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**BEFORE THE CALIFORNIA ENERGY COMMISSION**

In the Matter of:

Fountain Wind Project Opt-In  
Application for Certification

Docket No. 23-OPT-01

**COUNTY OF SHASTA  
STANDING RESERVATION OF RIGHTS**

Matthew McOmber  
Assistant County Counsel  
Office of County Counsel  
COUNTY OF SHASTA  
1450 Court Street, Suite 332  
Redding, CA 96001  
[mmcomber@co.shasta.ca.us](mailto:mmcomber@co.shasta.ca.us)

Ryan M. F. Baron  
Timothy Lyons  
Best Best & Krieger LLP  
18101 Von Karman Avenue, Suite 1000  
Irvine, CA 92612  
(949) 263-6568  
[ryan.baron@bbklaw.com](mailto:ryan.baron@bbklaw.com)  
[timothy.lyons@bbklaw.com](mailto:timothy.lyons@bbklaw.com)

Attorneys for  
**COUNTY OF SHASTA**

September 28, 2023

**BEFORE THE CALIFORNIA ENERGY COMMISSION**

In the Matter of:

Fountain Wind Project Opt-In  
Application for Certification.

Docket No. 23-OPT-01

**COUNTY OF SHASTA  
STANDING RESERVATION OF RIGHTS**

The County of Shasta (“County”) hereby files this Standing Reservation of Rights related to its participation in the above-captioned proceeding and its standing objection to jurisdiction of the California Energy Commission to proceed with the application process for the Fountain Wind Project.

**Background**

On or about January 11, 2023, Fountain Wind LLC (“Applicant”) submitted an opt-in application for certification (“AFC”) of the Fountain Wind Project (“Project”).<sup>1</sup> The Fountain Wind Project was previously denied by the County after exhaustive California Environmental Quality Act (“CEQA”) review by both the Shasta County Planning Commission and, on appeal, by the County Board of Supervisors. On or about August 11, 2023, the County objected to Commission jurisdiction over the Project under Assembly Bill (“AB”) 205 because the County already denied the Fountain Wind Project and because, among other things, the Legislature did not intend to allow a project proponent to use the Commission’s AB 205 opt-in process to circumvent the previous denials of approval of a project by a local government with land use

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<sup>1</sup> Files associated with the Application were uploaded to the California Energy Commission’s (“Commission”) docket (23-OPT-01) from January 3 through January 11, 2023 and the Commission deemed January 11, 2023 as the effective receipt date. Memo from Leonidas Payne to Docket Unit, January 13, 2023, TN No. 248411.

authority.<sup>2</sup> Instead, the Legislature intended to allow an applicant to “opt-in” to the Commission certification process “in lieu of” (*i.e.*, instead of) the default local government discretionary approval process. The County also questions whether AB 205 was properly enacted, considering that it proceeded through a budget trailer bill process as urgency legislation, and has raised constitutional and other legal issues with the Commission’s jurisdiction. For these reasons, and because the County found nothing in the record to indicate that the Commission has evaluated its jurisdiction with respect to the Application, the County objected to the Applicant’s August 3, 2023 request for a Commission determination that the Application is complete. The County has also asked the Commission to (1) formally review its jurisdiction under AB 205, (2) hold a duly-noticed Business Meeting to discuss its jurisdiction over the Application prior to allowing the Applicant or Commission staff (“Staff”) to proceed further in the proceeding, (3) decide this issue at the Business Meeting and ultimately find that the Commission does not have jurisdiction and deny or reject the Application, and (4) direct the Executive Director to delay issuing a notice of completion until this issue is finally decided.<sup>3</sup>

On August 15, 2023, the County submitted a Request for Reimbursement and Itemized Budget (“Reimbursement Request”) for the costs associated with the actual and added costs of the County’s review of and comments on the Application.<sup>4</sup> The County is required by law to review and submit comments on the Application and receive reimbursement for its participation in this proceeding.<sup>5</sup> In submitting its Reimbursement Request, the County clearly and unequivocally stated that the Commission lacks authority to review and certify the Application under AB 205

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<sup>2</sup> *In re Fountain Wind Project Opt-In Application for Certification*, County of Shasta Opposition to Commission Jurisdiction Under AB 205 and Objection to Fountain Wind LLC Request for Application Completion Determination, Docket No. 23-OPT-01, Aug. 14, 2023, TN No. 251601 (“County’s Opposition to Commission Jurisdiction”).

<sup>3</sup> *Id.* at 2, 14.

<sup>4</sup> *In re Fountain Wind Project Opt-In Application for Certification*, County of Shasta Request for Reimbursement and Itemized Budget, Docket No. 23-OPT-01, Aug. 15, 2023, TN No. 251628.

<sup>5</sup> Pub. Res. Code Sections 25519(f) and (k) and 25538 apply to opt-in applications per Pub. Res. Code Section 25545.8.

and that the County was not waiving any rights or other arguments to challenge the Commission's authority over the Fountain Wind Project, including without limitation the issue of jurisdiction.<sup>6</sup>

### **RESERVATION OF RIGHTS**

The Commission lacks jurisdiction to consider the Application under AB 205 because, among other things, the County has already denied the Fountain Wind Project. Nonetheless, the County is participating in this proceeding to protect its rights and advocate for its constituents while also being responsive to Staff requests for the County's review and comments on the Application. Notwithstanding the foregoing, the County's participation at Staff meetings, including, but not limited to, a pre-application meeting, review of the Application, any comments submitted by the County based on its review of the Application, and any and all filings and pleadings submitted by the County to the Commission, are undertaken and made without waiving or intending to waive, but to the contrary intending to preserve and preserving, any and all rights, objections, and remedies, including but not limited to the County's objections to the Commission's jurisdiction over the Fountain Wind Project.

Federal and state courts have used the term "waiver" to refer to a number of different concepts, but "waiver" generally means the "voluntary relinquishment of a known right," though it can also mean "the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to abandon or relinquish the right."<sup>7</sup> Here, the County has not, is not, and does not plan on relinquishing or waiving its right to challenge the Commission's jurisdiction to consider the Application. Instead, the County explicitly and directly challenged the Commission's jurisdiction over the Project and will continue to challenge the Commission's jurisdiction unless and until the Commission disclaims jurisdiction over it. If

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<sup>6</sup> *Id.* at 2.


<sup>7</sup> *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4<sup>th</sup> 307, 315.

the Commission does not disclaim jurisdiction, the County may pursue any and all options available to it, including judicial relief. In sum, the County has not relinquished any right to challenge Commission jurisdiction and explicitly reserves its right to do so, despite its participation in this proceeding.

Nor should the County ever be “estopped” from challenging Commission jurisdiction over the Project because the Commission lacks jurisdiction and any Commission order or ruling issued on the basis of the Commission’s purported jurisdiction is therefore void and “vulnerable to direct or collateral attack at any time.”<sup>8</sup> Here, there is an “entire absence of power [for the Commission] to hear or determine the case” because AB 205 does not grant the Commission jurisdiction over projects already denied by a local government with land use authority, among other reasons. Thus, any Commission order or ruling considering the merits of the Project application is void and the County can challenge that order or ruling at any time. Nevertheless, the County is submitting this standing reservation of rights out of an abundance of caution.

Dated: September 28, 2023

Respectfully submitted,

By:   
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Ryan M. F. Baron

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<sup>8</sup> *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4<sup>th</sup> 653, 660.