

DOCKETED

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Project Title:	Fountain Wind Project
TN #:	253801
Document Title:	20 CCR § 1231 – Request for Investigation Into Fountain Wind, LLC Regarding Fountain Wind Project
Description:	N/A
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Organization:	County of Shasta
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File No. 55398-00043

January 4, 2024

Drew Bohan
Executive Director
California Energy Commission
715 P Street
Sacramento, CA 95814

Re: Docket 23-OPT-01: 20 C.C.R. § 1231 – Request for Investigation Into Fountain Wind, LLC Regarding Fountain Wind Project

Dear Mr. Bohan:

Best Best & Krieger LLP represents the County of Shasta (“County”) in Docket 23-OPT-01. Section 1231 of Title 20 of the California Code of Regulations (“C.C.R.”) reads, “Any person may allege, in writing, a violation of a statute, regulation, order, program, or decision adopted, administered, or enforced by the commission.” The County hereby alleges, in writing, based on the statement of facts contained herein,¹ that Fountain Wind, LLC (“Fountain Wind”) has committed several such violations related to its AB 205 opt-in application for certification of the Fountain Wind Project (“Application”), which Application is currently under review by the California Energy Commission (“Commission”) in Docket 23-OPT-01. The County requests that the Commission undertake an investigation of Fountain Wind’s violations of law and regulation and upon finding that such violations occurred, initiate a complaint pursuant to section 1233 *et seq.*, refer the matter to the California Attorney General’s office, correct or modify prior Commission staff action, or take other action deemed appropriate by the Commission to address Fountain Wind’s flagrant disregard for the law and Commission regulations during the pendency of the Commission’s review of Fountain Wind’s opt-in application for certification of the Fountain Wind project in Shasta County, California (“Project”).²

The County further requests that the Executive Director use his powers under Section 1231 to investigate the subject matters and violations addressed herein because the County has submitted numerous comments into the docket for this proceeding on such matters, and they have not been addressed by the Commission. Furthermore, Public Resources Code section 25545.12(a) requires the Commission to adopt regulations to implement AB 205’s opt-in procedure. The Commission, however, does not appear to have implemented the necessary procedures to allow the County as a local government with review and comment obligations on the Project,³ or even interested persons,

¹ This letter is organized to correspond to and provide the information required by 20 C.C.R. section 1231.

² The County maintains its standing objection to jurisdiction of the Commission to proceed with the application process for the Project. See TN252439, *County of Shasta Standing Reservation of Rights* (Sep. 28, 2023).

³ Pub. Res. Code § 25519.

to procedurally address the subject issues other than to file comments in the docket. The docket for this proceeding appears to be a repository for third party filings and does not compel Commission action of any kind as is done in all other Commission siting proceedings and other proceedings and with other California sister agencies.⁴ The County has raised questions about which regulations apply to an opt-in proceeding, which procedures have been cherry-picked by Fountain Wind and gone unanswered.⁵ Therefore, the County is compelled to use all available procedures and administrative remedies to compel agency action in this proceeding due to the lack of procedures that have been adopted to properly implement AB 205.

Name, Address, Email, and Telephone Number – 20 C.C.R. § 1231(a)

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Identifying Information of the Entity Violating Law and Regulation – 20 C.C.R. § 1231(b)

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On information and belief, Fountain Wind is represented in this matter by

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⁴ For example, the Commission recently indicated that its regulation governing the date of docketing is of no effect even though its business hours are prescribed by the Legislature in the Government Code and its regulations include a clear process for filings submitted after-hours. See TN252889, *County of Shasta Comments Re Incorrect Docketed Date re Determination of Complete Application for Fountain Wind Project* (Nov. 1, 2023); TN253508, *County of Shasta Comments on Notice of Preparation of DEIR* at 3-4 (Dec. 4, 2023); and TN253603, *Memo re County's Comments on the Notice of Preparation of the Draft Environmental Impact Report* at 3 (Dec. 13, 2013).

⁵ See e.g., TN253120, *County of Shasta CEC Revised Reimbursement Request* at 2-3 (Nov. 14, 2023).

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Statement of Facts – 20 C.C.R. § 1231(c)

Community Benefits Agreement

Fountain Wind uploaded files associated with its Application from January 3 through January 11, 2023 and the Commission determined an effective receipt date of January 11, 2023.⁶

Pursuant to 20 C.C.R. section 1877(g), an opt-in application must include “the applicant’s plan or strategy, including a timeline for execution, to obtain legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations prior to project certification, consistent with Public Resources Code section 25545.10.”

Consistent with Public Resources Code section 25545.10(a), the Commission “shall not certify a site and related facility under this chapter” (*i.e.*, Chapter 6.2 – Certification of Nonfossil-Fueled Powerplants, Energy Storage Facilities, and Related Facilities) “unless the commission finds that the applicant has entered into one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more community-based organizations, such as workforce development and training organizations, labor unions, social justice advocates, local governmental entities, California Native American tribes, or other organizations that represent community interests, where there is mutual benefit to the parties to the agreement.”

Fountain Wind did not include with its Application its “plan or strategy, including a timeline for execution, to obtain legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community based organizations prior to project certification.” Instead, Fountain Wind filed a so-called “Community Benefits Program” (TN248296-2) from 2021 that had been previously submitted to the County when the County previously reviewed the same project and denied it. Importantly, at that time, none of the organizations listed in the program document were in discussions with or agreed to a community benefits agreement with the Applicant. The submittal itself did not include any documentation or information showing that the Applicant was in negotiations with any of the subject fund recipients, letters of support from those organizations, or drafts or outlines of community benefits agreements. Commission staff described the “Community Benefits Program” as a “not current” list with “outdated information” on projects Fountain Wind is “willing to fund purportedly based on community feedback.”⁷ According to Commission staff, Fountain Wind had stated on several occasions, including most recently on July 27, 2023, its intent to provide updated information on community benefits, but as of Mr. Eric Knight’s August 31, 2023 letter, had not.⁸ Commission staff therefore determined that

⁶ TN248411, *Application receipt confirmation*, (Jan. 13, 2023).

⁷ TN252072, *Staff Response to Applicant request for Determination of Completeness, including Wildfire Data Requests*, (Aug. 31, 2023).

⁸ *Id.*

Fountain Wind had not satisfied the requirements of Public Resources Code section 25545.10 or 20 C.C.R. section 1877(g).⁹

On September 8, 2023, the Applicant filed a response (TN252187) to Commission staff's August 31 deficiency letter (TN252072), but in its response did not provide full and accurate information of the actual plan it was proposing, and instead, in four short bullet points, summarized that conversations with the Commission were held on July 27; that the Applicant was negotiating an agreement with an unidentified foundation where funds would benefit the project area and the Burney, Montgomery Creek, and Round Mountain unincorporated area communities; and that an agreement would be executed by the "end of September" and submitted to the Commission 45 days after the application was determined to be complete.¹⁰ No other information about the plan was provided. Despite containing legal analysis of AB 205 requirements, the Applicant's response was not written or signed by Fountain Wind or its legal counsel.

On September 20, 2023, Commission staff issued a docketed data request to the Applicant setting forth staff's interpretation of Public Resources Code section 25545.10 and 20 C.C.R. sections 1877 and 1878.¹¹ Staff determined and stated in this data request that the additional information Applicant provided in its September 8 response (TN252187) to staff's request for additional data regarding Fountain Wind's plan for obtaining a legally binding community benefits agreement failed "to meet both the letter of the law and the purpose of the Opt-in provisions related to community benefits."¹² Staff again asked the Applicant to docket additional information related to community benefits agreements, advising the Applicant that these agreements "allow for meaningful community involvement in the land development process ... [and] are intended to be negotiated by community groups and stakeholder organizations to address community needs and to deliver economic and social benefits."¹³ These community benefit groups "represent the interests of residents who will be impacted by the proposed development" and the agreements "are the direct result of substantial community input."¹⁴

On September 28, 2023 the Applicant submitted its response to staff's September 20 community benefits data request, including a purported "draft agreement" and disclosing what it described as "negotiations" with a foundation.¹⁵ The Applicant redacted pertinent information from the public version of its response, including the name of the foundation and the material terms and amounts of the agreement.¹⁶ The redacted response did not include specific information about

⁹ *Id.*

¹⁰ TN252187, *fwp_response_to_deficiency_letter*, (Sep. 8, 2023).

¹¹ TN252320, *Community Benefits Data Request for the Fountain Wind Project* (Sep. 20, 2023).

¹² *Id.*

¹³ *Id.*

¹⁴ Staff cited to the U.S. Department of Energy Guide to Advancing Opportunities for Community Benefits through Energy Project Development, dated August 1, 2017 and available online at: <https://www.energy.gov/diversity/articles/community-benefit-agreement-cba-resource-guide>. TN252320 (emphasis added).

¹⁵ TN252431, *REDACTED Response to Community Benefits Data Request* (Sep. 28, 2023).

¹⁶ *Id.*

the community benefits plan or evidence that the Applicant was actually in discussions with a foundation.

