

DOCKETED

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December 12, 2023

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

Re: Fountain Wind Project: Shasta County's Revised Request For Reimbursement

Dear Mr. Bohan:

This firm represents the applicant Fountain Wind, LLC ("Fountain"). We write to object to Shasta County's Revised Request for Reimbursement Pursuant to Public Resources Code Section 25538 dated November 14, 2023 (TN 253120.) We understand that the California Energy Commission's ("Commission's") letter dated November 29, 2023 (TN 253385) constitutes a determination that Shasta County's ("County's") request for reimbursement is complete. This objection is filed pursuant to 20 Code of California Regulations ("CCR") section 1715 (c)(4.)

A. Introduction

Fountain objects to the County's request for reimbursement because the bulk of costs sought to be reimbursed by the County are not eligible for reimbursement pursuant to Public Resources Code sections 25519(f) and 25538 and 20 CCR 1715(a). The County's sweeping request for \$473,304.00 appears to include most if not all the County's projected costs in participating in the Commission's process and advocating against certification. Except for a relatively small amount yet to be evaluated for reasonableness when comments are actually provided on the application, the County's request should be rejected.

Public Resources Code sections 25519(f) and 25538 and 20 CCR 1715 limit local agency reimbursement to costs incurred for narrow and specific activities *that are mandated to occur by law*.¹ To be reimbursable, the costs must represent "a fee" for "the actual and added costs" of a local agency's required review of the opt-in application. (Public Resources Code section 25538). Further, they must be for "the added cost of service directly in response to Commission requests for review that are not normally covered by the permit fee" (see 20 CCR 1715(a)); and must provide services "for which a fee is normally charged." (*Id.*) Section 1715 expressly excludes costs incurred for "presentation or defense of positions not reasonably related to the matters which the agency is requested to review." Section 1715 also expressly excludes costs incurred to

¹ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 (optional activities by local government such as electing to acquire a particular property by eminent domain are not state mandates and are not reimbursable.)

advocate positions by formal intervenors to a proceeding.² Here, numerous categories of costs sought by the County do not qualify under these criteria. To the extent the costs do qualify for reimbursement, the amounts projected for reimbursement are unreasonable and inflated. \$473,304.00 is a staggeringly high fee for review and comment on an application about which the County is already intimately familiar.

While we agree in the main with the conclusions in the CEC's November 29, 2023, response letter, we believe that the staff has not properly applied all the eligibility requirements for reimbursement to all of the categories of costs. Based on the points raised here, we request that the Commission staff reconsider its determination that, apart from actual review and comment on the application, some of the other activities outlined in the County's Revised Request (such as review of CEQA impacts and net economic benefit) are reimbursable. With respect to the amount sought for the actual review and comment of the application (\$51,663), we believe it is unreasonable and unwarranted but cannot at this point fully evaluate the claim because no comment on the application has been actually received from Shasta County.

B. Analysis

1. The Scope of Activities For Which Reimbursement Is Available Is Narrow.

Under the Warren Alquist Act, upon the filing of an application, "the commission shall forward the application to local governmental agencies having land use and related jurisdiction in the area of the proposed site and related facility." Public Resources Code section 25519(f).³ Section 25519(f) further provides that "those local agencies shall review the application and submit comments on, among other things, the design of the facility, architectural and aesthetic features of the facility, access to highways, landscaping and grading, public use of lands in the area of the facility, and other appropriate aspects of the design, construction, or operation of the proposed site and related facility." Other than the statutory mandate in section 25519 to review and comment on the application, the Act requires no other action by local government in the opt-in process. Other decisions by the local agency to participate, or not, in the AB 205 process are entirely discretionary.

To compensate local government for the statute's narrow mandate to review and provide comments on the application, Public Resources Section 25538 allows for the local agency to request "a fee" from the commission "to reimburse the local agency for the actual and added costs of this review by the local agency. The commission shall reimburse the local agency for the added costs that shall be actually incurred by the local agency in complying the commission's request."

