STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: Application of Invenergy Thermal Development LLC's Proposal for Clear River Energy Center

Docket No. SB 2015-06

SUPLEMENT OF CONSERVATION LAW FOUNDATION TO ITS MOTION TO DISMISS THE APPLICATION AND CLOSE THE DOCKET

Intervenor Conservation Law Foundation (CLF) respectfully submits this supplement to its September 19, 2016 motion (Motion) requesting that the Energy Facility Siting Board (EFSB or Board) issue an Order dismissing Invenergy Thermal Development LLC's (Invenergy) Application to Construct the Clear River Energy Center (Application) and closing this Docket.

On September 13, 2016, the Town of Burrillville (Town) filed a Motion to Dismiss the Application due to Invenergy's failure to obtain a water supply for its proposed facility. On September 19, 2016, CLF filed its Motion, joining the Town's arguments and adding that a host of other failures on Invenergy's part and deficiencies in the Application proceedings precluded the Board from carrying out its duties under the Energy Facility Siting Act. On October 20, 2016, the Board issued an order with an effective date of October 13, 2016, providing that "1. The application proceedings in this docket shall be suspended for ninety days," and "2. Invenergy Thermal Development LLC shall file a written status update with the Energy Facility Siting Board within sixty days." The primary reason for this suspension was straightforward: the Order provided that "[t]he lack of information regarding Invenergy's water source rendered its

application incomplete and therefore not in compliance with Rule 1.6(b)(4) of the Rules of Practice and Procedure." The Board did not act on either the Town's or CLF's dismissal motion; both motions remain pending.

Since the Board's October 20, 2016 order, Invenergy has filed with the EFSB two relevant sets of documents.[1] On December 12, 2016, Invenergy filed a document titled "Invenergy Thermal Development LLC's Status Report." And on January 11, 2017, Invenergy filed a Water Supply Plan.

The additional material provided by Invenergy since the Board's October 20, 2016 order is necessary but is not sufficient for Board to do its job under the Energy Facility Siting Act. CLF's still-pending Motion is premised not only on information regarding Invenergy's water supply, but also on Invenergy's failure to provide useful answers to multiple agencies, which agencies were therefore unable to provide Advisory Opinions to the EFSB. That premise remains true. Invenergy's failure to provide adequate information violated the Energy Facility Siting Act, it precluded the agencies and subdivisions from doing their jobs, it robs the EFSB of its ability to fulfill its statutory mandates, and it requires dismissal of this Docket.

I. Invenergy's Information Remains Incomplete and Inadequate.

The EFSB's March 10, 2016 Preliminary Order required twelve "agencies and subdivisions of state and local government" to render advisory opinions regarding the Application.[2] Preliminary Order at 13. As CLF's Motion explained in greater detail, by the

[1] Invenergy has also filed responses to data requests and, in a joint filing with the Town of Burrillville, its tax stabilization agreement.
[2] The Preliminary Order is available at http://www.ripuc.ri.gov/efsb/efsb/SB2016_01_order_pre.pdf.

September 12, 2016 deadline, six of these agencies issued documents styled as "Advisory Opinions" that nevertheless expressed the agencies' inability to render true advisory opinions due to inadequate information from Invenergy. Motion at pp. 2-5. The agencies that were deprived of the ability to do their jobs included the Burrillville Zoning Board, the Burrillville Building Inspector, the Rhode Island Department of Transportation (RIDOT), the Rhode Island Department of Environmental Management (RIDEM), the Rhode Island Department of Health (RIDOH), and the Burrillville Planning Board. *Id.*

Invenergy's December 11, 2016 Status Report purports, but fails, to address some of those deficiencies. The Status Report does not mention RIDOH, though it does implicitly respond to RIDOH's concerns about "the impacts of potential nighttime lighting of the facility" by indicating that Invenergy "is developing a conceptual Lighting Plan" and that a lighting assessment "is being developed and will be provided in a supplemental submittal." Status Report at 9. With respect to RIDOT, the Status Report indicates that "Invenergy's consultants are developing the documents that will be presented to [RIDOT] for the required utility construction road permit application." *Id.* at 6. As to RIDEM, the Status Report says that Invenergy's Freshwater Wetlands application "is still in process" and "is expected to be submitted in the near term," and that the application "will include a wetlands impact analysis," among other materials. *Id.* at 7. And with respect to the host of issues identified by the Town Zoning Board, Planning Board, and Building Official, the Status Update notes several design changes and says that "[f]urther details on these design changes will be presented in updated materials along with the revised water supply plan. Invenergy will update its EFSB application

materials to reflect these changes in design." *Id.* at 8. Invenergy's January 11, 2017 Water Supply Plan does not address any of these gaps and deficiencies, but instead poses new questions.

