

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

eklebaner@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

DANIEL L. CARDOZO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
ELIZABETH KLEBANER
RACHAEL E. KOSS
JAMIE L. MAULDIN
ELLEN L. TRESCOTT

June 4, 2014

By: Email and U.S. Mail

Chairman Mark Luce and Supervisors
Napa County Board of Supervisors
County Administration Building
1195 Third Street, Suite 310
Napa, CA 94559
Gladys.coil@countyofnapa.org

**Re: Resolution Requesting Membership in Marin Clean Energy;
Intention to Adopt an Ordinance Approving Entry Into MCE Joint
Powers Authority and Authorizing the Implementation of a
Community Choice Aggregation Program for Unincorporated Napa
County; and Authorizing the Chair of the Board to Sign Any
Subsequent and Related Documents**

Dear Chairman Luce and Supervisors:

We write on behalf of the **International Brotherhood of Electrical Workers Local 1245**, to again advise the Board of its obligation to comply with the California Environmental Quality Act¹ before taking any action to join Marin Clean Energy's Community Choice Aggregation (CAA) program. As we explained in our letter dated May 14, 2014 and the attached technical analysis of David Marcus, the core purpose of joining a CCA program is to change the source of electricity generation for Napa County customers. By joining the MCE CCA program, the Board would cause customers to stop purchasing electricity from Pacific Gas & Electric Company, and begin purchasing electricity primarily from Shell Energy North America.

¹ Pub. Resources Code, §§ 21000 et seq.

According to MCE's own documents, in 2013 Shell supplied 95 percent of MCE's total energy requirement.^{2,3} Only a fraction of that generation – less than seven percent – was supplied by renewable energy plants, the rest was supplied by conventional resources, such as coal.^{4,5} As fully documented in our May 14th letter, the Board's action to join MCE will cause existing fossil fuel-burning plants to increase operations, while causing fossil fuel-burning plants elsewhere in California to decrease their operations. Even a marginal increase in operations at just one plant may result in significant localized impacts to public health and air quality. Accordingly, the Board may not approve joining MCE until an EIR has been prepared.

Your staff has not prepared a response to the evidence presented in our May 14th letter. However, your staff provided six purported reasons why CEQA should not apply here. Each of these reasons is patently nonsensical.

1. *“The County joining MCE will not directly change the present amount of power produced or purchased for the county . . .”*⁶

As explained in our May 14th letter and the supporting technical analyses of David Marcus, joining MCE will shift the County's electricity demand away from PG&E and to a new electricity supplier, such as Shell. David Marcus's analysis

² Compare MCE, Integrated Resource Plan Annual Update, Nov. 2013, Appendix A, available at http://marincleanenergy.org/sites/default/files/key-documents/Integrated_Resource_Plan_2013_Update.pdf and Exhibit 2 to Third Amendment to and Restatement of Confirmation Between MCE and Shell, Oct. 10, 2012, attached as **Attachment A** (hereafter “SENA Contract”).

³ 2013 Total Load, per Exhibit 2 to the SENA Contract = 1096.551 Gwh. MCE's Total Energy Requirement, per Appendix A to MCE's Integrated Resource Plan = 1,158 Gwh. $1096.551/1158=0.946$

⁴ In 2013, Renewable Portfolio Standard category 1 eligible renewable= 74,000 MWh. See Exhibit 1 to SENA Contract. Total load for 2013 = 1,096,551 Mwh. See Exhibit 2 to SENA Contract. $74,000/1,096,551 = 0.067$

⁵ Shell under contract to supply the majority of MCE's projected Total Energy Requirements through 2016. Compare SENA Contract, Exhibit 1 and MCE, Integrated Resource Plan Annual Update, Nov. 2013, Appendix A.

⁶ Board Agenda Letter from Steve Lederer, Director of Public Works to Board of Supervisors, Subject: Adoption of a resolution and Ordinance to join Marin Clean Energy, at p. 3, emphasis added.

demonstrated that this shift will cause existing fossil fuel-burning plants under contract to the County's new electricity provider to increase operations. Thus, it does not matter that the "present amount" of electricity consumed by the County may not increase after the County joins MCE. The point is that the *sources* of the County's electricity supply will change and so will the location of air pollutants that are emitted when the electricity is generated. Again, changing the source of the County's electricity supply is the very purpose of joining a CCA.

Thus, joining MCE is an "activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."⁷ The Board may not approve this action until it complies with CEQA.

2. *"The County joining MCE . . . will not directly result in construction (or removal) of any power generating facility, and will, therefore, not result in a direct physical change to the environment."*⁸

This assertion is a red herring. As documented by our May 14th letter, the County's action will cause the amount of generation at existing fossil fuel-burning plants to change, resulting in direct adverse environmental impacts.

