



**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.

BNSF'S OPENING BRIEF REGARDING JURISDICTION

BNSF'S OPENING BRIEF REGARDING JURISDICTION

Pursuant to Administrative Law Judge Hecht's direction on November 30, 2010, at the Prehearing Conference, Defendant BNSF Railway Company ("BNSF") hereby submits its Opening Brief Regarding Jurisdiction. As noted during the Prehearing Conference and in BNSF's Answer, BNSF submits this Brief without waiving its objections as to jurisdiction and standing, of which BNSF specifically reserves and regarding which BNSF has filed a Complaint in Los Angeles Superior Court, Case No. BC450692 (copy attached. The Commission lacks jurisdiction over this matter as alleged for the following reasons:

- As to the BNSF Maintenance-of-Way ("Maintenance-of-Way) Crossing, the Commission lacks jurisdiction under *Siemens v. Union Pacific Railroad Company*, 2002 WL 31557220 (CPUC Oct. 24, 2002; Decision 02-10-038).
- As to the BNSF MOW Crossing, the Commission lacks jurisdiction because a prerequisite to any action under Cal.Pub.Util. Code §7537 is that the applicant have ownership of lands immediately adjacent to the BNSF MOW. Neither Tessera Solar nor Calico Solar LLC ("Calico Solar") (collectively the "Calico Parties") own the property to the north or south of the BNSF MOW. Nor is there a public or

private roadway both north and south of the BNSF MOW that the Calico Parties could use to connect to the Calico Solar Project.

- As to the requested grade-separation crossing at issue, neither Tessera Solar nor Calico Solar have even alleged that they own the property adjacent thereto. Tessera Solar admits it does not own any property. Calico Solar bases its claim on a BLM right-of-way lease and does not own the property. BLM is not before the Commission and has made no request regarding a grade-separated crossing to connect its property.
- As to Calico Solar, 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.
- As to Tessera Solar, as set forth in BNSF's Motion to Dismiss, which is incorporated by reference herein,¹ Tessera Solar does not have any ownership over lands adjacent to the BNSF Right-of-Way ("ROW") or the Calico Solar site.

¹ BNSF will not reiterate argument previously set forth in its Motion to Dismiss.

1. BNSF's MOW Is Not Subject To Commission Jurisdiction

A maintenance-of-way crossing is neither a public crossing, subject to the Commission's jurisdiction pursuant to Cal.Pub.Util. Code §§1201 and 1202, nor a private crossing, subject to the Commission's jurisdiction pursuant to Cal.Pub.Util.Code §7537. *Siemens v. Union Pacific Railroad Company*, 2002 WL 31557220 (CPUC Oct. 24, 2002; Decision 02-10-038). As the Commission explained in *Siemens*,²

There can be no dispute that the Commission has exclusive jurisdiction over public railroad crossings. Cal. Pub. Util. Code sections 1201 and 1202; *Los Angeles Ry. Corp. v. Los Angeles*, (1940) 16 Cal. 2d 779, 785; *City of San Mateo v. Railroad Com. Of California*, (1937) 9 Cal. 2d 1, 5-6; *City of Union City v. Southern Pac. Co.*, (1968) 261 Cal. App. 2d 277, 279. However, the crossing here does not concern a “public or publicly used road or highway.” Similarly, the crossing is not a farm or private crossing as contemplated within Pub. Util. Code § 7537 to “permit reasonably necessary or convenient ... ingress to or egress” from a farm or private property. **Instead, this crossing is the railroad's own crossing, serving the railroad's line for purposes of maintenance and service, located on the railroad's private property.**

Siemens, 2002 WL 31557220 at 2 (emphasis added).

The Crossing in *Siemens* was a maintenance-of-way crossing similar to the one in this matter. As here, the subject maintenance-of-way crossing was entirely within the railroad's right-of-way, was used to connect "two sections of an unpaved maintenance roadway located on the railroad right-of-way," and does "not cross a public or publicly used road or highway or

² Commissioner Peevey, who is assigned to this matter, was one of the Commissioners that issued the *Siemens* decision.

street." *Id.* at 3 ("Findings of Fact").

