



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

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Calico Solar, LLC

Complainant,

vs.

BNSF Railway Company

Defendant.

CASE No. C1010015
(filed October 21, 2010)

**BNSF RAILWAY COMPANY'S
POST-HEARING OPENING BRIEF**

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PRELIMINARY STATEMENT

BNSF Railway Company ("BNSF") respectfully submits this Opening Brief, pursuant to the March 9, 2011 Scoping Ruling and Memo ("Scoping Memo") in this adjudicatory proceeding.

In 2008 Calico Solar, LLC ("Calico") proposed a utility-scale solar facility on both sides of 5 miles of the transcontinental BNSF mainline railroad east of Barstow. The portion of the Calico Solar Project north of the BNSF Right-of-Way ("ROW") is accessible via public rail crossings both east (from Ludlow) and west (from Newberry Springs) of the project site, which connect with public access routes. Calico's expert concurs, and indeed, drove the route from the west. The portion of the Calico Solar Project south of the BNSF ROW is accessible via the Hector Road exit of the I-40. The use of these alternative access routes have not been subjected to NEPA or CEQA analyses.

Despite these public crossings and existing access routes to both the northern and southern portions of the proposed facility, Calico proposes to construct a grade-separated crossing to connect potentially contiguous parcels north and south of the BNSF ROW. Since 2007, BNSF has cooperated with the request for a grade separation. The grade separation's location is dependent, however, on: (1) NEPA and CEQA analyses; (2) approval of amendments to the BLM ROW and the CEC Certification; (3) the footprint of the facility being finally determined; and (4) completion of all studies necessary to inform the location of the grade-separation.

In 2008, Calico proposed, as an element of their project, improving an access route east of the project site and constructing a new interchange off the I-40, for construction vehicles to reach the northern portion of the proposed project without crossing over the railroad tracks. This interchange and road would accommodate construction related vehicles needed to build the grade-separation. For financial reasons Calico abandoned this access alternative and it has not been included in either NEPA or CEQA analyses.

During the federal and state environmental permitting processes for the proposed Project, Calico requested BNSF allow the improvement of a BNSF Maintenance-of-Way crossing within the BNSF Hector station, which was contiguous to the then proposed footprint of the facility. They asked for five vehicle crossings per month for 3 months to conduct monitoring of species for their environmental analysis. Again BNSF accommodated the request, this time with the a written private crossing agreement, which provided that the improved crossing would be decommissioned at the conclusion of the term. In the interim, Calico was to submit designs for its proposed grade-separated crossing to BNSF's engineering team for review and approval. At Calico's request, BNSF subsequently accommodated extensions to this limited at-grade crossing agreement. The agreement terminated, however, on September 30, 2010.

In the intervening years between 2008 and 2011, multiple events, solely within Calico's control, have occurred which have impacted BNSF's ability to process Calico's request. They include: (1) Calico unilaterally reducing its footprint multiple times such that the requested crossings no longer connect contiguous lands of the proposed facility;

(2) Calico unilaterally eliminating the location of 600 acres of critical debris, detention and retention basins and related structures and obtaining Conditions of Certification to perform future hydrologic studies to determine the Project's hydrologic impacts and mitigation measures; (3) Calico unilaterally failing to perform those studies for the past 10 months; (4) Calico unilaterally eliminating the I-40 interchange and paving of a construction road north of the BNSF ROW to eliminate construction traffic crossing the mainline at-grade; (5) Calico unilaterally electing not to use existing public crossings at Newberry Springs or Ludlow and related public access routes; (6) Calico not performing a glare/glint study to assess the impacts of the 4,613-acres of SunCatcher mirrors on both sides of nearly 5 miles of the BNSF rail line and adjacent roadways; (7) Calico unilaterally selling its project to a company with a focus on different solar technology on December 24, 2010; (8) Calico unilaterally filing amendments to both its BLM ROW and its CEC Certification in March 2011, which are still pending, and in response to which, BLM has declined to issue a Notice to Proceed with construction and has indicated, on June 6, 2011, that it will not do so until it processes the amendment and completes its environmental analysis. BLM has also advised the amendment process results in the current ROW being "inoperative" and any new authorization will require a new ROW.

Despite all of these unilateral actions on Calico Solar's part, on October 21, 2010, Calico filed a complaint with the Public Utilities Commission ("PUC" or the "Commission") to compel BNSF to "process its requests" (October 21, 2010 Complaint, at para. G(4)). Knowing full well the uncertainties facing its project, it filed an amended

complaint on January 21, 2011 in which it sought to have the PUC order BNSF to “provide the private crossings over the railroad and railroad right of way”. January 21, 2011 Complaint, at para. G(4). As more fully set forth below, BNSF believes any action by the PUC or BNSF is premature, and again reiterates its request that the complaint be dismissed.

1. The Calico Right-of-Way Grant/Lease from BLM is Now "Inoperative."

Since the evidentiary hearing on May 17-19, 2011, the Federal Bureau of Land Management ("BLM") has determined that the Right-of-Way/Lease granted to Calico on October 20, 2010 (the "Calico ROW") is not "operative." BNSF's Request for Judicial Notice, dated June 9, 2011, Ex. A [BLM Brief to United States District Court, dated June 6, 2011] at p.5. BLM has essentially agreed with BNSF that Calico has abandoned the solar energy generation project that was approved by BLM on October 20, 2010 and the CEC on December 1, 2010 (the “Calico SunCatcher Project”), due to Calico's recent filings of requests to amend the Calico SunCatcher Project to change at least 80% of the solar technology for the project from SunCatchers to photo-voltaic panels. As BLM stated:

The changes contemplated by Calico’s still-pending amended application make plain that Calico will not request, and BLM will not approve, the construction of the project as set out in the ROD. Further, BLM has indicated that the ROW grant will be terminated or BLM will issue an amended ROW grant that will replace the grant challenged in this lawsuit. *Id.* at 4.

BLM has also determined that, "because Calico has not demonstrated that it is capable of building the project with the currently permitted [SunCatcher] technology, BLM will not issue the Notice to Proceed for construction of the project as presently authorized." *Id.* at 6. Instead,

BLM will engage in a supplemental environmental analysis of the revised project set forth in Calico's amended application. ... BLM's supplemental environmental review will lead to a new decision document supported by a new administrative record. *Id.* at 4.

These new facts, standing alone, make clear that Calico lacks the requisite "ownership" interest required by Public Utilities Code Section 7537 and require dismissal of this adjudicatory proceeding, on the ground that Calico's complaint is premature.

2. Calico's Requests for a Temporary At-Grade Crossing at Hector Station or Pisgah and for a Waterline are Beyond the Scope of the Commission's Jurisdiction Under Section 7537.

Calico's requests for particular relief, namely for a temporary at-grade "crossing" at the BNSF Hector Station or, alternatively, for a temporary at-grade crossing at the Pisgah crossing, as well as a waterline underneath the BNSF railway – these particular requests for relief fall outside the scope of the Scoping Memo and are beyond the jurisdiction of this Commission under Cal. Pub. Util. Code § 7537. Neither crossing would connect lands owned or leased by Calico that are "contiguous", even under the inoperative ROW. Indeed, Calico's own expert, Don Dali, testified that Calico's requested temporary at-grade crossing at Hector Station is not contiguous to any Calico land:

Q. Okay. And where Hector Station is and the temporary crossing at Hector Station is, is not contiguous to Calico Solar's property, right?

A. According to this map, that's correct.

Testimony of D. Dali, May 18 Tr. at 237:3-8. Likewise, with respect to Pisgah, Mr. Dali testified:

Q. Right. And you've also referred to the Pisgah crossing, right?

A. I have indeed.

Q. And that's not contiguous to Calico Solar's property, correct?

A. That's not indicated on this map. That's correct.

Q. But you know it's not contiguous, right?

A. Yes.

Id. at 237:9-18. And with respect to Calico's request for a waterline, there is no authority under Section 7537 of the Public Utilities Code for this Commission to order a waterline underneath a railway on behalf of a private party.

3. Calico Has No Need for Any Temporary At-Grade Crossing Because Calico Already Has Access to the Calico SunCatcher Project Site

Calico also failed to demonstrate any reasonable need for any temporary at-grade crossing whatsoever and Section 7537 only allows crossings to the extent that they are "reasonably necessary." At the hearing, Mr. O'Shea conceded that the Calico SunCatcher Project site is accessible north of the BNSF mainline from Newberry Springs Road. As Mr. O'Shea testified, "The Newberry Springs road we talked about is a way to get there." Testimony of D. O'Shea, May 17 Tr. at 101:3-11. Similarly, Calico's expert, Mr. Dali, conceded that "It's accessible now." Testimony of D. Dali, May 18 Tr. at 244:20-28.

Calico also admitted that it had eliminated its original proposal for construction of an off-ramp from Interstate 40 that would have eliminated any need for any temporary at-grade crossing, and that Calico did so for financial, not safety, reasons. Exhibit 6 (F. Bellows Rebuttal Testimony) at 4:1-10. Yet, Calico's expert agreed with BNSF that safety is more important than financial considerations. Testimony of D. Dali, May 18 Tr. at 219:9-11. It is more important than convenience. Testimony of D. Dali, May 18 Tr. at 219:12-14.