One set of questions is: what are the potential environmental effects of foregoing a sewer hookup? And what are the potential environmental impacts of installing new infrastructure including a water filling station, septic tank, and leaching field?

A second set of questions is: what are the potential environmental impacts of trucking water to the Facility, and more importantly trucking wastewater from the facility? Will this trucking have a significant impact on overall greenhouse gas emissions associated with the Facility? Will it pose risks relating to a wastewater spill? What are those risks?

And a third set of questions is: what are the effects of the newly proposed dry cooling system on the Facility's greenhouse gas emissions? Will the dry cooling system result in increased emissions of greenhouse gases and other air pollutants? If so, what will be the extent of these emissions increases? Will the system result in other inefficiencies?

To date, none of the above-referenced materials promised by Invenergy has been filed with the Board, and the questions set forth above remain unanswered and unassessed by any state or municipal agency.

II. The Application Should Be Dismissed Due To Inadequate Information.

Invenergy's incomplete Application and its failure to provide adequate information in furtherance of its Application violate the Energy Facility Siting Act and the Board's Rules. Accordingly, the Application should be dismissed and this Docket closed.

First, Invenergy's continued failure to provide necessary information – almost fifteen months after Invenergy filed its Application, ten months after the Board issued its Preliminary Order, and four months after the agencies' deadline for providing advisory opinions – has so tainted the process that compliance with the Energy Facility Siting Act is impossible. As is set forth in more detail in CLF's Motion, the Energy Facility Siting Act requires the Board to "consider as issues in every proceeding the ability of the proposed facility to meet the requirements of the laws, rules, regulations, and ordinances under which, absent this chapter, the applicant would be required to obtain a permit, license, variance, or assent." R.I. Gen. Laws § 42-98-9(b). So the Board can carry out this duty in a meaningful way, the Act provides for agencies to issue advisory opinions. *Id.* The Board must consider these advisory opinions in deciding whether to issue or deny a license; it cannot grant a license unless it finds that "the construction and operation of the proposed facility will be accomplished in compliance with all of the requirements of the laws, rules, regulations, and ordinances, under which, absent this chapter, a permit, license, variance, or assent would be required." R.I. Gen. Laws § 42-98-11(b)(2). By statute, advisory opinions are integral to this analytical task: the Board "*shall* explicitly address each of the advisory opinions received from agencies, and the board's reason for accepting, rejecting, or modifying, in whole or in part, any of those advisory opinions." R.I. Gen. Laws § 42-98-11(c) (emphasis added).

Invenergy has deprived the agencies of the information they needed to render advisory opinions both in the first instance and even now, four months after the advisory-opinion deadline. Moreover, Invenergy has not suggested that the additional information that it "is

developing" and that "will be presented" should be the subject of new administrative processes by the agencies that have been deprived of an opportunity to provide full, considered advisory opinions. Given that there are not now, nor does it appear that there ever will be, full, considered advisory opinions on several important items within the Board's purview, it follows that the Board cannot "explicitly address each of the advisory opinions," nor can the Board find that "the construction and operation of the facility will be accomplished in compliance with all of the requirements of the laws, rules, regulations, and ordinances, under which, absent this chapter, a permit, license, variance, or assent would be required." R.I. Gen. Laws § 42-98-11. As Invenergy cannot meet its burden and the Board cannot carry out its duties under the Act, its Application should be dismissed.

Likewise, Invenergy's flouting of the Board's Rules and the Preliminary Order support dismissal. Section 42-98-16(a) of the Energy Facility Siting Act provides that "[f]ailure to comply with any promulgated board rule, regulation, requirement or procedure for the licensing of energy facilities shall constitute grounds for suspension or dismissal." Board Rule 1.6(b)(4) requires "[a] detailed description of the proposed facility including its function and operating characteristics, and complete plans as to all structures, including, where applicable, underground construction, transmission facilities, cooling systems, pollution control systems and fuel storage facilities associated with the proposed location for the project." Board Rule 1.12(d)(1) provides that "parties shall have the obligation to present all relevant testimony and evidence and to fully participate in designated agency proceedings held pursuant to a preliminary decision of the Board." And the Board's Preliminary Order stated that "the Applicant shall provide[] any

information or evidence deemed necessary to support the subject opinion." Preliminary Order at 15. CLF's Motion pointed out that Invenergy had failed to provide the required material to the agencies and therefore violated both Rule 1.12(d)(1) and the Preliminary Order; nothing about Invenergy's unfulfilled *post hoc* promises to provide additional information changes that fatal failure. The Application should be dismissed under section 42-98-16(a).

