



Staff Report Item 9

TO: East Bay Community Energy Board of Directors
FROM: Nick Chaset, CEO
SUBJECT: Appointment of Interim General Counsel
DATE: April 17, 2019

Recommendation

Adopt a resolution appointing Inder Khalsa of Richards, Watson, and Gershon (RWG) as Interim General Counsel to the EBCE and authorizing the Chair to execute an amendment to the Legal Services Agreement between EBCE and RWG.

Background and Discussion

The EBCE appointed Inder Khalsa of Richards, Watson, and Gershon as General Counsel in January 2017. This was revised to special counsel in February 2018. RWG's most recent agreement with EBCE is dated August 22, 2018 and provides for the provision of special counsel services.

In light of the current vacancy in the General Counsel position, staff recommends that the Board appoint Inder Khalsa as Interim General Counsel. This requires an amendment to RWG's Legal Services Agreement with EBCE to increase the compensation to a not-to-exceed amount of \$100,000 and revise the scope of services. The term of the Agreement was also extended to April 15, 2020.

The attached resolution appoints Inder Khalsa as Interim General Counsel and authorizes the Chair to execute an Amended and Restated Legal Services Agreement with RWG with the above terms.

Attachments:

- A. Resolution Appointing Interim General Counsel; and
- B. Amendment to the Legal Services Agreement with Richards, Watson and Gershon

Attachment 10A

RESOLUTION EBCE R-2019-

**A RESOLUTION OF THE BOARD OF DIRECTORS
OF THE EAST BAY COMMUNITY ENERGY AUTHORITY
APPOINTING INTERIM GENERAL COUNSEL AND
APPROVING AN AGREEMENT FOR INTERIM GENERAL
COUNSEL LEGAL SERVICES WITH RICHARDS
WATSON & GERSHON**

**THE BOARD OF DIRECTORS OF THE EAST BAY COMMUNITY ENERGY
AUTHORITY DOES HEREBY FIND, RESOLVE, AND ORDER AS FOLLOWS:**

Section 1. On August 22, 2018 the East Bay Community Authority (“EBCEA”) approved an Agreement for Legal Services to provide special counsel with Richards, Watson & Gershon (“RWG”), a professional corporation practicing in law in California (“Agreement”).

Section 2. The EBCE desires to appoint Inder Khalsa of RWG as Interim General Counsel, requiring revisions to the Agreement.

Section 3. The Amended and Restated Agreement for Interim General Counsel Services will have a term extending to April 15, 2020, with a not to exceed amount of \$100,000.

Section 4. Inder Khalsa is hereby appointed Interim General Counsel pursuant to Section 4.11 of the EBCE Joint Powers Agreement.

Section 5. The Chair of the Board is directed to execute the Amended and Restated Agreement for Interim General Counsel Services, substantially in the form attached to the Agenda Report that accompanied this Resolution, on behalf of the EBCE, and is authorized to take all other actions necessary to implement the Agreement.

ADOPTED AND APPROVED this 17 day of April, 2019.

Scott Haggerty, Chair

ATTEST:

Stephanie Cabrera, Clerk of the Board

**AMENDED AND RESTATED AGREEMENT BETWEEN THE EAST BAY
COMMUNITY
ENERGY EBCE AND RICHARDS, WATSON & GERSHON, A PROFESSIONAL
CORPORATION, FOR RWG SERVICES**

This Amended and Restated Agreement for Legal Services, dated April 17, 2019, is by and between the East Bay Community Energy EBCE (EBCE), and the law firm of Richards, Watson & Gershon, a professional corporation engaged in the practice of law in California, hereinafter referred to as "RWG."

RECITALS

- A. EBCE and RWG entered into that certain agreement for legal services dated January 30, 2017 ("Agreement") wherein RWG agreed to provide general counsel legal services to EBCE.
- B. The Agreement was amended several times to extend the term and adjust the compensation.
- C. The Agreement for RWG was amended on August 22, 2018 to change General Counsel services to Special Counsel services and extend the term of the agreement to June 30, 2019.
- D. EBCE appointed Inder Khalsa of RWG as Interim General Counsel on April 17, 2019.
- E. EBCE and RWG therefore desire to amend and restate the Agreement for RWG to provide for Interim General Counsel services and extend the term of the Agreement to April 15, 2020.