² While the opt-in procedures do not allow for formal intervention, Shasta County has been filing motions and requesting rulings like formal intervenor. When a local government is conducting itself like a formal intervenor, the prohibition on reimbursement for advocacy-type intervenor activities should apply as well.

³ Public Resources Code section 25545.8 indicates that Public Resources Code sections 25519(f) and section 25538 apply to opt-in applications.

Public Resources Code section 25538 further provides that “the commission shall either request a fee from the person proposing the project or devote a special fund in its budget for the reimbursement of such costs incurred by public agencies.” Here, we understand that the Commission expects Fountain to reimburse the County for its costs to comply with this mandate. As such, Fountain has an immediate and compelling interest in ensuring that these costs are in fact reimbursable and if reimbursable, reasonable.

Section 1715 of the Commission’s regulations provide further guidance on what costs are eligible for reimbursement:

“Costs eligible for reimbursement. **(1)** Local agencies shall be reimbursed for costs incurred in accordance with actual services performed by the local agency, provided that the local agency follows the procedures set forth in this section. These costs include: **(A)** permit fees, including traffic impact fees, drainage fees, park-in-lieu fees, sewer fees, public facilities fees and the like, but not processing fees, that the local agency would normally receive for a powerplant or transmission line application in the absence of Commission jurisdiction, and **(B)** the added costs of services performed directly in response to Commission requests for review that are not normally covered by the permit fee and for which a fee is normally charged.”

Thus, to be reimbursable, the County’s costs must either related to permit and impact fees or fees for actions that perform a “service” that is “directly in response to Commission requests for review.” In addition, costs must be for services “for which a fee is normally charged.” 20 CCR section 1715 (a).

The regulations also specify that certain costs are not reimbursable:

(b) Costs ineligible for reimbursement. A local agency may not be reimbursed under this section for the following types of costs, even if actually incurred: **(1)** expenses incurred by a local agency for the presentation or defense of positions not reasonably related to the matters which the agency is requested to review or not within the area of the agency’s expertise; **(2)** expenses for which it receives payment from other sources; **(3)** expenses incurred in advocating a position as a formal intervenor to the proceeding, except for the local district and Air Resources Board presentations pursuant to Section 1744.5; or **(4)** entertainment and first class travel expenses.

As noted, prohibited costs include “expenses incurred ... for the presentation or defense of positions not reasonably related to the matters which the agency is requested to review” and “expenses incurred in advocating a position as a formal intervenor.”

The regulations also require that a request for reimbursement be filed within 21 days of receiving a request for review by the Commission. (20 CCR 1715 (c)(2).) “A local agency’s failure to file a proposed budget within the time specified herein shall not prevent it from receiving reimbursement; however, failure to use the approval process described in this section creates a risk that the local agency will not be reimbursed for the work already performed.”

Here, on January 25, 2023, CEC staff sent an email to the County requesting that it provide comments on the application pursuant to Public Resources Code section 25519(f). The email also invited the County to provide information of the County law, ordinances, and regulations it believes would be applicable but for the Commission’s exclusive jurisdiction.

Two hundred and forty-one (241) days later, on August 15, 2023, Shasta County filed a request for reimbursement and a budget in the amount of \$585,514 for various activities it alleged are reimbursable under the Act.

On August 25, 2023, the Commission rejected the County’s request on numerous grounds indicating that the request was (a) untimely and (b) contained requests that are “invalid, ineligible for reimbursement, or exceed the scope of review that the CEC staff has requested or will request, and the request for reimbursement is overbroad and unreasonable pursuant to Title 20, California Code of Regulations, section 1715(c)(4).”