Indeed, what Tessera Solar sometimes refers to as the "Hector Road Crossing," is actually the BNSF MOW Crossing. The BNSF MOW Crossing does not cross or connect with Hector Road, or any other public or private roadway. It is a private maintenance-of-way 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. Stations are critical safety features in rail operations.³ 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

³ Stations have multiple functions, some of which include the staging and operation of maintenance-of-way vehicles, the staging of equipment for surfacing gangs and tie gangs, and the setting out of cars with hot wheels for maintenance. Cars with hot wheels are placed on set out tracks such as those located at Hector Station. Detectors are located along on the rail line to detect hot wheels on railcars. This information is transmitted to the train. Set out tracks are located throughout the rail line, at distances from the detection locations that permit the train to stop and detach the car with the hot wheels. The detached car is placed on set out tracks to await maintenance.

laydown area, and is not associated with Hector Road or any public or private roadway. [See BNSF's Answer at pp. 3-4.]

Calico Solar has expressly conceded that the BNSF MOW Crossing is not a public or private crossing. In the California Energy Commission ("CEC") Application for Certification Proceeding, 08-AFC-13, Calico Solar faced opposition to certification from Patrick Jackson. Mr. Jackson is a private landowner whose property is sandwiched within the northern section of the proposed Project Site and designated as N.A.P. (Not A Part) Area 1. [See Map submitted by Tessera Solar with its Prehearing Conference Statement of November 30, 2010 (annotated to reflect the location of Patrick Jackson's Property and the approximate location of BNSF's MOW Crossing.)]

In its Brief to the CEC,⁴ Calico Solar argued that Mr. Jackson's property is **not landlocked**⁵ and that Mr. Jackson had no right or entitlement to use BNSF's

⁴ A Copy of Calico Solar's Brief re Patrick Jackson's Property is attached.

⁵ 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 concedes 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 a portion of these roads will be closed to the public by Calico Solar. See Attachment E, hereto, a map referred to in Calico Solar's Brief (identified in the CEC proceeding as Exhibit 82), prepared by Calico Solar's consultant and submitted by Calico Solar, entitled "Current Public Access Routes And Pre-Construction Route Designations Calico Solar Project." This map, which has been annotated to reflect the approximate location of the BNSF MOW Crossing, clearly shows that Calico Solar represented to the California Energy Commission that it has access through "Current Public Access Routes" to the Calico Project Site from both the west and the east. Again, the BNSF MOW

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.)

2. Section 7537 Does Not Apply To The MOW Crossing Because The Calico Parties Do Not Own Land Adjacent To The MOW Crossing

Regardless, a prerequisite to an application for a private crossing under Section 7537⁶ is the applicant must own lands adjacent to the requested crossing. *See, e.g., Dept. of Pub. Works v. Chastain*, 180 Cal.App.2d 805, 808 (1990)

Crossing is not adjacent to any Calico Project Site property on either side to the BNSF ROW.

⁶ Cal.Pub.Util Code §7537 provides:

The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner. The owner or operator of the railroad shall construct and at all times maintain such farm or private crossing in a good, safe, and passable condition. The commission shall have the authority to determine the necessity for any crossing and the place, manner, and conditions under which the crossing shall be constructed and maintained, and shall fix and assess the cost and expense thereof.

("[S]ection 7537 of the Public Utilities Code gives to the owner of land through which any railroad is constructed a right of ingress and egress."); *see also Buehler v. Burlington Northern & Santa Fe Railway Company*, Case No. 01-01-016, Unreported Decision 02-07050 (July 23, 2002). As the Commission explained in *Buehler*,

Legal standards governing private landowners' access to private crossings, such as they exist, pertain to adjoining landowners. Access problems also can arise under circumstances, such as those presented here, where landowners are not adjacent to the railroad tracks and crossing, but access problems do not, by themselves, create a legal entitlement to a crossing.

Buehler at 8.

The Buehlers' residence was in a development which used a private road that ran across the railroad tracks to the development. The development (and the Buehlers' property), however, was not immediately adjacent to the railroad tracks. There were other private lands between the railroad tracks and the development. While the Commission in *Buehler* sympathized with the access issues that the Buehlers were faced with, it made it clear that the Buehlers had no standing to request that the Commission order the creation of a private crossing under Section 7537.

Private property does adjoin the BNSF right-of-way, but complainants do not own that property. Thus complainants lack standing under §7537 to request that the Commission formally adjudicate the crossing as private for purposes of their "ingress to or egress from" lands through which the "railroad is constructed or maintained."

Buehler at 9.