On September 29, 2023, the County objected to the confidential designation request and provided legal analysis explaining why the Applicant's submittal was not entitled to confidentiality under the California Public Records Act.¹⁷

On October 12, 2023, the Applicant re-filed its community benefits plan response in unredacted form, but did not provide a further response as to why it filed the documents in redacted form in the first instance, and did not rescind its confidentiality designation request.¹⁸ In its unredacted response, the Applicant cited negotiations with the Community Foundation of the North State and stated that approximately \$3,000,000 in funds were earmarked for the Pit River Tribe and the Shasta County unincorporated area.¹⁹

On October 18, 2023, the Pit River Tribe, a federally recognized Indian tribe, filed the *Pit River Tribe Opposition to Fountain Wind Project* (TN252625), stating, among other things, that the Project, if approved, "would result in significant adverse impacts to the viewshed, aesthetics, water quality, biological environment, economic base, as well as Tribal cultural resources," and "**vehemently object[ing] to the misleading claims**" made by the Applicant in its TN252586 response to the Commission's community benefits data request. According to the Pit River Tribe, it "vehemently opposes any association with this financial arrangement."²⁰ The Pit River Tribe further stated that the Applicant's misrepresentations "raise serious ethical and transparency concerns that demand immediate attention."²¹ County Supervisor Mary Rickert subsequently sent and docketed a letter to Commission Chair Hochschild stating "on behalf of the County and [her] communities that the [Fountain Wind project] is universally opposed by residents, businesses, and other organizations throughout Shasta County due to the significant adverse impacts with respect to wildfire hazards, aerial firefighting, viewshed, water quality, biological resources, Shasta County's economic base, and Tribal Cultural resources," and stating that "there is no community benefits agreement" and calling into question whether negotiations were actually occurring.²²

On November 13, 2023, the County sent a 20 C.C.R. section 1716 information request to the Applicant regarding the Applicant's community benefits plan. On November 28, 2023, the County docketed its section 1716 request as well as the Applicant's response refusing to provide information regarding the status of its negotiations with the Community Foundation of the North State (the "Foundation").²³ The County alleged in this filing, based on information and belief, that

¹⁷ TN252457, *County of Shasta Objection to Applicant Confidentiality Request re Community Benefits Agreement Data Response* (Sep. 29, 2023). The County includes TN252457 as Attachment A hereto.

¹⁸ TN252585, *FWP Community Benefits DRAFT Fund Agreement* (Oct. 12, 2023); TN252586, *FWP Response to Community Benefits Data Request* (Oct. 12, 2023).

¹⁹ TN252586.

²⁰ TN252625, *Pit River Tribe Opposition to Fountain Wind Project* (Oct. 18, 2023).

²¹ *Id.*

²² TN252912, *Letter to CEC Chair from Supervisor Rickert* (Nov. 3, 2023).

²³ TN253348, *County of Shasta Information Request re Community Benefits Plan* (Nov. 28, 2023). The County includes TN253348 as Attachment B hereto.

the Applicant materially misrepresented its community benefits plan to the Commission and the public, that there is no community benefits agreement with the Foundation, and that negotiations with the Foundation had in fact been called off.²⁴

Commission staff deemed the Application complete on October 31, 2023.²⁵

On December 14, 2023, Fountain Wind filed another purported community benefits agreement, this time with the Northeastern California Building & Construction Trades Council (“NCBCTC”).²⁶ Fountain Wind alleged in the cover letter to its filing that NCBCTC is a “community-based organization” and that “this agreement satisfies the requirements of section 25541.10.”²⁷ The draft “Community Benefits Agreement” included with Fountain Wind’s December 14 filing refers to the NCBCTC as a “Union.” NCBCTC, however, does not refer to itself as a “union” or “labor union” on its website and is not organized as such under the National Labor Relations Act; it refers to itself as a “partnership of California’s three most Northern Building & Construction Trades Councils” that represents construction workers and contractors.²⁸ NCBCTC participates in the political process through a political action committee (North State Builds Jobs PAC), whose stated goal is to “elect candidates and support measures” that ensure construction jobs go to its members in California.²⁹ On January 3, 2024, the County filed comments on this most recent false community benefits plan, including evidence showing that the NCBCTC does not qualify as a community-based organization under Public Resources Code section 25545.10(a).³⁰

Verification of Opt-in Application

20 C.C.R. section 1876 requires that opt-in applications “be authorized and verified as set forth in section 1707,” which section requires that every application “be dated and signed by each applicant attesting under penalty of perjury to its truth and accuracy.” The Applicant uploaded files associated with its Application from January 3 through January 11, 2023 and the Commission determined an effective receipt date of January 11, 2023.³¹ On information and belief, Fountain

²⁴ *Id.*

²⁵ TN252844, *Determination of Complete Application for the Fountain Wind Project* (Oct. 30, 2023). This determination was dated October 30, 2023, but the filing was submitted after 5pm and therefore should have been docketed and effective October 31, 2023 pursuant to Commission rules of practice and procedure, 20 C.C.R. § 1208(b)(2). The County filed an objection to the docketing date noting the error. TN252889, *County of Shasta Comments re Incorrect Docketed Data re Determination of Complete Application for Fountain Wind Project* (Nov. 1, 2023). The CEC Docket Unit has since verified in writing with the County that the date was incorrectly docketed in violation of Commission filing regulations, yet the Commission has not taken any action to correct the data and has since issued multiple public notices with the incorrect date.

²⁶ TN253611, *Fountain_Wind_Community_Benefit_Agreement*, (Dec. 14, 2023).

²⁷ *Id.*

²⁸ <https://northstatebuilds.com/about-us/> (last accessed Dec. 26, 2023).

²⁹ <https://northstatebuilds.com/political-action/> (last accessed Dec. 26, 2023).

³⁰ TN253797, *County of Shasta’s AB 205 Review and Comments on Fountain Wind Project Community Benefits Agreement Update and Submittal* (Jan. 4, 2024).

³¹ TN248411, *Application receipt confirmation* (Jan. 13, 2023).

Wind did not file or otherwise provide to the Commission a signed, dated application in which Fountain Wind attested under penalty of perjury to the application's truth and accuracy.³²

To the extent Applicant did attest under penalty of perjury to the truth and accuracy of the contents of the Application, the Applicant perjured itself by lying to the public and the Commission about its community benefits plan.³³ Specifically, the Applicant attempted to mislead the public and the Commission into thinking it had satisfied its 20 C.C.R. 1877(g) obligation to include a plan or strategy for obtaining a legally binding agreement with a community-based organization by filing an outdated "community benefits program"³⁴ with purported financial commitments, but no documentation or information that the Applicant was in negotiations with any of the subject fund recipients, letters of support from those organizations, or drafts or outlines of community benefits agreements.³⁵

Correspondingly, the Commission staff issued its *Community Benefits Data Request* upon a finding that Applicant's "outdated" information failed to satisfy Pub. Res. Code section 25545.10 or 20 C.C.R. section 1877(g).³⁶ Applicant's response to this data request was also deficient, failing "to meet both the letter of the law and the purpose of the Opt-in provisions related to community benefits."³⁷ Applicant responded to Commission's second community benefits data request with an unsigned nine-page response full of legal analysis of Applicant's community benefits obligations.³⁸ Most recently, Applicant filed another false community benefits agreement with a trade council that advocates for its members interests and does not qualify as a community-based organization under Pub. Res. Code section 25545.10(a).³⁹

³² TN248321, *Appendix B Opt-in Application Crosswalk Matrix* (Jan. 4, 2023) at page 42 says the "Application has been verified in accordance with section 1707," but no document is listed in the "Filename in Docket" column, nor does any document with "attestation" or anything similar in the file name appear in the 23-OPT-01 Docket Log.

³³ The County refers Mr. Bohan to TN253797, attached hereto as Attachment C, in which the County further addresses the Applicant's misrepresentations and omissions concerning its obligation to enter into a legally binding community benefits agreement. *See also* TN251380, *Save Our Rural Town Comments – Comments by Save Our Rural Town* (July 31, 2023), in which Save Our Rural town acknowledged that the Application did not comport with the community benefits requirement; that there was no evidence of negotiations, commitments or agreements with community-based organizations; that the projects were "self-serving" and not "community oriented;" and that agreement execution was contemplated in 2024 after CEC certification, which would be contrary to the statutory requirement that it occur prior to certification.

³⁴ TN248296-2. At the time this same document was submitted to the County during the County's review and ultimate denial of the Project, none of the organizations listed in the program document were in discussions with or agreed to a community benefits agreement with the Applicant. *See* TN253348 at pages 3-4.

³⁵ TN248321. The Applicant's Crosswalk Matrix at page 43 identifies "pd_fwp_community_benefits_program" (which it also refers to as the "Community Benefits Programs pamphlet in docket", *i.e.*, TN248296-2) as the document that satisfies 20 C.C.R. section 1877(g).

³⁶ TN252072.

³⁷ TN252320 at page 1.

³⁸ TN252586. The memo was filed by and on the letterhead of Caitlin Barns, an environmental consultant at Stantec Environmental Services.

³⁹ TN253611.

The statute(s), regulation(s), order(s), program(s), or decision(s) violated – 20 C.C.R. § 1231(d)

1. **20 C.C.R. section 1707**, which reads in full: “Every notice and application shall be dated and signed by each applicant attesting under penalty of perjury to its truth and accuracy.” The Applicant violated section 1707 by not filing, docketing, or otherwise submitting to the Commission and making available to the public a dated and signed application in which the Applicant attested under penalty of perjury to the application’s truth and accuracy. The Applicant further violated section 1707 by submitting false community benefits plans and misleading the public and the Commission about the status of negotiations with the Foundation.
2. **20 C.C.R. section 1716(c)**, which reads in full: “Any public agency which is not a party and which has been requested to provide comments on the notice or application shall have the same rights as a party to obtain information necessary to comply with the commission’s request for comments. To the extent practicable, the staff shall coordinate requests from agencies to the applicant to avoid duplicative requests.” Section 1716(c) authorizes a local government that is required to review and comment on a project application to issue data requests related to the scope of that review to an applicant. The County issued such a data request to the Applicant and the Applicant violated 20 C.C.R. section 1716(c) by refusing to provide the requested information.
3. **20 C.C.R. section 1877(g)**, which reads in full: “The opt-in application shall include the applicant’s plan or strategy, including a timeline for execution, to obtain legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations prior to project certification, consistent with Public Resources Code section 25545.10.” The Applicant violated section 1877(g) by not including the required plan or strategy with its opt-in application and by repeatedly making false and misleading statements and filings concerning its community benefits obligations.

Other individuals, entities, and organizations affected by the violations – 20 C.C.R. § 1231(e)

The Commission, the County, the County’s residents, and members of the general public have been affected by the Applicant’s violations and ongoing disregard for the law, the Commission’s guidance and regulations, and the dignity of what is meant to be a public process.

