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

MOTION OF CONSERVATION LAW FOUNDATION PURSUANT TO EFSB RULE 1.7(f) TO CLOSE THIS DOCKET DUE TO INCOMPLETE FILING

I. INTRODUCTION

Intervenor Conservation Law Foundation (CLF) respectfully requests that the Energy Facility Siting Board (EFSB) return the permit application filed by Invenergy on October 29, 2015, and close this Docket. Invenergy's application is incomplete and, thus, it fails to meet: (1) the substantive statutory requirement of Rhode Island's Energy Facility Siting Act, R. I. Gen. Laws § 42-98-1, et seq.; (2) the requirements of the Resilient Rhode Island Act, R. I. Gen. Laws § 42-6.2-1, et seq.; and (3) the procedural requirements of the EFSB's Rules of Practice and Procedure, including Rule 1.7(c).

II. FACTS

A. Background Facts

On October 29, 2015, Invenergy filed its 471-page application with the EFSB (Invenergy Application). Invenergy seeks a permit to build a 900-megawatt (MW) fossil-fuel-fired electricity-generating facility in Burrillville, Rhode Island (the Invenergy Proposal).

On November 17, 2015, in response to Invenergy's filing, the EFSB opened this Docket.

On November 18, 2015, CLF filed its Motion to Intervene.

B. Invenergy Fails To Provide Data Required by the Resilient Rhode Island Act

The entire 471-page Invenergy Application fails to provide the required data on the cumulative impacts of its proposal on climate change, either in Rhode Island, the United States, or the world, as required by the Resilient Rhode Island Act. It is not that Invenergy's required discussion of this subject is abbreviated, inadequate, or incomplete. It is entirely omitted.

Invenergy provides the EFSB with no studies of the expected climate impacts of its proposed fossil-fuel facility. If Invenergy has performed the required studies, it has not provided any evidence of that fact.

C. Invenergy's CAA Major Source Permit Application Is Facially Incomplete

Exhibit B to Invenergy's Application is a copy its June 26, 2015 application filed with the Rhode Island Department of Environmental Management (DEM) for a Major Source Permit under the Clean Air Act (CAA).[1] CLF refers to this document (Exhibit B) as "Invenergy's Major Source Permit Application."

Invenergy's Major Source Permit Application is facially incomplete in multiple respects.

Invenergy's Major Source Air Permit is governed by the provisions of Rhode Island Air Pollution Control Regulation Number 9 (Reg. 9).[2]

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[1] The pages of Invenergy's Exhibit B are internally numbered, starting with number 1.

[2] Pursuant to EFSB Rule of Practice and Procedure 1.29(c), the EFSB can take administrative notice of DEM's Air Pollution Control Regulation 9. It is available on the DEM website: http://www.dem.ri.gov/pubs/regs/regs/air/air09_11.pdf

Reg. 9 defines "complete" as follows: "'Complete' means in reference to an application for a permit, that the application contains all the information necessary for processing the application."

Reg. 9.4.2(c) requires that "[t]he applicant must provide evidence in accordance with Subsection 9.4.3 that the total tonnage of emissions of the applicable nonattainment air pollutant allowed from the proposed new source or net emissions increase from the modification, shall be offset by a greater reduction in the actual air emissions of such pollutant from the same or other sources."

Invenergy acknowledges, as it must, that it has not complied with this requirement. Instead, Invenergy asserts that it plans to comply with the requirement at some vague, unspecified future time: "Invenergy will provide RIDEM with documentation that sufficient ERCs have been secured for the Project prior to issuance of the Major Source Permit." Invenergy, Exhibit B, page 8, lines 17-18.

Reg. 9.4.2(g) and (h) require an analysis showing "that emissions from the stationary source will not cause an impact on the ground level ambient concentration at or beyond the property line in excess of that allowed by Air Pollution Control Regulation No. 22 and any Calculated Acceptable Ambient Levels" as well as a Health Risk Assessment.