NOW THEREFORE, for good and valuable consideration, the amount and sufficiency of which are hereby acknowledge, the Parties mutually agree as follows:

AGREEMENT

1. **TERM**

The term of this Agreement commenced on April 1, 2019 and will extend through April 15, 2020, subject to the Termination provisions in Section 19 of this Agreement.

2. **SERVICES TO BE PERFORMED**

RWG shall perform each and every service set forth in Exhibit A, which is attached hereto and incorporated herein by this reference.

3. **COMPENSATION TO RWG**

EBCE will compensate RWG for services performed pursuant to this Agreement in a total amount not to exceed One Hundred Thousand Dollars (\$100,000) based on the rates and terms set forth in Exhibit B, which is attached hereto and incorporated herein by this reference.

4. **TIME IS OF THE ESSENCE**

RWG and EBCE agree that time is of the essence regarding the performance of this Agreement.

5. **STANDARD OF CARE**

RWG agrees to perform all services required by this Agreement in a manner commensurate with the prevailing standards of similar specially trained professionals in the San Francisco Bay Area and agrees that all services will be performed by qualified and experienced personnel. RWG represents and warrants that all personnel providing legal services have valid and active licenses to practice law. RWG agrees that should it need to represent EBCE in any California state court, personnel representing EBCE are active members of the State Bar of California as required.

6. **INDEPENDENT PARTIES**

It is understood and agreed that RWG, in the performance of the work and services agreed to be performed by RWG, is and will continue to be an independent contractor and not an agent or employee of EBCE; and as an independent contractor, RWG will not obtain any rights to retirement benefits or other benefits that accrue to EBCE's employees, and RWG hereby expressly waives any claim it may have to any such rights.

7. **NO RECOURSE AGAINST CONSTITUENT MEMBERS OF EBCE**

EBCE is organized as a Joint Powers EBCE in accordance with the Joint Powers Act of the State of California (Government Code Section 6500 et seq.) pursuant to a Joint Powers Agreement dated December 1, 2016, and is a public entity separate from its constituent members. EBCE is and will continue to be solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement. RWG agrees that it will have no rights and cannot make any claims, take any actions or assert any remedies against any of EBCE's constituent members in connection with this Agreement.

8. **NON-DISCRIMINATION**

RWG agrees that it will not harass or discriminate against a job applicant, an

EBCE employee, or RWG's employee on the basis of race, religious creed, color, national origin, ancestry, handicap, disability, marital status, pregnancy, sex, age, sexual orientation, or any other protected class. RWG agrees that any and all violations of this provision will constitute a material breach of this Agreement.

9. **HOLD HARMLESS AND INDEMNIFICATION**

RWG will, to the fullest extent allowed by law and without limitation of the provisions of this Agreement related to insurance, with respect to all services performed in connection with the Agreement, indemnify, defend, and hold harmless the EBCE and its members, officers, officials, Directors, agents, employees and volunteers from and against any and all liability, claims, actions, causes of action, demands, damages and losses whatsoever against any of them, including any injury to or death of any person or damage to property or other liability of any nature, whether physical, emotional, consequential or otherwise, arising out of, pertaining to, or related to the willful, reckless or negligent performance of this Agreement by RWG or RWG's employees, officers, officials, agents or subcontractors. Such costs and expenses will include reasonable attorneys' fees of counsel of EBCE's choice, expert fees and all other costs and fees of litigation. The acceptance of the Services by EBCE will not operate as a waiver of the right of indemnification. The provisions of this Section survive the completion of the Services or termination of this Agreement.

10. **INSURANCE**

10.1 RWG must procure, maintain and comply with the insurance requirements in Exhibit C throughout the full Term of this Agreement. RWG must provide proof of insurance either in the form of a certificate of insurance or, if requested by EBCE, a copy of the insurance policy, prior to performing any work under this Agreement.

