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BEFORE THE CALIFORNIA ENERGY COMMISSION

In the Matter of: Fountain Wind Project Opt-In Confidentiality Application for Certification	Docket No. 23-OPT-01

COUNTY OF SHASTA
OBJECTION TO APPLICANT CONFIDENTIALITY REQUEST
RE COMMUNITY BENEFITS AGREEMENT DATA RESPONSE

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BEFORE THE CALIFORNIA ENERGY COMMISSION

In the Matter of: Fountain Wind Project Opt-In Confidentiality Application for Certification.	Docket No. 23-OPT-01

COUNTY OF SHASTA
OBJECTION TO APPLICANT CONFIDENTIALITY REQUEST
RE COMMUNITY BENEFITS AGREEMENT DATA RESPONSE

The County of Shasta ("County") hereby objects to the *Confidentiality Application for Confidential Designation* filed by Fountain Wind LLC ("Applicant"), dated September 28, 2023 ("Confidentiality Application "), and the redactions contained in the *Applicant's Response to Community Benefits Data Request*, also dated September 28, 2023 ("Response").[1] The County respectfully requests that the California Energy Commission ("Commission") (1) deny the Confidentiality Application on the grounds that there are no exceptions to the California Public Records Act ("CPRA") that apply; and pause reviewing the adequacy of the community benefits plan until the Applicant has re-filed unredacted versions or the Commission has fully disclosed the Response in the record, so the public can properly review and comment on the Response concurrent with Commission adequacy review. In addition to this objection, the County notes that, through its legal counsel, it has filed a separate request with the Commission for a copy of the Applicant's unredacted Response pursuant to its rights under the CPRA.[2]

[1] TN252340 and TN252431.

[2] The County provides this objection on the Application designation request and redacted Response. It does not address herein the inadequate community benefits plan that has been filed. The County contends that the plan continues to be inadequate for the reasons set forth by Commission staff and comments raised by Save Our Rural Town, but reserves the right to provide further comment on plan adequacy in future comments.

Pursuant to 20 C.C.R. Section 2505, the Applicant is required to cite to applicable CPRA exceptions in order to keep its submitted data and other information confidential unless an automatic designation applies. In this case, the Response does not qualify for an automatic designation and the Confidentiality Application does not cite to any applicable exception of the CPRA. There is also no compelling reason provided in favor of nondisclosure that outweighs the right of the public to review and comment on the adequacy of the proposed community benefits plan and the public policy of transparency. It is also important to stress that CPRA statutory exemptions, such as the ones cited here, are permissive, not mandatory. The Commission has the discretion to disclose the Response in an unredacted form, notwithstanding any CPRA exception cited by the Applicant that may apply. Therefore, the Confidentiality Application must be denied and the Response disclosed in its entirety.

I. Government Code Section 7927.605 Does Not Apply

Government Code Section 7927.605(a) precludes the disclosure of records that are "corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California." This exception does not apply to the Response as Section 7927.605(a) only applies, in limited fashion, to business records shared with certain state agencies by companies working with the State on efforts to keep, expand or relocate their corporate facilities. Section 7927.605 expressly applies to state agencies that provide tax incentives and other compensation to companies desiring or continuing to do business in California. The Applicant is not a business seeking to retain, locate or expand its corporate business in California within the meaning of the statute, and the Commission is not an agency that is working with the

Applicant on doing so. The statute, quite simply, does not apply to the "siting" of a power plant by a regulatory agency.

The California Public Utilities Commission ("CPUC") has interpreted Section 7927.605 (through its predecessor statute Cal. Gov. Code § 6254.15) in the same situation that is at issue in the Applicant's Response, and has determined that this CPRA exception does not apply to corporate records submitted to the agency.

