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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Tessera Solar,

Complainant,

vs.

BNSF Railway Company,

Defendant.

Case10-10-015
(Filed November 4, 2010)

**ADMINISTRATIVE LAW JUDGE'S RULING
SETTING A SCHEDULE FOR FURTHER ACTIVITIES IN THIS PROCEEDING**

This ruling directs parties to work with the Commission's Docket Office to correct various deficiencies in documents offered for filing since the prehearing conference (PHC) held on November 30, 2010, declares a temporary moratorium on filing of new motions and other documents in this proceeding beyond those specifically authorized or required in this ruling, and sets a schedule for addressing the issues raised in this complaint and subsequent filings.

1. Procedural Background

On October 21, 2010, Tessera Solar, LLC., (Tessera) filed Complaint (C.) 10-10-015 with the California Public Utilities Commission (Commission) requesting that the Commission require BNSF Railway Company (BNSF) to allow Tessera immediate access to an at-grade crossing to enable Tessera (or Calico Solar, LLC. (Calico), at the time Tessera's wholly-owned subsidiary) to

begin construction on a solar generation project. Tessera's complaint also requests that the Commission require BNSF to process applications filed with BNSF related to the subject solar generation project, including an application for a grade-separated crossing that the complainant suggests would be constructed at Tessera's or Calico's expense to facilitate construction and operation of the project.

At the PHC, BNSF asserted that the Commission does not have jurisdiction over any issues related to Tessera's complaint. Tessera provided additional information about the proposed project that caused the company to file its complaint, including the fact that it had brought the complaint on behalf of Calico, then a wholly-owned subsidiary of Tessera and (then and currently) the developer of the proposed project. At the PHC, I required parties to prepare and file briefs by mid-December on the Commission's jurisdiction in this case, and set a time for continuation of the PHC on Monday, December 27, 2010, to begin addressing the substance of the complaint while the jurisdictional issues remained under review. In addition, parties at the November 30, 2010, PHC agreed to schedule a mediation session within the Commission's Alternative Dispute Resolution (ADR) Program.

Subsequent to the PHC, various parties and non-parties attempted to file many documents relating to this proceeding. These documents included BNSF's answer to the original complaint, the required briefs on Commission jurisdiction, and motions for relief including but not limited to a request for immediate dismissal of the complaint (from BNSF) and a request for issuance of a temporary restraining order and preliminary injunction (from Tessera and Calico).

In addition, consistent with the parties' agreement to schedule a mediation session, Administrative Law Judge (ALJ) Maribeth Bushey was assigned to serve as the neutral during parties' mediation of this case. ALJ Bushey contacted the parties on December 9, 2010, with information about mediation on the dates proposed at the PHC. Rather than attending the mediation, parties stated that they were engaged in independent settlement talks and no longer wished to participate. Similarly, the week of December 20, 2010, parties contacted me and asked that I take the PHC scheduled for December 27, 2010, off calendar in order to allow them to continue independent settlement talks.¹

Despite these requests, parties continued to submit documents for filing through at least December 21, 2010.² It is clear from these informal communications that parties have engaged in talks related to this proceeding outside of the Commission's formal complaint process, and that these talks were not conducted under the auspices of the Commission's mediation program. The record of this proceeding does not reflect the current status of these informal talks.

On January 10, 2011, counsel for Tessera and Calico requested via e-mail that I reset the pre-hearing conference previously scheduled for December 27, 2010, and move forward with other activities in this proceeding, as appropriate. In this electronic communication, Tessera noted that it had sold the Calico project, but did not provide information on the project's buyer or on the details

¹ I did so via electronic mail ruling, sent December 22, 2010, and attached to this ruling as Attachment 1.

² Many of those submittals included format and other errors and deficiencies that precluded their acceptance for filing, as described in Section 3, below.

of the sale.³ Counsel for BNSF responded to this message via e-mail, renewing its motion to dismiss the complaint and alleging that Tessera's sale of the Calico project confirmed its lack of standing to bring the complaint.⁴ In a brief e-mail response to this message, counsel for Tessera objected to this characterization of its standing and stated that it intended to await further guidance from the Administrative Law Judge.⁵ This ruling provides such guidance.

2. Party Status of Calico

At the PHC on November 30, 2010, representatives of Tessera and Calico discussed the possibility of Calico intervening in and thereby becoming a party to this proceeding, or of amending the complaint to include Calico in the case as a complainant.⁶ The record of the PHC reflects that Calico chose not to request intervention in this proceeding at the PHC, with counsel for Tessera stating that "they would intervene if they could not amend."⁷ I also did not receive a written or oral request for party status from Calico before the PHC was adjourned, nor have I received a written motion for party status from Calico since the PHC. As

³ See correspondence between Mr. Edmister, Mr. Lamb, and Administrative Law Judge Hecht, specifically the January 10, 2011 e-mail from Mr. Edmister, in Attachment 7.

