63:7-15; see also Exhibit A to Tessera Solar's Prehearing Conference Statement, filed 11/30/2010.]

The Complaint at Section (G)(4) lists the issues to be considered as: "BNSF should be processing the previously filed crossing and access requests in a normal, timely and non-discriminatory manner." Tessera Solar fails to attach any such "previously filed crossing and access requests" because there are no such requests by Tessera Solar. Moreover, Tessera Solar does not have the requisite ownership of the property at issue. Further, what Tessera Solar refers to as the "Hector Road Crossing" does not cross Hector Road. It is a private Maintenance-of-Way ("MOW") Crossing that connects the northerly and southerly MOW roads that run parallel to the mainline tracks within the BNSF Right-of-Way (ROW"). The MOW Crossing and the BNSF MOW roads are all exclusively within BNSF's ROW. In fact, the MOW Crossing is located at a BNSF station area, which, among other things, is used to lay down materials for railroad infrastructure and operations, and for setting on and off track supervisor equipment to inspect the tracks. Whereas most of the BNSF ROW is 100 feet wide from the center line of

the tracks; the area where the MOW Crossing is situated is a station and lay down area that is 200 feet wide from the center line of the tracks, to accommodate materials, infrastructure, and operations. The location of the MOW Crossing is situated where the track supervisors' territory splits, is based on the location of the BNSF station and laydown area, and is not associated with Hector Road or any public or private roadway.

Based on the face of the Complaint, therefore, there is no justiciable issue by and between Tessera Solar and BNSF of which the Commission has jurisdiction. Accordingly, the Complaint should be dismissed.

While the Complaint contains an Attachment A that refers to an entity named "Calico Solar," no such entity is a named party to the Complaint, which is brought solely in the name of Tessera Solar. While BNSF will respond herein to the material allegations contained in Attachment A, BNSF does so without waiving its objections as to jurisdiction and standing, of which it specifically reserves.

As explained during the Prehearing Conference, BNSF and Calico Solar entered into a Confidentiality and Reimbursement Agreement by and between BNSF Railway Company and Calico Solar LLC, dated March 26, 2010 (the "Agreement"), which precludes Calico Solar LLC from raising any claims relating to crossing or access in a forum other than the Los Angeles Superior Court. Attachment A to Tessera Solar's Complaint contains numerous misstatements and completely omits the critical fact that all prior payments to BNSF were pursuant to

this Agreement and that Calico Solar has been in material breach of the Agreement since at least September 2010. Accordingly, Calico Solar has no basis or standing to pursue any of its purported claims before the Public Utilities Commission and any such claims, which BNSF specifically denies, are barred by the Agreement. For these reasons, BNSF has filed a complaint in Los Angeles Superior Court to address these issues pursuant to the Agreement.

2. BNSF's Responses to the Complaint's Material Allegations

In compliance with Rule 4.4 of the Rules of Practice and consistent with BNSF's Motion to Dismiss pursuant to Rule 11.2 of the Rules of Practice, BNSF hereby specifically answers the material allegations of and by Tessera Solar and relating to Tessera Solar's purported claims against BNSF. To the extent any material allegation in the Complaint is not expressly admitted herein, BNSF denies such allegation as it pertains to the sole named Complainant and is relevant to the sole Complainant named in the Complaint, Tessera Solar.

BNSF lacks sufficient information and belief to respond to the allegation in paragraph D regarding the Complainant. BNSF is aware of a corporate entity named Tessera Solar North America, Inc., and assumes that "Tessera Solar" refers to such entity and answers herein accordingly.

BNSF admits the allegations in paragraph E that it is the Defendant in this proceeding.

The allegations contained in paragraph F and Attachment A to the Complaint do not set forth any material allegations of or by Tessera Solar or

relating to actions taken by Tessera Solar or against Tessera Solar. While BNSF will respond herein to the material allegations contained in Attachment A, BNSF does so without waiving its objections as to jurisdiction and standing, which it specifically reserves.

As explained during the Prehearing Conference, BNSF and Calico Solar entered into a Confidentiality and Reimbursement Agreement by and between BNSF Railway Company and Calico Solar LLC, dated March 26, 2010 (the "Agreement"), which precludes Calico Solar LLC from raising any claims relating to crossing or access in a forum other than the Los Angeles Superior Court. Attachment A to Tessera Solar's Complaint contains numerous misstatements and completely omits the critical fact that all prior payments to BNSF were pursuant to this Agreement and that Calico Solar has been in material breach of the Agreement since at least September 2010. Accordingly, Calico Solar has no basis or standing to pursue any of its purported claims before the Public Utilities Commission and any such claims, which BNSF specifically denies, are barred by the Agreement. For these reasons, BNSF has filed a complaint in Los Angeles Superior Court to address these issues pursuant to the Agreement.