> "Regulated entities commonly cite Cal. Gov't. Code Section 6254.15 for the proposition that it provides an exemption for all 'corporate financial records, corporate proprietary information including trade secrets,' regardless of the purpose such records or information was submitted to a government agency. However, this section must be narrowly construed. Additionally, upon reviewing the legislative history of Cal. Gov't. Code Section 6254.15, the Legislature's intent appears to have been to create an exemption focused on efforts of state agencies to encourage businesses to stay, locate, or expand their facilities within California. To narrowly construe the statute, consistent with the legislative history, would suggest that this exemption should only apply to financial records related to encouraging businesses to stay, locate, or expand their facilities in California."[3]

[3] CPUC Legal Div., Resolution No. L-614, 2022 WL 622399, pp. 8-9 (Feb. 24, 2022).

In the same proceeding, the CPUC in several conclusions at law clarified the CPRA and the public's right to access corporate records, which the Commission should be mindful of and that apply here.

- "The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning the conduct of the peoples' business.
- The California Constitution requires that authority favoring disclosure be broadly construed, and that authority limiting disclosure be construed narrowly; and that any new statutes, court rules, or other authority limiting disclosure be supported by findings determining the interest served by keeping information from the public and the need to protect that interest. Cal. Const. Article I, §§ 3(b)(1) and (2).
- The general policy of the CPRA favors disclosure of records.
- Justification for withholding a public record in response to a CPRA request must be based on specific exemptions in the CPRA or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Cal. Gov't. Code § 6255.
- [State law] does not limit the Commission's ability to order disclosure of records."[4]

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[4] Id.

The same principles cited by the CPUC, that comprise the overall purpose and policy that favors disclosure, apply to the Commission in this proceeding and to the Response. The laws favors disclosure of the Response in its entirety, and any CPRA exception interpreted by the Commission must be narrowly construed. Furthermore, the CPUC has rejected the exception in other matters,[5] and the 9th Circuit Court of Appeals has found that there is no guarantee that such information remains confidential when submitted to a public agency.[6] The Commission then has no duty to withhold the redacted information and can in its discretion order disclosure.

In addition, other statutory schemes are clear that Section 7927.605 only applies to specific agencies with responsibility for overseeing economic growth, such as the Governor's Office of Business and Economic Development, an agency charged with job growth and business assistance.[7] The Commission is not such an agency as set forth in its mandate under the Warren

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[5] "Shell cites to Ca. Gov. Code § 6254.15 as preventing the disclosure of prices and other contract terms. That provision of the California Public Records Act is intended to protect sensitive corporate information provided to the state "for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California. This contemplates a private company working with a government agency in the course of establishing or expanding its physical presence in the state. It does not apply to this scenario where a company has been directed to disclose contracts pursuant to the Commission's regulatory oversight of the RPS program." *Ord. Instituting Rulemaking to Continue Implementation & Admin., & Consider Further Dev., of California Renewables Portfolio Standard Program*, Decision 21-11-029, 2021 WL 5514585, pg. 42 (Nov. 18, 2021).

[6] "Absent specificity, CITA contends it has a ""statutory interest" that guarantees the confidentiality of certain information it submits to the Commission. (CITA reh.app. at pp. 5-6.) However, a similar argument was rejected by the Ninth Circuit Court of Appeals in *Re Subpoena Served on California Public Utilities Commission v. Westinghouse Electric Corporation* (9th Cir. 1989) 892 F.2d 778, as well as by this Commission in numerous decisions (discussed infra). Whether CITA is relying solely on two laws referenced in its footnotes, i.e., Evidence Code section 1060, or a provision of the California Public Records Act (CPRA), i.e., Government Code section 6254.15, or relying on some other law in alleging a guaranteed statutory interest in the confidentiality of certain information is unclear. Public Utilities Code section 1732 requires an application for rehearing to specifically set forth its allegations of error. *Ord. Instituting Rulemaking to Improve Pub. Access to Pub. Recs. Pursuant to the California Pub. Recs. Act*, Decision 17-05-035, 2017 WL 2362022, pg. 3 (May 25, 2017) (emphasis added).