3. *"It is not reasonably foreseeable that the County's decision to join MCE would result in an indirect physical change to the environment. Ultimately, decisions by MCE as to what power to purchase for an unknown number of County residents in an unknown quantity, where such power is produced, and for how long a term, are market driven decisions that occur over a period of months and years."*⁹

The Board's decision to join the MCE CCA program is a governmental action. As we summarize above, this action will result in direct and reasonably foreseeable physical changes to the environment. Again, the very purpose of joining a CCA is to

⁷ Pub. Resources Code, § 21065.

⁸ Board Agenda Letter from Steve Lederer, Director of Public Works to Board of Supervisors, Subject: Adoption of a resolution and Ordinance to join Marin Clean Energy, at p. 3, emphasis added.

⁹ *Ibid.*, emphasis added.

change the source of generation for Napa County customers. Changing the source of generation necessarily causes some power plants to increase their output, resulting in significant environmental impacts. Accordingly, the Board's action is subject to CEQA.¹⁰ To the extent that Staff claims that the environmental impacts of the County joining MCE are not reasonably foreseeable because the County's load is not known, the claim is false.

According to Pacific Energy Advisors, Inc.'s analysis, dated March 31, 2014 and included in your June 3, 2014 agenda packet, Napa County's load is estimated at 16,000 customers, with a potential increase in annual electricity sales of 336,000 megawatt hours per year for MCE.¹¹ The total renewable energy requirement associated with Napa County joining MCE is estimated at 144,000 megawatt hours annually.¹² The analysis prepared by Pacific Energy Advisors, Inc. further estimates that 144,000 megawatt hours is equivalent to the energy produced by 16 megawatts of geothermal capacity or approximately 50 to 80 megawatts of solar generating capacity.¹³

With respect to the sources of the generation that would be supplied by MCE to Napa County customers, the sources and the nature of MCE's resource portfolio are demonstrated by MCE's power contracts with its electricity suppliers. One example of such a contract is MCE's contract with Shell, which we include as Attachment A to this letter. The sources and nature of MCE's resource portfolio are neither mysterious nor speculative.

The County has all the data it needs to determine the environmental consequences of its action. If Staff determines that additional information may be necessary, it is incumbent on the County as lead agency to undertake a "good-faith effort at full disclosure" when evaluating the environmental consequences of the County's action to join MCE.¹⁴

¹⁰ See Pub. Resources Code, §§ 21080 subd. (a), 21065.

¹¹ Pacific Energy Advisors, Inc., 2014, *Marin Clean Energy Applicant Analysis for the County of Napa*, March 31, 2014, at p. 2.

¹² *Id.* at p. 6.

¹³ See *ibid.*

¹⁴ See *Berkeley Keep Jets Over the Bay Com. v. Board of Port Commissioners* (2001) 91 Cal.App. 1344, 1355.

4. *“To the extent new power supplies might be needed in the future to meet MCE’s power demands, or existing facilities need to modify their operations outside their current operating permits, such actions would be subject to further site specific CEQA evaluation. As those potential future actions are unknowable and speculative, it is impossible to conduct any meaningful CEQA analysis about them, and CEQA does not require it.”*¹⁵

David Marcus documented in his written analysis that the County joining MCE *will* cause certain *existing* fossil fuel-burning plants to increase operations. A meaningful analysis of the environmental impacts of these changes is entirely feasible. In fact, our May 14th letter presents evidence of one potentially significant impact that the Board’s action will have.

In order to evaluate the environmental impacts related to approving a contract for the sale of electricity, for example, the Bonneville Power Administration (BPA) considered proposed contract provisions that could result in foreseeable changes in the types of resources that would be used to satisfy contractual obligations. The BPA then evaluated the environmental impacts that could result from these changes, including new impacts to air quality from the changed operation of existing conventional power plants and new impacts to water and biological resources from the changed operation of existing hydroelectric plants. A similar analysis can and should be conducted here.

Lastly, the reference to causing an existing facility “to modify operations outside their current operating permits” is another red herring. Power plants are typically authorized to operate above their normal operating capacity. The fact is demonstrated by David Marcus’s analysis that existing plants would simply operate more, causing significant environmental impacts. CEQA requires the Board to consider the environmental impacts of an incremental increase in a power plant’s operation caused by shifting the County’s load, even when a permit modification is not necessary.

¹⁵ Board Agenda Letter from Steve Lederer, Director of Public Works to Board of Supervisors, Subject: Adoption of a resolution and Ordinance to join Marin Clean Energy, at p. 3, emphasis added.

In *Communities for a Better Environment v. South Coast Air Quality Management District*, the California Supreme Court held that CEQA requires that the impacts of a project ordinarily be measured against actual, “on-the-ground” operations, rather than the maximum allowable operations in a permit.¹⁶ Thus, because the Board’s action would cause the operations of existing plant(s) to increase, the Board is required to analyze those significant impacts in an EIR.

