



FILED

12-15-10
04:59 PM

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

Tessera Solar,

Complainant,

Complaint 10-10-015
(Filed October 21, 2010)

vs.

BNSF Railway Company,

Defendant.

**TESSERA SOLAR AND CALICO SOLAR, LLC
CONCURRENT REPLY BRIEF RE JURISDICTION**

William D. Kissinger
Todd O. Edmister
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111

Attorneys for
Tessera Solar and Calico Solar, LLC

December 15, 2010

I. INTRODUCTION

Pursuant to the assigned ALJ's order at the November 30, 2010 pre-hearing conference in this matter, Tessera Solar and Calico Solar LLC (the "Calico Parties") hereby submit their concurrent reply brief on jurisdictional issues.

In order to construct their CEC-approved 663.5 megawatt solar energy project (the "Calico Solar Project" or "CSP"), the Calico Parties need to cross a BNSF rail line that bisects the project site. Tessera Solar's complaint asks the Commission to order crossings for both the immediate and longer term, and to prevent BNSF's discriminatory treatment of the Calico Parties.

BNSF challenges, on a variety of grounds, the Commission's jurisdiction to issue the requested relief. Tessera Solar and Calico have already addressed most of BNSF's arguments in their opening papers; none are meritorious. The Calico Parties urge the Commission to quickly dispense with BNSF's jurisdictional arguments and order BNSF to provide the Calico Parties with immediate temporary access to the Hector Road crossing, and, longer term, a grade-separated crossing over the BNSF tracks that connects both sides of the CSP site without the need for an at-grade crossing.

II. THE COMMISSION CAN ORDER THAT THE HECTOR ROAD CROSSING BE MADE AVAILABLE AS A PRIVATE CROSSING EVEN THOUGH BNSF USES IT FOR MAINTENANCE PURPOSES

BNSF devotes much of its opening brief to the argument that the Commission in *Siemens v. Union Pacific Railroad Company*, Decision 02-10-038, 2002 Cal. PUC

LEXIS 661 (2002) disclaimed jurisdiction over “maintenance of way” (“MOW”) crossings. As part of its argument, BNSF tries to characterize the Hector Road crossing as an MOW crossing, and disavows any association between the crossing and Hector Road.

Whether BNSF uses the Hector Road crossing for maintenance, and the name BNSF attaches to the crossing, are irrelevant to this proceeding. Public Utilities Code section 7537 simply requires BNSF to provide a private crossing and any needed right of way to land adjacent to the railroad. The Commission accordingly has a panoply of options available. It could order BNSF to build a new crossing. Alternatively, it could compel BNSF to keep open an existing crossing – i.e., the Hector Road crossing –for a limited time or permanently. This is true regardless of how BNSF characterizes the crossing. In a relatively recent prior proceeding involving BNSF,¹ cited by BNSF itself in BNSF’s opening brief, BNSF argued, as here, for dismissal based on lack of jurisdiction. The Commission, however, denied BNSF’s motion and ordered the crossing at issue reopened pending a long-term solution. BNSF asserted in that prior proceeding, as here, that the crossing at issue was intended only for use by maintenance crews.² Despite the Commission’s conclusion that the crossing at issue was not public, and although the complainants’ land, unlike the CSP site, was some distance away from the railroad, the Commission nonetheless undertook to “consider whether it is necessary to

¹ *Buehler v. Burlington Northern & Santa Fe Railway Co.*, 2002 Cal. PUC LEXIS 333, *2 (2002) (“*Buehler*”).

² *Id.* at *5.

keep open the Summit Truck Trail crossing by evaluating the need for such crossing under Pub. Util. Code §§ 7537 and 1202(b).”³ So here, it should examine the Calico Parties’ claims under section 7537.

Siemens is not to the contrary, and certainly does not stand for any general proposition that MOW crossings are extra-jurisdictional. The crossing in *Siemens* was used for maintenance, but that fact was not determinative of the case, and the Commission nowhere in that decision states that it has no jurisdiction over a crossing used for maintenance. Responding to neighbors’ complaints that the crossing should be closed because train horns were too noisy, the Commission simply found that “Complainant has not demonstrated that public safety requires this crossing to be closed, reconfigured or relocated.”⁴ Implicit in this statement is that the Commission *could* have ordered the crossing closed had facts warranted, but the requisite facts were lacking: “[w]hile complainant has raised issues of noise and enjoyment of his private property, discussed infra, he has otherwise failed to provide us with the necessary authority on which we might require the railroad to close, reconfigure, or relocate this crossing.”⁵ *Siemens* does not stand for the proposition that crossings used for maintenance are exempt from the Commission’s general authority over rail crossing.