⁴ See correspondence between Mr. Edmister, Mr. Lamb, and Administrative Law Judge Hecht, specifically the January 12, 2011 e-mail from Mr. Edmister, in Attachment 7.

⁵ See correspondence between Mr. Edmister, Mr. Lamb, and Administrative Law Judge Hecht, specifically the January 10, 2011 e-mail from Mr. Edmister, in Attachment 7.

⁶ Representatives of BNSF objected to allowing Calico to intervene in the complaint on the grounds that intervention in a complaint by a party other than the complainant is not allowable. In fact, the Commission's Rules of Practice and Procedure (at http://docs.cpuc.ca.gov/published/RULES_PRAC_PROC/105138.htm), allow such intervention at Rule 1.4.

⁷ RT at 66.

a result, and despite recent claims to the contrary in electronic mail correspondence from Tessera and Calico representatives,⁸ Calico did not become a party to this proceeding at the PHC.

3. Deficiencies in Filings Attempted to Date

The Commission's Docket Office identified various deficiencies with many of the documents offered for filing to date. I understand that Docket Office staff contacted parties with instructions on how to cure these deficiencies and successfully file the documents, and that disagreements among parties on various facts and issues have ensued. The discussions below provide summaries of the problems that have been identified with some key documents, and describe actions that may be taken to resolve those problems if parties still wish to file these or other documents.

3.1. Tessera and Calico Motion to Amend Complaint

On December 3, 2010, Tessera and Calico jointly submitted the "Tessera Solar And Calico Solar, LLC. Joint Motion To Amend Complaint And For Shortened Time." In this document, Tessera and Calico request that the Commission approve an amendment to the complaint to name Calico as a co-complainant in this matter. On December 28, 2010, staff from the Commission's Docket Office contacted Counsel for Tessera to inform them that this motion would not be accepted for filing because it listed Calico, a non-party in the proceeding, as a filer. This message instructed to Tessera that it could refile its motion from Tessera alone in order to have it accepted for filing, and

⁸ See correspondence between Mr. Edmister and the Commission's Docket Office in Attachment 2.

provided other advice to Tessera on the need (if any) for verifications and supporting documentation along with the motion.⁹ In response, counsel for Tessera stated that Calico had become a party to this proceeding at the PHC, and should be allowed to join in the filing.¹⁰ Counsel for BNSF disagreed with this statement.¹¹

As discussed in Section 1, above, Calico did not become a party to this proceeding at the PHC. In addition, even if Calico had been a party to the proceeding at the time the motion to amend the complaint was submitted, it is most appropriate for the original complainant in a proceeding, not an intervenor, to request an amendment to the complaint. In order to address this problem, Tessera may re-submit its motion to amend the complaint in the proper format, as described in e-mail correspondence from the Commission's Docket Office on December 28, 2010. Tessera (and Calico, if it becomes a party) shall work with the Commission's Docket Office staff to ensure that all future filings in this proceeding meet all Commission requirements for filing.

The filing of the motion to amend the complaint will not automatically make Calico a complainant in this proceeding; Calico would become a complainant only if or when that motion is granted. Disposition of that motion may be affected by issues of Tessera's standing, which are discussed in Section 5, below. Similarly, that motion will not automatically make Calico a party to this

⁹ See Electronic Mail from Martin Nakahara to Todd Edmister, dated December 28, 2010, in Attachment 3.

¹⁰ See Attachment 2.

¹¹ See Electronic Mail from Steven Lamb to Todd Edmister and Martin Nakahara, dated December 28, 2010, in Attachment 4.

proceeding; Calico will become a party only if that motion or a separate written motion for party status submitted by Calico is actually granted (as discussed in Section 3.2, below). Tessera and Calico should structure their filings accordingly, to ensure that only currently recognized parties formally submit motions (other than motions for party status) or other filings.

3.2. Additional Filings by Tessera and Calico

Tessera and Calico jointly submitted several additional filings, including (but not limited to) opening and reply briefs on jurisdictional issues, a motion for a temporary restraining order and preliminary injunction, and responses to BNSF motions. As in the case of the Motion to Amend the Complaint, these documents could not be accepted for filing because they listed a non-party, Calico, as a filer. Options for Tessera to cure this deficiency so these documents can be filed include:

- Tessera may resubmit these filings from Tessera alone (similar to the process described in Section 3.1, above); or
- Tessera may properly submit and await the outcome of its motion to amend the complaint to add Calico as a complainant.
 - If that motion is granted, Tessera and Calico may cure any additional deficiencies with those joint submittals so they can be filed.
 - If that motion is not granted, Tessera alone may re-file those documents.
- Alternatively, Calico may submit a written motion for party status at any time; once party status is granted, Tessera and Calico would then cure any other deficiencies with their submittals and refile them jointly.