Additionally, Calico has submitted documents to the CEC claiming that access to the SunCatcher Project site north of the BNSF mainline is also available using public access routes from Ludlow, east of the site. Testimony of D. O'Shea, May 17 Tr. at 177:10-26; Exhibit 124. Accordingly, access to the Calico SunCatcher Project site is presently available from both the west and east of the site.

4. The Undisputed Hierarchy of Safety Requires the Commission to Grant Calico Only a Permanent Grade-Separated Crossing at a Location To Be Determined After the Requisite Studies and Plans Have Been Completed

BNSF has historically accommodated Calico's original plan for the immediate construction of a grade-separated crossing, because that original plan was consistent with BNSF's paramount concern: Safety. At trial, Calico's expert, Mr. Dali, agreed with BNSF's position regarding the hierarchy of safe crossings:

Q. Now, would you agree, sir, that the safest crossing is a grade-separated crossing, or what has been referred to as a bridge here?

A. Yes.

Q. That is the safest?

A. Yes, it is.

May 18 Tr. at 219:15-21. Mr. Dali also agreed that the Commission has adopted General Order 75-D's policy to reduce at-grade private crossings; that BNSF's internal policy of reducing at-grade private crossings is reasonable and consistent with the Commission's policy; and that, if an at-grade private crossing is necessary, then a temporary at-grade crossing within a fenced and secured project site is safer than one outside the fenced and gated site. This undisputed hierarchy of safety requires denial of Calico's requests for a temporary at-grade crossing at Hector Station or Pisgah, both of which are unguarded and actually or effectively ungated.

In short, Calico's complaint should be dismissed as premature, owing to the now-inoperative status of the existing Calico ROW, BLM's determination that no Notice to Proceed shall issue with respect to the existing Calico ROW, and the undisputed fact that Calico's requests for a temporary at-grade crossing at Hector Station or Pisgah fall beyond the Commission's jurisdiction under Section 7537. In the event that BLM issues a new ROW after BLM processes Calico's proposed amendment, however, Calico should be granted a permanent grade-separated crossing at a location contiguous to BNSF's ROW, to be determined after the hydrology and grading studies and supplemental environmental impact statements required by the CEC and BLM, respectively, have been done, so that a suitable location for a grade-separated crossing may be determined. Any temporary at-grade crossing should be located immediately adjacent to the site of the permanent grade-separated crossing and limited to the time necessary to build a grade-separated crossing.

FACTS

A. The Parties

BNSF is one of two Class 1 railroads operating in California. BNSF's transcontinental mainline, traversed by as many as 80 trains per day, carries interstate commerce from the Ports of Los Angeles and Long Beach to U.S. Midwestern, Southwestern and Eastern markets. BNSF's mainline has operated through the section of the Mojave Desert, where Calico Solar has proposed its project, for over one hundred years. Approximately 40 percent of all of the nation's west coast imports and exports transit the railroads in California. Garcia Direct Testimony at p.2.

Calico's Right of Way Lease/Grant from the Federal Bureau of Land Management ("BLM") was granted on October 21, 2010 ("Calico ROW"), and was conditioned on the right-of-way Stipulations attached as Exhibit B to the Calico ROW and the approved Final Plan of Development therein. The Calico SunCatcher Project was certified by the CEC on December 1, 2010. See Exhibit 1; Attachment 3. The Calico ROW was defined to exclude the BNSF right-of-way in every section of the Calico ROW granted by BLM. Exhibit 1, Attachment 3, Exhibit A (legal description and map of Calico ROW).

B. BLM Has Determined That The Calico ROW is "Inoperative."

On June 6, 2011, the BLM determined that the Calico ROW is no longer "operative." See BNSF's June 10, 2011 Request for Judicial Notice ("RJN"), at Ex. A, p. 5. As BLM explained:

The changes contemplated by Calico's still-pending amended application make plain that Calico will not request, and BLM will not approve, the construction of the project as set out in the ROD.

Further, BLM has indicated that the ROW grant will be terminated or BLM will issue an amended ROW grant that will replace the grant challenged in this lawsuit. *Id.* at 4.

BLM has also determined that "because Calico has not demonstrated that it is capable of building the project with the currently permitted [SunCatcher] technology, BLM will not issue the Notice to Proceed for construction of the project as presently authorized." *Id.* at 6.

Instead, BLM will either "terminate the existing ROW grant" or "issue[] an amended ROW grant and a new ROD, replacing the existing ROW grant and ROD." RJN, Ex. B [Declaration of James Stobaugh, dated June 6, 2011 ("Stobaugh Decl.")] at ¶ 15. BLM may even "revisit the land use plan decision for this project." *Id.* As a result of these determinations, BLM refers to the existing Calico ROW as not being "operative." *Id.* at 5, n.1.

BLM also determined that:

BLM will engage in a supplemental environmental analysis of the revised project set forth in Calico's amended application. ... BLM's supplemental environmental review will lead to a new decision document supported by a new administrative record. *Id.* at 4.

Thus, Calico cannot proceed to develop the existing Calico SunCatcher Project, even as it was originally approved.

Finally, Mr. Stobaugh notes the footprint of the site could be changed. RJN, Exh. B, Stobaugh Decl., at p. 6. Unless and until the footprint of the proposed solar project is approved by BLM, the fundamental facts of land ownership cannot be known.

These recent determinations by BLM are critical to this proceeding, because ownership of lands adjacent to a railway is a jurisdictional pre-requisite under Section 7537. Now that the BLM has determined that existing Calico ROW is no longer "operative" and that no Notice to Proceed shall issue under the existing Calico ROW, Calico has no present ownership interest sufficient to support jurisdiction for its requests under Section 7537.

C. The Scoping Ruling in this Proceeding Requires Any Crossing to Connect Contiguous Lands Granted to Calico

On March 9, 2011, a Scoping Memo and Ruling ("Scoping Memo") was issued.

The Commission defined the "Scope of Issues" in this proceeding as follows:

1. Should BNSF be required to provide Calico with a temporary at-grade rail crossing to connect *contiguous land* granted to Calico by the Federal Bureau of Land Management... [and]
2. Should BNSF be required to provide Calico with a permanent grade-separated rail crossing ... to connect *contiguous land* granted to Calico by the Federal Bureau of Land Management...

Scoping Memo at p. 5. (emphasis added).

At the February 9, 2011 pre-hearing conference, in response to BNSF's concern that Calico's Complaint does not identify any specific site for a temporary or permanent crossing that would connect contiguous land granted to Calico, the Commission noted that Calico would have an opportunity in its prepared direct testimony to submit such a proposal. As the Commission stated, "What Calico decides to propose is what Calico decides to propose and they will propose it in their direct testimony." The Commission made clear, however, that its jurisdiction under Section 7537 of the California Public

Utilities Code is limited to "crossing[s] to connect contiguous land." Feb. 9 Tr. at 59, 61.

The Scoping Memo reflects the Commission's conclusion on jurisdiction.

D. The Location of a Grade-Separated Crossing Cannot Be Determined At This Time Because the Necessary Hydrological Studies, Glare & Glint Studies and Grading and Design Plans Have Not Been Performed by Calico

The location of a grade-separated crossing cannot be determined at this time, because the necessary hydrological studies, glare and glint studies, and grading and design plans have not been performed by Calico. This is the result of Calico's unilateral and repeated decisions to change their plans, and unilateral decisions not to perform studies.

According to the unrebutted testimony of BNSF's Thomas Schmidt, BNSF was told in early June 2010 that Calico's plans "included approximately 600 acres of debris, detention and retention basins and related structural controls which were intended to eliminate impacts of the Calico project from stormwater and sedimentation runoff on the BNSF right-of-way." Exhibit 125 [Schmidt Rebuttal Testimony], at p. 2 & Exhibit A thereto [excerpts from the Staff Assessment and Draft Environmental Impact Statement ("SA/DEIS") for the Calico Solar Project, jointly prepared by the CEC and BLM and issued March 30, 2010]; Exhibit A, Project Description - Figure 2 and Soil and Water Resources - Figure 4 for illustrations of the debris, detention and retention basins.

It is undisputed that "studies had shown that stormwater from both the northern and southern parcels of the Calico project flowed onto the BNSF right-of-way, and if unmitigated, could pose a significant risk to the integrity of the structures along the BNSF right-of-way, and to the safety of train crews and operations." *Id.* citing Exhibit A

thereto and Exhibit B [excerpts from the Supplemental Staff Assessment (“SSA”) for the Calico Solar Project, prepared by the CEC and issued July 20, 2010].

Mr. Schmidt further testified that, "after the June 3 meeting, BNSF received drawings of Calico’s project plans, which revealed that the debris, detention and retention basins were not properly located to prevent safety and operational impacts to BNSF from stormwater runoff and sediment transport." Exhibit 125 at p.2. Mr. Schmidt therefore submitted testimony before the CEC in July 2010, where he expressed BNSF’s concerns that the debris, detention, and retention basins and related structural controls would not be sufficient to protect BNSF’s mainline from these impacts. He also requested additional hydrologic studies be performed to evaluate whether the proposed structures would be sufficient to eliminate adverse hydrological impacts from the Project on rail safety and operations. *Id.* and Exhibit C thereto.