Further distinguishing the facts here from those in *Siemens*, the record in this dispute shows that the Hector Road crossing has not been used just by BNSF, or just for

³ *Buehler*, 2002 Cal. PUC LEXIS 333, *16.

⁴ *Siemens*, 2002 Cal. PUC LEXIS 661, *4.

⁵ *Id.*

maintenance. BNSF has previously made the Hector Road crossing available to the Calico Parties as a private crossing.⁶ Further, the gate through which the Calico Parties previously accessed the crossing is locked with multiple padlocks “daisy-chained” together. The Calico Parties possess a key to only one of these locks, with the implication being that others besides Calico and BNSF have access to the crossing as well.

Turning to the question of what to call the Hector Road crossing, BNSF itself has used the names “Hector” and “Hector Road” to describe the crossing.⁷ Moreover, the name of the crossing would not seem to have any legal significance. Perhaps BNSF is anticipating an argument that the Hector Road crossing is a public crossing, and thinks the crossing name has some bearing on the public/private distinction. Be that as it may, the Calico Parties do not contend that the Hector Road crossing is or should be a public crossing.

III. CALICO IS THE PROPERTY OWNER FOR PURPOSES OF PUBLIC UTILITIES CODE SECTION 7537

BNSF claims in a bullet in the introduction to its brief that neither of the Calico Parties “own the property to the north or south of the BNSF MOW.”⁸ BNSF asserts in a subsequent bullet that “Calico Solar bases its claim on a BLM right-of-way lease and

⁶ See May 30, 2008 “Agreement for Private Crossing” between the Calico Parties’ corporate predecessor and BNSF. Declaration of Felicia Bellows in Support of Tessera Solar and Calico Solar, LLC Brief Re Jurisdiction, ¶ 6, Ex. 6 (Dec. 8, 2010).

⁷ See *Id.*, Ex. 6, Exhibits A, C.

⁸ BNSF’S Opening Brief Regarding Jurisdiction, p. 2.

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.”⁹

The first point – that the Calico parties do not own land adjacent to the *crossing* – is irrelevant to the Calico Parties’ claims under section 7537. That statute requires only that the land in question be adjacent to railroad right of way, not that complainants’ land be adjacent to the crossing. Section 7537 allows the Commission to order “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.” Thus the Commission could order BNSF to make right of way available as needed to connect the Hector Road crossing to the CSP site. The Calico Parties are not requesting such an order because there is a BLM road that will tie the crossing to the site; BNSF offers no reason why the Calico Parties’ self-limited “ask” here should deprive the Commission of jurisdiction.

BNSF asserts that BLM, not Calico owns the land under the CSP. However, pursuant to a 30-year BLM right-of-way grant,¹⁰ the Calico Parties have the possessory interest in land adjacent to the tracks, for which the Calico Parties will be taxed an estimated \$950,000 per year by San Bernardino County.¹¹ This long-term ownership of a possessory interest is sufficient to qualify as “ownership” for purposes of Public Utilities

⁹ *Id.*, p. 3.

¹⁰ See Declaration of Felicia Bellows in Support of Joint Motion of Tessera Solar and Calico Solar, LLC for Temporary Restraining Order And Preliminary Injunction, Ex. 1 (Dec. 6, 2010).

¹¹ <http://www.energy.ca.gov/2010publications/CEC-800-2010-012/CEC-800-2010-012-CMF.PDF>, Override Findings at 4.

Code section 7537.¹² While the question of what constitutes “ownership” for purposes of section 7537 has not been litigated, another jurisdiction has addressed the question of whether a “tenant” can assert crossing rights under an analogous statute. The New Hampshire Supreme Court concluded that: “plaintiff, as tenant by curtesy, possessed and was entitled to enjoy the right to use farm crossings which were appurtenant to the premises so held by him. If those rights were infringed, the plaintiff’s life interest was sufficient to enable him to maintain any appropriate remedy in law or equity to redress the wrong, independent of the owners of the fee.”¹³ BNSF has not cited any authority stating that “owner” under section 7537 must mean the owner of the fee interest, *i.e.*, BLM. The Commission should recognize that the Calico Parties’ possessory interest under the long-term BLM right-of-way grant entitles the Calico Parties to a private crossing under section 7537.

¹² “The primary meaning of the word [owner] when applied to land is one who owns the fee and who has the right to dispose of the property, *but the term also includes one having a possessory right to land or the person occupying or cultivating it.*” Black’s Law Dictionary (emphasis added), Abridged 5th ed. (1983) at 574. *See also* Black’s Law Dictionary, 9th Ed. at 1214 (owner is “One who has the right to possess, use, and convey something; a person in whom one or more interests are vested.”)