In addition, a few filings by Tessera and Calico, such as their “Opposition to BNSF’s Motion to Dismiss,” cannot be processed yet because they respond to motions and other documents submitted by BNSF that have not been

successfully filed. Those BNSF filings are addressed below. In general, once all motions and primary pleadings from both parties are properly filed, it should be possible to process corresponding responsive filings if those documents meet the Commission's other basic filing requirements, such as for format.

3.3. BNSF Filings to Date

Also on December 3, 2010, BNSF attempted to file two motions, one "Motion to Dismiss of BNSF Railway Company to Complaint of Tessera Solar," and one "Motion for an Order Shortening Time and for a Briefing Schedule Regarding BNSF's Motion to Dismiss." On December 28, 2010, the Commission's Docket Office staff informed BNSF counsel by electronic mail that these motions could not be accepted for filing due to technical and formatting errors in the submittals, and requested that BNSF correct the identified errors and resubmit their documents for filing.¹² In response to this communication, BNSF counsel stated that, to the company's knowledge the documents had been submitted in a compliant format.¹³ Staff provided further direction to BNSF on proper format for electronic submittals, and offered to assist BNSF with correcting technical problems with its filings, if necessary.¹⁴ I understand that BNSF has attempted to provide these motions in a compliant format, and I urge BNSF counsel to review these and the company's other filings to identify and correct any similar technical or formatting problems with those submittals.

¹² See Electronic Mail from Martin Nakahara to Stephen Lamb and Cynthia Burch, dated December 28, 2010, in Attachment 5.

¹³ See Electronic Mail from Stephen Lamb to Martin Nakahara, dated December 28, 2010, in Attachment 6.

¹⁴ See Electronic Mail from Martin Nakahara to Stephen Lamb, dated December 29, 2010, in Attachment 6.

In addition, a few filings by BNSF, such as “BNSF’s Opposition to Joint Motion for Temporary Restraining Order and Preliminary Injunction,” cannot be processed yet because they respond to motions and other documents submitted by Tessera and Calico that have not been properly filed, as described in Sections 3.1 and 3.2, above. As stated earlier, once all motions and primary pleadings from both parties are properly filed, it should be possible to file corresponding responses if those responses meet the Commission’s other basic filing requirements, such as for format.

In summary, I direct all parties (and potential parties) to work with the Commission’s Docket Office staff to ensure that all future filings in this proceeding meet all Commission requirements for format and content.

4. Tessera’s Standing to Bring a Complaint

In addition to challenging the Commission’s jurisdiction to hear this complaint, BNSF has challenged Tessera’s standing to bring this complaint. BNSF raised this challenge at the initial PHC, through formal filings, and through informal e-mail messages to the ALJ and others on the service list for this proceeding since the initial PHC. Most recently, in an electronic mail send on January 12, 2011, BNSF alleged that in acknowledging that it has sold Calico, Tessera has acknowledged its lack of standing to bring a complaint on Calico’s behalf, and renewed its earlier motion for dismissal of the case. Calico disputes this claim, and suggests that additional briefing of issues of jurisdiction may be appropriate given the sale of Calico since the original briefs were filed.

Based on the information in the record of this proceeding at this time, it is not possible to determine whether Tessera has standing to bring this complaint before the Commission. Because Tessera allegedly sold Calico after briefs were filed on jurisdictional issues in mid-December, the record contains no

information on the sale or its effect on the complaint. Tessera and Calico have provided no information on the development's buyer, no information on the terms or details of Tessera's sale of Calico, and no information or discussion in support of the claim that Tessera has standing despite the sale of the project to an unidentified (within this proceeding) entity for undisclosed (within this proceeding) terms.

Given these gaps in the record, it is not possible to determine whether Tessera has standing to bring this complaint. It appears likely based on the information available that Calico Solar would have standing to bring this (or a similar) complaint, however, as discussed above, Tessera has not yet amended its original complaint to include Calico as a complainant.

In order to determine whether Tessera has standing to bring this complaint, I require parties to file supplemental briefs addressing the effect of Tessera's sale of Calico on Tessera's standing to bring this complaint. Opening and reply briefs will be due as provided in the schedule below.