On September 3, 2010, the CEC advised Calico that it could not approve the plan as requested. *Id.* and Exhibit D [CEC’s Committee Order regarding Further Review of the Calico Solar Project]. In response, Calico reduced the overall footprint of the proposed project by thousands of acres. In connection with this, Calico chose to eliminate 600 acres of debris, detention and retention basins and related structural controls were eliminated. Exhibit 125 at p. 4 and Exhibits E and F thereto [Calico Solar’s Submittal of Reduced Project Boundary Scenarios, dated September 8, 2010, and September 10, 2010, respectively.]

After BNSF objected to the deletion of these project elements intended to control stormwater runoff and sediment transport onto the BNSF right-of-way, the CEC issued a

Supplemental Staff Assessment Addendum on September 17, 2010, that reflected BNSF's concerns. See Exhibit 125 at pp. 5, 6, and Exhibit G. Also, incorporated into the CEC's Final Decision were Conditions of Certification Soil & Water 1-15, which were designed to ensure that the requisite hydrology and glint & glare studies, as well as grading and design plans would be performed. See Exhibit 125 at p. 5 and Exhibit N (CEC's Final Decision) to Exhibit 128 (Prepared Testimony of R. Garcia).

As Mr. Schmidt testified, without any rebuttal from Calico, the outcome of these studies could very well alter where the bridge should be located, because the studies "could have resulted in debris, detention or retention basins being placed at the location of the proposed bridge. Additionally, it could have revealed that a major alluvial wash would be impacted by the location of the proposed grade separation structure." Exhibit 125 at p. 4.

Yet, "Calico Solar [has] acknowledged that it has not completed these required and critical hydrology studies." *Id.* at p. 7.

Since the CEC's certification on December 1, 2010, however, matters have been become even more complicated. The Complaint filed in this proceeding was based upon the existing Calico ROW. The existing Calico ROW was expressly limited to the Calico SunCatcher Project, as approved by the CEC on December 1, 2010, and by BLM on October 29, 1010. In turn, the Calico SunCatcher Project was based and is contingent on the employment of SunCatcher technology.

But since the February 9, 2011 pre-hearing conference in this proceeding, Calico has made clear, and the BLM has determined, that Calico has no intention of building the

Calico SunCatcher Project, as approved by the CEC and BLM. Instead, Calico proposes, among other changes, to replace at least 80% of the SunCatchers with photovoltaic panels. These changes are described in Calico Solar's Plan of Development, dated March 28, 2011, and Calico Solar's Form 299, dated March 29, 2011, submitted to the BLM. Exhibit 125, Exhibits H and I, respectively.

As a result of Calico's proposed amendment, BLM twice issued a Notice of Intent to Terminate the Calico ROW in light of the sale of Calico Solar, LLC by Tessera Solar to K-Road Power, as well as statements by Calico that use of SunCatcher technology at the Calico SunCatcher Project was "unlikely." Exhibit 125 at p. 7 and Exhibit K.

On March 29, 2011, Calico Solar attempted to respond to BLM's concerns by submitting a Form 299 and Amended Draft Plan of Development. Exhibit 125 at Exhibit I. But on April 28, 2011, BLM notified Calico Solar that its March 29, 2011 submission

was insufficient as it relates to the request to address the technical requirements of the ROW grant and is insufficient as it relates to additional information and data necessary to proceed with the application to amend the ROW grant.

Exhibit 125 and Exhibit L.

On May 31, 2011, Calico submitted a letter responding to BLM's April 28, 2011 letter. See RJN at Ex. A [Exhibit 6 to Stobaugh Decl.]. In response, on June 6, 2011, BLM advised Calico that the information received was sufficient for BLM to accept Calico's amendment application for further processing. However, BLM advised that "BLM will engage in a supplemental environmental analysis of the revised project set forth in Calico's amended application." BNSF RJN Exhibit B [Stobaugh Decl.] at ¶ 14.

"BLM's supplemental environmental review will lead to a new decision document supported by a new administrative record." *Id.* at ¶ 15.

In the meantime, on March 18, 2011, Calico Solar filed a Petition to Amend its Certification of the Calico SunCatcher Project with the CEC. Exhibit 128 [Prepared Direct Testimony of Ronnie Garcia] at Exhibit O.

As of this time, none of the critical hydrological studies, glare and glint studies, or the grading or design plans have been completed. Testimony of D. O'Shea, May 17 Tr. At 101:24-102:23 (hydrological studies); 160:1-6 (hydrological studies and grading); 164:14-166:9 (glint and glare studies). Until these studies and plans are completed, neither BNSF nor this Commission can determine a safe location for any permanent grade-separated crossing or temporary at-grade crossing within the footprint of the proposed Calico project.

E. The Relief Calico Seeks in this Proceeding, As Described in its Prepared and Live Testimony

On April 1, 2011, Calico served its Direct Prepared Testimony in this proceeding, which makes clear that Calico has no intention of building the Calico SunCatcher Project approved by the CEC and BLM. Exhibit 1 (O'Shea's Prepared Testimony) at 4:5-19. Thus, Calico now seeks an order from the Commission authorizing a temporary at-grade crossing and a permanent grade-separated crossing for a proposed PV Project that has not been approved by either BLM or the CEC. Exhibit 1 (O'Shea's Prepared Testimony). At this point, no one knows whether the BLM will issue a new ROW or whether the CEC

will certify Calico's Petition to Amend and, if so, what the future footprint of a Calico PV Project might be.

Moreover, as set forth in its Prepared Direct Testimony, Calico seeks an order from the Commission authorizing a permanent grade-separated crossing at mile marker 710.8, as well as three so-called "crossings" that clearly fall outside the scope of the Scoping Memo and the Commission's jurisdiction under Section 7537:

1. Calico's Seeks a Permanent Grade-Separated Crossing At Mile Marker 710.8

In its prepared testimony, Calico requests a permanent grade-separated crossing at mile marker 710.8 and suggests that BNSF selected that site. As Mr. Schmidt testified, however, BNSF initially suggested that site on June 3, 2010, "based upon the location of the crossing relative to sight distance and the limited facts understood by BNSF at that time." Exhibit 125 [Schmidt Rebuttal] at p.2. But "as a result of Calico's plan changes, BNSF can no longer necessarily recommend Mile Post 710.8 as the location of a permanent bridge. Clearly, additional factors, including factors such as Project-related stormwater and sediment runoff onto the right-of-way need to be taken into consideration." *Id.* at p.7. Calico never rebutted Mr. Schmidt's testimony.

2. Calico Requests a Temporary At-Grade "Crossing" At Hector Station That Includes Not Only Use of BNSF's Private Hector Station MOW Crossing But Also Use of BNSF's Station Property and Another 1.7 Miles of a Road That Weaves In and Out of the BNSF ROW

Calico seeks a temporary at-grade "crossing" at the BNSF Hector Station Maintenance-of-Way crossing ("BNSF Hector Station MOW Crossing"). Exhibit 1 (O'Shea Direct Testimony) at 9:13-25. But the "crossing" that Calico seeks is no

ordinary "crossing" over the railway. The "crossing" that Calico seeks includes use not only of BNSF's private Hector Station MOW crossing, but also use of approximately .25 miles of BNSF's Hector Station property and another 1.4 miles of a road that weaves in and out of BNSF ROW between the eastern edge of BNSF Hector Station and the western edge of the Calico SunCatcher site north of the BNSF mainline.

Calico's expert, Don Dali, acknowledged that a crossing within a railway station is "more significant to a railroad than another area that is not within a station." Testimony of D. Dali, May 18, 2011 Transcript ("May __ Tr.") at 221:10-21. Mr. Dali agreed that it is "[a]bsolutely" appropriate that the station area at Hector Station is more significant to BNSF because BNSF "plans to do things within that station that are significant to operations." Testimony of D. Dali, May 18 Tr. at 221:22-28. Mr. Dali acknowledged that non-railroad uses, such as the requested use of the crossing at Hector Station by Calico, are generally not allowed within a station. Testimony of D. Dali, May 18 Tr. at 223:4-10. Moreover, Mr. Dali agreed that it is reasonable that BNSF would want to keep non-railroad personnel out of Hector Station. Testimony of D. Dali, May 18 Tr. at 223:15-21; 230:16-23. It is undisputed that the requested crossing at Hector Station is located approximately 1100 feet west of the eastern border of the BNSF Hector Station. See Exhibit 128 (Garcia Direct Testimony) at Exhibit J (Declaration of Mathew Barr) at ¶ 9; see also Testimony of D. Dali, May 18 Tr. at 260:15-20 (putting the distance at 1200 feet).

Mr. Dali also conceded that safety is a more significant concern within a station and that he is unaware of any use by Calico of the private MOW Crossing at Hector

Station other than the limited use for 26 or 27 months for surveying that was the subject of an expired private agreement. Testimony of D. Dali, May 18 Tr. at 222:1-19.

It is also undisputed that Calico does not own or lease land immediately north or south of the BNSF Hector Station MOW Crossing. Even Mr. Dali agreed that the crossing at Hector Station is not contiguous to any Calico land:

Q. Okay. And where Hector Station is and the temporary crossing at Hector Station is, is not contiguous to Calico Solar's property, right?