10.2 RWG agrees not to terminate any of the required insurance coverage during the term of this Agreement. RWG must give EBCE ten (10) days written notice and obtain EBCE's written approval prior to making any modifications in the insurance coverage.

10.3 RWG must either include subconsultants under its insurance policies or require each subconsultant to comply with the insurance obligations in Exhibit C.

11. **CONFLICT OF INTEREST**

11.1 RWG warrants that it presently has no interest other than those previously disclosed in conflict waivers, executed copies of which appear in Exhibit D, and will not acquire any interest, direct or indirect, financial or otherwise, that would conflict in any way with the performance of this Agreement, and that it will not employ any person having such an interest.

11.2 RWG understands that EBCE is a public agency subject to compliance

with the Political Reform Act and various other conflict of interest laws. RWG agrees to advise EBCE immediately if any conflict arises and understands that it may be required to fill out a conflict of interest form if the services provided under this Agreement require RWG to make certain governmental decisions or serve in a staff capacity, as defined in Title 2, Division 6, Section 18700 of the California Code of Regulations.

11.3 RWG shall avoid all conflict of interest or appearance of conflict of interest in performance of this Agreement. As of the date of entering into this Agreement, RWG's employees assigned to perform services as specified in Exhibit E of this Agreement ("**RWG's Assigned Employees**") shall not be required to complete and file a Form 700 with EBCE's Clerk. In the event that the EBCE subsequently determines to require RWG's Assigned Employees to complete and file a Form 700 with EBCE's Clerk, EBCE will notify RWG in writing of such requirement, including without limitation, instructions regarding the categories of economic interests subject to disclosure on the Form 700 ("**Form 700 Notice**"). RWG agrees that upon notification, RWG will cause RWG's Assigned Employees to complete and file the Form 700 with EBCE's Clerk, in accordance with the instructions specified in the Form 700 Notice, no later than thirty (30) days of the date of the Form 700 Notice.

12. **PROHIBITION AGAINST ASSIGNMENT**

The parties agree that the expertise and experience of RWG are material considerations for this Agreement. RWG agrees not to assign or to transfer any interest in this Agreement nor the performance of any of RWG's obligations in this agreement, without the prior written consent of EBCE, and any attempt by RWG to so assign this Agreement or any rights, duties or obligations arising hereunder will be void and of no effect.

13. **SUBCONTRACTOR APPROVAL**

Unless prior written consent from EBCE is obtained, RWG will not use subcontractors. In the event that EBCE approves use of subcontractors, any subcontractors will be subject to the requirements of this Agreement, including without limitation, the conflict of interest provisions, the insurance provisions and the indemnity provisions.

14. **INVOICING AND PAYMENT**

14.1 In order to request payment, RWG must submit monthly invoices to the EBCE describing the services performed and the applicable summary of the work performed during that period. The invoice must detail the personnel who performed the services, hours worked and task(s) performed. RWG must bill in increments no greater than 1/10 of an hour. Each invoice must include the total budget allocated to the Agreement and the amount of the budget remaining after deducting the amount of the invoice.

14.2 Administrative, overhead, secretarial time or overtime, word processing, insurance and other ordinary business expenses are included within the scope of payment for services and are not reimbursable expenses. However, the rates listed above do not include minor expenses directly related to an EBCE matter, including postage, photocopying, printing, faxing, and messenger services, or costs for travel. Travel expenses will only be reimbursed to the extent consistent with EBCE's travel policy. All out of pocket reimbursable expenses in excess of \$50 must be authorized in advance by the EBCE and receipts must be furnished with monthly invoices. EBCE will be responsible only for the actual cost of any reimbursable expenses with no markup.

14.3 In the event of a dispute between EBCE and RWG regarding any invoice, the parties agreed to meet and confer and try to resolve the dispute. If unable to resolve the dispute, the Parties agree to comply with the State Bar of California's guidelines and dispute resolution mechanism related to legal fees.

15. **RECORDS**

15.1 RWG must maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services (collectively "Records"), or expenditures and disbursements charged to EBCE for a minimum period of five (5) years, or for any longer period required by law, from the date of final payment to RWG pursuant to this Agreement. For the purposes of this Agreement, "Records" will not include draft documents or preliminary research providing that final documents were provided to EBCE containing the same or updated information.