On October 19, 2023, Shasta County filed a 20-page “Response to Staff Objection to County’s Request for Reimbursement and Itemized Budget.” (TN 252654.) In this response, County admits that some of the costs for which it seeking reimbursement include costs to “understand its rights under AB 205 and applicable regulations” (p. 2) as well as “costs the County has incurred ... in its prior review and denial of the Fountain Wind Project (e.g. CEQA). . . “ and costs to “seek direction from the County’s governing body.” (p. 7.) The Response also admits that request includes “costs the County has already incurred . . .” (p. 8). The response claims that a denial of the Request “unfairly prejudices the County’s participation in the proceeding as a matter of due process and violates the prohibition on unfunded state mandates set forth in the California Constitution.” (p. 3.)

On November 14, 2023, Shasta County filed a “Revised Request for Reimbursement Pursuant to Public Resources Code Section 25538.” (TN 253120, “Revised Request.”) The Revised Request proposes a budget of \$473,304, a \$112,210 reduction from its initial request. The budget includes an itemized list of costs for which the County believes it should be reimbursed.

On November 29, 2023, the CEC responded to the County’s Revised Request (TN 253385) and found some of the items eligible and some ineligible without addressing the amounts requested in the budget.

As explained further below, Fountain objects to almost all of the categories of activities in the County’s Revised Request as outside the scope of reimbursable activities. With respect to

listed activities that may be eligible, Fountain objects to the amounts proposed in the budget as unreasonable.

2. Reimbursable Costs Do Not Include Discretionary Costs for A Local Agency to Participate in the Proceeding

Under Public Resources code 25538 and 20 CCR 1715, reimbursable costs are limited to “a fee” for the cost of the County’s review and comment on “the application.” Providing comments on an application is the only *obligation* placed upon local government under the Act. Per Public Resources Code section 25519(f), suggested topics for comment include “the design of the facility, architectural and aesthetic features of the facility, access to highways, landscaping and grading, public use of lands in the area of the facility, and other appropriate aspects of the design, construction, or operation of the proposed site and related facility.” While section 25519 indicates that this list of topics is not exclusive, the nature and characteristics of the examples enumerated, which focus on the physical, aesthetic and engineering characteristics of the Project, indicate that the Legislature intended reimbursable work to focus on design and function of the proposed facility and not on alleged defects in the application materials or on the Commission’s processing of the Project, or on the Commission’s staff assessment or EIR, or on choice of alternatives or on determinations that the Project is needed for public convenience or necessity. While the County certainly has a right to participate in the process and make whatever arguments it chooses to make, the cost of such discretionary advocacy is not reimbursable.

3. Reimbursable Costs Only Include Those That Are Providing a “Service” That “Directly In Response to Commission Requests for Review.”

Most of the County’s requests for reimbursement are not providing a “service” that is “directly in response to Commission requests for review.” The activities for which reimbursement are sought include large amounts attorney and consultant time to research and investigate the AB 205 process to advise the County on ways to find fault with the process, advocate for denial of the proposal and perhaps ultimately to challenge the Commission’s determination in court. None of these costs are eligible for reimbursement under the provisions allowing reimbursement. To the extent any of the costs are reimbursable, they cannot be reimbursed until the service has been performed. Even without seeing any comments on the applicant from Shasta County, the costs incurred appear to be excessive and unreasonable in amount.

a. Costs of “Initial Review” of the Application.

The first category of costs for which the County claims it is due a “fee” includes “Initial review of Project and Project Application and Comments Submitted in the Docket Regarding AB Application Requirements and Deficiencies.” (Revised Request at p. 4)

These activities include the following:

- Identification of “areas of review and comment under AB 205.”
- Review and comment on Applicant docket submittals related to AB 205 Application requirements, including “Applicant submittals regarding Commission deficiency notices and data requests.”
- County’s comments on the community benefits agreement plan.⁴
- Review of Commission staff deficiency notices
- Review of third-party docket submittals related to AB 205

Costs to conduct these activities are not reimbursable for the following reasons:

- Section 25538 does not call for an “initial review” of the application; it calls for “review” and “comment” on the application. The language of the code suggests that the Commission requests local government review and comment on the application relatively quickly upon receipt of the request. It does not suggest that this service is requested on just an “initial” basis.⁵
- To comment on the application, it is not necessary for the County to first “identify areas of review and comment under AB 205.” Section 25519(f) is straightforward: it requests review and comment on “the application.” It suggests specific aspects of the application on which comment would be appropriate including “the design of the facility, architectural and aesthetic features of the facility, access to highways, landscaping and grading, public use of lands in the area of the facility, and other appropriate aspects of the design, construction, or operation of the proposed site and related facility.” The statute does not require the County to “identify areas of review and comment under AB 205” more generally.
- To be reimbursable, costs must be “directly in response to Commission requests for review.” The Commission has not asked Shasta County to review Commission deficiency notices and data requests, community benefits agreements, or third-party docket submittals related to AB 205. Further, providing comments on these topics is not a “service” for which a fee is normally charged, and these costs do not qualify under 20 CCR 1715(a)(1)(B) for this reason as well.
- Section 25519 does not call for review of “Commission deficiency notices or data requests” and cannot reasonably be construed to include review and comment on these notices and requests to the applicant. The Commission did not request the County to perform this service nor is this a service “for which a fee is normally charged.”

⁴ More discussion on the issue of review of the Community Benefits Plan is set forth below.

⁵ The Commission’s January 25, 2023 email requested County comments “at your earliest convenience”

- An opt-in application must contain the applicant’s plan or strategy to enter into legally binding agreements for community benefits.⁶ The application is not itself required to contain a Community Benefits Agreement and thus any comments on the application pursuant to section 25519(f) should be limited to the comments on applicant’s “plan or strategy.” Further, the Commission has not requested the County’s comments on any Community Benefit Agreement and thus such costs are not “directly in response to Commission requests for review.” Nor is review of such agreements a cost for which “for which a fee is normally charged.”
- In all events, to our knowledge, the County has not yet submitted any comments on any design, aesthetic, or engineering aspect of the application and thus has performed no reimbursable service to the Commission at all. To be reimbursable, the mandated review and comment must actually occur.

b. The Purportedly Incurred Costs for Review of the Application are Not Reasonable.

Fountain concedes that if the County actually provides specific comments on the application pursuant to section 25519(f), it is due a reasonable “fee” for that service under section 25538 and 20 CCR 1715 because that review is a state-mandated activity. However, as noted, no comments on the application pursuant to section 25519(f) have in fact been received. If comments on the application are at some point received, the Applicant will be in a better position to evaluate whether the amount of \$51,663 allegedly incurred for this purpose is reasonable.

But even without having received any comments to date, the amount of \$51,663 appears unreasonable. Of this \$51,663, \$15,260 is time for County Counsel review and \$24,243 is time for outside counsel review. Review of the project by the Resource Management department is \$12,160.

The \$39,503 in costs allegedly incurred by County Counsel or outside counsel in providing the not-yet-received comments on the application should be rejected. Commenting of the design, aesthetics, highway access and other operational features of the Project does not require a law degree. To our knowledge, the County’s lawyers have provided no “service” to the Commission in better understanding the design, architectural, technical, engineering or aesthetic attributes of the Project. In addition, review of development applications for design, aesthetic, traffic and architectural features *by in-house and outside counsel* are not services for which a fee is normally charged. Finally, the request for reimbursement is untimely. Section 1715 indicates that untimely reimbursement requests for costs *that have already been incurred* are at added risk for rejection. For all the above reasons, the \$39,503 in attorney’s fees that have allegedly already been incurred for review and comments on the application should be rejected.