Once again, Invenergy acknowledges that it has not complied with the requirement. Once again, Invenergy asserts that it will comply with the requirement at some vague, unspecified time in the future: "Section 5.0 of this application details the air quality impacts

impact analysis which will be conducted for the Project, which will include the required analyses and compliance demonstrations." Invenergy, Exhibit B, page 9, ¶ 3.

D. Multiple Other Invenergy DEM Permit Applications Are Facially Incomplete

Exhibit C to the Invenergy Application is copies of what appear to be several permit applications pertaining to required construction permits for the proposed plant, which applications Invenergy filed with DEM.

These permit applications are facially incomplete in multiple respects.

For example, all the applications are undated, and the required fields for inserting the date on which they were signed are left blank.

In Section D (of Exhibit C), several of these applications require Invenergy to provide the manufacturer name and model number for both its intended boiler and its intended combustion turbine. Invenergy provides none of these. On some of the applications, Invenergy filled in "TBD." CLF understands "TBD" to mean "to be determined." On other applications, Invenergy merely left the space blank where it was required to provide the names and model numbers for its boilers and combustion turbines.

Similarly, Invenergy does not provide the manufacturer name or model number for either its boiler or its gas turbines in its June 26, 2015 Major Source Permit Application filed with DEM under the Clean Air Act, which application Invenergy provides to the EFSB as Exhibit B to its Application.

In fact, at no place in its 471-page application (including appendices) does Invenergy provide to the EFSB the manufacturer name or model number of either the boilers or the gas

turbines that it plans to use in its 900-MW fossil-fuel facility. Quite the contrary: In its Application, Invenergy tells the EFSB that it (Invenergy) does not know what company will manufacturer its equipment. Instead, Invenergy refers rather vaguely to "potential equipment manufacturers," and lists possibilities as GE, Siemens and MHI. Invenergy Application, page 32, ¶ 1.

Invenergy's filing also impermissibly omits required information on the manufacturer name and model numbers of equipment it will use to conduct continuous emissions monitoring for opacity, oxygen, CO_2, NOx, SO_2, and CO. (Invenergy Application, Appendix C, Section E of each document.) Here again, forms are impermissibly filled in with "TBD" or left entirely blank.

III. THE STANDARD GOVERNING THIS MOTION

The EFSB Statute requires that all applications filed with the EFSB must contain a "[d]etailed description of the proposed facility, including its function and operating characteristics . . . ." R. I. Gen. Laws § 42-98-8(a)(2). This statutory provision is copied exactly in EFSB Rule 1.6(b)(4)

EFSB Rule 1.6(b)(20) requires that all applications filed with the EFSB include "[a]ll pertinent information regarding filings for licenses made with federal, state, local foreign [*sic*] governmental agencies . . . ."

EFSB Rule 1.6(b)(12) requires that all applications filed with the EFSB include "[a] detailed description and analysis of the impact, including cumulative impact . . . of the proposed

facility on the physical and social environment on and off site and a summary of all studies prepared and relied upon in connection therewith."

That those impacts include carbon emissions and climate effects was made explicitly clear by the General Assembly in 2014 when it enacted the Resilient Rhode Island Act, R. I. Gen. Laws § 42-6.2-1, et seq. The Resilient Rhode Island Act established carbon-emission-reduction goals for Rhode Island and stated: "Consideration of the impacts of climate change shall be deemed to be within the powers and duties of all state departments, agencies, commissions, councils, and instrumentalities, including quasi-public agencies, and each shall be deemed to have and to exercise among its purposes in the exercise of its existing authority, the purposes set forth in this chapter pertaining to climate change mitigation . . . ." R. I. Gen. Laws § 42-6.2-8.

Finally, EFSB Rule 1.7(c) requires that "[a]n application that does not meet the requirements of the Act and these Rules of Practice and Procedure shall not be docketed and shall be returned to the Applicant . . . ."

