

DOCKETED	
Docket Number:	23-OPT-01
Project Title:	Fountain Wind Project
TN #:	254421
Document Title:	County of Shasta Request for Chair Review of Exec Dir Determination - Pursuant to 20 CCR 12325
Description:	N/A
Filer:	Kelly Lotz
Organization:	County of Shasta
Submitter Role:	Public Agency
Submission Date:	2/12/2024 4:08:00 PM
Docketed Date:	2/12/2024



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

File No. 55398.00043

February 12, 2024

Via Email and Docket 23-OPT-01

Chair David Hochschild
California Energy Commission
715 P Street
Sacramento, CA 95814
chair.hochschild@energy.ca.gov

**Re: Docket 23-OPT-01: 20 C.C.R. § 1232.5 – Request for Commission
Chair Review of Executive Director Determination Under 20 C.C.R.
§ 1232 Regarding Fountain Wind Project**

Dear Chair Hochschild:

Best Best & Krieger LLP represents the County of Shasta (“County”) in California Energy Commission (“Commission”) Docket 23-OPT-01, in which the Commission is reviewing Fountain Wind, LLC’s (“Applicant”) Assembly Bill (“AB”) 205 opt-in application for certification of the Fountain Wind Project (“Application”). On January 4, 2024, pursuant to 20 California Code of Regulations (“C.C.R.”) section 1231, the County filed with the Executive Director a Request for Investigation into the Applicant regarding the Fountain Wind Project (“Project”).¹ The Request for Investigation detailed certain violations of the Commission’s rules regarding the veracity of the Applicant’s attestations and submittals related to its community benefits plan and agreement. On January 26, 2024, the Executive Director issued a determination declining to investigate the Applicant and made certain other determinations that were outside the scope of the Executive Director’s review and authority.² Pursuant to section 1232.5,³ the County requests the Chair’s review of the Determination and issuance of a written decision ordering the investigation and corrective action requested by the County. In the alternative, the County requests that the Chair refer the matter to Commissioner Gallardo as the Lead Commissioner for siting, transmission and environmental protection for further evaluation. Pursuant to section 1232.5(a), the County’s request herein is timely filed within the Commission’s 15 day appeal period.

¹ TN253801, 20 C.C.R. § 1231 – *Request for Investigation Into Fountain Wind, LLC Regarding Fountain Wind Project* (Jan. 4, 2024) (“Request for Investigation”).

² TN254155, *Response to the County of Shasta’s Request for Investigation into Fountain Wind LLC Regarding Fountain Wind Project* (Jan. 26, 2024) (“Determination”).

³ All references to “section” include the California Code of Regulations.

The Request for Investigation included a detailed statement of facts evidencing the Applicant's violations of sections 1707,⁴ 1716(c), and 1877(g). The County demonstrated how the Applicant violated section 1707 by not including with its Application an attestation under penalty of perjury as to the truth and accuracy of the Application. More importantly, the Applicant violated section 1707 and the perjury oath it was supposed to have submitted by submitting a false community benefits plan with its initial Application and further misleading the Commission and the public about the status of negotiations with a community-based organization, from which a community benefits agreement never came to fruition within the statutory and regulatory timeframes. Secondly, the Applicant violated section 1716(c) by declining to respond to the County's lawfully issued data request seeking information about the Applicant's community benefits agreement negotiations and representations it had made to the Commission. Lastly, the Applicant violated section 1877(g) by submitting with its Application a false and misleading plan, strategy, and timeline for obtaining a legally binding community benefits agreement with one or more community-based organizations, and for repeated false and misleading statements and filings concerning its community benefits negotiations.⁵

The Request for Investigation complied with the section 1231 requirements⁶ and established the necessary facts for the Commission to open up an investigation into the Applicant's violations of the Commission's opt-in application rules. The Request for Investigation, however, was denied based on incorrect determinations by the Executive Director.

The County, therefore, asks you as the Chair of the Commission and pursuant to section 1232.5 to review the Determination and issue a written decision ordering an investigation into the Applicant's violations of Commission opt-in regulations or, alternatively, to refer the matter to Commissioner Gallardo for further evaluation for the reasons more fully set forth below.