15.2 RWG must maintain all Records that demonstrate performance under this Agreement for a minimum period of five (5) years, or for any longer period required by law, from the date of termination or completion of this Agreement.

15.3 Any Records required to be maintained pursuant to this Agreement must be made available for inspection or audit at no cost to EBCE, at any time during regular business hours, upon written request by the EBCE. Copies of such Records must be provided to EBCE for inspection at EBCE's offices when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the Records shall be available at RWG's address indicated for receipt of notices in this Agreement.

15.4 Where EBCE has reason to believe that such Records may be lost or discarded due to dissolution, disbandment or termination of RWG's business, EBCE may, by written request, require that custody of the Records be given to EBCE and that the Records be maintained in the EBCE General Counsel's office. Access to such Records will be granted to any party authorized by RWG, RWG's representatives, or RWG's successor-in-interest.

15.5 EBCE owns all work produce and Records prepared by RWG under this Agreement, including without limitation, all research memoranda, contracts, underlying research, legal opinions, and pleadings.

16. **PARTY REPRESENTATIVES**

The General Counsel, or his/her designee, represents the EBCE in all matters pertaining to the services to be performed under this Agreement. Tracy Green represents RWG in all matters pertaining to the services to be performed under this Agreement.

17. **CONFIDENTIAL INFORMATION**

RWG shall maintain in confidence and not disclose to any third-party or use in any manner not required or authorized under this Agreement any and all of EBCE's proprietary or confidential information provided to RWG.

18. **NOTICES**

Any notices required to be given under this Agreement must be made in writing and may be delivered a) personally, in which case they are effective upon receipt; b) by U.S. Mail, in which case they are effective three (3) days following deposit in the U.S. Mail, unless accompanied by a return receipt in which case, they are effective upon the date on the receipt; or c) by electronic mail, in which case they are effective upon confirmation of receipt, and if no confirmation of receipt, they are effective one day after transmission, providing that a hard copy is also sent via U.S. mail. All notices must be sent to the addresses below:

EBCE

Attn: Nick Chaset, Chief Executive Officer
East Bay Community Energy
1111 Broadway, 3rd Floor, Suite 05-142
Oakland, CA 94607
Email: nchaset@ebce.org
Phone: 510- 809-7440

RWG

Attn: Inder Khalsa, Interim General Counsel
Richards, Watson & Gershon
44 Montgomery Street, Suite 3800
San Francisco, CA 94104-4811
Email: ikhalsa@rwglaw.com
Phone: (415) 421-8484

19. **TERMINATION**

19.1 EBCE has the right to terminate this Agreement, without cause, by giving not less than seven (7) days' written notice of termination. RWG may terminate this Agreement in compliance with the California Rules of Professional Responsibility, provided, however, that RWG agrees to give EBCE no less than thirty (30) days advance notice of termination.

19.2 If RWG fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, EBCE may terminate this Agreement immediately upon written notice.

19.3 In the event of termination, RWG must deliver to the EBCE's General Counsel, at no cost to EBCE, copies of all reports, documents, and other work performed by RWG under this Agreement within five (5) business days of the date of termination.

20. **COMPLIANCE**

RWG must comply with all applicable federal, state and local laws and regulations.

21. **CONFLICT OF LAW**

This Agreement will be interpreted under and enforced by the laws of the State of California. Any suits brought pursuant to this Agreement shall be filed with the Superior Court of the County of Alameda, State of California, or if appropriate, the Federal District Court sitting in San Francisco.

22. **ADVERTISEMENT**

RWG will not reference or disclose to any third parties that it is working with EBCE without EBCE's express written approval.

23. **WAIVER**

A waiver by EBCE of any breach of any term, covenant, or condition contained herein will not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant, or condition contained in this Agreement, whether of the same or a different character.

24. **INTEGRATED AGREEMENT**

This Agreement represents the full and complete understanding of every kind or

nature whatsoever between the Parties, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant will be held to vary the provisions hereof. In the event that the terms specified in any of the Exhibits attached hereto conflict with any of the terms specified in the body of this Agreement, the terms specified in the body of this Agreement will control. Any modification of this Agreement will be effective only by a written document signed by both EBCE and RWG.