A. According to this map, that's correct.

Testimony of D. Dali, May 18 Tr. at 237:3-8. Instead, according to Calico responses to BNSF's Requests for Admission, "Calico's land is 7,720 feet [*i.e.*, 1.46 miles] from the Hector Road Crossing [BNSF Hector Station MOW Crossing] on the north side of the Hector Road Crossing" and "1,570 feet from the Hector Road Crossing on the south side of the Hector Road Crossing." Calico's Response 1 to BNSF's Request for Admissions, Exhibit 128 at Exhibit H.

Thus, as part of its requested "crossing," Calico seeks not only use of BNSF's private Hector Station MOW Crossing, but also use of BNSF's station property, including 1100 feet of MOW road within Hector Station and lateral use of BNSF's right-of-way "from the crossing to the CSP site" – *i.e.* use of 1.7 miles of a road that runs parallel to the BNSF railway and is within 100' of the centerline of the track at many locations. Exhibit 1 (O'Shea Direct Testimony) at 9:14-25; Exhibit 128 (Garcia Direct Testimony) at pp.10-11.

3. Alternatively, Calico Seeks a Temporary At-Grade Crossing At Pisgah

As an alternative to a temporary at-grade crossing at the BNSF Hector Road MOW Crossing, including its request for use of BNSF's station property and maintenance-of-way road for 1.7 miles, Calico seeks a temporary at-grade crossing at Pisgah. Exhibit 1 (O'Shea Direct Testimony) at 14:15-22.

The Pisgah crossing is located east of the Calico SunCatcher Project site. Like the BNSF Hector Road MOW Crossing, the Pisgah crossing is not adjacent or contiguous to any of the lands subject to the Calico ROW. As Calico candidly admits, Calico does not own or lease land that is contiguous to the BNSF ROW on both sides of the Pisgah crossing. As Calico states, Calico "has no land located due south of the Pisgah Crossing." See Calico's Response to BNSF Requests for Admission, Exhibit 128(Garcia Direct Testimony) at Exhibit H, at p.9. "Calico's land is 460 feet from the Pisgah Crossing on the north side of the Pisgah Crossing." *Id.* at p.8. See also map at Exhibit 1 (O'Shea Direct Testimony) Attachment 2. At the evidentiary hearing, Mr. Dali confirmed these facts. Testimony of D. Dali, May 18 Tr. at 137:12-18.

Calico acknowledges that the Pisgah crossing "is a private crossing north of the Pisgah Substation which ... is used by Southern California Edison for maintenance of transmission lines and by BLM to access BLM-administered lands north of the railroad." See Exhibit 1 (O'Shea Prepared Testimony) at 6:27-7:2. BNSF granted the private crossing to Southern California Edison ("SCE") because SCE owns a transmission line right-of-way that is contiguous to the BNSF ROW on both sides of the BNSF mainline. Exhibit 128 (Garcia Direct Testimony) at p.15.

Since Calico does not own or lease any land north or south of the Pisgah Crossing, Calico's request to use Pisgah Crossing necessarily requires Calico to trespass on the BNSF ROW and the SCE transmission-of-way. SCE is not a party to this proceeding.

4. Calico Requests a Waterline Underneath the BNSF Railway

Finally, Calico seeks an order authorizing the emplacement of a waterline underneath the BNSF mainline to connect a well in the northern section of the Calico SunCatcher Project site to a Service Complex in the southern section of the Calico SunCatcher Project site. Exhibit 1 (O'Shea Direct Testimony) at 13:7-21. Neither the inoperative BLM ROW nor the December 1, 2010 CEC Certification references the placement of a waterline beneath the BNSF ROW.

LEGAL ARGUMENT

I. BLM RECENTLY DETERMINED THAT THE CALICO ROW IS "INOPERATIVE"; THUS, CALICO HAS NO CURRENT PROPERTY INTEREST TO SUPPORT ITS COMPLAINT FOR TEMPORARY OR PERMANENT ACCESS ACROSS THE BNSF RAILWAY

A. The BLM ROW Is Not "Operative;" Thus, Any Request For A Crossing Is Premature

As the BLM's recent filings to the United States District Court make clear, the existing Calico ROW is not now "operative." RJN, Ex. B at p. 5, n.1. BLM explains:

The changes contemplated by Calico's still-pending amended application make plain that Calico will not request, and BLM will not approve, the construction of the project as set out in the ROD. Further, BLM has indicated that the ROW grant will be terminated or BLM will issue an amended ROW grant that will replace the grant challenged in this lawsuit. *Id.* at 4.

BLM has also determined that "because Calico has not demonstrated that it is capable of building the project with the currently permitted [SunCatcher] technology,

BLM will not issue the Notice to Proceed for construction of the project as presently authorized." *Id.* at 6.

Instead, BLM will either "terminate the existing ROW grant" or "issue[] an amended ROW grant and a new ROD, replacing the existing ROW grant and ROD." RJN, Ex. B [Declaration of James Stobaugh, dated June 6, 2011 ("Stobaugh Decl.")] at ¶ 15. BLM may even "revisit the land use plan decision for this project." *Id.* As a result of these determinations, BLM refers to the existing Calico ROW as not being "operative." *Id.* at 5 n.1.

BLM also determined that:

BLM will engage in a supplemental environmental analysis of the revised project set forth in Calico's amended application. ... BLM's supplemental environmental review will lead to a new decision document supported by a new administrative record. *Id.* at 4.

Thus, Calico cannot proceed to develop the existing Calico SunCatcher Project, even as it was originally approved.

At the evidentiary hearing, Mr. O'Shea acknowledged that Calico has not been issued a Notice to Proceed from BLM and that Calico is not authorized to do any ground disturbance on the site. Mr. O'Shea admitted that ground disturbance would include the construction of the waterline. Testimony of D. O'Shea, May 17 Tr. at 108:17-26.

Further, the BLM has not approved a Plan of Development, and Calico cannot "initiate any construction or other surface disturbing activities in the right-of-way without prior written authorization." Testimony of D. O'Shea, May 17 Tr. at 138:1-16.

At the February 9, 2011 Prehearing Conference, the ALJ determined that the Commission had jurisdiction over Calico's complaint, because the BLM ROW provided Calico the "right to use and occupy" the subject land. February 9, 2011 TR. at 41:7. Since February, however, BLM has determined that Calico has no such "right to use and occupy" the land. To the contrary, BLM has determined that the Calico ROW is "inoperative" and no Notice to Proceed shall issue for that Calico ROW.

Accordingly, under the current circumstances, the Commission lacks jurisdiction because Calico does not have a present right to use and occupy the land. The Calico complaint is premature and should be dismissed.

B. There Have Been No Environmental Studies Assessing The Impacts Of Calico's Requests, which Renders Calico's Requests Premature

Before the Commission can issue any order that would require BNSF to allow Calico to cross BNSF's tracks, the Commission must comply with CEQA. *See In re Pac. Gas and Elec. Co. Application for PUC Easement*, 2002 WL 31175127 at 3 (Cal.P.U.C.) (September 19, 2002) ("CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval."). Calico's expert, Mr. Dali, agreed that compliance with CEQA is necessary. See Testimony of D. Dali, May 18 Tr. at 257:20-26.

As Mr. Dali acknowledged at the hearing, there has been no environmental review of Calico's proposed use of property within Hector Station, within the BNSF ROW and outside and north of the BNSF ROW for the 1.7 miles from Hector Station to the eastern edge of the Calico SunCatcher Project site, or regarding the crossing at Pisgah.

Testimony of D. Dali, May 18 Tr. at 260:17-261:9. And, as Mr. O'Shea acknowledged at the hearing, there have been no environmental studies regarding: (1) Calico's proposed bridge; (2) traversing from the eastern edge of Hector Station to the western edge of the Calico SunCatcher Project site, the proposed waterline running under BNSF's tracks; (3) moving the main services complex from north of the mainline to south of the mainline; (4) moving the substation from north of the mainline to south of the mainline; or (5) installing a waterline beneath the BNSF railroad tracks. Testimony of D. O'Shea, May 17 Tr. at 84:4-85:5.

Equally important, as Mr. O'Shea acknowledged, the site for the bridge cannot be established until after certain environmental studies, including hydrology studies, glare and glint studies, and grading and design plans, have been performed. Mr. O'Shea admits that those studies and plans could affect the location of any bridge by at least a quarter of a mile from Calico's now-requested location at mile marker 710.8. See Testimony of D. O'Shea, May 17 Tr. at 109:19-110:19.

And Mr. Schmidt's testimony on this issue was not rebutted in any manner by any of the Calico witnesses. Indeed, Calico's expert, Mr. Dali, has no experience in or expertise in hydrology. Testimony of D. Dali, May 18 Tr. at 218:4-8. Mr. Dali does, however, have experience with the impact of flooding on a Class 1 mainline such as the BNSF mainline. Mr. Dali agreed that the impact of flooding on the BNSF mainline could be catastrophic, leading to loss of life and the disruption of the transcontinental mainline that could interrupt commerce throughout the states. Testimony of D. Dali, May 18 Tr. at 218:13-26.

Accordingly, because the requisite environmental studies have not yet been completed, it is premature at this time to consider any crossings of the BNSF mainline pursuant to Section 7537 and the Calico complaint should be dismissed.

