

DOCKETED

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January 24, 2024

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

Dear Director Bohan:

This firm represents Fountain Wind LLC (“Fountain Wind”), the applicant for the Fountain Wind Project, which application is currently pending before the California Energy Commission (“Commission” or “CEC”) under the AB 205 opt-in program (“Opt-In Program”).

This letter serves as Fountain Wind’s response to the County of Shasta (“Shasta County” or the “County”) AB 205 Review and Comments on Fountain Wind Community Benefits Agreement Update and Submittal with Exhibits (TN 253813), and Request for Investigation Into Fountain Wind, LLC Regarding Fountain Wind Project (TN 253801), each dated January 4, 2024.

Shasta County alleges that Fountain Wind is in violation of 20 Code of California Regulations (“CCR”) section 1877(g) and requests that the Commission undertake an investigation of the alleged violation, pursuant to 20 CCR section 1231. Specifically, the County contends that Fountain Wind (1) failed to submit a “plan or strategy” to obtain one or more community benefits agreements (TN 253801, at pp. 3, 7); (2) “materially misrepresented its community benefits plan to the Commission and the public” (TN 253801, at p. 4); and (3) “[lied] to the public and the Commission about its community benefits plan.” (TN 253801, at p. 7.) For the following reasons, Shasta County’s allegations lack any basis in fact or law and should be rejected.

I. Fountain Wind Has Not Misled the Commission or the Public in Demonstrating Its Efforts to Comply with Public Resources Code Section 25545.10.

Shasta County alleges that Fountain Wind’s various submissions and filings to the Opt-In Program docket, intended to demonstrate compliance with Public Resources Code section 25545.10 regarding community benefits, constitute “lying” and are “misleading.” The County’s arguments are unfounded and fail to acknowledge that Fountain Wind provided fulsome documentation with respect to its efforts to comply with section 25545.10’s requirements. Per the statute, compliance with the community benefits requirements must be verified by the Commission at the time a project is certified.¹ Thus, such agreements are not required at the time the application is initially

¹ Section 25545.10 states in full:

(a) The commission shall not certify a site and related facility under this chapter 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-

submitted; rather, the Opt-In Program regulations require an applicant to submit “a plan or strategy, including a timeline for execution” to show it can satisfy Public Resources Code section 25545.10 at or prior to certification. (20 CCR section 1877(g).)² As further documented below, Fountain Wind provided a “plan or strategy” with its initial application, provided additional information in response to Commission requests for more detail regarding “timeline for execution” and, at the Commission’s request, provided an executed a community benefit agreement with the Northeastern California Building and Construction Trades Council (“Trades Council”) in satisfaction of the statutory requirement. (TN 253611.) None of these documents were misleading and, therefore, no investigation is warranted.

II. Applicant’s Submission of Its 2021 Proposal for Community Benefits as Part of the Opt-In Application Was Not a “Lie.”

Shasta County claims that Fountain Wind misled the Commission by submitting a copy of a community benefits program it developed in 2021 (the “2021 Program”). (TN 248296-2.) Fountain Wind developed the 2021 Program voluntarily when its application was pending before Shasta County.³ The 2021 Program publicly set forth Fountain Wind’s commitment to provide approximately \$2,800,000 to various local organizations that entered into community benefits agreements if the Fountain Wind Project was approved by Shasta County and construction of the Fountain Wind Project commenced. When submitted with the application to the Commission in 2023, the 2021 Program was prominently dated “June 2021” and described a proposal to fund various educational, civic, public safety and fire prevention activities, expressly subject to further discussions with the various proposed recipients.⁴ The 2021 Program did not convey that Fountain Wind had entered into binding agreements with these organizations or that such organizations had accepted any funds. By including a copy of the 2021 Program as part of its Opt-In Program

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. The topics and specific terms in the community benefits agreements may vary and may include workforce development, job quality, and job access provisions that include, but are not limited to, any of the following: (1) Terms of employment, such as wages and benefits, employment status, workplace health and safety, scheduling, and career advancement opportunities.

(2) Worker recruitment, screening, and hiring strategies and practices, targeted hiring planning and execution, investment in workforce training and education, and worker voice and representation in decision making affecting employment and training.

(3) Establishing a high road training partnership, as defined in Section 14005 of the Unemployment Insurance Code.

(b) The topics and specific terms in the community benefits agreement may also include, but not be limited to, funding for or providing specific community improvements or amenities such as park and playground equipment, urban greening, enhanced safety crossings, paving roads and bike paths, and annual contributions to a nonprofit or community-based organization that awards grants to organizations delivering community-based services and amenities.

² Section 1877(g) provides: “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.”

³ In contrast to requirements under the Opt-In Program, Shasta County does not require community benefits to obtain a conditional use permit. Such benefits may be offered voluntarily, and Fountain Wind did so as part of its County application.

⁴ In the discussion of proposed funding to the Cedar Creek Elementary School, the 2021 Plan says “the above recommendations are merely ideas and suggestions.” (p. 6 of 18). Elsewhere, the 2021 Plan says “the success of this initiative will require input and guidance from the community.” (p. 6 of 18.) The 2021 Plan further describes the Project’s “goals” and “proposal to commit funds” and expressly states “turning this commitment into a reality requires collaboration and inspiration from the community.” (p. 5 of 18.)

application, Fountain Wind was providing an example of its long-standing, voluntary commitments to provide community benefits as evidence of its “plan or strategy” to satisfy the requirements of Public Resources Code section 25545.10. During meetings with the CEC in November 2022 and May 2023, Fountain Wind communicated to CEC staff that its 2021 Program was submitted as evidence of its plan and strategy for community benefits, and, while Fountain Wind remained willing to fund projects as described in the 2021 Program, it would be pursuing additional community benefit agreements with a variety of community organizations pursuant to Opt-In Program requirements.

