



**FILED**

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

Tessera Solar,

Complainant,

vs.

BNSF Railway Company,

Defendant.

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

**TESSERA SOLAR AND CALICO SOLAR, LLC OPPOSITION TO BNSF'S  
MOTION TO DISMISS COMPLAINT**

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## **I. INTRODUCTION**

BNSF's Motion to Dismiss the Complaint in this proceeding echoes arguments Tessera Solar and Calico Solar, LLC (the "Calico Parties") have already addressed at the Prehearing Conference and, variously, in their Motion to Amend, Motion for Temporary Restraining Order and Preliminary Injunction, and Brief Re Commission Jurisdiction. To summarize, BNSF insists that the Commission lacks jurisdiction over the Complaint on the grounds that Tessera Solar "never submitted any crossing requests to BNSF," does not own the property at issue, and that "the purported 'Hector Road Crossing' is not at Hector Road at all and is instead a private Maintenance of Way Crossing that is within BNSF right-of-way." Motion to Dismiss at 7. These arguments lack merit, for the reasons set forth below.

## **II. BNSF'S ARGUMENTS REGARDING TESSERA SOLAR AND HECTOR ROAD FAIL TO DEMONSTRATE THAT THE COMMISSION LACKS JURISDICTION**

### **A. Commission Jurisdiction Does Not Require That Tessera Solar Submit A Crossing Request To BNSF Or Become An Owner Of The Calico Solar Project Site.**

BNSF's argument that the Complaint should be dismissed because Tessera Solar never submitted a "crossing request" to BNSF suffers from three fatal flaws. The first is the motion to add Calico Solar, LLC as a complainant, which BNSF does not mention. The second is that Tessera Solar did in fact request BNSF's agreement to access a portion of the Calico Solar Project utilizing a portion of BNSF right of way. BNSF granted that request in an MOU (BNSF's term; a "Memorandum of Understanding") dated November 20, 2009. Declaration of Felicia Bellows (Bellows Decl.) ¶¶ 5-6, Ex. 2-4. (Nov. 20, 2010 BNSF letter and Nov. 19, 2010 transmittal email describing the letter as an MOU). The MOU stated, in part: "BNSF will not

oppose granting Tessera Solar/SES access to Tessera property via BNSF right of way. The location of the right of way will be between BNSF Needles Subdivision Milepost 712.5 to 714.5...”

The third fatal defect in BNSF’s argument is that Public Utilities Code section 7537, does not require a complainant to submit any “crossing request” to a railroad at all. A complainant could simply have come straight to the Commission. Section 7537 states:

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 time, manner, and conditions under which the crossing shall be constructed and maintained, and shall fix and assess the cost and expense thereof.<sup>1</sup>

Although, as described in their Motion for Temporary Restraining Order and Preliminary Injunction, the Calico Parties went to great effort to work cooperatively with BNSF to obtain the access promised in 2009, BNSF is not a government agency, and there is no “exhaustion” requirement in section 7537.

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<sup>1</sup> At page 4 of its Motion to Dismiss, BNSF appears to argue that a complainant under section 7537 must have a property interest in the land adjacent to the crossing itself in order for section 7537 to apply. The plain language of section 7537 imposes no such requirement. The Calico Parties still hope for a permanent crossing further to the east that would directly connect the northern and southern portions of the Calico Solar Project, but under section 7537, Calico Solar is entitled to whatever crossing is “reasonably necessary and convenient for ingress to or egress from” the site; for the foreseeable future, only the Hector Road crossing fits that description.

As the Calico Parties have pointed out, Calico Solar, LLC is the lessee/grantee of BLM right-of-way adjacent to the rail line, and is entitled to join the proceeding as a complainant under section 7537. Moreover, Tessera Solar itself received BNSF's independent promise to provide access to the project. Bellows Decl. Ex. 3, 4. (MOU).

**B. Commission Jurisdiction Does Not Require That The Hector Road Crossing Be Aligned With Hector Road Or Not Part Of BNSF Right-of-Way.**

BNSF's final argument is puzzling. BNSF insists that the Hector Road crossing is not aligned with Hector Road and that it is part of BNSF's right-of-way. Motion to Dismiss at 5. Both of these statements are true, but they are irrelevant to the Calico Parties' claims. BNSF, like the Calico Parties, has commonly and repeatedly referred to the crossing at issue as the "Hector Road Crossing" and the "private crossing." Bellows Decl. ¶¶ 2-3. The fact that the crossing is within BNSF right-of-way is not surprising, and section 7537 expressly provides for ordering crossings over railroad right-of-way. Nothing in BNSF's assertions regarding Hector Road or right-of-way deprives the Commission of jurisdiction such that the Complaint could be dismissed.

**III. CONCLUSION**

For the foregoing reasons, BNSF's Motion to Dismiss should be denied.

DATED: December 8, 2010

Respectfully Submitted,

Tessera Solar

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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 OPPOSITION TO BNSF'S MOTION TO DISMISS COMPLAINT, 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 8, 2010, at Scottsdale, Arizona.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “TESSERA SOLAR AND CALICO SOLAR, LLC OPPOSITION TO BNSF’S MOTION TO DISMISS COMPLAINT” 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 8, 2010 at San Francisco, California.

/s/Todd O. Edmister

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