Regarding Tessera Solar's claim that "BNSF has threatened to withhold access to Calico Solar to cross and use the railroad right-of-way," Tessera Solar's representative stated at the Prehearing Conference that it no longer needs an "application for use of [BNSF's] right-of-way." [11/30/2010 TR at 56:8-19.] Accordingly, BNSF treats this allegation as limited to "cross" and not "use."

To the extent that this allegation refers to an application to cross the MOW Crossing, BNSF denies this allegation because neither Tessera Solar nor Calico Solar have submitted an application to BNSF to cross the MOW Crossing. Neither Tessera Solar nor Calico Solar have ever had a right or interest in the MOW Crossing or the BNSF ROW. BNSF did grant Calico Solar a Temporary Occupancy Permit for the exclusive purpose of a site survey within a portion of the BNSF ROW. Neither Tessera Solar nor Calico Solar own or have any right or property interest in or to lands immediately adjacent (to the north and south) of the MOW Crossing on the BNSF ROW.

To the extent this allegation refers to an a grade-separated crossing application by Calico Solar east of the BNSF station, BNSF has ceased processing that application pursuant to the Agreement. Regardless, due to significant changes by Calico Solar to its project in September 2010, subsequent to the filing of their application for a bridge crossing, the appropriate location for a grade-separated crossing cannot yet be determined pending appropriate performance by Calico Solar of certain Conditions of Certification established by the CEC.

To the extent Calico Solar claims it needs access to its site through a crossing at the MOW Crossing, BNSF denies this allegation. Calico Solar expressly conceded this point in its Applicant Calico Solar's Brief re Access to Patrick Jackson's Property, submitted by Calico Solar in the California Energy Commission ("CEC") Application for Certification Proceeding, 08-AFC-13, on August 11, 2010. In its Brief to the CEC, Calico Solar argued that Mr. Jackson's

property, which is sandwiched in the middle of the project site north of the railroad tracks and designated as N.A.P. (Not A Part) Area 1, is not landlocked and that Mr. Jackson had no right or entitlement to use BNSF's MOW Crossing.

Indeed, according to Calico Solar, the MOW Crossing is "not a legal crossing." Rather, Calico Solar expressly concedes that the Bureau of Land Management ("BLM") specifically "found 'that [t]he crossing was established as a BNSF ROW for access to, and maintenance of, the rail line and, and [sic] therefore, the crossing is not a public road.'" (Quoting from the BLM's Final Environmental Impact Statement of August 3, 2010 relating to the Calico Solar Project (the "FEIS"), at Appendix G, G-129.) Calico Solar further noted that the CEC Staff was in agreement with the BLM's assessment that "'the crossing is not a legal road with authorized access for the public.'" (Quoting from the CEC Supplemental Staff Assessment at C.8-13.)

As significantly, Calico Solar expressly stated that "Mr. Jackson will have continued access to his property." As Calico Solar explained, "Mr. Jackson still has access to his property via the roads to the east and west of the BNSF crossing [the MOW Crossing] at the Hector Road exit from I-40." Given that Calico Solar argues that Mr. Jackson has continued access, Calico Solar cannot here complain that it does not have access. Indeed, the FEIS notes that a number of BLM "open routes" traverse the Project Site. Those open routes are available for vehicular traffic and will remain open and accessible to Calico Solar, although they will be closed to the public. [FEIS at 3-139, 4-136, and Figure A-29.]

Regarding Calico Solar's allegation that "[t]his will delay translocation of desert tortoise and construction of the Calico Solar project, threatening the jobs that the project would create and the availability of ARRA funding to California," BNSF lacks sufficient information with which to admit or deny such allegation and on that basis denies the allegation.

Regarding Calico Solar's allegations in its first bullet point in Attachment A, BNSF denies the allegations as framed. BNSF specifically avers that "the Calico Solar project" has changed markedly in size, scope, outlay and impact over the recent months and that, as presently envisioned, BNSF has only known of the Calico Solar project since September 2010. BNSF admits that it did grant Calico Solar a Temporary Occupancy Permit for the exclusive purpose of a site survey within a portion of the BNSF ROW. To the extent not expressly admitted, BNSF denies any allegations in this first bullet point.