⁴ The County acknowledges that section 1876 requires opt-in applications to be authorized and verified "as set forth in" section 1707, but the County alleges a violation of section 1707 because it is the County's position that either (1) the entirety of the Commission's Chapter 5, Article 1 (General Provisions Applicable to Notices of Intent and Applications for Certification) regulations apply to opt-in applications, or (2) that the Commission failed to implement in its AB 205 emergency rulemaking certain critical rules that typically allow for robust public participation during the Commission's review of thermal power plant siting applications. Similarly, the County alleges violation of section 1716(c), which the County believes is applicable to opt-in applications to allow the public to uncover and provide to the Commission additional relevant evidence to aid in the Commission's review of a proposed opt-in project.

⁵ See Request for Investigation at 8. See also, TN253813, *County of Shasta AB 205 Review and Comments on Fountain Wind Community Benefits Agreement Update and Submittal with Exhibits*;

⁶ The County disagrees with the Determination that it contained a deficiency (Determination at 2). The Request for Investigation described the various ways the County attempted to resolve the issue with the Applicant, including the County's data request to the Applicant and its various docketed comments. Moreover, there was no meaningful way for the County to resolve these issues with the Applicant because (1) the application materials are controlled by Commission staff and mostly unavailable to the County and the public, and (2) it would have been an exercise in futility to have discussions with the Applicant about whether its latest community benefits agreement is valid or truthful.

I. 20 C.C.R. § 1707 – The Applicant Failed to Attest Under Penalty of Perjury as to the Truth & Accuracy of its Application

Persons submitting an opt-in application for certification of a nonfossil-fueled powerplant must date and sign the application attesting under penalty of perjury as to its truth and accuracy.⁷ The County showed that the Applicant did not file or otherwise provide to the Commission a signed, dated application in which it did so.⁸ The Executive Director agreed, but nevertheless determined that no additional action was required because Commission staff issued a data request to the Applicant seeking the attestation that should have been included with the Application.⁹

This corrective action by Commission staff, however, occurred after the County filed its Request for Investigation and seems to have been added to data requests that had already been developed.¹⁰ And regardless of when it was noticed and addressed by staff, the Applicant’s failure to comply with this rather basic—and very much standard—filing requirement raises significant concerns when considered in the context of other examples of the Applicant’s indifference towards Commission rules.¹¹ The point of the attestation requirement is for an applicant to attest to the truthfulness and correctness of the application and its representations to the Commission such that the applicant would be guilty of perjury under the law if the facts declared in the application or representation are found to be untrue.¹² This requirement then is the basis for the other violations in the Request for Investigation. If the community benefits plan submitted at the time of the Application was false and there was no intention of pursuing the plan, then the Applicant not only violated section 1877(g) but willfully stated as true a material matter that the Applicant knew to be false in violation of the attestation, and therefore, state law. Even if the Applicant has now submitted an attestation, which it purportedly did on February 6, the veracity of the community benefits plans are still questionable and should be investigated by the Commission to confirm whether the Applicant had truthful plans or withheld material facts, which raise perjury concerns.¹³

Regardless of the attestation being filed with the Commission on February 6, the County continues to assert that (1) the Applicant’s failure to attest to the accuracy and truth of its Application is one of several examples of the Applicant’s dismissive attitude towards Commission rules and grounds for conducting a further investigation and potentially initiating a complaint proceeding or referring the matter to the Attorney General’s office or another state agency, and (2)

⁷ 20 C.C.R. § 1707.

⁸ See Request for Investigation at 6-7.

⁹ Determination at 2. Specifically, the Executive Director determined that the matter was already being corrected under section 1232(a)(8).

¹⁰ See, TN253812, *Post Scoping Data Requests for Fountain Wind Project*.

¹¹ It should be noted that the Applicant did not even file an “application” in the traditional sense. But instead repackaged the same documents it submitted to the County during the County’s review of this same project and dumped them—one filing at a time—in Commission staff’s lap with a “crosswalk,” essentially saying “here, staff, you figure it out.”