Consistent with and as a demonstration of this approach, on September 8, 2023, Fountain Wind filed a response (TN 252187) to a Commission data request (TN 252072) informing the Commission that it was negotiating an agreement with a community organization to distribute funds for various projects in the Burney, Montgomery Creek, and Round Mountain communities and it expected to execute the applicable agreement by the end of September 2023. In the filing, Fountain Wind indicated it would submit the agreement within forty-five (45) days after its Opt-In Program application was determined complete. This filing satisfied the Commission’s request for further detail demonstrating a “timeline for execution,” in compliance with Commission regulations.

None of the foregoing submittals constitute “lying” to the Commission or a violation of 20 CCR section 1877(g) and, therefore, no investigation is warranted.

III. Applicant’s Submission of a Draft Agreement Under Negotiation with a Community-Based Organization Was Not “Misleading.”

In response to a further Commission request TN 252320, on October 12, 2023, Fountain Wind docketed the “**Draft Funding Agreement between Community Foundation of the North State and Fountain Wind LLC**” (emphasis added), which such parties were then negotiating for the funding of various community benefit programs (TN 252585). Fountain Wind’s submission of this draft agreement under negotiation with a community-based organization, in which it proposed to fund a variety of community benefits, was not misleading the Commission. Fountain Wind was completely transparent, even in the titling of the document, that it was in draft form and not fully executed. That the counterparty ultimately elected not to execute the agreement does not change the fact that, at the time the agreement was provided, it was under active negotiation and was responsive to the Commission’s request to provide a “timeline for execution” of a community benefit agreement. As such, the draft agreement does not constitute a misrepresentation or violation of 20 CCR section 1877(g) and, accordingly, an investigation is not warranted.

IV. The Trades Council is a Community-Based Organization Pursuant to Public Resources Code Section 25545.10.

On December 14, 2023, Fountain Wind docketed a final executed copy of a community benefit agreement with the Trades Council. Shasta County maintains that the Commission should reject

this agreement because the Trades Council fails to qualify a community-based organization under Public Resources Code section 25545.10; however, Shasta County is mistaken.

Public Resources Code section 25545.10(a) calls for the applicant to enter into “one or more legally binding and enforceable agreements with, or that benefit, a coalition of one or more community-based organizations ... where there is mutual benefit to the parties to the agreement.” The section then provides non-exclusive examples of such community-based organizations, including “workforce development training organizations, labor unions, social justice advocates, local governmental entities, California Native American Tribes, or other organizations that represent community interests.” Subdivision (a) further recognizes that an applicant may satisfy this requirement through various mechanisms, providing that the “topics and specific terms in the community benefits agreements may vary and may include workforce development, job quality, and job access provisions.”

Section 25545.10(a) does not define “community-based organization” or “other organizations that represent community interests,” although it provides a non-exclusive list of examples. Two of these non-exclusive examples are “workforce development training organizations” and “labor unions.” From this language, it must be concluded the California State Legislature intended to include organizations based in the community or representing its interests, whose mission is to support labor and workforce development.

On its website, the Trades Council highlights its mission:

“Founded in 2017, ‘North States Builds’ is a community-based organization designed to serve the building and construction needs of California’s northern counties. Through construction and development advocacy, investment in localized state-approved apprenticeship training programs, and partnerships with end-users and contractors that employ local North State residents we are working to carry the North State into the future.”

<https://northstatebuilds.com/northeastern-california-building-construction-trades-council/>
(last visited January 19, 2024).

Under the community benefits agreement with Fountain Wind, the committed funds are to be used by the Trades Council to (i) conduct Fountain Wind Project-related job fairs in both Redding and Burney before commencement of excavation work for the installation of foundations for the wind turbines and (ii) provide month-long Multi-Craft Core Curriculum (“MC3”) Trainings in both Redding and Burney prior to commencement of commercial operations. (TN 253611, at §1(A).)

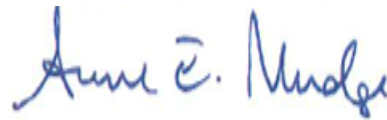
There can be no serious argument that the Trades Council is not a community-based organization or that the activities funded pursuant to the agreement are not within the scope of Public Resources Code section 25545.10, which specifically includes the scope of this agreement: “workforce development, job quality, and job access provisions.”

January 24, 2024
Page 5

Fountain Wind has been diligently negotiating community benefits agreements in furtherance of compliance with Public Resources Code section 25545.10. In doing so, it has not violated any law, statute, regulation, or ordinance under the Commission's jurisdiction. Shasta County's allegations that Fountain Wind has "lied" to the Commission or made "fraudulent" representations are baseless and appear to be based on Shasta County's opposition to the Fountain Wind Project. For the aforementioned reasons, Shasta County's request for an investigation under 20 CCR section 1231 should be denied.

Sincerely,

Cox, Castle & Nicholson LLP



Anne E. Mudge