II. THE COMMISSION CANNOT AUTHORIZE ANY CROSSING TO CONNECT LAND THAT IS NOT "CONTIGUOUS" TO A RAILWAY RIGHT-OF-WAY

A. Calico's Request for a Temporary Crossing at Hector Station Should Be Denied Because That Crossing Does Not Connect "Contiguous" Lands Owned or Leased by Calico

Calico's request for authorization to use the BNSF Hector Station MOW Crossing, BNSF's property within Hector Station and another 1.46 miles of a private BNSF road running parallel to the BNSF tracks to get from the crossing to the Calico SunCatcher Project site, should be denied because the request falls outside the scope of the Scoping Memo and is beyond this Commission's jurisdiction under Section 7537 of the Public Utilities Code.

Initially, 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*:

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

Additionally, the Scoping Memo in this proceeding made clear that the issues before the Commission include:

1. Should BNSF be required to provide Calico with a temporary at-grade rail crossing to connect *contiguous land* granted to Calico by the Federal Bureau of Land Management... [and]
2. Should BNSF be required to provide Calico with a permanent grade-separated rail crossing ... to connect *contiguous land* granted to Calico by the Federal Bureau of Land Management...

Scoping Memo at p. 5. (emphasis added).

A prerequisite to an application for a private crossing under Section 7537 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) ("[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.") Section 7537 provides, in pertinent part:

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.

Cal. Pub. Util. Code § 7537. On its face, Section 7537 is limited to requests for private crossings by owners of lands that are "along or through which any railroad is constructed or maintained" that would connect "such lands" – i.e. lands that are "along or through which any railroad is constructed or maintained" with "other adjacent lands of the owner."

Here, BNSF supports the immediate construction of a permanent grade-separated crossing at a location to be determined after the critical hydrology studies, glare and glint studies, and grading and design plans have been performed. That permanent grade-separated crossing would clearly satisfy Section 7537's requirement of connecting lands that are "along or through which any railroad is constructed or maintained" with "other adjacent lands of the owner." Cal. Pub. Util. Code § 7537.

It is undisputed, however, that the at-grade temporary crossing at BNSF Hector Station that Calico seeks would not connect "lands along or through which [BNSF railroad] is constructed or maintained] with "other adjacent lands_of [Calico]," as the statute requires. To the contrary, as is evident both from the live testimony of Calico's expert, Mr. Dali, and Calico's discovery responses in this proceeding, Calico does not own or lease land immediately north or south of the BNSF Hector Station MOW Crossing. Mr. Dali testified that Calico's requested temporary at-grade crossing at Hector Station is not contiguous to any Calico land:

Q. Okay. And where Hector Station is and the temporary crossing at Hector Station is, is not contiguous to Calico Solar's property, right?

A. According to this map, that's correct.

Testimony of D. Dali, May 18 Tr. at 237:3-8. Rather, "Calico's land is 7,720 feet [*i.e.*, 1.46 miles] from the Hector Road Crossing [BNSF Hector Station MOW Crossing] on the north side of the Hector Road Crossing" and "1,570 feet from the Hector Road Crossing on the south side of the Hector Road Crossing" See Calico's Response 1 to BNSF's Request for Admissions, Exhibit 128 (Garcia Prepared Testimony) at Exhibit H.

In other words, Calico does not seek to connect land that is "along or through which BNSF railroad is constructed or maintained" with other "adjacent land." Instead, Calico's proposed crossing at the BNSF Hector Station MOW Crossing merely connects non-Calico land with other non-Calico land.

Indeed, it is for that very reason that, in addition to a normal "crossing" – *i.e.* use of the BNSF Hector Station MOW Crossing, which is an at-grade perpendicular crossing over the BNSF tracks – Calico also seeks Commission authorization of a "related right-of-way" – that is, the right to use approximately .25 mile of BNSF's MOW road within the BNSF Hector Station, itself, and another 1.46 miles of a road that weaves in and out of the BNSF ROW, so that Calico can "traverse" the 1.7 miles between the BNSF Hector Station MOW Crossing and the Calico SunCatcher Project site. See Exhibit 1 (O'Shea Direct Testimony) at 9:13-25; Calico's Response 1 to BNSF's Request for Admissions, Exhibit 128 (Garcia Prepared Testimony) at Exhibit H.

In order to satisfy the "contiguous" requirement of Section 7537, Calico requests that, in addition to the perpendicular crossing across the BNSF railway at the BNSF Hector Road Station MOW, it should also be granted "a related right-of-way" for use of a road in order to "traverse" the distance between the BNSF Hector Road Station MOW Crossing and Calico's lands. Exhibit 1 (O'Shea Prepared Testimony) at 9:13-25. Calico thereby suggests that, by including a request to use the road to connect the BNSF Hector Road Station MOW Crossing to its lands, the so-called "crossing" (inclusive of the 1.46 miles of road between the actual railroad crossing and Calico land) would render its lands "contiguous" to the BNSF railway.

But Calico's interpretation flies in the face of the statute. Under such an interpretation, Section 7537's prerequisite that lands be "along or through which a railway is constructed or maintained" would be written right out of the statute. Any land – even land many miles away from any railway – could be made to be "contiguous" to a railway simply by requesting authorization for a "related right-of-way" to use roads to get to or from a railway, as Calico has done here.

B. Calico's Request for a Temporary At-Grade Crossing at Pisgah Should be Denied Because it Falls Outside the Scope of the Scoping Memo and the Commission's Jurisdiction Under Section 7537

Calico also seeks a temporary at-grade crossing at Pisgah. But, like the proposed crossing at the Hector Station MOW, Pisgah would not connect contiguous land owned or leased by Calico. Calico's expert, Mr. Dali, candidly concedes that Calico does not own or lease land that is contiguous to the BNSF ROW on both sides of the Pisgah crossing:

Q. Right. And you've also referred to the Pisgah crossing, right?

A. I have indeed.

Q. And that's not contiguous to Calico Solar's property, correct?

A. That's not indicated on this map. That's correct.

Q. But you know it's not contiguous, right?

A. Yes.

Id. at 237:9-18.

As Calico states, Calico "has no land located due south of the Pisgah Crossing." Exhibit 128 at Exhibit H, page 9 (Calico's Response to BNSF Requests for Admission). Likewise, "Calico's land is 460 feet from the Pisgah Crossing on the north side of the Pisgah Crossing." *Id.* at p.8. See also Attachment 2 to Exhibit 1, map at O'Shea Direct Testimony.

Thus, even if Calico's request for a temporary at-grade crossing at Pisgah were granted, Calico could not reach the Calico SunCatcher Project site without trespassing on the SCE transmission right-of-way located due north of the Pisgah Crossing. Accordingly, Calico's request for a temporary at-grade crossing at Pisgah, should be denied.

III. CALICO'S REQUESTS FOR A TEMPORARY AT-GRADE CROSSING SHOULD BE DENIED BECAUSE CALICO HAS NO SUCH NEED

Section 7537 only allows crossing to the extent that they are "reasonably necessary."

Mr. O'Shea concedes that the Calico Solar project site is accessible north of the BNSF mainline from Newberry Springs Road. "The Newberry Springs road we talked about is a way to get there." Testimony of D. O'Shea, May 17 Tr. at 101:3-11. Mr. Dali concedes that "It's accessible now." Testimony of D. Dali, May 18 Tr. at 244:20-28. While Mr. Dali claims that it is not now accessible "by anything heavy," the only use needed now is for general surveying work – which does not require heavy vehicles. Even Mr. Dali concedes, however, that that if it were "bladed and graded," "[the Newberry Springs road] could be made accessible" for heavy construction vehicles. Testimony of D. Dali, May 18 Tr. at 244:20-28.

Additionally, Mr. O'Shea concedes that, at one time, Calico proposed to access the site north of the BNSF mainline by constructing an off-ramp off of Interstate 40 east of the Lugo-Pisgah transmission line. Testimony of D. O'Shea, May 17 Tr. at 113:11-20, 115:6-22, Exhibit 101 at page 3-22. Mr. O'Shea also acknowledged that BNSF has requested that the I-40 off ramp be considered as a reasonable alternative in the amendment process. Testimony of D. O'Shea, May 17 Tr. at 117:3-23. Mr. O'Shea further agreed that, during this time period, Calico Solar planned to access the site to the north of the BNSF mainline from construction access roads off of the I-40 off ramp. Testimony of D. O'Shea, May 17 Tr. at 124:10;125:1; Exhibit 102 at Exhibit J (map depicting construction access roads).

Mr. O'Shea also testified that Calico could, through the amendment process, ask for access to the northern portion of it site through access off of I-40 and/or from Ludlow, east of the site, along BLM open routes or other roads. Testimony of D. O'Shea, May 17

Tr. at 145:23-146:7. Mr. Dali also was aware of the I-40 off-ramp proposal and agreed that it would be a way to obtain access to the site without requiring a crossing at all.

Testimony of D. Dali, May 18 Tr. at 272:22-273:6.

Mr. O'Shea also admitted that Calico Solar submitted a map to the CEC that represented that public access routes would allow Calico access to its site from the east at Ludlow and from the West at Newberry Springs:

Q. Now you understand that this document was submitted by Calico Solar?

A. Yes.

Q. And it shows yellow or public access routes coming from Ludlow that would get you into your project site, right?

A. It does, yes.

Q. And it shows yellow or public access routes coming from Newberry Springs?

A. Yes.

Q. It would get you to your project site?

A. Yes.

Q. And along the BNSF right-of-way, you see that Calico has referred to this BNSF railroad roads, right?

A. Yes.

Testimony of D. O'Shea, May 17 Tr. at 177:10-26, Exhibit 124.