¹² Penal Code § 118.

¹³ The Applicant appears to have now docketed what it describes as a “verification.” TN254342, *fwp_fountain_wind_application_certification* (Feb. 6, 2024).

that the Commission committed legal error by deeming the Application complete prior to ensuring the Applicant complied with all applicable Commission rules.

II. 20 C.C.R. § 1716(c) – Applicant Refused to Respond to the County’s Valid Data Request

The County as a local agency that has been asked by the Commission to provide comments on an opt-in application has the same right as a party to a powerplant siting certification proceeding to obtain information necessary to comply with the Commission’s request for comments.¹⁴ Here, the Commission asked the County to review and comment on the Application.¹⁵ The County attempted to do so on the community benefits agreement. Upon information and belief that the Applicant’s representations regarding its negotiations with the Community Foundation of the North State (“Community Foundation”) were false, and which false representations had been communicated to Commission staff, the County sent a data request to the Applicant seeking information about the status of the Applicant’s negotiations so that the County could complete its review and provide feedback to the Commission.¹⁶ The County’s data request was therefore valid and should have elicited substantive responses from the Applicant pursuant to section 1716(c). Instead, the Applicant refused to provide any responses whatsoever.¹⁷ The Determination unfortunately supported this position by incorrectly determining that section 1716(c) does not apply to opt-in applications because section 1716 was not expressly incorporated into the emergency regulations the Commission adopted pursuant to AB 205.¹⁸

The County argues that section 1716 does indeed apply to opt-in applications. In fact, Commission staff relied on an analogous position in addressing the County’s right to reimbursement under section 1715. Section 1715 governs local agency reimbursement procedures and sets forth certain criteria for determining eligible activities as part of the County’s review and comment obligations required by Public Resources Code sections 25519(f) and 25538 and the plain language of the legislative text of AB 205.¹⁹ The Applicant has also objected to the County’s section 1715 reimbursement requests.²⁰ As the County has pointed out in prior comments, however, that section 1715 was not expressly incorporated into the Commission’s emergency

¹⁴ 20 C.C.R. section 1716(c).

¹⁵ Email from Leonidas Payne, Project Manager, CEC, to County of Shasta, *Notice of application receipt for Fountain Wind project (23-OPT-01) / request for comments and information* (Jan. 25, 2023).

¹⁶ “The nature and extent of the benefits of the entire project are relevant to the CEC’s decision whether to approve the project despite its inconsistency with local laws as required under Public Resources Code section 25525.” Determination at 2.

¹⁷ TN253801 includes the County’s data request and the Applicant’s response, as well as a lengthier discussion of why the County is entitled to receive the information it requested from the Applicant.

¹⁸ Determination at 2.

¹⁹ See, TN2533985, *Response to County of Shasta Revised Request for Reimbursement*, in which the Executive Director identified expenses that would be eligible for reimbursement pursuant to 20 C.C.R. section 1715.

²⁰ TN253590, *FWP Letter – Objections to Shasta County Reimbursement Request* (Dec. 12, 2023).

regulations, yet has been cited as applicable.²¹ Thus, it is entirely inconsistent to disallow the County from using section 1716(c) to request relevant information from the Applicant.

The County, therefore, requests that the Chair modify the Executive Director's determination that section 1716(c) does not apply and direct the Executive Director to order the Applicant to respond to the County's valid data request regarding the Applicant's community benefits plan. The only information provided by the Applicant was in a January 24, 2024 in response to the Request for Investigation that "*the counterparty ultimately elected not to execute the agreement . . .*"²² This statement, however, came three months after the issue was initially raised. ***Had the Applicant provided the required information, it would have been demonstrated prior to the Commission's determination of application completion on October 31, 2023 that there was no community benefits plan with the Community Foundation, Public Resources Code section 25545.10 and 20 C.C.R. section 1877(g) was not satisfied, and that the completion determination could not have been made.***

To the extent section 1716 does not apply to opt-in proceedings, the Commission committed error by failing to develop and implement procedures for opt-in applications that protect the due process review and comment rights of local agencies. Such a failure to adopt rules analogous to those applicable to thermal powerplant certification proceedings prevents local governments from meaningfully participating in opt-in proceedings in which their own discretionary powers are being preempted. Such a result is prejudicial and not legally supportable.