5. *“PG&E operates in the identical marketplace, and decisions made by PG&E as to their future supply power for the unincorporated area of Napa County are likewise unknowable and speculative.”*¹⁷

The content of PG&E’s resource portfolio is available directly from the California Energy Commission staff through the Power Content Label Program¹⁸ and the California Public Utilities Commission’s Renewable Portfolio Standard Program website.¹⁹ This environmental baseline information necessary to conduct a CEQA analysis is readily available to the County.

6. *“Forming or joining a CCA presents no foreseeable significant adverse impact to the environment over the incumbent investor owned utility (IOU) (i.e., PG&E) because California regulations such as the Renewable Portfolio Standard (RPS) and Resource Adequacy (RA) requirements apply equally to CCAs and IOUs. Because CCAs fall under the same environmental statutes, regulations, and standards, any argument that moving from an IOU to a CCA presents a risk to the environment, when the IOU itself is also being required to increase its renewable energy portfolio, is factually without basis.”*²⁰

¹⁶ See Cal. Code Regs., tit. 14, § 15125 subd. (a).

¹⁷ Board Agenda Letter from Steve Lederer, Director of Public Works to Board of Supervisors, Subject: Adoption of a resolution and Ordinance to join Marin Clean Energy, at p. 3, emphasis added.

¹⁸ California Energy Commission staff contact information is available here <http://www.energy.ca.gov/sb1305/>.

¹⁹ See <http://www.cpuc.ca.gov/PUC/energy/Renewables/>.

²⁰ Board Agenda Letter from Steve Lederer, Director of Public Works to Board of Supervisors, Subject: Adoption of a resolution and Ordinance to join Marin Clean Energy, at p. 3, emphasis added.

Staff's argument that PG&E and MCE are subject to the same, or similar, regulatory requirements and that, therefore, there could be no impact on the environment when transferring customer load between the two entities is neither credible nor accurate. The very purpose of joining a CCA program is to change the resource portfolio serving customers in the jurisdiction. Indeed, Staff assumes that shifting the County's load away from PG&E and to MCE would be marginally beneficial for the environment.²¹ However, the analyses and documentation that we included in our May 14th letter points to the opposite conclusion.

David Marcus showed that because MCE purchases very little actual renewable generation, MCE's program is highly unlikely to cause new renewable generation to be built. David Marcus also showed that the County joining MCE would simply shift the County's load to a different existing fossil fuel-burning plant. As fully documented in our May 14th letter, this shift will result in potentially significant impacts to ambient air quality and public health. Most of the state's existing fossil fuel-burning plants are located in urban areas that are not in attainment of state and federal ambient air quality standards. As explained in our May 14th letter, just two hours of maximum operations of an existing fossil fuel-burning plant results in significant impacts to public health and ambient air quality.

In addition, publicly available information regarding the carbon intensity of MCE's power shows that MCE's resource portfolio is not comparable, but actually far dirtier than PG&E's. MCE's own Integrated Resource Plan plainly shows that less than 22 percent of its electricity supply comes from GHG-emissions free generation.²² In contrast, PG&E's resource portfolio is more than 50 percent GHG-emissions free.²³

²¹ See Board Agenda Letter from Steve Lederer, Director of Public Works to Board of Supervisors, Subject: Adoption of a resolution and Ordinance to join Marin Clean Energy, at p. 4 "It is important to note that while MCE has a higher "renewable" percentage, the carbon emissions from both PG&E and the MCE light green program are almost identical (about 390 pounds of carbon/MW HR generated)."

²² Compare, for example, MCE's "Total Energy Requirements" for years 2013 through 2018 and "PCC-1 (Bundled, In State)" for years 2013 through 2018 in Integrated Resource Plan Annual Update, Nov. 2013, Appendix A, available at http://marincleanenergy.org/sites/default/files/key-documents/Integrated_Resource_Plan_2013_Update.pdf

²³ See emailed attachments from Kevin Chou, California Energy Commission, regarding Power Content Label Program (Public Records Act request), attached as **Attachment B**.

MCE apparently bases its claims of lower GHG emissions on the belief that it can offset GHG emissions from fossil fuel generation with unbundled Renewable Energy Credits (“RECs”).^{24,25} MCE’s accounting treatment is contrary to state law. The state agency with statutory authority over GHG accounting – the California Air Resources Board – does not permit using unbundled RECs as GHG emissions offsets.