Notwithstanding the clear availability of public access routes from the west and east to the Calico SunCatcher Project site, the record is completely devoid of any testimony by Calico regarding the navigability of the known public access routes from

the east. Mr. Dali concedes that he does not know if they are navigable or not.

Testimony of D. Dali, May 18 Tr.247:3-10.

Nor has Calico explained why it cannot use these known public access routes to access the Calico SunCatcher Project site and then build its own private roads within the Calico SunCatcher site to access the location of the permanent grade-separated crossing, as well as its main complex and substation sites. Ultimately, Calico will need to construct roads internal to its project, in any event.

Yet, Calico insists on using instead, AF058, which is entirely within the BNSF ROW at Hector Station and weaves in and out of the BNSF ROW for 1.7 miles to the east before it reaches the western border of the Calico SunCatcher Project site – no doubt, to save Calico the cost of building its own road. Significantly, however, there is no testimony regarding the navigability of AF058. As Mr. Dali explained, he did not travel on AF058 and does not know its condition. He has, therefore, no reason to believe that travel on AF058 would be less difficult than any other route to the site. Testimony of D. Dali, May 18 Tr.247:3-13, 21-28; 268:1-12. Likewise, Mr. O’Shea testified that he never travelled within the BNSF ROW or along AF058. Testimony of D. O’Shea, May 17 Tr. 78:7-23.

Accordingly, Calico has failed to make an adequate showing that the crossings at Hector Station and Pisgah are reasonably necessary.

IV. CALICO'S REQUESTS FOR TEMPORARY AT-GRADE CROSSINGS SHOULD BE DENIED BECAUSE SAFETY MUST BE THE FIRST PRIORITY IN DETERMINING WHETHER A TEMPORARY AT-GRADE CROSSING SHOULD BE GRANTED

Assuming the Commission reaches the merits of Calico's Complaint, it is undisputable that the issue of safety is paramount. Calico's expert, Mr. Dali, agreed that safety is the first priority. Testimony of D. Dali, May 18 Tr. at 219:4-8. Mr. Dali's testimony was unequivocal:

Q. Now would you agree that safety is the first priority?

A. Absolutely.

Q. Always?

A. Always.

Testimony of D. Dali, May 18 Tr. at 219:4-8. Mr. Dali also agreed that safety is more important than financial considerations. Testimony of D. Dali, May 18 Tr. at 219:9-11. Safety also is more important than convenience. Testimony of D. Dali, May 18 Tr. at 219:12-14. For the numerous reasons discussed below, each and every safety consideration requires denial of Calico's request for a temporary crossing at Hector Station or Pisgah. Instead, safety militates that any crossing ordered by the PUC should be a permanent grade-separated crossing and that such crossing should be ordered to be constructed with no delay. Any temporary at-grade crossing should be in close proximity to the grade-separated crossing, within the proposed fenced and secured facility footprint, and should be dismantled immediately after the grade-separated crossing is operational.

A. A Permanent-Grade Separated Crossing Is the Safest Crossing Possible

BNSF has always agreed to accommodate the immediate construction of a grade-separated permanent crossing. Even Calico's expert, Mr. Dali, agreed that a grade-separated crossing -- *i.e.*, a bridge -- is the safest crossing. Mr. Dali testified:

Q. Now, would you agree, sir, that the safest crossing is a grade-separated crossing, or what has been referred to as a bridge here?

A. Yes.

Q. That is the safest?

A. Yes, it is.

May 18 Tr. at 219:15-21. Mr. O'Shea concurred that the "best option, the safest option is the bridge." Testimony of D. O'Shea, May 17 Tr. at 76:16-19 87:2-5.

Accordingly, Calico's Vice President and retained expert agree with BNSF's Mr. Hartley (see Hartley Prepared Direct and Rebuttal Testimony) that the safest crossing is a grade-separated crossing, or bridge. The construction estimate for the bridge is five months. Testimony of D. O'Shea, May 17 Tr. at 87:6-13.

Calico, however, proposes to delay bridge construction for over two years. The decision by Calico to wait for over two years to build the bridge is "a monetary decision, fiscal decision." Testimony of D. O'Shea, May 17 Tr. at 87:14-88:5; 104:13-17.

Mr. O'Shea acknowledges that the Calico Solar project is a \$2 billion project and that safety is "[a]bsolutely" important. Notwithstanding the importance of safety, he can give no reason for waiting over two years to construct the bridge other than financial considerations and convenience. Testimony of D. O'Shea, May 17 Tr. at 111:26-113:2;

87:14-28 (“But to spend significant amounts of money on a bridge early in the project . . . doesn’t seem practical or appropriate.”)

B. The Commission's General Order 75-D Discourages At-Grade Private Crossings, But if An At-Grade Private Crossing is Necessary, It Should Be Within the Footprint of the Fenced and Secured Solar Facility

Calico's expert, Mr. Dali, confirmed that the Commission has adopted General Order 75-D's policy to reduce at-grade private crossings and that BNSF's internal policy of reducing at-grade private crossings is both reasonable and consistent with the Commission's policy. Testimony of D. Dali, May 18 Tr. at 262:21-28.

Mr. Dali also agreed that, in the hierarchy of safety, after a permanent grade-separated crossing, the next safest alternative is an at-grade crossing with lights and gates and a center median, or what is typically referred to as a signalized crossing. Testimony of D. Dali, May 18 Tr. at 219:22-220:2. By contrast, Calico proposes to use an at-grade crossing that is not signalized

Mr. Dali acknowledged, however, that Calico plans on fencing and securing the Calico Solar Project site property. Accordingly, the Calico plan that includes a temporary at-grade crossing site in the vicinity of the proposed bridge would be more secure and safer than the proposed unguarded, at-grade crossing at Hector Station. Testimony of D. Dali, May 18 Tr. at 240:7-19.

Clearly, Calico's plan to fence and guard the Calico Solar Project site militates in favor of locating any at-grade crossing within the project footprint. Neither Hector Station nor Pisgah – which are not adjacent to any portion of the Calico Solar Project site – meets this requirement.

C. Calico's Requests for a Temporary Crossing at Hector Station or Pisgah Raise Serious Safety Issues Based On The Total Number of Forecasted Vehicle Crossings and the Weight and Length of the Construction Vehicles and Equipment

BNSF's safety expert, Lyn Hartley, testified that private at-grade crossings are for "infrequent use." Mr. Hartley explained, "As the level of usage increases, the potential for catastrophic collisions and derailments increases." Exhibit 126 [Hartley Direct Testimony] at p.5.

Calico's expert, Mr. Dali, did not disagree with Mr. Hartley's testimony in this regard. However, Mr. Dali's assumption that the crossings at Hector Station and Pisgah would be safe for Calico's intended use as a temporary at-grade crossing had no basis in fact. Indeed, he conceded that his assumption regarding usage was dependent entirely on Mr. O'Shea's testimony. Exhibit 2 (Dali Direct Testimony) at 4:9-11. Mr. O'Shea, in turn, claimed that "the forecasted temporary usage is not materially different from the historic usage of the Hector Road crossing. Exhibit 1 (O'Shea Direct Testimony) at 1:13-14.

But Mr. O'Shea has no knowledge of the historic usage of the Hector Station Crossing. Testimony of D. O'Shea, May 17 Tr. at 74:12-25. Mr. O'Shea testified that the only basis for his testimony regarding the historic usage of the crossing at Hector Station was the 2008 private crossing agreement with BNSF. Testimony of D. O'Shea, May 17 Tr. at 74:20-75:3. That document, Attachment 1 to Exhibit 3 (Bellows Direct Testimony), is limited, by its express terms, to "5 crossings per month for 6 months" of light vehicles (4x4 trucks) (Exhibit A to Attachment 1 to Exhibit 3) and additional limited

crossings to allow for the drilling of a water well (2 crossings of construction vehicles and 8 crossings for water trucks) (Exhibit D to Attachment 1 to Exhibit 3).

By contrast, both Mr. O'Shea and Mr. Hartley testified that Calico's current forecasted usage entails crossing the BNSF mainline 134 times a week, 22 crossings per day – 50 pickup trucks, 10 flatbed trucks, four concrete trucks, one backhoe, one grader, one 88,000 pound crane. Testimony of D. O'Shea, May 17 Tr. at 106:15-23; 107:2-11; see also Exhibit 126 [Hartley Direct Testimony] at pp. 4-5. Thus, Calico's position that its forecasted usage is merely a continuation of its prior usage is contradicted by Mr. O'Shea's own testimony and Mr. Hartley's unrebutted direct testimony.