The Determination also suggests that Commission staff could issue data requests essentially "on behalf of" the County if the County runs its requests through the Fountain Wind project manager.²³ First, section 1716 contains an absolute right to obtain relevant information from an applicant. And, while section 1716(c) encourages staff coordination, it does not require it. Second, and more importantly, the County's data request did go through the Commission and was raised directly by the County in staff communications and formal filings with the Commission.²⁴ Yet, no such data request was issued.

Lastly, section 1878(c) requires the Applicant to provide updated or supplemental information to the Commission within 45 days of the application being deemed complete to support certain required findings, such as those that are required as part of the community benefits agreement. In September 2023, Commission staff interpreted that to mean the Applicant was required to file the final executed Community Foundation agreement by the 45-day date, in this case December 14, 2023.²⁵ Considering there was no data request issued by Commission staff after the County commented on information that negotiations were not ongoing, a decision was seemingly made to wait for the 45-day supplemental period under section 1878(c) and not address

²¹ TN253120, *County of Shasta CEC Revised Reimbursement Request* at 2-3 (Nov. 14, 2023). The County requested clarification of why section 1715 governed reimbursement even though it was not expressly incorporated into Article 4.1 of Commission regulations. No clarification has been provided to-date.

²² TN254101, *Applicant Response to Shasta County Investigation Request*, at 3 (Jan. 24, 2024).

²³ Determination at 1.

²⁴ See, e.g., TN253448.

²⁵ TN252320, *Community Benefits Data Request for the Fountain Wind Project*, at 2 (Sept. 20, 2023).

the issue with the Applicant despite the misrepresentation issue being raised. *But, on December 14, the Applicant submitted an altogether different agreement with a never before identified organization (i.e., Northeastern California Building & Construction Trades Council) for a plan that had never been disclosed or submitted as part of the application.* The effect is that under the Determination the prior “plans” are no longer an issue to or considered relevant by the Commission and the community benefits plan requirement required by section 1878(g) is illusory. This could all have been avoided had the County been able to pursue its lawfully issued data request.

III. 20 C.C.R. 1877(g) – Applicant Failed to Include a Valid Community Benefits Plan With Its Application and Repeatedly Made False and Misleading Statements and Filings

The Applicant violated section 1877(g) by failing to include with its Application its plan or strategy, including a timeline for execution, to obtain the legally binding community benefits agreement required by Public Resources Code section 25545.10. To the extent it did include a “Community Benefits Program” from 2021, such plan was not submitted truthfully or correctly and is therefore not a plan in contemplation of this requirement. It is perjury. It was also premature for the Commission to deem the Application complete. That the Applicant may eventually file a “valid” agreement does not render the issue moot or irrelevant or excuse the violation, and as previously stated, such a requirement is illusory if the application does not contain truthful information or the agreements not theretofore identified can be submitted at any time during the proceeding. The Applicant also violated section 1877(g) because it identified agreements with the Community Foundation or NCBCTC at the time it filed its application and never provided the Commission any other information of these plans.

The Determination does not dispute that the Applicant failed to satisfy the plain language of the law.²⁶ Instead, it opines that the Applicant’s “2021 Proposal” (i.e., the one the Applicant included with its Application) is “not relevant” to a determination of compliance with 1877(g). The County disagrees. Section 1877(g) explicitly states that the Applicant must include with its application “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 [.]” As the County has explained in various communications with staff and docketed filings,²⁷ the 2021 Proposal was not reflective of a plan or strategy for obtaining a community benefits agreement, but instead reflected an outdated list of projects the Applicant was purportedly willing to fund based on “community feedback,” but for which the Applicant could point to no actual contractual negotiations or preliminary discussions.²⁸ The Applicant’s 2021 Proposal stands in stark contrast to the community benefits plan filed by

²⁶ See, Determination at 2. The Determination did not claim or determine that the Applicant submitted a valid plan with its Application. Instead, it determined that the Applicant’s most recently submitted CBA complies with statutory requirements, a determination that the County did not ask the Executive Director to make in its Request for Investigation, and a determination that was inappropriate for the Executive Director to make in silo, separate from Commission staff’s otherwise standard process for reviewing and making determinations on an application.