The County’s attempts to resolve these violations with the Applicant – 20 C.C.R. § 1231(f)

The County submitted a 20 C.C.R. section 1716 request to the Applicant seeking information on its purported community benefits plan with the Foundation, including (i) whether the Applicant had in fact executed a community benefits agreement; (ii) whether good faith negotiations with the Foundation were ongoing; (iii) whether the Foundation had concluded negotiations or otherwise indicated that it would not enter into a community benefits agreement with the Applicant; and (iv) the date on which the Foundation indicated that it was not entering into an agreement with the Applicant. The County docketed its November 13, 2023 information

request when the Applicant refused to provide any information to the County about its efforts to satisfy its obligation to enter into a community benefits agreement.⁴⁰

The County also attempted to resolve these violations by submitting comments in this proceeding, including its *Objection to Applicant Confidentiality Request re Community Benefits Agreement Data Response* (TN252457), in which the County asked the Commission to require the Applicant to re-file an unredacted version of its community benefits plan so the County and public could properly review and comment on it. The County has filed numerous comments on those issues, which are attached hereto and incorporated by reference herein, asking for Commission action on these issues.

CONCLUSION

The Applicant has failed to follow AB 205 and the Commission's regulations implementing the opt-in application for certification process since it first began filing its application in piecemeal fashion. Fountain Wind's violations began when it disregarded the 20 C.C.R. section 1707 requirement to attest to the truth and accuracy of its application under penalty of perjury. Fountain Wind also violated 20 C.C.R. section 1877 by not including a plan or strategy for obtaining a legally binding community benefits agreement, agreements that the Commission has acknowledged "ensure that measurable, local benefits will be given to a community ... and are the direct result of *substantial community* input." To date, the Applicant has not provided anything that demonstrates it has listened to the substantial community input it has received or will address community needs and deliver economic and social benefits. Instead, it has misled the public and submitted false community benefits plans. Moreover, the Applicant violated 20 C.C.R. section 1716 by failing to respond to the County's valid data request. This pattern of behavior, if left unchecked, may undermine the public's faith in the opt-in process and in turn this agency. The County therefore requests that the Commission immediately pause its review of the Application while it investigates the Applicant's misrepresentations, omissions, and violations of 20 C.C.R. sections 1707, 1716, and 1877.

Sincerely,



Ryan M. F. Baron
of BEST BEST & KRIEGER LLP

Cc: Elizabeth Huber
Dian Vorhees
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⁴⁰ TN253348.

BEFORE THE CALIFORNIA ENERGY COMMISSION

In the Matter of:

Fountain Wind Project Opt-In
Application for Certification

Docket No. 23-OPT-01

**DOCKET 23-OPT-01: 20 C.C.R. § 1231 – REQUEST FOR INVESTIGATION
INTO FOUNTAIN WIND, LLC REGARDING FOUNTAIN WIND PROJECT**

ATTACHMENT A (TN252457)

**COUNTY OF SHASTA OBJECTION TO APPLICANT CONFIDENTIALITY
REQUEST**

DOCKETED

Docket Number:	23-OPT-01
Project Title:	Fountain Wind Project
TN #:	252457
Document Title:	County of Shasta Objection to Applicant Confidentiality Request Re Community Benefits Agreement Data Response
Description:	N/A
Filer:	Claudia Peach
Organization:	County of Shasta
Submitter Role:	Public Agency
Submission Date:	9/29/2023 3:46:17 PM
Docketed Date:	9/29/2023

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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COUNTY OF SHASTA

September 29, 2023

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

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

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

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:



Ryan M. F. Baron

BEFORE THE CALIFORNIA ENERGY COMMISSION

In the Matter of:

Fountain Wind Project Opt-In
Application for Certification

Docket No. 23-OPT-01

**DOCKET 23-OPT-01: 20 C.C.R. § 1231 – REQUEST FOR INVESTIGATION
INTO FOUNTAIN WIND, LLC REGARDING FOUNTAIN WIND PROJECT**

ATTACHMENT B (TN253348)

**COUNTY OF SHASTA INFORMATION REQUEST REGARDING
COMMUNITY BENEFITS PLAN**

DOCKETED	
Docket Number:	23-OPT-01
Project Title:	Fountain Wind Project
TN #:	253348
Document Title:	County of Shasta Information Request re Community Benefits Plan
Description:	N/A
Filer:	Dawn Forgeur
Organization:	County of Shasta
Submitter Role:	Public Agency
Submission Date:	11/28/2023 10:44:17 AM
Docketed Date:	11/28/2023

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
COMMENTS REGARDING COMMUNITY BENEFITS PLAN AND
APPLICATION COMPLETENESS DETERMINATION**

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COUNTY OF SHASTA

November 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
COMMENTS REGARDING COMMUNITY BENEFITS PLAN AND
APPLICATION COMPLETENESS DETERMINATION**

The County of Shasta (“County”) is hereby docketing its November 13, 2023 information request sent to Fountain Wind LLC (“Applicant”) regarding the Applicant’s community benefits plan as well as the Applicant’s November 16, 2023 response refusing to provide information regarding the status of its negotiations with the Community Foundation of the North State (“Foundation”). The attached records are being submitted in the docket (1) so the California Energy Commission (“Commission”) is aware that the Applicant materially misrepresented its community benefits plan and that based on information and belief there is no community benefits agreement with the Foundation; (2) to request the Commission enforce 20 C.C.R. section 1716 and order the Applicant to provide updated information on its negotiation with the Foundation, or in the alternative, request that Commission staff issue a data request for the same information requested by the County; and (3) to object to the Application being deemed complete by the Executive Director and that the proceeding be paused until the misrepresentations and omissions can be fully investigated by the Commission.

I. FOUNTAIN WIND LLC HAS REFUSED TO PROVIDE THE COMMISSION WITH UPDATED INFORMATION ON ITS COMMUNITY BENEFITS PLAN NEGOTIATIONS DESPITE A LAWFULLY ISSUED INFORMATION REQUEST

Based on information and belief, the County understands that the Foundation did not approve the purported community benefits agreement that was submitted under false pretenses to the Commission, negotiations have concluded, and that there is no community benefits plan or agreement with the Foundation. In order to corroborate the information and ensure that the Applicant is correctly, and truthfully, reporting updated information on its community benefits plan, the County on November 13, 2023, submitted an information request to the Applicant, with copies to Commission staff, pursuant to 20 C.C.R. section 1716. The County requested the following information from the Applicant:

1. *whether the Applicant had executed a community benefits agreement;*
2. *whether good faith negotiations are ongoing with the Foundation;*
3. *whether the Foundation has concluded negotiations or otherwise indicated that it will not enter into a community benefits agreement with the Applicant; and*
4. *the date on which the Foundation indicated that it was not entering into an agreement with the Applicant.*

On November 16, 2023, the Applicant responded that the County was not legally entitled to send an information request to the Applicant and that it had no duty to provide any information to the County whatsoever. The Applicant further responded that even if it did have a duty to provide information pursuant to a lawfully made request under section 1716, it would not do so because community benefits plan information was not necessary for the County to comment on the Fountain Wind Project. ***Therefore, despite information that may be known to the Applicant that the Foundation has concluded its negotiations and there is no community benefits plan or***

agreement, the Applicant refuses to verify or otherwise provide this information to the County, and more importantly, to the Commission and to the public.

II. FOUNTAIN WIND LLC FILED A FALSE COMMUNITY BENEFITS PLAN WITH THE COMMISSION, HAS MISREPRESENTED ITS CURRENT PLAN AND EVADED COMMISSION REQUIREMENTS AND PUBLIC SCRUTINY

Pursuant to AB 205, the Commission cannot certify the Fountain Wind project “unless the Commission finds that the applicant has entered into one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more community-based organizations.”¹ The Project application requirements require the Applicant to provide significant, detailed information regarding the design, construction and operation of the Project.² This includes information about the Applicant’s community benefits plan.³ The Applicant was required to provide the “plan or strategy, including a timeline for execution, to obtain legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations prior to project certification, consistent with Public Resources Code section 25545.10.”⁴

On January 3, 2023, the Applicant submitted as part of its application a document entitled *Community Benefits Program*.⁵ The *Community Benefits Program* document was dated June 2021 and had been previously submitted to the County when the County previously reviewed the Project and denied it. At that time, none of the organizations listed in the program document were in discussions with or agreed to a community benefits agreement with the Applicant. The same

¹ Pub. Res. Code § 25545.10(a).

² Pub. Res. Code §§ 25520, 25545.4(b), and 25545.6; 20 C.C.R. Div. 2 Ch. 5 App. B; 20 C.C.R. § 1877(a).

³ Moreover, 20 C.C.R. § 1876 mandates that opt-in applications be “authorized and verified” as set forth in 20 C.C.R. § 1707, which requires every notice and application to be dated and signed by each applicant “attesting under penalty of perjury to its truth and accuracy.” Based on information and belief, the Applicant did not authorize and verify its application as required by 20 C.C.R. § 1707 and the Commission has therefore not followed its own regulations in deeming the Application complete.

⁴ 20 C.C.R. § 1877(g).

⁵ TN 248296-2.

community benefits program document that was submitted to the Commission as part of the Applicant’s opt-in application consisted of the same 17 pages of purported financial commitments of approximately \$2,000,000 to Shasta County organizations including Cedar Creek Elementary School Redevelopment, the Fall River Resource Conservation District Fuel Reduction Project, ShastaBeam Internet Expansion, a contribution to the Pit River Tribe Tribal Employment Rights Office (“TERO”), Shasta County Sheriff’s Office, and community access to the Shasta Cascade Timberlands Property. The program document contained a summary of the proposed projects and included a March 17, 2021 letter from the Applicant to the Pit River Tribe TERO; a March 1, 2021 letter from the Northeastern California Building and Construction Trades Council to the Applicant discussing the potential for trade work for the Pit River Tribe; and a March 24, 2021 non-binding memorandum from Forestry Services California, LLC, a forestry operation management limited liability company who controls the project site in question, to the Applicant outlining a generalized plan to allow limited community and Tribal access to the Project site, including a permit system for such access. The “community benefits program” was not updated or modified before being submitted to the Commission or during the Commission’s application adequacy review. The submittal itself did not include any documentation or information that the Applicant was in negotiations with any of the subject fund recipients, letters of support from those organizations, or drafts or outlines of community benefits agreements. Furthermore, on January 4, 2023, the Applicant submitted another document as part of its opt-in application entitled *Appendix B Opt-In Application Crosswalk Matrix* (“Crosswalk Matrix”).⁶ On page 43 of the Crosswalk Matrix, the Applicant buried supplemental information in the matrix regarding its community benefits plan that was not disclosed in the program document that the community benefits agreements identified

⁶ TN248321.

in the plan would not be executed “until the second half of 2024 after the CEC permit is granted.” No other information was provided or updated regarding the “2021 plan.”

