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

Calico Solar, LLC

Complainant,

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

vs.

BNSF Railway Company,

Defendant.

**CALICO SOLAR, LLC'S MOTION TO STRIKE THE PORTION OF THE  
TESTIMONY OF BNSF WITNESSES RONNIE GARCIA AND LYN HARTLEY  
THAT IS LEGAL ARGUMENT**

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May 11, 2011

Pursuant to ALJ Hecht's e-mail of Monday, May 9, 2011, Complainant Calico Solar, LLC ("Calico") hereby moves to strike portions of the Prepared Testimony of Ronnie Garcia ("Garcia Testimony") and the Prepared Testimony of Lyn Hartley ("Hartley Testimony").

BNSF witnesses Garcia and Hartley have offered numerous purely legal arguments either without adornment or in the guise of factual testimony. These legal arguments are either interpretations of Public Utilities Code section 7537 or interpretations of the Private Crossing Agreement. None of BNSF's witnesses are attorneys with legal expertise; nor do they have facts to offer relevant to these topics. Their legal conclusions are irrelevant and should be stricken.

Even if BNSF's witnesses had legal expertise, it would be improper to admit their *legal* arguments as *factual* testimony. To the extent that Lyn Hartley or Ronnie Garcia are offered as experts: "...the admitting expert testimony on the ultimate issue in a case does not authorize an 'expert' to testify to legal conclusions in the guise of expert opinion.... The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." *Downer v. Bramet*, 152 Cal.App.3d 837, 841-842 (1984) (citations and quotation marks omitted); *See Summers v. A.L. Gilbert Co.*, 69 Cal.App.4th 1155, 1178 (1999) ("There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law.").

In Answer 13, Mr. Garcia states: "Section 7537 is limited to crossings to connect contiguous land and there is no authority under Section 7537 to order BNSF to allow lateral access within the BNSF ROW itself." (Garcia Testimony, A13, p. 12) In Answer 14 of his testimony, Mr. Garcia offers his interpretation of the Private Crossing Agreement in the guise of factual testimony. (Garcia Testimony, A14, p. 12) In Answer 20, Mr. Garcia states:

If, for example, after amendment, the footprint of the Calico Solar Project is modified yet again and the new Calico Solar Project is not on land that is contiguous to BNSF property on both sides of the BNSF mainline, then BNSF would have no obligation to provide a temporary or permanent crossing and the California Public Utilities Commission would have no jurisdiction to order BNSF to provide one.

(Garcia Testimony, A20, p. 18)

Mr. Hartley testifies in Answer 6: “My understanding is that any authorization to use a non-contiguous crossing would be strictly subject to a private agreement between the parties.” (Hartley Testimony, A6, p.3) He testifies in Answer 14 that: “BNSF has never been ordered to allow a third party access laterally within its right-of-way by a governmental agency and I do not believe that the PUC has jurisdiction to do so.”

(Hartley Testimony, A14, p. 7) He testifies in Answer 19 that: “My understanding is that Calico Solar must have a current property interest in the land, a need for a crossing – that is there is no other crossing that they could use, and the crossing must be contiguous.” (Hartley Testimony, A19, p. 9)

None of these statements are relevant or admissible, and they should be excluded. In addition, none of the statements regarding Public Utilities Code section 7537 is correct. To the extent that the BNSF wants to make legal arguments, it should be limited to making them in briefing, not in testimony.

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DATED: May 11, 2011

Calico Solar, LLC

By: \_\_\_\_\_ /s/  
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