²⁷ See, e.g., TN253813.

²⁸ See TN253813 at 4-5.

Darden Clean Energy (“Darden”) in its current opt-in application proceeding, a plan in which Darden outlined a broad plan for engaging the community and identified a clear plan and timeline for executing one or more meaningful community benefits agreements prior to project certification.²⁹ In contrast, the Applicant in this proceeding failed to include a plan or strategy with a timeline for execution of an agreement with its Application, and its 2021 Proposal was knowingly false, thereby violating section 1877(g).

Surprisingly to the County, Commission staff initially deemed this portion of the Application complete by not including an 1877(g) community benefits plan or strategy in the deficiency letter it sent to the Applicant upon completion of its initial review of the project.³⁰ Staff later questioned its determination with no public docketing of the issue until August 2023 when Commission staff responded to the Applicant’s request for a completeness determination by issuing data requests regarding, among other things, the Applicant’s community benefits plan.³¹ In short, the 2021 Proposal is very much relevant to determining compliance with section 1877(g) and is clearly deficient, thereby evidencing a violation that requires further investigation by the Commission as to whether the Applicant knowingly submitted false information to the Commission or had any evidence of or intent to further the 2021 Proposal, and why the Community Foundation or NCTCBC agreements were never identified in the initial plan or not made known to the Commission.

To the extent section 1877(g)—which requires applicants to file community benefits plans with their applications—can be “violated again” through a subsequent filing of a purported community benefits plan, the Applicant did just that by attempting to mislead the Commission, the County, and the public with its filing of a draft agreement that materially misrepresented the status of negotiations with the Community Foundation and attempting to obfuscate its actions through its vague and ambiguous responses to staff data requests.³² The Determination therefore was in error by deeming that “any deficiencies with the Foundation Agreement are now moot.” To the contrary, the Applicant’s misleading behavior and filings related to its second false community benefits plan (*i.e.*, Community Foundation) clearly warrant further investigation and potential corrective action by the Commission.

The Determination further concluded that the NCBCTC agreement satisfied findings that needed to be made on the applicant: “The executed agreement with the Trades Council supports the findings the CEC must make regarding satisfying Public Resources Code section 25545.10,

²⁹ 23-OPT-02, TN253022, *Appendix E Community Benefits Plan_Darden Clean Energy*.

³⁰ Public Resources Code section 25545.4(a) requires the Commission to, within 30 days of the submission of an opt-in application for certification, review the application and make a determination of completeness.

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

³² TN252431, *REDACTED Response to Community Benefits Data Request*.

Chair David Hochschild

February 12, 2024

Page 8

and this meets the requirements of the regulations.” The Executive Director had no authority, however, to make this determination and the Chair should issue an order reversing it. Public Resources Code section 25545.10 expressly states that *the Commission* must make the necessary findings, not staff. Commission staff should have investigated the organization’s status and made recommendations to the Commission itself, as the Commission is the entity charged with determining whether section 25545.10 is met or not. As part of the unlawful exercise of Commission authority, the Determination also disregarded evidence that NCBCTC did not provide workforce development, job quality, and job access services but that its primary mission was to donate money to candidates to elected office, and there is no indication whether the agreement or the organization was further researched by Commission staff.³³ Certainly, additional data requests could have been issued or an investigation conducted.

For the foregoing reasons, we respectfully request that the Chair review the County’s Request for Investigation and the Determination, direct that an investigation be instituted, and that certain findings of the Executive Director be reversed for Commission review and determination.

Sincerely,



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

RMB

cc: Alan Cox, Acting County Counsel, County of Shasta
Paul Hellman, Resource Management Director, County of Shasta

³³ The Determination does leave open the issue of whether there is any meaningful benefit to Shasta County from the NCBCTC agreement as Commission staff correctly welcomed further County comments on this issue.