25. **EBCE**

The individual(s) executing this Agreement represent and warrant that they have the legal EBCE to do so on behalf of their respective legal entities.

26. **SEVERABILITY**

If a court of competent jurisdiction holds any Section or part of this Agreement to be invalid or unenforceable for any reason and the scope of work can still be performed, the Parties agree to sever the invalid or unenforceable Section(s) from this Agreement and that all remaining Sections or parts of this Agreement will continue to be enforceable.

27. **CAPTIONS AND TERMS**

The captions in this Agreement are for convenience only, are not a part of the Agreement and in no way affect, limit or amplify the terms or provisions of this Agreement.

28. **COUNTERPARTS**

This Agreement may be signed in counterparts, each of which will be one and same agreement and will be binding upon the party that signed it.

IN WITNESS WHEREOF, the parties have caused the Agreement to be

executed as of the date set forth above.

INTERIM GENERAL COUNSEL

By _____

Title _____

Date _____

EAST BAY COMMUNITY ENERGY
EBCE

A Joint Powers EBCE

By _____

Title Chair, East Bay Community
Energy

Date _____

Exhibit A

SCOPE OF SERVICES

As Interim General Counsel for EBCE, RWG shall provide the general legal services typically required by a joint powers authority in addition to those general legal services related more specifically to the operation of a community choice aggregation program as described below. These legal services shall include the following:

- Attendance at the monthly EBCE Board of Directors (“Board”) meetings and any special meetings and workshops as required by the Chief Executive Officer or Chair of the Board
- Brown Act, Conflict of Interest and Public Records Act advice and representation
- Preparation or review of consultant and vendor contracts
- Advice and preparation of documents related to personnel matters
- Advice to the Chief Executive Officer and designated staff on administrative and operational matters
- Research and advice on legal questions asked by the Board, Chief Executive Officer and designated staff
- Advice and assistance on other legal matters as may be assigned by the Chief Executive Officer

Legal services will not include matters in which Richards, Watson & Gershon has a conflict of interest that precludes the law firm from representing EBCE. Interim General Counsel services also will not include energy contracts or regulatory matters before the CPUC that require specialized legal services in these areas of law.

Exhibit B

COMPENSATION

EBCE will compensate RWG for Interim General Counsel legal services in accordance with the terms and conditions of this Agreement based on the hourly rates and compensation schedule set forth below. Compensation will be calculated based on the hourly rates set forth below.

Inder Khalsa	\$300.00
Gregory Stepanicich	\$325.00
Roy Clarke	\$300.00
Michael Estrada	\$300.00
Rebecca Green	\$300.00
Casey Strong	\$250.00
Elena Pacheco	\$250.00

Exhibit C

INSURANCE REQUIREMENTS

A. Minimum Scope and Limits of Insurance. RWG must procure and at all times during the term of this Agreement carry, maintain, and keep in full force and effect, insurance as follows:

1. Commercial General Liability Insurance with a minimum limit of One Million Dollars (\$1,000,000.00) per occurrence for bodily injury, personal injury and property damage and a general aggregate limit of Two Million Dollars (\$2,000,000.00) per project or location. If RWG is a limited liability company, the commercial general liability coverage must be amended so that RWG and its managers, affiliates, employees, agents and other persons necessary or incidental to its operation are insured.

2. Automobile Liability Insurance for any owned, non-owned or hired vehicle used in connection with the performance of this Agreement with a combined single limit of One Million Dollars (\$1,000,000.00) per accident for bodily injury and property damage. If RWG does not use any owned, non-owned or hired vehicles in the performance of Services under this Agreement, RWG must obtain a non-owned auto endorsement to the Commercial General Liability policy required under subparagraph A.1) of this Exhibit C.

3. Workers' Compensation Insurance as required by the State of California and Employer's Liability Insurance with a minimum limit of One Million Dollars (\$1,000,000.00) per accident for bodily injury or disease. If RWG has no employees while performing Services under this Agreement, workers' compensation policy is not required, but RWG must execute a declaration that it has no employees.