On February 10, 2023, Commission staff docketed a 243-page document entitled *Deficiency Letter* that included a “Data Adequacy Worksheet” showing areas of the application that were determined by staff to be adequate or inadequate for purposes of making an application completeness determination pursuant to 20 C.C.R. section 1878(b).⁷ The Data Adequacy Worksheet on pages 10-14 showed that Commission staff determined that the community benefits plan was adequate except for project specific community improvements contemplated by Public Resources Code section 25545.10(b).⁸ The rest of the Applicant’s plan was determined to be complete.

On July 31, 2023, Save Our Rural Town filed comments in the docket noting that the application did not comport with the community benefits agreement requirement of AB 205 or with the Commission’s own regulations at 20 C.C.R. section 1877(g).⁹ Save Our Rural Town indicated in detailed analysis that, among other things, agreement execution was contemplated in 2024 after CEC certification contrary to statutory requirements that it be done before certification; there was no evidence of actual negotiations, commitments or agreements with community-based organizations; and that projects were “self-serving” and not “community-oriented.” In short, the community benefits agreement portion of the application was inadequate and should not have been deemed adequate by Commission staff.

On August 3, 2023, the Applicant submitted a request for a completion determination at the request of Commission staff “to confirm that as of August 2, 2023, the Applicant has responded to and submitted all docketed requests and deficiencies related to application sufficiency pursuant

⁷ TN248742.

⁸ Data Adequacy Worksheet at 13.

⁹ TN251380.

to Public Resource Code section 25545.5(b) and is seeking a determination of completeness.”¹⁰

On August 31, 2023, five months after the Commission deemed this portion of the application “adequate,” Commission staff filed a response to the request for determination of completeness indicating for the first time publicly that the community benefits plan was indeed “inadequate.”¹¹

Specifically, the staff response stated:

“On January 3, 2023, the applicant filed a document entitled, Community Benefits Program (TN 248296-2). The document was drafted in 2021 and contains a list of projects the applicant proposes to fund to benefit the local community. The document largely contains descriptions of specific projects that the applicant is willing to fund purportedly based on community feedback. The project list is not current and contains outdated information. On several occasions, including most recently on July 27, 2023, in a meeting with CEC staff regarding outstanding data requests, the applicant has stated its intent to provide updated information on community benefits. However, to date the applicant has not submitted updated information and details about the proposed community benefits including a plan or strategy, and a timeline for execution, to obtain legally binding and enforceable agreements as required under Title 20, California Code of Regulations, section 1877(g).”

Prior to the August 31 response, there has been no other public indication by the Commission that the community benefits plan was inadequate, that staff and the applicant were in discussions about the inadequacy of the application, and the Applicant failed to provide the Commission with updated information. And, as the local government agency that represents many of the communities and organizations at the local electoral level and who previously reviewed the “2021 plan,” there was no discussion by staff with the County about the inadequacy of the plan, or any information request by staff of the County as allowed and required by Public Resources Code section 25519(f). There is also no indication in the record of this proceeding or in Public Records Act disclosures by the Commission to date that the Commission attempted to verify the original

¹⁰ TN251479, *Fountain Application Completion Letter 2023-0803*.

¹¹ TN252072, *Staff’s Response to Applicant Request for Determination of Completeness, Wildfire Data Requests*.

plan submitted on January 3, 2023 with any of the organizations identified in the plan. Clearly, the Applicant misrepresented its community benefits plan with little follow-up and no public disclosure of this issue until six months after the “plan” was filed.

Rather than being forthright and providing an adequate or updated plan as requested by Commission staff, the Applicant sought to further obstruct the application process and avoid the plain requirements of AB 205 by refusing to provide full and accurate information of the actual plan it was proposing. On September 8, 2023, the Applicant filed a response to Commission staff’s August 31 deficiency letter, and in four short bullet points, summarized that conversations with the Commission were held on July 27; the Applicant was negotiating an agreement with an unidentified foundation where funds would benefit the project area and the Burney, Montgomery Creek, and Round Mountain unincorporated area communities; and that an agreement would be executed by the “end of September” and submitted to the Commission 45 days after the application was determined to be complete.¹² No other information about the plan was provided. The Applicant’s response was not written or signed by Fountain Wind LLC or ConnectGen LLC or its legal counsel despite containing legal analysis of AB 205 requirements, but was submitted unsigned in a memorandum format by the outside environmental consultant and project manager, Caitlin Burns, Stantec, the same individual that submitted the crosswalk matrix and original false plan.

In response to the lack of information again provided by the Applicant, Commission staff issued a docketed data request on September 20, 2023 to the Applicant.¹³ The data request set forth staff’s interpretation of Public Resources Code section 25545.10 and 20 C.C.R. sections 1877 and 1878, determined that the application did not comply with community benefits plan legal

¹² TN252187, *FWP Response to Deficiency Letter*.

¹³ TN252320, *Community Benefits Data Request for the Fountain Wind Project*.

requirements, and that the Applicant needed to docket additional detailed information, which the Applicant failed to do.

Despite Commission staff's admonition to the Applicant in the September 20 data response that community benefits plan information is required so "that members of the community have the opportunity to shape the project's contributions to the community," the Applicant submitted its response and a "draft agreement" in the docket on September 28, 2023 disclosing so-called "negotiations" with a foundation, but redacting all pertinent information from the public version of the document, including the name of the foundation and material terms and amounts of the agreement, and requesting confidential designation of the redactions on the grounds that the information was exempt under the California Public Records Act.¹⁴ The redacted response provided no specific information about the community benefits plan and no evidence that the Applicant was actually in discussions with a foundation. The next business day, on September 29, 2023, the County objected to the confidential designation request and provided legal analysis why the Applicant's submittal was not entitled to confidentiality under the Public Records Act. Commission staff did not in any way address the County's objection or the Applicant's designation request. On October 12, 2023, the Applicant re-filed its community benefits plan response in the docket in unredacted form, and did not provide a further response as to why it filed the redacted documents, and did not rescind the confidentiality designation request.¹⁵ In its unredacted response, the Applicant cited negotiations with the Community Foundation of the North State and that approximately \$3,000,000 in Foundation funds was earmarked for the Pit River Tribe and the Shasta County unincorporated area.

¹⁴ TN252430, *Cover Letter re Confidential Designation September 2023*; TN252431 *REDACTED Response to Community Benefits Data Request*.

¹⁵ TN252585, *FWP Community Benefits DRAFT Fund Agreement*; TN252586, *FWP Response to Community Benefits Data Request*.

On October 18, 2023, the Pit River Tribe objected to Fountain Wind Project. In the Tribe's comments, it "vehemently" objected to the misleading claims by Fountain Wind regarding its community benefits plan and assertions that 50 percent of the funding was dedicated for Tribal resources. The Tribe opposed any financial arrangement with Fountain Wind. Likewise, Shasta County Supervisor Mary Rickert filed comments that, in part, objected to the proposed funding arrangement, noting that funds had previously been rejected and that organizations in the county have clearly indicated that they would not accept funds attributable to the Fountain Wind Project.

Despite these objections and the lack of evidence that a community benefits plan existed or that negotiations were ongoing, Commission staff deemed the Fountain Wind Project application complete.¹⁶ After the Applicant evaded Commission and public scrutiny of its plan for 9 months, Commission staff on October 31,¹⁷ and in a mere 12 calendar days after the unredacted plan was filed, determined the application was complete, and with no evidence that the Applicant was, in fact, negotiating a community benefits plan with the Foundation.

III. THE COUNTY HAS THE LEGAL RIGHT TO ISSUE AN INFORMATION REQUEST FOR UPDATED COMMUNITY BENEFITS PLAN INFORMATION

The County believes that the Foundation is not currently negotiating a community benefits agreement with Fountain Wind LLC and that any negotiations that Applicant had have been terminated. Because a foundation is a non-profit corporation, its records can only be released by the foundation itself. In order to verify the negotiations, the Applicant's veracity, and the Commission's error in determining the application complete, the County utilized 20 C.C.R.

¹⁶ TN252844, *Determination of Complete Application for the Fountain Wind Project*.

¹⁷ Commission determination of complete application was dated October 30, 2023, but the filing was submitted after 5pm and therefore, should have been docketed and effective October 31, 2023. The County filed an objection to the docketing date noting the error. TN252889, *County of Shasta Comments re Incorrect Docketed Date re Determination of Complete Application for Fountain Wind Project* (Nov. 1, 2023). The CEC Docket Unit has since verified in writing with the County that the date was incorrectly docketed in violation of Commission filing regulations, yet the Commission has not taken any action to correct the date and has since issued multiple public notices with the wrong date.

section 1716 and issued a data request to the Applicant. Section 1716 authorizes a local government that is required to review and comment on a project application to issue data requests to an applicant. This procedure has been available to local governments for years and is identical to similar procedures allowed by the California Public Utilities Commission. The County issued its information request, and to ensure it would be reviewed and enforced, served the request on the Commission's Siting Division.

In the attached response, Fountain Wind refused to provide the information stating that section 1716 was not available to the County in an opt-in proceeding. The Applicant also indicated that to the extent a request could be issued, a community benefits plan was not within the scope of the County's review and comment obligations, and thus, it was not entitled to the information.