IV. DISCUSSION

Invenergy's application is incomplete in multiple, material respects, and should therefore be rejected by the EFSB. EFSB Rule 1.7(c); Altamont Gas Trans. Co. v. Fed. Energy Regulatory Comm'n, 965 F.2d 1098, 1101 (D.C. Cir. 1992) (affirming dismissal of application by FERC because the application was incomplete).

A. Application Is Incomplete As To Resilient Rhode Island Act

In 2014, the Rhode Island General Assembly enacted the Resilient Rhode Island Act in order to address the climate change emergency. This enactment announced the public policy of the state. Allstate v. Fusco, 101 R.I. 350, 356, 223 A.2d 447 (1966) (It is well settled that public policy is what the legislature says it is through the statutes it enacts, citing Chicago Burlington & Quincy R.R. v. McGuire, 219 U.S. 549 (1911)). According to the Resilient Rhode Island Act, the public policy of Rhode Island is to reduce statewide carbon emissions by 10% below 1990 levels by 2020, 45% by 2035, and 80% by 2040. R. I. Gen. Laws § 42-6.2-2(a)(2).

The requirements of the Resilient Rhode Island Act meld seamlessly with both the organic statute that created the EFSB and with the EFSB's own Rules. The Resilient Rhode Island Act calls for statewide carbon-emission reductions at specific levels by specific dates and empowers the EFSB to enforce the Act. The EFSB's organic statute requires Invenergy to provide a detailed description and analysis of the environmental characteristics and impacts of the proposed plant. R. I. Gen. Laws § 42-6.2-8(a)(3). And the EFSB's Rules require "[a] detailed description and analysis of the impact, including cumulative impact . . . of the proposed facility." EFSB Rule 1.6(b)(12).

As noted above, the problem with Invenergy's application is not that its analysis of the plant's impacts on the specific carbon-emission-reduction targets set in the Resilient Rhode Island Act is deficient, inadequate, or abbreviated. The problem is that the analysis is omitted entirely.

B. Application Is Incomplete As To Proposed Equipment

Invenergy's application is additionally incomplete in its failure to specify what equipment it means to use. This missing information is central to Invenergy's application: manufacturer name of boiler and gas turbines, model numbers for boiler and gas turbines, manufacturer name and model numbers of equipment it will use to conduct continuous emissions monitoring for opacity, oxygen, CO_2, NO_X, SO_2, and CO. Invenergy's cagey and vague reference to "potential equipment manufacturers," is inadequate.

C. Application Is Incomplete As To Major Source Permit

Compliance with the Major Source Permit Application procedures – required by the federal Clean Air Act – is not a minor detail; it is an important matter. DEM regulations are pellucid as to what constitutes a "complete application." Invenergy's June 26, 2015 Major Source Permit Application, filed with DEM and provided to the EFSB as Exhibit B to the Invenergy Application here, is facially incomplete in multiple respects.

Invenergy does not assert, falsely, that its Major Source Permit Application is complete. Invenergy acknowledges candidly that it is incomplete, and assures the reader that it (Invenergy) will provide the missing required information – some time.

D. Incomplete Applications Must Be Rejected

Invenergy's application simply does not meet the completeness requirements of the EFSB statute and the EFSB Rules, and the EFSB should reject the application and close the Docket.