⁶ 20 CCR 1877 (g): “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 Recourses Code section 25545.10”

Second, the County's Department of Resource Management proposed reimbursement of \$12,160 for 80 hours of review appears to be excessive and should be rejected. As noted, the Department of Resource Management has not in fact provided any comments. In absence of seeing any comments, it is difficult to judge whether 80 hours was necessary, but it bears pointing out that the Department is already extremely familiar with the details of the Project since the Project was under review by the Department for many years. It is difficult to believe that 80 hours were or are necessary to familiarize the Department with the design, aesthetic, architectural features of the Project or its operational or functional capabilities.

Because no comments on the application have been received by the Commission, the Commission has received no service from the County for which reimbursement is appropriate. For this reason, none of the \$51,663 should be reimbursable until actual comments on the application are received and an evaluation can be made whether the alleged cost of \$51,663 to prepare the comments can be made.

c. Review and Comment on the Net Economic Impact Analysis Is Not Reimbursable.

The County requests reimbursement of \$106,372 to prepare its position on why the Project will not result in a net economic benefit to the local government. Whether the Project will result in a net economic benefit to the local government is of course a valid topic for the County to comment on *in its discretion*, but these costs are not subject to reimbursement under section 25538 as AB 205 does not mandate any comment from local government on this topic. County comments on the topic will amount to advocacy about the merits of the Project and thus are not reimbursable.

To the extent that comments on whether the Project will result in a net economic benefit to the local government are subject to reimbursement, the amount of \$94,000 for a consultant review is not reasonable.

AB 205's requirement that a project demonstrate a net economic benefit is not complex. Public Resources Code section 25545.9 provides that:

The commission shall not certify a site and related facility under this chapter unless the commission finds that the construction or operation of the facility will have an overall net positive economic benefit to the local government that would have had permitting authority over the site and related facility. For purposes of this section, economic benefits may include, but are not limited to, any of the following:

- (a) Employment growth.
- (b) Housing development.
- (c) Infrastructure and environmental improvements.
- (d) Assistance to public schools and education.

- (e) Assistance to public safety agencies and departments.
- (f) Property taxes and sales and use tax revenues.

Given that section 25545.9(c) indicates that a finding of net economic benefit can be based solely on a project providing “infrastructure and environmental improvements,” it is difficult to understand how the County needs to pay a consultant \$94,000 to verify (or refute) that this point.

The amount of \$4,560 for the Shasta County Treasurer-Tax Collector-Public Administrator and Shasta County Assessor-Recorder to “support the economic impact analysis with data support and provide further comment on the economic benefits to the County” cannot be evaluated without more information but in all events is discretionary and not reimbursable.

The County’s request for \$7,812 to prepare and submit the “administrative record” surrounding the adoption of Shasta County Ordinance SCC 2023-01 prohibiting wind energy in the County was not requested by the Commission, does not provide the Commission with any service and is not a service for which the County normally charges an applicant a fee. This “administrative record” comprises hundreds of pages of materials submitted by the County as TN 253290-1 through -8. Submission of these documents was optional. The costs to prepare and submit these materials is not reimbursable.

d. Review and Comment on the Community it Benefits Plan Is Not Reimbursable.

The County seeks \$10,000 to analyze whether, in its opinion, the applicant’s community benefits plan is beneficial and whether the plan complies with the requirements of AB 205. While the County may, in its discretion, comment on these topics, comments on this topic are not mandated and therefore the cost to undertake these comments is not reimbursable. The Commission has not requested any comments on this topic, and it is outside the scope of section 25519(f). While 20 CCR 1887 requires that an opt-in application discuss the applicant’s “plan or strategy” to enter in one or more Community Benefit Agreements, the agreement itself is not required to be included as part of the application. To the extent they are ever provided, the County’s comments on Fountain’s “plan or strategy” may be reimbursable. Discretionary comments containing the County’s *opinion* on actual agreements are not subject to reimbursement.

e. Costs To Advocate Its Position on the Commission’s EIR and Other Findings Are Not Reimbursable.