If Tessera is found not to have standing, it may not be possible to allow Tessera to take further action in this case. This may affect Tessera's ability to amend the complaint to add Calico as a complainant. Because of this possibility, if Tessera and Calico wish to pursue their complaint, one possible option is for Calico to file its own cause of action that clearly states the reason for the complaint and the specific relief requested; such a complaint could be identical to the Tessera complaint at issue in this proceeding or could contain additional supporting information that may assist the Commission in understanding and addressing the complaint. If Calico chooses to pursue this separate complaint option, Tessera could either withdraw this complaint, or Tessera or Calico could request that the two complaints be consolidated.

5. Process and Schedule for Future Activity in this Proceeding

Despite the fact that I have been told that parties (and possibly non-parties) to this proceeding are engaged in active settlement talks about the issues involved in this case, many documents submitted for filing before and (apparently) during those settlement talks still await filing because deficiencies (many already brought to the filers' attention) have not been corrected. Some of these filings request urgent action from the Commission, and yet their submitters have not cured the identified deficiencies. In order to clarify the record in this case and address the additional issues of standing raised in Section 5, above, I require the complainant and defendant to do the following:

- 1) Attend a PHC in this proceeding scheduled for Wednesday, February 9, 2011, prepared to report on the status of this case and develop a schedule for resolving all issues within this proceeding.
- 2) Cure any deficiencies identified by Commission staff in documents already submitted for filing, or withdraw those documents.
- 3) Refrain from filing any additional material until all outstanding filings have been processed (either accepted for filing, withdrawn, or rejected) and appear on the Commission's Docket Card for this case, which is accessible at:
<http://docs.cpuc.ca.gov/published/proceedings/C1010015.htm>.
- 4) Either meet with the mediator assigned to this case, Maribeth Bushey, or settle any outstanding issues in this proceeding without the assistance of a mediator before the date of the next PHC.
- 5) File supplemental briefs on jurisdiction and standing, with specific reference to the effect of Tessera's sale of the Calico project on these issues, as provided in the schedule below.

In addition, not later than February 8, 2011, parties shall prepare, file, and serve a joint case management statement that includes a description of all issues

currently in dispute, along with a proposed schedule for resolving all issues (including jurisdictional and other procedural issues as well as the substance of the complaint).

The current schedule for this proceeding is as follows:

Date	Action
January 26, 2011	Supplemental opening briefs on jurisdiction and standing to be filed and served.
February 2, 2011	Replies to January 26 th briefs to be filed and served.
Not later than February 4, 2011	All parties shall cure deficiencies in or withdraw all pleadings previously submitted to the Commission in this proceeding.
Not later than February 8, 2011	All parties shall meet with the Commission-designated mediator or resolve substantive issues in the case independently.
February 8, 2011	Parties shall file and serve a joint case management statement to ALJ Hecht by 5 p.m.
February 9, 2011	Prehearing Conference at Commission Courtroom, State Office Building 505 Van Ness Avenue, San Francisco, California 1:30 p.m.

A more detailed schedule for resolving all issues in this proceeding will be set at the PHC on February 9, 2011.

As a reminder, only pleadings successfully filed with the Commission's docket office become part of the formal record of a proceeding; informal communications among parties are considered correspondence unless later submitted with a filed pleading, and are outside of the formal record of a case. In addition, parties may not have ex parte communications with Commission

decision-makers in an adjudicatory proceeding such as this complaint case, and parties are discouraged from e-mail and other communications with Commission decision-makers, especially the assigned Administrative Law Judge, even on procedural matters.

IT IS RULED that:

1. Calico Solar, LLC., (Calico) is not currently a party to this proceeding.
2. Parties shall file and serve supplemental opening briefs on jurisdiction and standing issues by January 26, 2011. Parties may file and serve replies to the January 26th briefs not later than February 2, 2011.
3. As discussed in Section 3, above, parties shall work with staff in the Commission's Docket Office to cure deficiencies with all documents previously submitted for filing in this proceeding, or shall withdraw those filings. This shall occur by February 4, 2011.
4. No additional documents beyond those specifically authorized in this ruling may be offered for filing in this proceeding until all outstanding submissions are accepted for filing or withdrawn.
5. A prehearing conference in this proceeding will be held before Administrative Law Judge Jessica T. Hecht, on February 9, 2011, at 1:30 p.m., in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California.
6. Parties shall prepare, file, and serve a joint case management statement that includes a description of all issues currently in dispute, along with a proposed schedule for resolving all issues, by 5:00 p.m. on February 8, 2011.

7. Parties shall either resolve all substantive issues in this case or meet with the Commission-designated mediator for this case before the prehearing conference scheduled for February 9, 2011.

Dated January 18, 2011, at San Francisco, California.

/s/ JANET A. ECONOME for
Jessica T. Hecht
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated January 18, 2011, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.