The wholly unremarkable rule that administrative agencies cannot and do not rule on incomplete applications is widely followed. See, e.g., Wood Nov & Permit Applications v. Wood, 194 Vt. 190, 75 A.3d 568 (2013) (upholding decision of Zoning Board to reject application for retaining wall because application was incomplete); Unistar Prop. v. Conservation & Wetlands Com'n of Putnam, 293 Conn. 93, 977 A.2d 127 (2009) (affirming decision by Conservation and Wetlands Commission to deny wetlands permit because the permit application was incomplete); Manor Care, Inc. v. Dep't of Health, 558 So.2d 26 (Fla.App. 1990) (affirming denial of application for nursing home Certificate of Need where application was incomplete); Tuscarora Forests, Inc. v. Fermanagh Board of Supervisors, 80 Pa.Cmwlth 104, 471 A.2d 137 (1984) (affirming decision by Board of Supervisors to refuse to take action on application for subdivision where application was incomplete); Wellingham v. City of Dearborn, 359 Mich. 7, 101 N.W.2d 294 (1960) (affirming decision by city to reject plaintiff's application for a building permit where the application was incomplete).

There are sound reasons why administrative agencies uniformly require full applications before the agency will consider such applications. One reason is that agencies are unable properly to evaluate applications if necessary information is omitted. Sun Ventures, Ltd., 15 FERC ¶61,015 (April 3, 1981) (FERC dismisses incomplete permit application because allowing review of incomplete applications "would preclude any meaningful review of the application[] by the Director and government agencies . . . ."); Northeastern Minnesota Mun. Power Agency, 16 FERC ¶61,033 (July 21, 1981) (same).

Moreover, other parties, including opponents of the application such as CLF, may be denied their opportunity to be heard in a meaningful way if they do not have complete and accurate notice of the matter to be heard. Liberte Capital Group v. Capwill, 229 F. Supp.2d 799, 802-803 (N.D. Ohio 2002) (concept of notice and opportunity to be heard means that "all parties have had an opportunity to present their respective positions and been afforded due consideration" [emphasis supplied]); see generally Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950) (requirement of notice and opportunity to be heard is rooted in due process clause).

In this, as in all EFSB proceedings, the proponent of the project has the burden of proof. R. I. Gen. Laws § 42-98-11(b). If the EFSB does not dismiss Invenergy's application and this Docket proceeds, CLF (and potentially other objectors) would be prejudiced because the objectors would be forced into the position of presenting expert testimony to the effect that permitting this plant would make it impossible for the state to achieve the carbon-emission-reduction targets set by the Resilient Rhode Island Act, without having seen any contrary evidence from Invenergy. CLF and its expert witness will have nothing to respond to.

E. The Broader Picture

It is not difficult to discern what is happening here. Invenergy states:

> This Facility will be bid into the ISO-NE's Forward Capacity Auction number 10 ("FCA 10") in February 2016, and if selected, commercial operation of the Facility will be required by June 1, 2019, with significant penalties due if this capacity obligation is not met.

Invenergy October 28, 2015 Letter to EFSB, page 4 (emphasis supplied).

In other words, Invenergy, for reasons that seemed appropriate to Invenergy, made the conscious, deliberate election to enter the ISO-NE Forward Capacity Auction-10 (FCA-10), to be conducted starting February 8, 2016, without first obtaining any of the necessary, required state permits for its proposed plant. If Invenergy clears in the upcoming auction, it will acquire a Capacity Supply Obligation (CSO) that will correspond to the ISO-NE's Capacity Commitment Period-10 (CCP-10), which runs from June 1, 2019 through May 31, 2020 (corresponding exactly to the June 1, 2019 date in Invenergy's Letter).

Invenergy elected to seek a CSO before it had obtained its required CAA Major Source Permit from DEM; before it had obtained required construction permits from DEM; and before it has obtained the required permit from this EFSB.

What Invenergy tells the EFSB about "significant penalties" is accurate. In order to participate in FCA-10, Invenergy was required to post a multi-million-dollar bond, called "Financial Assurance" (FA) with the ISO-NE. The complicated terms of FA are set forth in Exhibit IA to Section I of ISO-NE's Tariff,[3] but the key fact for present purposes is that Invenergy forfeits its FA if its proposed plant is not on line by June 1, 2019, the start of CCP-10.[4]

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[3] The EFSB can take administrative notice of the ISO-NE tariff. The complete ISO-NE tariff appears on the ISO-NE website:
http://www.iso-ne.com/participate/rules-procedures/tariff

[4] The referenced Exhibit IA to Section I of the Tariff runs to 84 pages, including the 4 Attachments, and includes multiple algabræic formulæ for calculating FA, including this one:
$L = (MW_1 \times LF \times Hr_{MIS} \times (EP + S_{2-3}) \times 3.25 + (MW_1 \times Hr_{MIS} \times TC \times 3.25)$.