[7] "Any information submitted to GO-Biz that the applicant considers to be a trade secret, confidential, privileged or otherwise exempt from disclosure under the Public Records Act (California Government Code section 6250, et seq.) shall not be publically disclosed by GO-Biz unless it is required to do so by court order or applicable law. An applicant shall assert a claim of exemption by identifying each of the items to be restricted and the section of law that provides for the exemption (e.g., Government Code section 6254.15) at the time its application form is submitted to GO-Biz. In the event GO-Biz is required to publically disclose information identified by the applicant as a trade secret, confidential, privileged, or otherwise exempt from disclosure, GO-Biz shall notify the applicant at least five (5) business days prior to the release of such information in order to allow the applicant to seek an injunction, as applicable, unless a court order or the equivalent prevents such timely notice." 10 C.C.R. § 8030 (emphasis added).

Alquist Act and AB 205, and instead, is charged with overseeing and administering thermal energy certification, energy conservation, and other statewide energy programs.

In addition, and to the extent Section 7927.605 is deemed to apply, the name and other information of the purported "community-based organization" and proposed agreement by the Applicant (to the extent it exists and is valid) is not a corporate financial record, corporate proprietary information, or a trade secret. Furthermore, the Response does not contain any information related to the "siting" by Fountain Wind LLC within California for the purpose of the Commission working with the Applicant in retaining, locating or expanding its corporate business.

II. Government Code Section 7927.500 Does Not Apply

Likewise, Government Code Section 7927.500 does not apply. This section states that public records can be exempt from disclosure if they are "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by a public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." First, the plain language of the statute and case law make clear that the exception only applies to drafts of a public agency, not the Applicant or a private company submitting records responsive to an agency data request. Second, the Response and draft agreement are required by the Commission as part of its adequacy review and have been requested as part of a data request. Third, the draft agreement will be retained by the Commission in the ordinary course of business as part of the Commission's adequacy review, and has been filed in the docket as a permanent and official agency record by the choice and free will of the Applicant. Fourth, the cases involving Section 7927.500 have not found evidence or a compelling reason for an agency to not disclose a draft and have only applied to handwritten notes. Fifth, there is no interest in withholding the

information that outweighs disclosure, as further discussed below.[8] And, as a matter of practice, drafts are commonly disclosed by public agencies pursuant to CPRA requests.

III. Government Code Section 7922.000 Does Not Apply

Government Code Section 7922.000 does not apply to the Response as the public's right to disclosure outweighs any interest by the Applicant in keeping the Response and the draft agreement that it voluntarily filed from disclosure. Section 7922.000 is more commonly referred to as the catch-all exception, which applies if " on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."[9] Unless one of the exceptions stated in the Act applies, the public is entitled to access to "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency."[10] Because state law favors disclosure of public records, the privacy and catchall statutory exemption is narrowly construed.[11]

In a data response issued September 20, 2023, the Commission determined that the current community benefits plan information submitted by the Applicant "fails to meet both the letter of the law and the purpose of the Opt-in provisions related to community benefits."[12] The data request describes at length the legal requirements surrounding the community benefits requirement

[8] "There is no indication in the record regarding the contents of these notes; moreover, there is no indication whether the notes are of the type 'not retained by the public agency in the ordinary course of business.' *Reg. Div. of Freedom Newspapers, Inc. v. Cnty. of Orange* (1984) 158 Cal. App. 3d 893, 908. "The second condition of section 6254, subdivision (a) is that the records be documents which are not retained by the Department in the ordinary course of business. If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed. (§ 6254, subd. (a).) Thus, the agency controls the availability of a forum for expression of controversial views on policy matters by its policy and custom concerning retention of preliminary materials." *Citizens for a Better Env't v. Dep't of Food & Agric.* (1985) 171 Cal. App. 3d 704, 714.

[9] *Int'l Fed'n of Pro. & Tech. Engineers, Loc. 21, AFL-CIO v. Superior Ct.* (2007) 42 Cal. 4th 319, 329.

[10] Id.

[11] *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301.