Here, a simple review of the Map submitted by Tessera Solar with its Prehearing Conference Statement shows that the lands immediately north and south of BNSF's MOW Crossing are not within the Calico Project site and are not owned by either of the Calico Parties. Accordingly, the Commission lacks jurisdiction under Section 7537.⁷

3. Neither Tessera Solar Nor Calico Solar Own Property Adjacent To The Requested Grade-Separated Crossing

As to the requested grade-separation crossing at issue, neither Tessera Solar nor Calico Solar have even alleged that they own the property adjacent thereto. Tessera Solar admits it does not own any property. Calico Solar bases its claim on a BLM right-of-way lease and does not own the property.⁸ BLM is not before the Commission and has made no request regarding a grade-separated crossing to connect its property. Accordingly, because neither of the Calico Parties own property adjacent to the requested grade-separated crossing, the Commission lacks jurisdiction to act.

⁷ The phrase “lack of jurisdiction,” usually refers to one of two different concepts, although the distinction between them is hazy: (1) a lack of jurisdiction in its fundamental or strict sense results in an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties; or (2) a court may have jurisdiction in the strict sense but nevertheless lack “jurisdiction,” or power, to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. See *People v. Lara*, 48 Cal.4th 216, 224 (2010). Here, the Commission lacks jurisdiction in the second sense.

⁸ See the Calico Parties TRO Brief at pp.1-2.

4. Calico Solar Is Barred By Contract From Bringing This Action

Again, because the Administrative Law Judge has directed the parties to submit briefs regarding jurisdictional issues, BNSF brings to the Commission's attention the fact that Calico Solar is barred from bringing the instant action. BNSF does so, however, without waiving its right to have these issues resolved in the proper forum, the Los Angeles County Superior Court. As set forth in its Answer, BNSF has filed a Complaint in Los Angeles Superior Court, Case No. BC450692, to enforce its rights under 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. In its Motion for Temporary Restraining Order ("Motion for TRO"), the Calico Parties acknowledge that Calico Solar entered into and is bound by the Agreement. [Motion for TRO at pp. 4-5, Declaration of Felicia Bellows at ¶13 and Exhibit 6 thereto.]

Calico Solar entered into the Agreement for the express purpose of having BNSF "analyze and determine whether BNSF will agree to grant [Calico Solar] a roadway access agreement and/or a grade separated crossing (the "Analysis")." [Agreement, Recital B.] While the Complaint is vague and conclusory, Tessler Solar has since stated its position regarding the claims made in the Complaint and the relief it seeks. 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. Accordingly, there is no doubt that the Calico Parties⁹ make claims and seek relief relating to "a roadway access agreement and/or a grade separate crossing (the "Analysis")," which is the subject of the Agreement.

The Agreement specifically provides that: "This Agreement shall be governed by and construed in accordance with the laws of the State of California, and any legal action or proceeding arising out of or in connection with this Agreement shall be brought and maintained in the applicable court in the State of California with venue in the city and county of Los Angeles." [Agreement at § 15 (emphasis added).] The Agreement further specifically provides that: "[Calico Solar] agrees (i) that money damages would not be a sufficient remedy for any breach or threatened breach of this Agreement by [Calico Solar] or its employees or agents, and (ii) that, in addition to all other remedies, BNSF shall be entitled to specific performance, and injunctive or other equitable relief, as a remedy for any such breach or threatened breach." [Agreement at § 12.]

⁹ The Calico Parties Joint Motion to Amend to add Calico Solar as a complainant does not add or alter the claims alleged or relief sought.

Attachments

- A Los Angeles Superior Court, Case No. BC450692
- B *Siemens v. Union Pacific Railroad Company*, 2002 WL 31557220 (CPUC Oct. 24, 2002; Decision 02-10-038)
- C Map submitted by Tessera Solar with Prehearing Conference Statement (annotated to reflect approximate location of BNSF's MOW Crossing and Patrick Jackson's property)
- D Calico Solar's Brief to CEC re Patrick Jackson's Property
- E Map (Exhibit 82 to Calico Solar Brief re Patrick Jackson's Property, annotated to reflect approximate location of BNSF's MOW Crossing
- F *Buehler v. Burlington Northern & Santa Fe Railway Company*, Case No. 01-01-016, Unreported Decision 02-07050 (July 23, 2002)

SERVICE LIST

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

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