The County contends that it is entitled to issue information requests to the Applicant. Section 1716 is available to all local governments with the exact review and comment obligations in other siting proceedings. Moreover, Commission staff recently indicated in its objection to the County's reimbursement request that the neighboring regulation, section 1715, setting forth a procedure for local government reimbursement, applied in this proceeding despite section 1715 not being expressly referenced in the Commission's opt-in regulations.¹⁸ In addition, the community benefits plan information being requested is squarely within the County's review and comment obligations. Public Resources Code section 25545.10 requires an agreement with a community-based organization. The Applicant has acknowledged in its October 12 response that such an organization by law is to be within and for the benefit of Shasta County. The County is the representative agency for the entire county and has specific jurisdictional authority over the unincorporated area where the communities of Burney, Round Mountain, and Montgomery Creek

¹⁸ TN251926, *Objection to Shasta County Reimbursement Request* (Aug. 25, 2023).

are located, and are identified as recipients of Fountain Wind's funding. The County is the only local government entity that can speak on behalf of these constituencies, and it has a right and obligation to review and comment on a plan for the purported benefit of the Shasta County communities. To the extent that section 1716 does not apply, however, then the Commission failed to adopt a procedure allowing for local government review and comment, contrary to AB 205, and in violation of the County's rights.

As a matter of law and for the sake of the public and the transparency of the opt-in certification process, the County requests that Commission enforce the County's information request. In the alternative, the County requests that Commission staff issue a data request to the Applicant for the status of negotiations with the Foundation and if such negotiations have concluded. Otherwise, the Applicant will not update the Commission until 45 days after the application has been determined complete and the proceeding will, unlawfully, move forward with no repercussions for the Applicant's false statements, omissions, and misrepresentations of the Applicant to the Commission and to the public about its community benefits plan. If the Applicant's community benefits plan has been deficient all along, which, based on the information available to it, the County believes it has, the Commission should not have deemed the Application complete and the County continues to object to the Commission deeming it complete.

If the Commission is unwilling to enforce the information request or issue its own or otherwise investigate the misrepresentations and omissions of the Applicant, the County will consider filing a formal complaint against the Applicant or utilize other remedies available to it under Commission regulations and the law.

Dated: November 28, 2023

Respectfully submitted,

By: 
Ryan M. F. Baron



Ryan M. F. Baron
Partner
(949) 263-6568
ryan.baron@bbklaw.com

November 13, 2023

VIA E-MAIL

Anne E. Mudge
Cox Castle & Nicholson LLP
50 California Street, Suite 3200
San Francisco, CA 94111
amudge@coxcastle.com

Re: *County of Shasta Title 20 C.C.R. Section 1716 Request for Information re
Fountain Wind Project (23-OPT-01) Community Benefits Agreement*

Dear Ms. Mudge:

INSTRUCTIONS

Best Best & Krieger LLP represents the County of Shasta (“County”) on the Fountain Wind Project opt-in application at the California Energy Commission (“CEC”). Pursuant to Title 20, California Code of Regulations (“C.C.R.”), Section 1716(c), the County hereby requests responses to the Data Requests below seeking information related to the binding legal agreement that your client, Fountain Wind, LLC (“Fountain Wind”), is purportedly negotiating with the Shasta Regional Community Foundation, Inc. dba Community Foundation of the North State (“Foundation”), which legally binding agreement Fountain Wind identified in its October 12, 2023 “CONFIDENTIAL Response to Community Benefits Data Request (TN 252320, Docketed September 20, 2023)” (TN 252586), a draft copy of which Fountain Wind filed with the CEC in CEC Docket 23-OPT-01 on or about October 12, 2023 (TN 252585).

It is the County’s understanding that the Pit River Tribe and the unincorporated areas of Round Mountain, Montgomery Creek and Burney have been identified in the draft Foundation agreement but have indicated in public comments that they will not accept any of the funding that has been proposed by Fountain Wind in its docketed submissions. ***It is also the County’s understanding that the Foundation did not approve the draft copy of the community benefits agreement that was filed with the CEC, negotiations have concluded, and there is no community benefits agreement or plan with the Foundation.*** Based on the County’s information and belief, the County is hereby filing this Data Request pursuant to its rights under Section 1716(c) to request supplemental information about Fountain Wind’s community benefits plan that has not been shared with the CEC. CEC staff is hereby copied in an effort to avoid duplicative requests.

Each Data Request is continuing in nature. Please provide your responses to these Data Requests as they become available, but **not later than November 20, 2023**. If you are unable to

provide a response by this date, please notify me as soon as possible, with a written explanation as to why the response date cannot be met and a best estimate of when the information can be provided. If you acquire additional responsive information after providing an answer to any request, please supplement your response following the receipt of such additional information.

Please identify the person providing the answer to each Data Request and his or her contact information. Responses should be provided in original electronic format, if available. If available in Word format, please send the Word document, not a PDF file. All electronic documents submitted in response to these Data Requests should be in readable, downloadable, printable, and searchable formats, unless use of such formats is infeasible. Each page should be numbered. If any of your answers refer to or reflect calculations, provide a copy of the supporting electronic files that were used to derive such calculations, such as Excel-compatible spreadsheets, with data and formulas intact and functioning. Documents provided in response to the Data Requests should be Bates-numbered, and indexed if voluminous. Responses to the Data Requests that refer to or incorporate documents should identify the particular documents referenced by Bates numbers or Bates-range.

Where you cannot fully answer or respond to any Data Request, state, in detail, the reasons for your inability to fully answer or respond. If you object to any Data Request or portion thereof on the ground that it requests information that is privileged or is encompassed within the attorney work-product doctrine, then please provide the following information, except to the extent it may call for the precise information you object to disclosing:

- a) The nature of the privilege or doctrine you claim;
- b) The identity of all documents subject to the privilege or doctrine you claim and the identity of all persons known to you to have seen each such document;
- c) The identity of all oral communications subject to the privilege or doctrine you claim and the identity of all persons to whom the substance of the oral communication has been disclosed or made known.

As used herein, the singular shall include the plural, and vice versa; the use of the word “any” shall include and encompass the word “all,” and vice versa; the use of the word “each” shall include and encompass the word “every,” and vice versa; the use of the disjunctive shall include the conjunctive, and vice versa; and, unless the context indicates otherwise, the use of any gender includes the other gender.

DEFINITIONS

In preparing your answers to the Data Requests set forth herein, the following definitions and instructions should control unless expressly indicated otherwise by the context:

1. The term “Person” or “Persons” means a natural person, corporation, association, partnership, sole proprietorship, public entity, or other entity of any nature or kind.

2. “You” and “Your” means Fountain Wind, LLC, including its agents, employees, attorneys, accountants, investigators, and anyone else acting on behalf of Fountain Wind, LLC.
3. “County” means the County of Shasta, California.
4. “Proposed Project” means the proposed Fountain Wind Project, docketed at the California Energy Commission as 23-OPT-01.
5. “Foundation” means the Shasta Regional Community Foundation, Inc. dba Community Foundation of the North State.
6. “Commission” or “CEC” means the California Energy Commission.
7. “TN 252586” means Your “CONFIDENTIAL Response to Community Benefits Data Request (TN 252320, Docketed September 20, 2023)”.
8. “TN 252585” means the document entitled “Funding Agreement Between Community Foundation of the North State and Fountain Wind LLC” that You submitted to the California Energy Commission on or about October 12, 2023.
9. “Document” or “Documents” shall mean any book, pamphlet, periodical, letter, electronic mail message, report, memorandum, record, study, summary, list, working paper, chart, paper, graph, index, data sheet, data processing card, tape, contract, agreement, lease, ledger, journal, balance sheet, account, invoice, purchase order, receipt, billing, record, file diary, film, trip tickets, expense vouchers, instructions, bulletins, photographs, video tape, microfilm, telegram, analysis, license, agreement, message, and all other “writings”, as that term is defined in section 250 of the California Evidence Code, however produced or reproduced, and also means any mechanical recording, reproductions, draft or other copy in the custody or control of Fountain Wind, LLC or of any of its representatives or any other person, firm, association, corporation or entity willing to make the document available to Fountain Wind, LLC. Such term also includes any copies of a document that bear notations, writing, or other marks not found on the original of such document.

DATA REQUESTS

A. Relating to TNs 252585 and 252586

1. Please confirm whether You have executed a legally binding agreement with the Foundation.
2. If You have not executed a legally binding agreement with the Foundation, please confirm whether good faith negotiations with the Foundation are ongoing.
3. Please confirm whether the Foundation has “called off negotiations” or in any way or manner or by any means indicated to You that the Foundation disapproved or will not enter into a legally binding agreement with You.

4. If the Foundation has indicated to You that the Foundation will not enter into a legally binding agreement with You, please identify the date on which the Foundation indicated to You that the Foundation would not enter into a legally binding agreement with You and all written records indicating the same.

Thank you for your consideration of this important matter. Please do not hesitate to contact me with any questions or to discuss.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ryan Baron", with a long horizontal flourish extending to the right.

Ryan M. F. Baron
of BEST BEST & KRIEGER LLP

Cc: Lisa M. DeCarlo, CEC
Elizabeth Huber, CEC
Eric Knight, CEC
Leonidas Payne, CEC
Matthew McOmber, County of Shasta
Paul Hellman, County of Shasta



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Anne E. Mudge
415.262.5107
amudge@coxcastle.com

November 16, 2023

Mr. Ryan Baron
Best, Best & Krieger
18101 Von Karman Avenue, Suite 1000
Irvine CA 92612

Re: Shasta County Request for Information Pursuant to 20 CCR section 1716

Dear Mr. Baron:

I have received your request dated November 13, 2023, requesting information on behalf of Shasta County related to the Fountain Wind Project. Your letter seeks data from Fountain Wind LLC, regarding its communications with the Community Foundation of the North State, purportedly under the authority of 20 California Code of Regulations (CCR) section 1716.

Fountain Wind, LLC declines to provide the information you are requesting.

First, Fountain Wind's application before the California Energy Commission (CEC) is pending under the CEC's opt-in procedures, contained in 20 CCR 1875-1882. The authority to obtain information invoked in your letter (20 CCR section 1716 entitled "Obtaining Information") is not applicable in an opt-in proceeding.

The provision on which you rely is found in the regulations applicable to thermal power plant applications filed pursuant to Title 20, Chapter 5, Article 1 entitled "General Provisions Applicable to Notices of Intent and Applications for Certification." Applications filed in accordance with these procedures are known as "Applications for Certification" or AFCs. Under an AFC proceeding, "Any public agency which is not a party and which has been requested to provide comments on the notice or application shall have the same rights as a party to obtain information necessary to comply with the commission's request for comments. To the extent practicable, the staff shall coordinate requests from agencies to the applicant to avoid duplicative requests."