Regarding Calico Solar's allegations in its second bullet point in Attachment A, BNSF denies the allegations as framed. BNSF admits that Calico Solar has submitted an application for a grade-separated crossing across the BNSF ROW. Consistent with the Agreement, BNSF has ceased processing this request. Regardless, due to significant changes by Calico Solar to its project in September 2010, subsequent to the filing of their application for a bridge crossing, the appropriate location for a grade-separated crossing cannot yet be determined pending appropriate performance by Calico Solar of certain Conditions of Certification established by the CEC. BNSF admits that Calico Solar filed an

application for ROW access, but stated at the Prehearing Conference that it is "no longer need[ed]." [11/30/2010 TR at 56:16-19.] To the extent not expressly admitted, BNSF denies any allegations in this second bullet point.

Regarding Calico Solar's allegations in its third bullet point in Attachment A, BNSF denies the allegations as framed. BNSF admits that it has retained Katten Muchin Rosenman LLP. BNSF specifically avers that all funds requested and paid were pursuant to the Agreement, of which Calico Solar is in breach. To the extent not expressly admitted, BNSF denies any allegations in this third bullet point.

Regarding Calico Solar's allegations in its fourth bullet point in Attachment A, BNSF denies the allegations as framed. BNSF admits that BNSF personnel, experts retained by BNSF pursuant to the Agreement, and BNSF's counsel, have requested information pursuant to the Agreement. BNSF specifically avers that, to date, Calico Solar has provided some but not all of the requested information. To the extent not expressly admitted, BNSF denies any allegations in this fourth bullet point.

Regarding Calico Solar's allegations in its fifth bullet point in Attachment A, BNSF denies the allegations as framed. The implication that BNSF's intervention in the CEC proceeding was not agreed upon by Calico Solar and BNSF is patently untrue. BNSF made this very clear in its Petition to Intervene, which included the express representation that "Counsel for Calico Solar has been apprised of this Petition and supports this Petition." [Petition to Intervene at p. 4.]

Indeed, at the Prehearing Conference on July 30th, Hearing Officer Kramer made sure that Calico Solar, Staff, and all of the Intervenors had received BNSF's Petition and had an opportunity to review it. Hearing Officer Kramer asked, "no party feels that they'll be prejudiced by the late entry of this party into the case?" In response, Calico Solar's counsel represented, "The applicant doesn't." [July 30, 2010 CEC Prehearing Transcript at 7:1-6.] In its Order granting BNSF's Petition, the Commission specifically found that – "At the Prehearing Conference held on July 30, 2010, the parties were specifically asked if they wished to object to the Petition. No party indicated any objection to the Petition." [Committee Order Granting Petition to Intervene, dated, August 3, 2010, at page 2, paragraph 5.] To the extent not expressly admitted, BNSF denies any allegations in this fifth bullet point.

Regarding Calico Solar's allegations in its sixth bullet point in Attachment A, BNSF denies the allegations as framed. BNSF admits that, because of critical safety concerns BNSF requested in the CEC proceeding that no hydrogen line pass over, under or through the BNSF ROW. BNSF admits that Calico Solar has agreed to this as a Condition of Certification. BNSF admits that, because of critical safety concerns BNSF requested in the CEC proceeding that transmission lines be set back at least 300 feet from the BNSF ROW. BNSF admits that Calico Solar has agreed to this as a Condition of Certification. BNSF admits that, because of critical safety concerns BNSF requested in the CEC proceeding that a hydrology study be performed to assess the impact of Calico Solar's planned

operations on the BNSF ROW. Calico Solar agreed to this and provided preliminary funding for the study in August 2010. Subsequently, in September 2010, Calico Solar significantly altered the footprint of the project site and proposed the removal of approximately 600 acres of debris basins, detentions basins, and other flood control structures that all previous plans contained for the express purpose of protecting on-site and off-site facilities and lands, to include but not limited to the BNSF ROW. BNSF admits that Calico Solar has agreed to a Condition of Certification that includes a hydrology study; but avers that Calico Solar objected to a series of Conditions of Certification, setting performance standards and requiring additional studies, that the CEC adopted. Those studies are still in process. BNSF admits that, because of critical safety concerns BNSF requested in the CEC proceeding that a glint and glare study be performed to assess the impact of Calico Solar's planned operations on the BNSF ROW prior to the emplacement of any SunCatchers, particularly in light of the known safety hazard that SunCatchers pose on human receptors from glint and glare. Calico Solar has agreed to fund a study. BNSF specifically avers that it has a non-delegable duty to ensure the safety of its rail operations and train crews. To the extent not expressly admitted, BNSF denies any allegations in this sixth bullet point.

Regarding Calico Solar's allegations in its seventh bullet point in Attachment A, BNSF denies the allegations as framed. BNSF specifically avers

that BNSF requested additional funds be deposited pursuant to the Agreement and that the Agreement specifically provides that:

If at any point during the term of this Agreement BNSF reasonably determines that additional funds will be needed in the Deposit Account to fund the Expenses, Solar One shall deposit such additional funds with BNSF (to be held as part of the Deposit Account) within five (5) days after receiving such request. Further work by BNSF shall cease unless and until further funding of Deposit Account occurs.
[Agreement at § 7.]