¹³ *Costello v. Railway*, 70 N.H. 403, 404 (1900)(“ At the time of the construction of the defendants’ railroad and since, the statute imposed upon railroad corporations the duty to provide suitable crossings *for the accommodation of landowners* in accordance with the agreement of the parties, or, if unable to agree upon the place, number, or kind of such crossings, then in accordance with the determination of some tribunal provided for that purpose.” (emphasis added)).

IV. NOTHING IN THE “CONFIDENTIALITY AND REIMBURSEMENT AGREEMENT” DEPRIVES THE COMMISSION OF JURISDICTION TO ORDER PRIVATE CROSSING ACCESS UNDER PUBLIC UTILITIES CODE SECTION 7537

The Calico Parties have explained at length in their opening brief why the Confidentiality and Reimbursement Agreement cannot be construed to deprive the Commission of jurisdiction over their complaint.¹⁴ They will not repeat those arguments here beyond noting once again that the Confidentiality and Reimbursement Agreement concerns, as the document’s title implies, confidentiality and reimbursement, and relates primarily if not exclusively to water arrangements. Nowhere in that agreement is there any waiver of Commission jurisdiction to order crossings or to prohibit discrimination.

V. CALICO PARTIES HAVE A REASONABLE NEED FOR A PRIVATE CROSSING

BNSF repeats in its opening brief arguments it had previously made in its Objections to Tessera Solar’s And Calico Solar, LLC’s Opposition To BNSF’s Motion For An Order Shortening Time And For Briefing Schedule at 5-7 (Dec. 7, 2010), regarding the claims a Mr. Jackson raised at the CEC. The Calico Parties have addressed BNSF’s contentions regarding Mr. Jackson in their opening papers¹⁵ and will not repeat them here. Mr. Jackson’s inability to make a case for use of the Hector Road crossing on his own behalf at the CEC has no bearing on the Calico Parties’ claims in this proceeding.

¹⁴ Tessera Solar and Calico Solar, LLC Brief Re Jurisdiction pp. 7-10 (Dec. 8, 2010).

¹⁵ Tessera Solar and Calico Solar, LLC Brief re Jurisdiction, pp. 10-12.

VI. FINAL CEC AUTHORIZATION TO CONSTRUCT IS NOT A PREREQUISITE TO COMMISSION JURISDICTION UNDER SECTION 7537

Finally, BNSF asserts that the CEC's final authorization to begin construction of the Calico Solar Project is a prerequisite to Commission jurisdiction under section 7537. These arguments have been addressed in the Calico Parties' opening brief. Nothing in Public Utilities Code sections 453 or 7537 suggests that having permits for a project is a prerequisite to a claim under those statutes. BNSF has identified no authority to date suggesting there should be one, and neither reason nor public policy would support a rule that a complainant with a pending Application for Certification at the CEC *cannot even ask* the Commission for relief until the AFC is approved. In any event, the CEC approved the Calico Solar Project on October 28 and December 1, 2010. BLM approved it on October 20 and issued the Right-of-Way Lease/Grant on October 21, 2010. These agency actions render BNSF's argument moot.

///

///

///

VERIFICATION

I, Felicia Bellows, am a Vice President of both Tessera Solar and Calico Solar, LLC. I am authorized to make this Verification on their behalf. I declare under penalty of perjury that the statements in the foregoing copy of TESSERA SOLAR AND CALICO SOLAR, LLC CONCURRENT REPLY BRIEF RE JURISDICTION, filed in C.10-10-015, are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

/s/ Felicia Bellows

Felicia Bellows

Executed on December 15, 2010, at Barstow, California.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “TESSERA SOLAR AND CALICO SOLAR, LLC CONCURRENT REPLY BRIEF RE JURISDICTION” by using E-Mail Service, sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses as set forth in the attached list.

Executed on December 15, 2010 at San Francisco, California.

/s/ Todd O. Edmister

Todd O. Edmister

felicia.bellows@tesseractosolar.com; cynthia.burch@kattenlaw.com;
brent.bailey@tesseractosolar.com; Douglas.Werner@bnsf.com;
steven.lamb@kattenlaw.com; mdjoseph@adamsbroadwell.com;
todd.edmister@bingham.com; cem@newsdata.com; sgallagher@stirlingenergy.com;
jhe@cpuc.ca.gov; vdl@cpuc.ca.gov; dar@cpuc.ca.gov