In contrast, no such rights are provided in Chapter 5, Article 4.1 entitled "Certification of Nonfossil Fueled Power Plants, Energy Storage Facilities and Related Facilities." These procedures were adopted in response to the Legislature's directive to adopt regulations to implement AB 205. See Public Resources Code section 25545.12 (a): "Regulations adopted to

implement this chapter, or any amendment to those regulations shall be adopted by the commission....” The regulations adopted by the CEC to implement AB 205 cross-reference some provisions of its previously adopted regulations, but not section 1716 and no other provision of the opt-in regulations allow for anyone other than the executive director to obtain information from the applicant. It also appears that the Commission knows how to provide such rights when it wants to since it has done so for AFCs as well as for applications filed under the Small Power Plant Exemption (SPPE) review process (see for example 20 CCR section 1941 have specific regulations regarding “Obtaining Information”). The regulations adopted to implement AB 205 do not.


It is also noteworthy that section 1716 refers to “parties,” “petitions,” “service of documents,” and a “committee” convened to order compliance with the request for information. The opt-in procedures do not involve “parties,” do not require “service” of any documents, do not call for preparation of “petitions” and do not call for the identification of a “committee” to resolve disputes over requests for information by entities opposed to the project. The absence of procedures in the opt-in process that are adjudicative in nature such as exist in the AFC process further supports the conclusion that the “discovery”-type provisions of section 1716 do not apply to the opt-in process.

Finally, even if section 1716 were applicable here, section 1716 requires that the information requested be “necessary to comply with the commission's request for comments.” The information you have requested is not necessary for Shasta County to comply with the commission’s request for comments about the project.

Thank you.

Sincerely,

Cox, Castle & Nicholson LLP



Anne E. Mudge

cc: Jared Babula, CEC
Elizabeth Huber, CEC
Eric Knight, CEC
Leonidas Payne, CEC

AEM:mp

BEFORE THE CALIFORNIA ENERGY COMMISSION

In the Matter of:

Fountain Wind Project Opt-In
Application for Certification

Docket No. 23-OPT-01

**DOCKET 23-OPT-01: 20 C.C.R. § 1231 – REQUEST FOR INVESTIGATION
INTO FOUNTAIN WIND, LLC REGARDING FOUNTAIN WIND PROJECT**

ATTACHMENT C (TN253797)

**COUNTY OF SHASTA’S AB 205 REVIEW AND COMMENTS ON FOUNTAIN
WIND PROJECT COMMUNITY BENEFITS AGREEMENT UPDATE AND
SUBMITTAL**

DOCKETED	
Docket Number:	23-OPT-01
Project Title:	Fountain Wind Project
TN #:	253797
Document Title:	COUNTY OF SHASTA AB 205 REVIEW AND COMMENTS ON FOUNTAIN WIND PROJECT COMMUNITY BENEFITS AGREEMENT UPDATE AND SUBMITTAL (Final)
Description:	N/A
Filer:	Kelly Lotz
Organization:	County of Shasta
Submitter Role:	Public Agency
Submission Date:	1/4/2024 10:21:17 AM
Docketed Date:	1/4/2024

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 AB 205 REVIEW AND COMMENTS ON
FOUNTAIN WIND PROJECT COMMUNITY BENEFITS AGREEMENT
UPDATE AND SUBMITTAL**

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Attorneys for
County of Shasta

January 4, 2024

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 AB 205 REVIEW AND COMMENTS ON
FOUNTAIN WIND PROJECT COMMUNITY BENEFITS AGREEMENT
UPDATE AND SUBMITTAL**

The County of Shasta (“County”) respectfully submits these comments on the *Community Benefits Agreement* filed by Fountain Wind, LLC (“Applicant”) in the above-captioned docket on December 14, 2023.¹

I. INTRODUCTION

The Applicant has once again filed a false community benefits plan with the Commission, thereby making the Fountain Wind Project (“Project”) ineligible for certification under the Commission’s Assembly Bill (“AB”) 205 opt-in process.² The Applicant has done so despite repeated admonishments and data requests by Commission staff³ and the County,⁴ and despite the County objecting to the Project application being deemed complete by Commission staff.⁵ This

¹ TN253611.

² The Commission is prohibited by law from certifying the Project “unless the commission finds that the applicant has entered into one or more legally binding and enforceable agreements with, or that benefit, one or more community based organizations ... “ Pub. Res. Code § 25545.10(a).

³ TN252072, *Staff Response to Fountain Wind, LLC’s Letter Seeking Determination of Completeness; Wildfire Data Requests* (Aug. 31, 2023); TN252320, *Community Benefits Data Request for the Fountain Wind Project (23-OPT-01)* (Sept. 20, 2023).

⁴ On November 13, 2023, the County submitted an information request regarding the Applicant’s purported community benefits agreement with the Community Foundation of the North State (“Foundation”)—with copies to Commission staff—pursuant to 20 CCR section 1716. The County docketed its information request and the Applicant’s response thereto on November 28, 2023 (TN253348).

⁵ TN253348, *County of Shasta Comments Regarding Community Benefits Plan and Application Completeness Determination* (Oct. 31, 2023).

behavior by the Applicant runs contrary to its claim that it “has been in close coordination with Commission staff to provide required data and answer all deficiency questions.”⁶ Yet it is hardly surprising, considering the Applicant’s flagrant disregard for the will of the people of Shasta County,⁷ the tribal cultural resources of the Pit River Tribe,⁸ and applicable laws and regulations. In short, the Applicant has yet to submit a valid community benefits agreement that comports with AB 205 requirements or the Commission’s regulations implementing those requirements.⁹ The Commission, therefore, should not have deemed the Project application complete and cannot by law certify the Project.¹⁰

The Applicant has abused the AB 205 opt-in process from the moment it filed its application, has disregarded clear statutory and Commission requirements, and now asks the Commission to believe that buying off a special interest group—whose members, not the community, stand to benefit from the payout—satisfies its obligation to enter into a community benefits agreement with one or more community-based organizations. To be clear, the Northeastern California Building & Construction Trades Council (“NCBCTC”) is not a community-based organization under Public Resources Code section 25545.10. Its primary purpose is to lobby for its own interests and the interests of its members; not to provide a benefit to the community. NCBCTC is not a labor union and does not engage in workforce training or development, has no revenue or staff, and any program it has offered appears to be on a one-time

⁶ TN251479, *Opt-In Application for Certification of Fountain Wind Project, Docket Number 23-OPT-01* (“Fountain_Application_Completion_Letter_2023-0803”) (Aug. 3, 2023).

⁷ See e.g., TN252912, *Letter to CEC Chair from Supervisor Rickert*, in which Supervisor Rickert unequivocally states that “the project is universally opposed by residents, businesses, and other organizations throughout Shasta County due to the significant adverse impacts with respect to wildfire hazards, aerial firefighting, viewshed, water quality, biological resources, Shasta County’s economic base, and Tribal cultural resources.” (emphasis added).

⁸ TN252625, *Pit River Tribe Comments – Objection to Fountain Wind Project* (Oct. 18, 2023).

⁹ 20 CCR section 1877(g) required the Applicant to include within its opt-in application the Applicant’s “plan or strategy, including a timeline for execution, to obtain a legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations prior to project certification”

¹⁰ Pub. Res. Code § 25545.10.

basis in the Shasta County area carried out by other organizations and serving paid-for members across multiple counties. Nor is \$175,000 a meaningful contribution,¹¹ especially when compared to the \$1,800,000 the Applicant initially indicated it was providing as part of its *Fountain Wind Project Community Benefit Program*¹² and then later promised \$2,900,000.¹³ The Community Benefits Agreement is also suspect based on NCBCTC's prior proposal to serve the Pit River Tribe.

Accordingly, the Applicant has not presented the Commission with a community benefits plan or agreement that satisfies AB 205 pursuant to the timelines provided by the Public Resources Code and Commission regulation. ***Therefore, the County asks the Commission to dismiss the Fountain Wind application for failing to satisfy the community benefits agreement requirements of Public Resources Code section 25545.10 and 20 CCR section 1877 and terminate the proceeding.*** If the Commission does not do so immediately, it should pause the proceeding while it conducts a formal investigation or evaluates this issue in further data requests of the Applicant.

II. DISCUSSION

Under its AB 205 review and comment obligations, and as recognized by Commission staff in responses regarding 20 CCR section 1715 cost reimbursement,¹⁴ the County has reviewed the Community Benefits Agreement with NCBCTC, including NCBCTC's purported status as a "community-based organization" under federal and state law and in the Shasta County community

¹¹ \$175,000 is the "Funding Obligation" in the "Community Benefits Agreement" the Applicant filed on December 14, 2023. TN253611.

¹² TN248296-2, *Community Benefits Program* (Jan. 3, 2023).

¹³ TN252585, *FWP Community Benefits DRAFT Fund Agreement* (Oct. 12, 2023); TN252586, *FWP Response to Community Benefits Data Request* (Oct. 12, 2023).