In the event that Invenergy is not fully operational by June 1, 2019, it is allowed, under the ISO-NE Tariff, to request a one-time-only deferral of its CSO for one year. The deferral provisions of the ISO-NE Tariff appear at Section III.13.3.7.[5] According to this provision, both of the following conditions would apply to Invenergy's request: (1) Invenergy is allowed to request a deferral, but the ISO-NE is not obligated to grant the request; and, in any event, the deferral must also be approved by the Federal Energy Regulatory Commission (FERC); and (2) if Invenergy does defer for a year, it will lose its scheduled flow of tens of millions of dollars of capacity payments during the one-year deferral period, a serious matter for a company that is seeking financing for a $700 million merchant project.

Two points must be emphasized about Invenergy's decision to seek a CSO before having any of the required permits for its proposed facility. First, this was solely Invenergy's own choice and election. Second, Invenergy's choice to proceed in this order (seeking a CSO before obtaining required permits) is by no means the universal election of new generation assets seeking to enter the ISO-NE market.

The inevitable consequence of Invenergy's choice is set forth – accurately and candidly – in the very next sentences of Invenergy's October 28, 2015 letter to the EFSB:

> In order to meet this obligation, construction of the facility needs to commence in late 2016. A RIEFSB Final Decision by no later than September 15, 2016 would allow sufficient time for project financing and construction commencement to meet the FCM capacity obligation deadline.

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[5] ISO-NE Tariff Section III.13.3.7, like the entire Tariff and all proposed amendments thereto, must be approved by the Federal Energy Regulatory Commission (FERC) pursuant to Section 205(c) of the Federal Power Act, 16 U.S.C. § 824d. See, e.g., In re ISO-New England & New England Power Pool, 150 FERC ¶ 61,007 (Jan. 9, 2015) (approving proposed changes to the ISO-NE Tariff).

Invenergy October 28, 2015 Letter to EFSB, page 4.

The short of it is this: Invenergy chose to participate in the upcoming auction before it had any of the permits required for its proposed plant, and, as a result, Invenergy is now trying to stampede the EFSB into processing its (Invenergy's) application prematurely, even while that application is facially incomplete in multiple respects.

But the EFSB is not required to accede to Invenergy's improper demand.

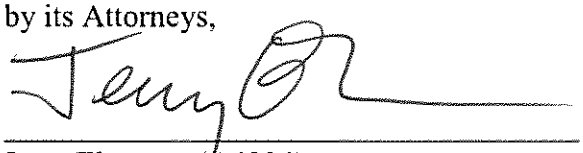
Invenergy's attempt to have the EFSB consider its (Invenergy's) incomplete application is contrary to the organic statute governing the EFSB.

Invenergy's attempt to have the EFSB consider an incomplete application violates the EFSB's own Rules of Practice and Procedure.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, CLF respectfully requests that the Energy Facility Siting Board close this Docket and reject Invenergy's application to build a 900-MW fossil-fuel-fired power plant, because Invenergy's application is incomplete.

CONSERVATION LAW FOUNDATION,
by its Attorneys,



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CERTIFICATE OF SERVICE

I certify that the original and fifteen copies of this Motion were filed with the Energy Facility Siting Board. In addition, copies of the Motion were served on the entire service list of this Docket. Service was made two separate way: (1) by first-class mail, postage prepaid; and (2) via e-mail, as a PDF attachment. I certify that all of the foregoing was done on January 4, 2016.