The Revised Request includes \$291,000 to review the Commission’s EIR, including “the range of actions, alternatives, mitigation measures and significant effects to be analyzed in depth in the environmental impact report and any staff assessments.” (Revised Request at p. 8.) This amount also includes review and comment on “the notice of preparation, public informational meeting, public workshops, public scoping meeting, notice of availability, staff assessment and draft and final environmental reports, consideration of final Commission certification, and other meetings, and the County’s participation in the meetings thereof.” (*Id.*)

The County also proposes reimbursement for its comments on “the public convenience and necessity of the Project, any proposed override by the Commission of the County’s land use and other authority.” (*Id.* at p. 9.)

The County claims reimbursement for these comprehensive activities is “contemplated by Public Resources section 25519(f), 25525, 25527 and 25454.7.2” (Revised Request at p. 9.) The County is mistaken.

As noted, the *only* mandated review and comment in AB 205 imposed on local government is pursuant to section 25519(f), which is limited to comments on the application itself. Section 25519(f) is not a catch-all bucket into which the County can capture every discretionary cost.

Nothing in the statute entitles local government to reimbursement for commenting of the Commission’s staff assessment or environmental impact report. Nor has the Commission requested Shasta County comment on its EIR, mitigation measures, analysis of alternatives or determination of significant environmental impacts. Such costs are therefore not for a “service” that is directly responsive to a request for information by the Commission. Nor are comments on *another agency’s* staff assessment or EIR costs for which a fee is normally charged to a project applicant.

Nothing in the statute allows for reimbursement for comments on the “notice of preparation, public informational meeting, public workshops, public scoping meeting, notice of availability, staff assessment and draft and final environmental reports, consideration of final Commission certification, and other meetings, and the County’s participation in the meetings thereof.” Nor does the statute allow for reimbursement for local government comments on Commission determinations regarding “the public convenience and necessity of the Project, any proposed override by the Commission of the County’s land use and other authority.” The County *may* do so but is not required to do so and therefore no compensation for such discretionary participation is available.

Finally, reliance on sections 25525, 25527 and 25454.7.2. is misplaced. Section 25525 contains the circumstances and criteria under which the Commission may certify a project despite inconsistencies with local and state laws and regulations. It says nothing about reimbursement and is not cross-referenced in section 25538. Section 25527 lists areas in which the state where energy facilities should not be approved and neither mandates comments from local agencies on these areas in relation to a particular project or allows for reimbursement for such comments. Section 25454.7.2. calls for the Commission to conduct public outreach to seek input on a range of topics including the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in the environmental impact report. However, nothing in section 25454.7.2 mandates that local government provide such input; it is entirely discretionary

to do so. Further, nothing in section 25454.7.2 calls for reimbursement to local government for the cost of providing such discretionary input.⁷

The entirety of the requested \$291,000 should be rejected. The County may of course comment on whatever it wants to and may participate in the AB 205 process in whatever fashion it chooses at its sole discretion. However, the duty to reimburse only applies to state-mandated actions by local government as set forth in the mandate to review and comment on the application itself pursuant to section 25519(f). The broad interpretation the County is applying to section 25519(f) to allow reimbursement to present positions not requested by the Commission and which amount to advocacy against the certification of the Project is not warranted. The regulations expressly *exclude* costs related a local government's presentation of arguments that are not directly related to the Commission's request for information and excludes costs related to advocacy.

Finally, as a practical matter, if local governments are effectively allowed to compel applicants to pay for the cost of local government opposition to renewable energy projects, the purpose and promise of the AB 205 opt-in program would be severely undermined.

Very truly yours,

Cox, Castle & Nicholson LLP

A handwritten signature in blue ink that reads "Anne E. Mudge". The signature is written in a cursive, flowing style.

Anne E. Mudge

⁷ The request for public input in Section 25454.7.2 on the EIR supports the conclusion that comments on the application pursuant to section 25519(f) were not intended to include comments on the EIR. Had the Legislature wanted to include comments on the EIR as part of comments on the application, it would have said so.