¹⁴ TN253385, *Response to County of Shasta Revised Request for Reimbursement* at 4 (Nov. 29, 2023) "In anticipation of a binding agreement, Shasta County anticipates providing additional review and comment. The costs associated with this additional review would be an expense eligible for reimbursement since a binding agreement is a required component of the developer's application."

and its Form 990 financial filings with the Internal Revenue Service (“IRS”). The County’s review is a required component of the Project application. And, as the local government with underlying land use authority and who previously reviewed a prior community benefits agreement proposal submitted by Fountain Wind LLC to the County as part of Fountain Wind LLC’s permit application, such review is within the County’s expertise as the County is the local agency that represents, through its elected Board of Supervisors, the local community, and is acutely aware and knowledgeable of community interests, benefits and organizations, and through such representation can speak on behalf of or regarding those interests, benefits or organizations.¹⁵

A. The Applicant Has Not Followed the Law, Commission Regulations, or Commission Guidance Regarding the Community Benefits Agreement Requirement

The Applicant has continuously and repeatedly disregarded AB 205 requirements and Commission regulations and guidance since first filing its application. At the outset, the Applicant failed to satisfy 20 CCR section 1877(g) by not including in its opt-in application a “plan or strategy ... to obtain legally binding and enforceable agreement(s) with, or that benefit, a coalition of one or more community-based organizations prior to project certification ...” Instead, the Applicant submitted an “outdated” and arguably manufactured, list of projects the Applicant was “willing to fund purportedly based on community feedback” that Commission staff determined seven months into the proceeding did not satisfy the Applicant’s obligations under statute or regulation.¹⁶ As acknowledged by Commission staff, this “Community Benefits Program,” apparently created in June 2021,¹⁷ did not include details about the “proposed community benefits including a plan or strategy, and a timeline for execution, to obtain legally binding and enforceable

¹⁵ The County’s comments herein are also eligible under 20 C.C.R. § 1715(b)(1) as they are a presentation or defense of a position reasonably related to the community benefits plan, which the County is requested to review and is within the County’s expertise as the local agency.

¹⁶ TN252072, *Staff Response to Applicant request for Determination of Completeness, including Wildfire Data Requests*” at 2 (emphasis added) (Aug. 31, 2023).

¹⁷ TN248296-2, *Community Benefits Program* (Jan. 3, 2023).

[community benefits agreement(s)]” and therefore did not satisfy the requirements of Public Resources Code section 25545.10 or 20 CCR section 1877(g).¹⁸ Moreover, the Applicant had not as of August 31, 2023—over eight months after submitting its opt-in application—submitted updated information to remedy this deficiency, despite making statements that it would.¹⁹ The Applicant’s disregard for the Commission’s opt-in application filing requirements foreshadowed what has become a regular pattern of behavior by Fountain Wind, LLC.

This pattern of non-compliant behavior continued when, on September 28, 2023, the Applicant submitted its *Response to Community Benefits Data Request*,²⁰ disclosing so-called “negotiations” with a foundation, but redacting all pertinent information from the public version of the document.²¹ The Applicant, thereafter, re-filed its community benefits plan data response without the redactions, but did not explain why it had initially redacted the documents or did not rescind its confidentiality designation request.²² The Applicant did, however, cite negotiations with the Community Foundation of the North State (“Foundation”) and allege that approximately \$2,900,000 in Foundation funds was earmarked for the Pit River Tribe and the Shasta County unincorporated area.²³ Subsequently, the Pit River Tribe objected to the Project and “vehemently” objected to the Applicant’s misleading claims regarding its community benefits plan and assertions that 50 percent of the funding was dedicated for Tribal resources.²⁴

¹⁸ *Id.*

¹⁹ *Id.* According to staff, “[o]n several occasions, including most recently on July 27, 2023 ... the applicant has stated its intent to provide updated information on community benefits [but] to date the applicant has not submitted updated information and details about the proposed community benefits ...”

²⁰ TN252431.

²¹ The County addresses this deficient filing further in TN253348, *County of Shasta Comments Regarding Community Benefits Plan and Application Completeness Determination* (Nov. 28, 2023). The County objected to the Applicant’s designation of this filing as confidential in TN252457, *County of Shasta Objection to Applicant Confidentiality Request Re Community Benefits Agreement Data Response* (Sept. 29, 2023).

²² TN252585, *FWP Community Benefits DRAFT Fund Agreement* (Oct. 12, 2023); TN252586, *FWP Response to Community Benefits Data Request* (Oct. 12, 2023).

²³ *Id.*

²⁴ TN252625.

Moreover, the Applicant refused to confirm whether it had executed a community benefits agreement with the Foundation or whether good faith negotiations with the Foundation remained ongoing, despite the County’s lawful 20 CCR section 1716 information request seeking confirmation thereof.²⁵ Considering the Applicant’s ongoing obstinate behavior, this refusal to substantively respond to the County’s information request was not surprising, but it was unlawful. The Applicant’s refusal to verify or otherwise provide information to the County—and, more importantly, the Commission and the public—as to whether its purported community benefits agreement negotiations with the Foundation were ongoing further demonstrated the Applicant’s unwillingness (or inability) to satisfy its community benefits agreement requirements. Despite the County’s objections and the lack of evidence of a “plan or strategy, including a timeline for execution” of a valid community benefits agreement, Commission staff deemed the application complete on October 31, 2023.²⁶ Nevertheless, the Commission is obligated to follow the law and must not certify the Project until the Applicant demonstrates compliance with Public Resources Code section 1877(g), which, despite its claims to the contrary, it still has not shown.

Again, under 20 CCR section 1877(g), the Applicant was required to have submitted an application including the community benefits plan or strategy with a timeline for execution. It did not do so. The Applicant was given 8 months to further supplement its application, and despite

²⁵ The County submitted its information request to the Applicant on November 13, 2023 and on November 16, 2023 the Applicant responded that the County was not legally entitled to submit to Applicant an information request, that it had no duty to provide any information to the County whatsoever, and that, even if it did have a duty pursuant to a lawfully made section 1716 request, it would not do so because community benefits plan information was not necessary for the County to comment on the Project. The County discusses this exchange with the Applicant at greater length in its November 28, 2023 *County of Shasta Comments Regarding Community Benefits Plan and Application Completeness Determination*, TN253348.

²⁶ Commission determination of complete application was dated October 30, 2023, but the filing was submitted after 5pm and therefore, should have been docketed and effective October 31, 2023. The County filed an objection to the docketing date noting the error. TN252889, *County of Shasta Comments re Incorrect Docketed Date re Determination of Complete Application for Fountain Wind Project* (Nov. 1, 2023). The CEC Docket Unit has since verified in writing with the County that the date was incorrectly docketed in violation of Commission filing regulations, yet the Commission has not taken any action to correct the date and has since issued multiple public notices with the wrong date.

indicating that it was negotiating an agreement with the Foundation and would execute such agreement by the end of September 2023, it did not do so. After 45 days from when the application was deemed complete, in accordance with 20 CCR section 1878(c), the Applicant still has not provided updated or supplemental information to the Commission regarding the initial 2021 plan or the Foundation plan, or submitted a *bona fide* community benefits plan or agreement that complies with the Public Resources Code. Instead, the Applicant has brazenly submitted an agreement with an organization that does not qualify as a community-based organization, does not offer programs or services to the community, and which agreement is not a meaningful community benefit by law. The Applicant has also indicated in its scoping memo presentation and recent filing that it only has to submit one agreement, does not have to provide executed agreements until the last day of the 270-day AB 205 certification period, and a promise that other agreements are being negotiated. Given this, by law, the time for a community benefits plan has passed and the application should be dismissed and the proceeding terminated.

B. The Northeastern California Building & Construction Trades Council Is Not a Community-Based Organization Under Public Resources Code Section 25545.10

The Northeastern California Building & Construction Trades Council, or NCBCTC, is not a community-based organization under Public Resources Code section 25545.10 or any other definition of federal or state law and the agreement between the Applicant and NCBCTC is not a *bona fide* community benefits agreement under the law. Formed in 2017, NCBCTC is a small non-profit corporation with the primary, if not sole, purpose to lobby on behalf of three North State member trade councils through the operation of a political action committee.²⁷ NCBCTC is a

²⁷ According to its website, it engages in political activism to “support candidates and measures that are in line with the interests of the construction industry” and has “been at the forefront” of “issues directly relevant to its members.” *Northeastern California Building & Construction Trades Council – About Us*, [www://https://northstatebuilds.com/northeastern-california-building-construction-trades-council/](https://northstatebuilds.com/northeastern-california-building-construction-trades-council/) (last accessed Dec. 19, 2023). See also <https://www.causeiq.com/organizations/northeastern-building-and-construction-trades-coun,941393142/>.

regional trade council operating on behalf of three smaller trade councils across several counties in the larger Northern California area. Its stated goal is to “elect candidates and support measures” that ensure construction jobs go to its members in California.²⁸ NCBCTC is not a labor union,²⁹ nor does it claim to be one, despite the Applicant’s characterization of it as such.³⁰ As a lobbying organization for three regional trade councils pledging financial support for political candidates that support labor, NCBCTC is merely an association, but it is not itself a labor union and does not fall within the definition of and is not organized as a “labor organization” under the National Labor Relations Act because it does not represent employees in labor relations with a specific employer or industry.³¹ It is simply an advocacy organization for certain paid-for labor interests across the North State, and like other PACs or entities running PACs is a community-based organization where the purpose is to elect and defeat candidates for office.

Although its business address is located in Redding, California, it is collocated in a location of one of its members and has no office of stand-alone location, and the organization does not provide services to the Shasta County community. And, as evidenced by its Form 990s filed

²⁸ According to its website, the “North State Builds Jobs PAC” is a Political Action Committee registered with the FPPC as a General Purpose State Committee.” [www://northstatebuilds.com/political-action/](http://www.northstatebuilds.com/political-action/) (last accessed Dec. 19, 2023). According to the Fair Political Practices Commission’s (“FPPC”) Campaign Manual 4 (June 2020), a “general purpose committee receives contributions to use for political purposes, such as making contributions or independent expenditures to support or oppose candidates and ballot measures, or making contributions to political parties and other state and local campaign committees.” The FPPC’s General Purpose Committees Campaign Disclosure Manual 4 is available at https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual_4/Final_Manual_4.pdf (last accessed Dec. 19, 2023).

²⁹ NCBCTC refers to itself as “North State Builds,” a “partnership of California’s three most Northern Building & Construction Trades Councils” that represents construction workers and contractors. The website makes no claim that either NCBCTC or North States Builds is a labor union and there is no other information submitted by the Applicant or publicly available indicating that it is.

³⁰ The Applicant refers to the NCBCTC as “Union” throughout its purported Community Benefits Agreement. TN253611. NCBCTC is not a union as that term is more commonly known under the National Labor Relations Act (“NLRA”) or a “labor organization” as defined under the NLRA.

³¹ A “labor union” is ultimately governed by the National Labor Relations Act which defines “labor organization” as “any organization of any kind, or any agency, or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5).

with the IRS, NCBCTC is not a “workforce development and training organization” under AB 205.