BNSF admits that Calico Solar has refused to provide additional funds, in breach of the Agreement. BNSF admits that it has ceased processing Calico Solar's application pursuant to the Agreement. To the extent not expressly admitted, BNSF denies any allegations in this seventh bullet point.

Regarding Calico Solar's allegations in its eighth bullet point in Attachment A, BNSF denies the allegations as framed. On September 20, 2010, BNSF explained that the changes to hydrology mitigation had impacted BNSF's ability to process any applications. To the extent not expressly admitted, BNSF denies any allegations in this eighth bullet point.

3. Defects in the Complaint that Require Amendment or Clarification

Pursuant to Rule 4.4 of the Rules of Practice, BNSF hereby advises the Administrative Law Judge, consistent with the position BNSF set forth at the Prehearing Conference and BNSF's Motion to Dismiss, that the Complaint is fatally defective as to Tessera Solar. As noted, the Commission lacks jurisdiction to adjudicate the purported claims asserted by Tessera Solar in the Complaint

against BNSF. As to the entity identified as "Calico Solar" in Attachment A to the Complaint, but not identified as a complainant in this action, no further action or response is warranted or required by BNSF in relation to "Calico Solar" until and unless Calico Solar is properly named and identified as a complainant against BNSF. Additionally, Tessera Solar should be required to: (1) attach the actual applications on which it bases its Complaint; (2) specify precisely where each crossing is requested; (3) specify why the requested crossing is necessary at that particular location; (4) specify precisely where the roads will connect to the requested crossing and where they will go to from the crossing site; and (5) provide details regarding any other factual basis for the allegations in its Complaint.

4. Scoping Memo Information (Article 7)

BNSF agrees with Complainant's categorization that this proceeding is adjudicatory in nature. BNSF requests a hearing on BNSF's Motion to Dismiss. The threshold issue to be determined at this stage of the proceeding is whether Tessera Solar has the predicate ownership interest in property to bring a claim against BNSF under Cal.Pub.Util. Code §75373. Other issues, safety concerns, related matters, and hearings, if any, await the determination on BNSF's Motion to Dismiss and Tessera Solar providing the information requested in paragraph 3, above.

5. **Conclusion**

Accordingly, because: (1) Tessera Solar never submitted any crossing requests to BNSF; (2) Tessera Solar does not have the requisite ownership of any of the property at issue; and (3) the purported "Hector Road Crossing" is not at Hector Road at all, is clearly a private MOW Crossing within the BNSF ROW that connects the northerly and southerly MOW roads that run parallel to the main tracks within the BNSF ROW, and the MOW Crossing and the BNSF MOW roads are all exclusively within BNSF's ROW, BNSF respectfully requests that the Commission dismiss Tessera Solar's Complaint for lack for lack of jurisdiction over the claims contained therein.

December 6, 2010

S. A. Lamb

Cynthia Lea Burch
Steven A. Lamb
Katten Muchin Rosenman LLP

Attorneys for Defendant BNSF Railway Company

VERIFICATION

I, the undersigned, say:

I am an attorney of BNSF Railway Company, a corporation, and am authorized pursuant to California Code of Civil Procedure §446(a), paragraph 3, to make this verification for and on behalf of said corporation and I make this verification for that reason. I have read the foregoing pleading **ANSWER OF BNSF RAILWAY COMPANY TO COMPLAINT OF TESSERA SOLAR** and I am informed and believe that the matters stated therein are true and on that ground I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 6th day of December 2010 at Fort Worth, Texas.

Ward D. Werner

Ward D. Werner
Special Counsel to the Law Department

PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of Los Angeles. I am over the age of eighteen (18) years and am not a party to the within action. My business address is 2029 Century Park East, Suite 2600, Los Angeles, California 90067. On December 6, 2010, I served the within:

ANSWER OF BNSF RAILWAY COMPANY TO COMPLAINT OF TESSERA SOLAR
Case No C10-10-015

on the parties and representatives identified in the attached Service List, by electronic transmission to the e-mail address identified on the Service List.

In addition, I caused the a true and correct copy to be mailed by US Mail in an envelope, with postage fully prepaid, as follows:

Honorable Jessica T. Hecht
Administrative Law Judge
California Public Utilities Commission
ALJ Division
505 Van Ness Avenue, RM 5113
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, on December 6, 2010.

S. A. Lamb
Steven A. Lamb

SERVICE LIST

Tessera Solar v. BNSF Railway Company, CPUC No. C.10-10-015

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