Equally important, Mr. O'Shea is not competent to offer testimony regarding the safety of the Hector Station crossing or whether the 5 crossings per month by "light vehicles" should be viewed as equivalent to at least 22 daily crossings, some by heavy construction vehicles, backhoes, graders and cranes. Mr. O'Shea candidly admitted that he has no experience as an engineer and no experience in construction management. Testimony of D. O'Shea, May 17 Tr. at 62:20-63:09. In fact, he is a lawyer. Testimony of D. O'Shea, May 17 Tr. at 63:10-64:11. Moreover, Mr. O'Shea did not become a consultant and act as a Vice President of Calico Solar until February 2011; thus, he had no involvement in Calico's efforts to obtain the temporary and permanent crossings that are at issue in this proceeding. Testimony of D. O'Shea, May 17 Tr. at 72:25-73:20.

D. Flaggers and/or Lights & Gates Would Not Cure BNSF's Safety Concerns

Also pertinent to safety considerations is Mr. Dali's acknowledgement that, at present, the crossing at Hector Station is unlocked and unattended, thereby creating a safety hazard. Testimony of D. Dali, May 18 Tr. at 238:4-8. He also acknowledged that Calico plans on fencing and guarding the site property and that the Calico plan that includes a temporary crossing site in the vicinity of the proposed bridge would be more secure and safer than the crossing at Hector Station. Testimony of D. Dali, May 18 Tr. at 240:7-19.

To address that particular concern, BNSF suggested, in its direct testimony, that lights and gates be installed, thereby removing the risks of human error that would accompany any flagmen. Exhibit 126 [Hartley Direct Testimony] at pp. 6-7. Calico's expert, Mr. Dali, disagreed, contending that installation of lights and gates would make any such crossing an "attractive nuisance" because it would invite local residents to use the crossing, as well.

But it was undisputed that non-Calico personnel are already using the Hector Station crossing, even without the installation of lights and gates. Testimony of D. Dali, May 18 Tr. at 238:4-8. According to Calico's expert, Mr. Dali, because the Hector Station crossing is frequently found unlocked, the Hector Station crossing already creates a "safety hazard." As Mr. Dali testified:

Q. Okay. So now you understand that there's been testimony about the temporary crossing at Hector Station. It's gated, but somebody keeps breaking the locks, right?

A. Well, I don't know about breaking locks, but it's certainly an unlocked situation.

Q. Unlocked and unattended?

A. Yes.

Q. Okay. And that's -- creates a certain safety hazard, correct?

A. Yes.

May 18 Tr. at 237:25 – 238:8.

As noted above, both this Commission and BNSF have adopted policies to reduce the number of at-grade private crossings due to concerns over safety. Yet giving Calico approval to use the Hector Station crossing, at the volume and types of construction vehicles Calico proposes, would only encourage local residents to use the Hector Station crossing more, thereby increasing the risk of injuries, accidents and derailments.

At the same time, Calico did not dispute BNSF's testimony that flaggers and implementation of a Form B requirement would significantly impede BNSF's rail operations, because Form B and flaggers are intended for "short-term maintenance jobs," not the 2.5 year-period that Calico anticipates for its "temporary" usage. See Exhibit 127 [Hartley Rebuttal Testimony] at p.3.

In fact, the only way to remove any safety concerns regarding the Hector Station crossing is to close it down altogether. As Denise Gauthier testified on behalf of BNSF, this is exactly what BNSF intends to do. The parties' 2008 Private Crossing Agreement has terminated. Under its terms, BNSF has the legal right to remove the Hector Station MOW crossing and return it to its previous state, which allowed only for transit by BNSF

personnel within the BNSF ROW and did not provide access north or south of Hector Station. Testimony of D. Gauthier, May 19 Tr. at 401:14-26; 405:13-20; 406:6-15.

Significantly, Calico's expert, Mr. Dali, agreed that, when, as here, there is a private crossing agreement for a temporary crossing, "once the temporary crossing has been used . . . it's decommissioned and terminated." Testimony of D. Dali, May 18 Tr. at 232:8-14. Here, the parties' 2008 Private Crossing Agreement specifically allows BNSF to remove the crossing upon termination of the agreement. Exhibit 3, Attachment 3, at ¶ 20. Mr. Dali testified that this provision is typical and reasonable:

Q. Okay. So in general terms if there's been a temporary crossing that is being used to facilitate construction, you would expect that the temporary crossing would be decommissioned, shut down and removed after the permanent crossing, the bridge, is put in?

A. Yes

Q. And that would be a reasonable condition here regardless of where the temporary crossing is ordered?

A. Sure.

Testimony of D. Dali, May 18 Tr. at 232:15-26; 286:7-11.

Mr. Dali also testified that these types of agreements are consistent with PUC General Order 75-D, and he would expect that the parties would be bound by their terms. Testimony of D. Dali, May 18 Tr. at 241:23-242:13. After reviewing the specific provision (paragraph 20) in the parties' 2008 Private Crossing Agreement (Exhibit 3, Attachment 1), which expressly allows BNSF to remove the crossing, Mr. Dali confirmed that decommissioning the crossing and putting the crossing out of service "would be a

reasonable thing to do if the railroad didn't need it for another purpose." Testimony of D. Dali, May 18 Tr. at 242:23-243:18.

As BNSF made clear at the evidentiary hearing, the only reason BNSF has not already decommissioned the Hector Station MOW crossing is the pendency of this adjudicatory proceeding. BNSF should be permitted to decommission the Hector Station MOW crossing, thereby removing the safety risks arising from what Calico characterizes as an "attractive nuisance" to local residents. BNSF would continue to have full access to Hector Station, itself, for the railroad purposes to which they testified.

E. Pisgah Is Unsafe As a Temporary Crossing for Calico

At the hearing, Calico tried to make much of the fact that the Pisgah crossing has been in place for many decades for the sole use of Southern California Edison. Calico tried to suggest that, since SCE uses the Pisgah crossing occasionally to maintain its transmission lines, any use by Calico would be safe, *per se*. See Closing Argument of William Kissinger, May 19 Tr. at 422:1-7.

But, as we discussed above, occasional use by light vehicles is a far cry from extremely frequent usage by heavy construction vehicles and equipment.

Equally important, Mr. Hartley testified that the approach road from the south to the Pisgah crossing is at an angle. May 18 Tr. at 334:12-21. Mr. Hartley testified that this "increases the potential for collisions and corresponding derailments and catastrophic injury and death and damage to rail infrastructure, rolling stock and the environment." Exhibit 126a [Hartley Direct Testimony] at p.8. At the hearing, Calico did not dispute

that the southern approach to Pisgah is, in fact, at an angle and that a driver's vision would, therefore, be obscured.

Thus, Pisgah would be unsafe, particularly given the high volume, types and weight of the construction vehicles and equipment that Calico intends to use.

* * *

In short, both sides' experts agree that it would be safest to construct a bridge, and avoid building an at-grade crossing by using existing public crossings at either Newberry Springs or Ludlow which connect with existing public access routes to the proposed site. Both experts agree that if any temporary at-grade crossing is necessary, the temporary crossing should be located within the fenced and guarded facility footprint near the construction site for the bridge, and then immediately dismantled once the bridge is operational. Any temporary at-grade crossing should be signalized due to the volume and size of the construction equipment. Calico's financial and convenience concerns do not override safety. Moreover, Calico should not be allowed to avoid the obligations that it knowingly entered into in relation to the private crossing agreement and the reimbursement agreement. Accordingly, Calico's requests for a temporary at-grade crossing should be denied, because there are significant safety concerns and alternative access routes to both the northern and southern portions of the proposed facility currently exist.

V. THE COMMISSION HAS NO POWER TO AUTHORIZE A WATERLINE UNDERNEATH THE BNSF RAILWAY

Calico seeks an order compelling BNSF to authorize the emplacement of "a waterline under BNSF's tracks" in order to provide a water source for the Calico SunCatcher Project site north of the tracks. Exhibit 1 (O'Shea Prepared Testimony) at 1:22-24.

The approved Calico SunCatcher Project called for water to be collected and processed at the main services complex north of BNSF's mainline tracks. Any use of water south of BNSF's mainline tracks would be trucked to the south. There was no need for a waterline crossing under BNSF's mainline tracks under the approved Calico SunCatcher Project. The amendment changed both phasing of the project (commencing construction south of the BNSF mainline rather than north of the BNSF mainline) and moved certain facilities, to include the main services complex, from north of the BNSF mainline to south of the BNSF mainline. See Testimony of D. O'Shea, May 17 Tr. at 75:4-13. Notably, Mr. O'Shea conceded that there is an alternative water source for construction south of the BNSF mainline under the amendment. That alternative water source is Chambless Water Services, Inc., and is specifically referenced in the proposed Plan of Development Calico submitted with its amendment. See Exhibit 113 (Plan of Development) at p. 16; Testimony of D. O'Shea, May 17 Tr. at 96:10-97:2 referring to Chambless Water Services as "Shambless").

Regardless, Calico's request for a waterline clearly falls outside the scope of the Scoping Memo because a waterline is neither "a temporary at-grade rail crossing to

connect contiguous land granted to Calico" or "a permanent grade-separated rail crossing ... to connect contiguous land granted to Calico." Scoping Memo at 5 (emphasis added).

In fact, a waterline does not connect any land, much less "contiguous land." It is simply a waterline, which falls outside the scope of Section 7537. The plain language of Section 7537, itself, authorizes the Commission only to permit "private crossings over the railroad and railroad right of way" Cal. Pub. Util. Code § 7537 (emphasis added). The statute does not authorize the Commission to permit any crossings under railroad tracks or railroad right-of-way. Accordingly, Calico's requests for an underground waterline should be denied.