4. Professional Liability/Errors & Omissions Insurance with minimum limits of Two Million Dollars (\$2,000,000.00) per claim and in aggregate.

B. Acceptability of Insurers. The insurance policies required under this Exhibit C must be issued by an insurer admitted to write insurance in the State of California with a rating of A:VII or better in the latest edition of the A.M. Best Insurance Rating Guide.

C. Additional Insured/Additional Named Insured. The automobile liability policies must contain an endorsement naming EBCE, its officers, employees, agents and volunteers as additional insureds. The commercial general liability policy must contain an endorsement naming EBCE, its officers, employees, agents and volunteers as additional named insureds.

D. Primary and Non-Contributing. The insurance policies required under this Agreement must apply on a primary non-contributing basis in relation to any other insurance or self-insurance available to EBCE. Any insurance or self-insurance maintained by EBCE, its officers, employees, agents or volunteers, will be in excess of RWG's insurance and will not contribute with it.

E. RWG's Waiver of Subrogation. The insurance policies required under this Agreement will not prohibit RWG and RWG's employees, agents or Subconsultants from waiving the right of subrogation prior to a loss. RWG hereby waives all rights of subrogation against EBCE.

F. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by EBCE. At EBCE's option, RWG must either reduce or eliminate the deductibles or self-insured retentions with respect to EBCE, or RWG must procure a bond guaranteeing payment of losses and expenses.

G. Cancellations or Modifications to Coverage. RWG agrees not to cancel any insurance coverage during the Term. RWG further agrees not to, reduce or otherwise modify the insurance policies required by this Agreement during the term of this Agreement, without the prior written approval of EBCE. The commercial general and automobile liability policies required under this Agreement must be endorsed to state that should the issuing insurer cancel the policy before the expiration date, the issuing insurer will endeavor to mail 30 days' prior written notice to EBCE. If any insurance policy required under Agreement is canceled or reduced in coverage or limits, RWG must, within two business days of notice from the insurer, phone and notify EBCE via electronic mail and certified mail, return receipt requested, of the cancellation of or reductions to any policy.

H. EBCE Remedy for Noncompliance. If RWG does not maintain the policies of insurance required under this Agreement in full force and effect during the term of this Agreement, or in the event any of RWG's policies do not comply with the requirements of this Exhibit C, EBCE may either immediately terminate this Agreement or, if insurance is available at a reasonable cost, EBCE may, but has no duty to, take out the necessary insurance and pay, at RWG's expense, the premium thereon. RWG must promptly reimburse EBCE for any premium paid by EBCE or EBCE, in its sole discretion, may withhold amounts sufficient to pay the premiums from payments due to RWG.

I. Evidence of Insurance. Prior to the performance of Services under this Agreement, RWG must furnish EBCE with a certificate or certificates of insurance and all original endorsements evidencing and effecting the coverages required under this Agreement. The endorsements are subject to EBCE's approval. EBCE may request, and RWG must provide complete, certified copies of all required insurance policies to EBCE. RWG must maintain current endorsements on file with EBCE. RWG must provide proof to EBCE that insurance policies expiring during the term of this Agreement have been renewed or replaced with other policies providing at least the

same coverage. RWG must furnish such proof at least two weeks prior to the expiration of the coverage.

J. Indemnity Requirements not Limiting. Procurement of insurance by RWG will not be construed as a limitation of RWG's liability or as full performance of RWG's duty to indemnify EBCE under Section 9 of this Agreement.

K. Subconsultant Insurance Requirements. RWG's insurance coverage must include its subconsultants or RWG must require each of its subconsultants that perform Work under this Agreement to maintain insurance coverage that meets all of the requirements of this Exhibit C.

Exhibit D
CONFLICT WAIVERS

N/A (No conflicts)

Exhibit E

INTERIM GENERAL COUNSEL PERSONNEL

1. Inder Khalsa, Interim General Counsel
2. Gregory Stepanicich
3. Roy Clarke
4. Michael Estrada
5. Rebecca Green
6. Casey Strong
7. Elena Pacheco