[12] TN252320, Commission Data Request, pg. 1.

and the current inadequacy of the Confidentiality Application information stating that "This information is needed by CEC staff to ensure that members of the community have the opportunity to shape the project's contributions to the community."[13]

The Confidentiality Application states that it is in existing negotiations with a community-based organization and that the terms and amounts are "commercially sensitive" that must be "shielded from disclosure." It asserts that any disclosure would interfere with an "open discussion" until the final agreement amounts are finalized, and that there is no "harm to the public interest" in maintaining confidentiality and the public will be able to comment on it when it is finalized.

Despite the nondisclosure reasons provided for in the Confidentiality Application, the public has the right to review and comment on the proposed community benefits plan and the adequacy of that plan for purposes of determining whether this portion of the Project application is complete and in compliance with Public Resources Code Section 25545.10. Under Public Resources Code Section 25519(f), the County is required to review and comment on the Project application, which includes the community benefits plan. This right includes, but is not limited to, verification that the party to the agreement is a valid community-based organization or whether funding would be expended outside of the geographic community of Shasta County,[14] the topics and specific terms of the agreement meet the requirements of AB 205, there is a mutual benefit to the agreement parties, and even whether there is any indication that there are indeed active negotiations between the Applicant and the purported community-based organization or there is simply a draft agreement that has been sent to an organization with amounts and programs listed

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[13] *Id*, pg. 4.

[14] For instance, the Response indicates that funds will be expended outside of Shasta County, which appears inconsistent with AB 205 and the Applicant's own interpretation of the statute that "community" is a "geographic reference . . . to mean the locality within which the project is proposed, here Shasta County." TN252431, Applicant Response, pg. 3.

in it. This latter point is important because the Applicant has previously identified a plan with support for community-based organizations in both the County's prior review and in what has been submitted in the current docket, and none of the proposed organizations entered into agreements or a plan with the Applicant.[15] In addition, the existing community benefits plan identified execution of an agreement after Commission certification. Moreover, the County fails to see how disclosure will inhibit negotiations or how such closed-door negotiations outweigh the public's right to review and comment on the Applicant's response and the adequacy of the Project Application, considering that the Applicant on August 3, 2023 requested a completion determination.

In reviewing the case law on the catch-all exception, the Commission should understand that nondisclosure has only been upheld in very limited circumstances involving the privacy interests of individuals, such as Public Defender databases, certain vehicle license plate scans by law enforcement, and the location of COVID-19 outbreaks.[16] Here, the information at issue does not involve the privacy interests of the individual members of the public, but is the very information that is required by law to allow the Commission to determine the adequacy of an application, and, ultimately, certify an eligible AB 205 project. The negotiations allegedly at issue are also not protected under the Supreme Court case of *Michaelis, Montanari & Johnson v. Superior Court*.[17] While the Court has recognized an exception for open competitive solicitations and requests for proposals where certain contract negotiations prior to execution of a contract are ongoing, that exception is limited and only applies to the government agency, not a private party.

[15] See, e.g., https://www.fountainwind.com/benefits/ (claiming $1.1 million to the Shasta County Sheriff's Office, Western Shasta Resource Conservation District and Shasta County Fire Safety Council); TN248296-2, Community Benefits Program (claiming $2 million in a 2021 Community Benefit Program to various organizations).

[16] See, *e.g.*, *Voice of San Diego v. Superior Court of San Diego County* (2021) 280 Cal.Rptr.3d 906.

[17] (2006) 38 Cal.4th 1065.

The rule in that case is also predicated on a recognized exception "to guard against discrimination, favoritism, or extravagance, and to assure the best social, environmental, and economic result *for the public*" where the public interest is scrutiny of the process leading to the selection of a "winning proposal." In this case, it is the very information itself that is required by AB 205 and Commission regulations and the ability to validate the adequacy thereof.

IV. Conclusion

For the aforementioned reasons, the County respectfully requests that the Commission deny the Confidentiality Application and order the Applicant to submit the full and unredacted contract and other redacted information into the record and pause adequacy review until the public can concurrently review the data response in its entirety.

Dated: September 29, 2023

Respectfully submitted,

By: ______________________________
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