CONCLUSION

As set forth herein, the evidence presented at the hearing on this matter makes clear that the relief Calico is requesting is premature. Based on BLM's recent determination that the BLM Row is not "operative," Calico does not have the requisite right to use and occupy the BLM ROW. Moreover, BLM has determined that, throughout the pendency of the consideration of Calico's amendment, BLM will not issue the requisite Notice to Proceed. Additionally, Calico concedes that the required environmental studies have not, to date, been performed. For this reason, alone, the Commission should dismiss Calico's complaint as premature.

Further, the evidence is uncontroverted that neither the crossing at Hector Station nor the crossing at Pisgah are contiguous to any BLM ROW property. As such, the threshold requirement under Section 7537 is not met and the Commission cannot grant Calico's requested relief.

Assuming the Commission determines that it has the jurisdiction to order temporary crossings at Hector Station and/or Pisgah notwithstanding the undisputed testimony that both crossings not "contiguous" to any Calico ROW, safety mandates that the Commission decline to grant a temporary at-grade crossing at either of those locations. Any crossing should be a permanent grade-separated crossing. The location of any grade separation should be determined after the appropriate hydrology and glare and glint studies and grading plans and designs are completed. The construction vehicles for the grade separation should be required to use public crossings and access routes.

Calico has failed to make the necessary showing that temporary crossings at the Hector Station or Pisgah are reasonably necessary. Indeed, Calico's expert concedes access is currently available for survey purposes via Newberry Springs. Moreover, the Newberry Springs access route would be accessible for construction vehicles if it were bladed and graded. Nor can Calico identify an access route from either the crossing at Hector Station or Pisgah that would not need to be bladed and graded to accommodate construction vehicles. Further, the initial Calico access plan via an off-ramp off of I-40 – which would eliminate the need for any crossing of the BNSF ROW – should be fully examined before any crossing over the mainline is considered. Finally, Calico represented to the Energy Commission that access from Ludlow was available. Calico has failed to present any evidence that would undermine its initial representation, to which it should be held.

Finally, there is no basis under Section 7537 for the Commission to grant Calico's request that the Commission order BNSF to allow it to construct a waterline underneath the BNSF mainline.

In conclusion, in response to each of the questions presented in the Scoping Memo, BNSF provides the following:

1. Should BNSF be required to provide Calico with a temporary at-grade rail crossing to connect contiguous land granted to Calico by the Federal Bureau of Land Management, for the purpose of constructing a solar generation project?

ANSWER: No, as discussed above, Calico's requests for crossings at either Hector Station or Pisgah are neither safe nor necessary. Calico presently has adequate access from either the west at Newberry Springs or from the east at Ludlow to access the site for any current needs. As discussed above, BLM has not provided and will not provide Calico with a Notice to Proceed during the pendency of the amendment process. Accordingly, Calico has no present right to use and occupy the land for the purpose of building a solar generation project; it only has a limited right to go on the land for surveying purposes and it cannot conduct any ground disturbing operations. Further, if BLM approves Calico's amendment request and Calico seeks a grade-separated crossing to connect contiguous lands pursuant to an amended BLM ROW, then Calico can either: (1) blade and grade public access routes from either or both Newberry Springs and/or Ludlow; or (2) construct an off-ramp from the I-40 travelling west from Ludlow. Either approach would eliminate any private crossing over the BNSF mainline to construct or

operate the project. If Calico elects to build a grade separation to connect contiguous properties, they should build it at the commencement of Phase I of their project so as to minimize their off-site project impacts. Moreover, the proposed crossings at Hector Station and Pisgah are not contiguous to the BLM ROW and, therefore, are outside the scope of the Scoping Memo and do not fall within the jurisdictional purview of California Public Resources Code Section 7537. Finally, there is no basis – either through Section 7537 or the Scoping Memo – for Calico’s request for a waterline running under the BNSF mainline at an as-yet-to-be-determined location. For this reason, it should be denied.

If so,

- a) Where should this crossing be located?

ANSWER: As discussed above, BNSF does not believe that any crossings are reasonable or necessary. Notwithstanding, BNSF continues to accommodate any request by Calico for a grade-separated crossing to connect contiguous lands pursuant to a BLM ROW. As Calico concedes, its exact location is subject to numerous further studies and analyses, to include but not limited to hydrological and glare and glint studies. Additionally, while BNSF does not believe that any further temporary at-grade crossing is reasonable and necessary, any temporary at-grade crossing should be in the immediate vicinity of the location of any permanent grade-separated crossing and within the fenced and secured footprint of the Calico Solar Project.

b) How should this crossing be constructed or modified (if necessary) to ensure safe use by Calico?

ANSWER: Any temporary at-grade crossing in the vicinity of the location of any such permanent, grade-separated crossing should be constructed using best construction practices and consistent with BNSF's standards and protocols for temporary at-grade crossings. It should be constructed in such a manner to allow for heavy construction vehicles to pass over the temporary at-grade crossing to facilitate construction of the permanent, grade-separated crossing. In no instance should BNSF be ordered to allow crossing or transit within Hector Station or laterally within the BNSF ROW. It should not be used until Calico fences and secures the proposed BLM ROW.

c) What is the anticipated cost of preparing the crossing, and who should pay for any work needed to prepare the crossing for Calico's use?

ANSWER: Approximately \$300,000-\$500,000.¹ Calico should pay for any costs to construct a signalized temporary, at-grade crossing within its fenced and secured facility footprint.

d) When should this crossing be made available?

ANSWER: If and after BLM approves Calico's amendment, and after appropriate hydrological and glare and glint studies have been performed, and the location of the permanent, grade-separated crossing can be determined, the location of any reasonable

¹ See Exhibit 126 [Hartley Direct Testimony] at p.7.

and necessary temporary at-grade crossing to accommodate construction traffic associated with building the grade separation within the facility footprint, can also be determined.

e) Will railroad flaggers or other special procedures be necessary for use of the temporary at-grade crossing by Calico?

ANSWER: To ensure safety and prevent unauthorized access and use: (1) signalization, and K-rails along the sides and center median of the crossing, paid for by Calico, should be required consistent with the testimony of Lyn Hartley for BNSF; and (2) access to any such temporary at-grade crossing should be controlled by Calico through fencing around the site and gates and security controlling access to the temporary at-grade crossing from the to-be-constructed access road.

2. Should BNSF be required to provide Calico with a permanent, grade-separated rail crossing, paid for by Calico, to connect contiguous land granted to Calico by the Federal Bureau of Land Management for the purpose of operating a solar generation project? If so,

ANSWER: As discussed above, BNSF does not believe that any such permanent grade-separated rail crossing is reasonable and necessary. Initial construction plans called for an off-ramp off of I-40 to be constructed travelling west from Ludlow. Such an off-ramp would completely eliminate the need for any crossing, temporary or permanent, over BNSF's mainline. Alternatively, Calico could use the public crossing at Newberry

Springs to connect with public access routes to its facility. Such routes could be bladed and graded as required to accommodate the necessary vehicular traffic. Both would provide the additional benefit of an emergency access route to and from the proposed 30-year project and access to property owners whose current public access routes are being eliminated by the BLM's grant of Calico's request to close all existing public access routes within the footprint of their property. Notwithstanding, BNSF has accommodated and will continue to accommodate Calico's request for a grade-separated crossing to connect contiguous lands pursuant to a BLM ROW.

a) Where should this crossing be located?

ANSWER: The location of the crossing can only be ascertained when further studies and analyses are completed, to include but not limited to hydrological studies and glare and glint studies, and appropriate mitigation measures have been approved.

b) What is the anticipated cost of constructing the permanent crossing?

ANSWER: Approximately \$5 million to \$6 million.²

c) Who will construct the crossing?

ANSWER: Calico, subject to and in accordance with best construction practices and consistent with BNSF's standards and protocols for grade-separated crossings. Such standards and protocols include but are not limited to: a proper insurance policy covering

² See Prepared Direct Testimony of D. Dali, Exhibit 2, at 3:1-2; 11:22-24.

construction, which typically is for \$10 million or more³; and (2) BNSF's right to inspect the bridge and ensure it complies with BNSF's safety requirements.⁴

d) What is a reasonable timeframe for completing construction of the permanent crossing and making it available for Calico's use?

ANSWER: The construction can be completed within four to five months⁵ after determination of where the grade separation can be located. As explained above, the prerequisites for determining where the grade separation can be located include the completion and approval of hydrologic and glare and glint studies, grading plans, and stormwater and sedimentation runoff mitigation measures.

June 13, 2011

 /s/
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³ See Testimony of D. Dali, May 18 Tr. at 265:18-24.

⁴ See Testimony of D. Dali, May 18 Tr. at 277:11-22.

⁵ See Prepared Direct Testimony of D. Dali, Exhibit 2, at 3:1-2; 12:1-8.

PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of Los Angeles. I am over the age of 21. On June 13, 2011, I served the within:

BNSF'S POST-HEARING OPENING BRIEF

Case No C10-10-015

on the parties and representatives identified in the attached Service List, by electronic transmission to the e-mail address identified on the Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, on June 13, 2011.

_____/s/
Helen B. Kim

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