Finally, CLF"s Motion acknowledged that section 42-98-16(a) provides an applicant who violates the Energy Facility Siting Act with "a reasonable opportunity to show cause for and remedy the lack of compliance." CLF argued that as of September, Invenergy had already had its reasonable opportunity and that its Application was ripe for dismissal. A month later, the Board elected to give Invenergy an additional 90 days, for a total of four months after CLF filed its motion calling attention to these deficiencies. But today the Application remains incomplete; the agencies have still been deprived of the ability to do their job under the Energy Facility Siting Act; and the Board has likewise been deprived of the ability to follow the procedures and make the findings laid out in the Act. The Board has been more than generous, but Invenergy not risen to the occasion. The time for generosity is over. The time for dismissal is now.

III. The Application Should Be Dismissed Due to Noncompliance with Statutory Deadlines

Invenergy's application should be dismissed and the Docket closed for another reason: as a result of Invenergy's failures, the Board cannot meet its deadlines under the Energy Facility Siting Act. The Act states:

> Within forty-five (45) days after the final date for the submission of advisory opinions pursuant to § 42-98-10, the board *shall* convene the final hearing on the application.

Rhode Island General Laws § 42-98-11(a) (emphasis supplied).

On January 12, 2015, EFSB Chairperson Margaret Curran acknowledged this statutory requirement, and observed that the deadline was not "squishy." Jan. 12 EFSB Hearing Transcript, page 80, line 15 to page 81, line 3. Although six agencies were unable to submit advisory opinions due to Invenergy's failure to provide those agencies with necessary data, all advisory opinions were due on September 13, 2016. Accordingly, the statute requires that the Final Hearing be commenced no later than October 31, 2016 – a date now well in the past.[3]

Although CLF recognizes that the statute's forty-five day requirement may be viewed as directory not mandatory, *West v. McDonald*, 18 A.3d 526, 534 (R.I. 2011), other elements of the Energy Facility Siting Act counsel in favor of dismissal as a response to delay in violation of the Act. Section 42-98-16(a), for example, calls for an application's dismissal as a remedy for "failure to comply with any … requirement or procedure for the licensing of energy facilities." The schedule spelled out by the Act is certainly a "requirement or procedure." And lest there be any doubt about that interpretation of the Act, General Laws section 42-98-18 requires that the Act's provisions "shall be construed liberally to effectuate its purposes," and the Act's very first enumerated purpose is to assure that energy facilities "are planned for, considered, and built in a timely and orderly fashion." R.I. Gen. Laws § 42-98-2. Nothing about the process so far, replete as it has been with incomplete filings and delays, has been timely and orderly. Under the Act, dismissal is the appropriate response.

[3] Even if the Board were to consider the statutory deadline tolled for the 90 days the Docket was suspended, the result would be a new statutory deadline of Monday, January 30, 2017. That deadline cannot be met.

This analysis squares with the well settled principle favoring secure the just, *speedy*, and *inexpensive* determination of every action. This requirement is enshrined in both the Federal and the Rhode Island Rules of Civil Procedure, indeed in Rule 1. Unless this Docket is closed now, the Town of Burrillville, CLF, other parties, and the EFSB itself will all be forced to expend unending amounts of time and money on litigating a power plant proposal that remains incomplete well over a year after this docket was opened.

"There must be an end of litigation some time." Corning v. Troy Iron and Nail Factory, 56 U.S. 451, 466 (1853). In this case, that time has come.

WHEREFORE, CLF respectfully requests that the Energy Facility Siting Board issue an order dismissing Invenergy's Application and closing this docket.

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CERTIFICATE OF SERVICE

I certify that the original and fourteen copies of this Supplement were sent via U.S. Mail, postage prepaid, to the Energy Facility Siting Board on _____. In addition, electronic copies were served by e-mail on the service list of this Docket on _____.

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