The GHG emissions of the electricity consumed in California must be calculated and reported pursuant to CARB’s Mandatory Greenhouse Gas Reporting Regulation (“MRR”).²⁶ CARB adopted the MRR to implement the California Global Warming Solutions Act of 2006, widely known as “AB 32.”²⁷ The MRR establishes mandatory reporting and verification protocols for electricity sales and purchases by electric power entities, including CCAs.²⁸ Pursuant to the MRR, the generation that MCE purchases from Shell, or any other supplier, must be reported and accounted for in the State’s GHG emissions inventory.

Shell imports GHG-emitting electricity into California and sells that generation to MCE. For the 2011 calendar year, Shell reported GHG emissions from its electricity sales at 234,824 metric tons of carbon dioxide equivalent gases.²⁹

²⁴ A REC represents the environmental and renewable attributes of renewable electricity, and it can be sold together or separately from the underlying generation. RECs that are sold separately, or “unbundled” from the renewable generation, reflect past operation of renewable resources but real-time consumption of non-renewable, greenhouse gas-emitting facilities. Thus, the actual source of the electricity being consumed is the fossil-fuel substitute that is available at the time of customer demand.

²⁵ See *Understanding MCE’s GHG Emission Factors*, at p. 3, presented to the Marin Energy Authority Technical Committee at a Meeting on May 13, 2013, attached as **Attachment C**; see also Pacific Energy Advisors, Inc., 2014, *Marin Clean Energy Applicant Analysis for the County of Napa*, March 31, 2014, at p. 6 “... as well as assumed zero carbon emission rates for various renewable energy purchases ...”; see also Third Amendment to and Restatement of Confirmation, Oct. 10, 2012, 1 Definitions, defining “GHG Free Energy” to include unbundled RECs, attached as **Attachment A**.

²⁶ See Cal. Code Regs., tit. 17, §§ 95100 et seq. (hereafter “MRR”).

²⁷ See Health & Saf. Code § 38530 subd. (a); Cal. Code Regs., tit. 17, § 95100, subd. (a).

²⁸ See MRR, §§ 95111 subds. (a) and (c), 95012 (415), defining retail providers to include CCAs.

²⁹ ARB, 2011 Data Reported by Facilities, Suppliers, and Electric Power Entities, *available at* <http://www.arb.ca.gov/cc/reporting/ghg-rep/reported-data/ghg-reports.htm> (last accessed, Feb. 13, 2014).

According to reports on ARB's website, the GHG emissions of Shell's 2012 electricity sales amounted to 195,421 metric tons of carbon dioxide equivalent gases.³⁰ Only a fraction of the generation that Shell sells to MCE is required to source directly from renewable facilities.³¹ The rest is supplied by fossil fuel-burning power plants.³²

MCE's estimated GHG emissions rate of 373 lbs of carbon dioxide equivalent gases per megawatt hour³³ does not include all of the GHG emissions from fossil fuel generation that MCE purchases from Shell for resale to MCE's customers. MCE claims that this generation is GHG-free because it is offset by MCE's purchases of unbundled RECs from renewable facilities. MCE is wrong. CARB's regulations do *not* allow unbundled RECs to offset GHG emissions from fossil fuel generation. In adopting the MRR, CARB determined that such an accounting treatment would be contrary to the express requirements and the purposes of AB 32.³⁴ Accordingly, CARB has emphasized that "for the emissions profile of electricity generated and procured, RECs play no role in GHG accounting."³⁵

* * *

The Board's decision to join the MCE CCA is subject to CEQA. We object to the Board approving joining the MCE CCA program without first certifying an EIR

³⁰ ARB, 2012 GHG Facility and Entity Emissions Detailed Spreadsheet, *available at* <http://www.arb.ca.gov/cc/reporting/ghg-rep/reported-data/ghg-reports.htm> (last accessed, Feb. 13, 2014).

³¹ Exhibits 1 and 2 to Third Amendment to and Restatement of Confirmation, Oct. 10, 2012, attached as **Attachment A**.

³² *See ibid.*

³³ *See* Pacific Energy Advisors, Inc., 2014, *Marin Clean Energy Applicant Analysis for the County of Napa*, March 31, 2014, at p. 6.

³⁴ *See* ARB, *Final Statement of Reasons for Rulemaking Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions*, Oct. 28, 2011, at pp. 108-09, *available at* <http://www.arb.ca.gov/regact/2010/ghg2010/mrrfsor.pdf>.

³⁵ *Id.* at p. 108, emphasis added, *available at* <http://www.arb.ca.gov/regact/2010/ghg2010/mrrfsor.pdf>; *see also id.* at p. 110 ("ARB does not believe that the purchase of RECS entitles the purchaser to any right to use those avoided emissions to comply with any GHG regulatory program . . .").

June 4, 2014
Page 10

and respectfully request that the Board direct Staff to conduct an environmental analysis before the Board approves this action.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Elizabeth Klebaner', with a large, sweeping initial 'E'.

Elizabeth Klebaner

EK:lj1
Attachments