The attached Form 990s for 2019, 2020 and 2022 were filed by NCBCTC as part of its federal financial transparency obligations as a registered 501(c)(5) organization.³² The Form 990s demonstrate that the bulk of revenue to NCBCTC comes from member dues.³³ As an organization, the total annual revenue is approximately \$5,000 per year.³⁴ NCBCTC also has no staff, and is run instead by a few volunteer “officers,” presumably leaders from the NCBCTC members, who commit a few hours of time to the organization.³⁵ As indicated on the Form 990s, there are no salaries, compensation, or employee benefits provided by the organization.³⁶ Thus, NCBCTC is extremely small and does not have staff or resources and could not conduct community events or engage community interests. Rather, the various Form 990s shows that annual organizational expenditures are on professional fees to independent contractors with the only significant expense in this category being in 2019 for \$11,603.³⁷ Remaining expenses reflected on Schedule O list office expenses, depreciation, fixed office assets, and meetings.³⁸ Other than those expense categories, the only other expenses noted by NCBCTC are on campaign contributions. These contributions are as follows: \$4,295 in 2019, \$39,000 in 2020, and \$7,000 in 2022.³⁹ ***There are no other expenses listed or any categories showing that NCBCTC engages in community benefit or educational programs or activities.***

³² NCBCTC appears to not have filed a Form 990 with the IRS for fiscal year 2021 and is missing other prior years.

³³ See e.g., 2022 Form 990EZ, Part I, Line 3.

³⁴ 2022 Form 990EZ, Part I, Line 9. This is the average revenue amount across the last few Form 990 filing years.

³⁵ 2022 Form 990EZ, Part IV(b).

³⁶ 2022 Form 990EZ, Part I, Line 12.

³⁷ 2019 Form 990EZ, Part I, Line 13.

³⁸ See 2019-2022 Form 990EZ, Schedule O.

³⁹ See 2019-2022 Form 990EZ, Part I, Line 16 and Schedule O.

According to nonprofit watchdog organizations, at least 65 percent of nonprofit expenses should be spent on programs.⁴⁰ In fact, NCBCTC’s political activities and campaign contributions to candidates for elected office account for approximately 60 percent of its budget with the remaining budget spent on building and overhead costs. Simply put, NCBCTC is not a community benefits organization. It serves a few regional members most of which are located outside Shasta County, has no staff, has no educational expenses or budget, and whose primary purpose and expenses are giving campaign contributions to labor friendly candidates, none of which have been in Shasta County.⁴¹ It is essentially a shell company that exists only on paper for its members to provide campaign contributions.

Lastly, there is scant evidence suggesting that NCBCTC has conducted—or upon receipt of funds from the Applicant would conduct—workforce training or development programs benefitting Shasta County, or more importantly, the unincorporated areas of Round Mountain, Montgomery Creek or Burney, or regularly conducts such programs at all sufficient for NCBCTC to constitute a “workforce development and training organization.” NCBCTC at one-time has steered the members of its member organizations to an educational class and certain out-of-area apprenticeship programs run by other entities. But, neither the Applicant nor NCBCTC’s website show that NCBCTC has performed the services identified in Exhibit A of the Applicant’s “Community Benefits Agreement Update & Submittal.” Exhibit A describes educational curriculum for building trades and that NCBCTC has “conducted five MC3 classes in Redding, CA”; however, there is no evidence that such curriculum has actually been conducted or that it benefitted Shasta County residents. The “North State Builds” website states that it has partnered

⁴⁰ Organizations such as Better Business Bureau, Charity Navigator, and Charity Watch publish benchmarks for nonprofits with three key expense categories – program, management, and fundraising.

⁴¹ <https://northstatebuilds.com/political-action/current-endorsements/>.

with the California State Building & Construction Trade Council to offer a “pre-apprenticeship program” following the “Multi Craft Core Curriculum (MC3).” One class in 2022 for Shasta and Tehama counties is listed while all other classes are benefitting Colusa, Glenn, Yuba, Sutter, Butte, and Humboldt counties. There are no other dates of Shasta County specific information listed.⁴² There is also no curriculum or coursework listed as such at Shasta College, other than a Forest Training and Accounting Services apprenticeship unaffiliated with NCBCTC.⁴³ In addition, the North State Builds apprenticeship program is for surrounding counties,⁴⁴ and the bulk of the work listed for other counties would not be for the benefit of the Fountain Wind Project or jobs affiliated with a large-scale renewable energy project but for traditional building and construction trades like drywall, plumbing and painting.⁴⁵

Also, the one-time job fair and MC3 curriculum offered at NCBCTC’s office do not constitute the type of workforce development and training contemplated under AB 205. There is no prior record of holding such an event and no evidence that it has any benefit to Shasta County residents, workers and businesses other than that it will be held in Shasta County.

The alleged benefits that would come from this arrangement are clearly not based on “direct feedback from members of the community,” as the Applicant alleged in its June 2021 Community Benefit Program. More than likely, the Applicant has offered \$175,000 to this special interest

⁴² <https://northstatebuilds.com/north-state-builds-pre-apprenticeship-class-schedule/> (last accessed Dec. 19, 2023). The County has been unable to substantiate the claims at page 7 of the “Community Benefit Agreement” (TN253611) that the NCBCTC has “conducted five MC3 classes in Redding ... at both local Union member offices as well as Shasta Community Colleges,” or that “93 MC3 graduates have been placed into Union Apprenticeship Programs to date.”

⁴³ <https://www.shastacollege.edu/about/economic-workforce-development/apprenticeship/>.

⁴⁴ <https://northstatebuilds.com/north-state-builds-pre-apprenticeship-class-schedule/>.

⁴⁵ <https://northstatebuilds.com/construction-training/north-state-apprenticeship-programs/>. Electrician apprenticeships are held in Medford, Oregon. <https://0kyfd6.p3cdn1.secureserver.net/wp-content/uploads/2023/05/23-24-Schedule.pdf>

group in a thinly veiled attempt to try and buy its way into compliance without any consideration of the needs of the local community.

C. The Proposed Benefits Are Not a Meaningful “Benefit” Under AB 205

There are no similarities between NCBCTC and true community-based organizations that might qualify under Public Resources Code section 25545.10 or in the proposed “community-based” expenditures. A community-based organization is one with a demonstrated effectiveness that is representative of the community and provides educational services to individuals in a community.⁴⁶ Such an organization is usually a 501(c)(3) that provides programs and services to individuals in a particular local area with over half of its revenues dedicated to community education and programs. Here, NCBCTC is an association formed for the purpose of political donations at both the state and regional level, with no demonstrated record of services or workforce training to Shasta County residents.

In addition, in its original community benefits proposal submitted to the Commission, the Applicant proposed \$1,800,000 in Shasta County commitments to redevelop an elementary school, implement a fuel reduction project, expand rural internet, contribute to Tribal workforce development, and promote public safety. In its later, modified “plan” with the Foundation, the Applicant proposed \$2,900,000 to the Foundation for grants in the Shasta County unincorporated area. Now, and in the face of rejection of these proposals by organization throughout Shasta County and a denial by the Foundation, the Applicant proposes funding for member-driven, paid-for interests benefitting out of area workers, if any, with a small sum of \$175,000.

In its third and latest proposal, the Applicant has failed to show how paying \$175,000 to a special interest group whose goal is to advocate for its own interests would provide the type of

⁴⁶ See e.g., 20 U.S.C. § 7801(5).

meaningful community benefit envisioned under AB 205. Aside from the lack of benefit to the overall community, \$175,000 seems wholly insufficient to generate any real impact and pales in comparison to the approximately \$2,000,000, or even \$3,000,000, the Applicant claimed it would invest.⁴⁷ The funding associated with its original proposals was supposedly earmarked for local programs for education, public safety, fire protection, workforce development, and Tribal interests. The County struggles to understand why the Applicant would spend “two years listening to the community” but when faced with putting pen to paper would ignore actual community needs and instead offer a handout to a special interest group whose members at most represent but a small fraction of the Shasta County community, if they are representative at all. In fact, there is no empirical evidence that providing money to NCBCTC would benefit Shasta County at all or that the proposed jobs and workforce benefits would benefit anyone in Shasta County, as it is common knowledge that utility-scale renewable energy projects are built by trained workers that come from out-of-area locations across the state or nation. Irrespective of its intent and aims, \$175,000 to a trade council is not a meaningful benefit and the proposed agreement with the NCBCTC therefore does not satisfy the Applicant’s obligations under Public Resources Code section 25545.10.

Lastly, in its original “2021 plan” submitted as part of the application on January 3, 2023, the Applicant did not propose a community benefits agreement with NCBCTC and has never indicated that it was part of its plan. Rather, the Applicant included a support letter from NCBCTC, dated March 1, 2021, whereby NCBCTC only offered to host a hiring fair for tribal members based on the Pit River Tribe’s choosing as well as slotting tribal members into apprenticeship programs. As was clearly indicated in the Pit River Tribe’s objection and comments in this proceeding, the Pit River Tribe “vehemently” opposed the Project and indicated that “the misrepresentations by

⁴⁷ TN248296-2.

ConnectGen raise serious ethical and transparency concerns that demand immediate attention.”⁴⁸

It is clear then that the NCBCTC agreement should also be called into question because it has never been proposed to the Commission as required by 20 CCR section 1877 and NCBCTC’s original letter of support and commitment to tribal employment interest was false as the Pit River Tribe had no intention of availing itself of such programs that are affiliated with or stem from the Fountain Wind Project.

III. CONCLUSION

The Commission cannot allow the application to proceed further and cannot certify the Project because the Applicant has failed to show that it has entered into one or more legally binding agreements with, or that benefit, a coalition of one or more community-based organizations and in the timelines required by law. The County therefore asks the Commission to immediately dismiss the application and terminate the proceeding, or in the alternative, pause the proceeding and investigate the false claims of the Applicant.

Dated: January 4, 2024

Respectfully submitted,

By: 
Ryan M. F. Baron

⁴⁸ TN252625, *Pit River Tribe Comments – Objection to Fountain Wind Project* at 7-8 (Oct. 18, 2023).