

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

**CONSERVATION LAW FOUNDATION'S RESPONSE
TO BURRILLVILLE'S MOTION TO DISMISS**

Introduction

Conservation Law Foundation (CLF) respectfully files its Response to the Town of Burrillville's Motion for Dismissal or Denial of Invenergy's Application for Failure to Comply with an Order of the EFSB and EFSB Rules (Burrillville's Motion to Dismiss), which was filed and served on October 27, 2017.

CLF agrees with Burrillville's principal argument that dismissal is appropriate here because "Invenergy has repeatedly failed to disclose the CREC-Fall River Water Agreement to the EFSB and the parties for over two months, despite multiple opportunities to disclose it and a continuous obligation to do so." Burrillville's Motion To Dismiss, at 5. This corresponds to the argument previously made by CLF in CLF's Motion For Oral Argument, filed and served October 23, 2017, at 5. CLF's Motion For Oral Argument has yet to be ruled on by the Energy Facility Siting Board (EFSB or Board).¹

¹ The failure of the EFSB to formally rule on CLF's Motion for Oral Argument is of more than academic importance. CLF's Motion for Oral Argument contained a written request for a new Advisory Opinion from the Department of Environmental Management "on the effects of the water contract with the Narragansetts on Charlestown's sole source water aquifer." Motion for Oral Argument, at 8 n.1. CLF believes that failure to address that request may constitute error.

CLF believes that, while Burrillville is correct that Invenergy's failure to disclose the Invenergy-Fall River water contract is grounds for dismissal, other misstatements by Invenergy not cited by Burrillville provide additional support for the same conclusion: it is past time that this case be dismissed.

Additional Facts Supporting Dismissal

This Docket was opened on October 29, 2015, when Invenergy filed a 473-page permit application with the EFSB that contained false information. Invenergy's application stated that Invenergy will (Invenergy's choice of word) obtain its water from the Pascoag Utility District (PUD). For example, "Water from the PUD's well will be treated at the wellhead" Invenergy Application, Section 6.2.3.1, at p. 46 (emphasis supplied).

This statement was inaccurate. At the time the statement was made, Invenergy had no contract for water with PUD. At the time the statement was made, Invenergy knew that it had no contract for water with PUD.

Invenergy's decision to provide false information on October 29, 2015, was not a mistake or a coincidence, for it was repeated.

On January 12, 2016, at the Preliminary Hearing, Invenergy again presented factually inaccurate information about its water source. On that date, Invenergy presented a PowerPoint presentation. Slide 16 stated, point-blank: "Water supply from Pascoag Utility District." The point was repeated on Slide 12: "The project will . . . us[e] water from Pascoag Utility District."

These statements were untrue. At the time these statements were made to the EFSB, Invenergy was fully aware that it had no contract with the Pascoag Utility District.

At the January 12, 2016 Preliminary Hearing, John Niland, Invenergy's Director of Business Development, said that Invenergy "is going to use a well in the Pascoag Utility District that had previously been contaminated" At the time that statement was made, Invenergy knew that it did not have a contract with PUD. At no time before or since has Invenergy ever had a water contract with PUD.

On March 31, 2016, the EFSB held a public hearing in the Burrillville High School. At that public hearing, Mr. Niland repeated the false, factually inaccurate statements about obtaining water from the Pascoag Utility District, this time in front of an audience of 700 people. March 31, 2016 Hearing Transcript, page 16, line 18 through page 17, line 16.

At the time the statement was made, Invenergy had no contract for water with PUD. Moreover, at the time the statement was made, Invenergy was fully aware of the fact that it had no contract with the Pascoag Utility District.

This Docket was opened in reliance on Invenergy's false assertion, made repeatedly over a period of months, that it "will" (Invenergy's word) obtain water from PUD. At no time in 2015 did Invenergy ever have a contract for water with PUD. At no time in 2016 did Invenergy ever have a contract for water with PUD.

Also at the March 31, 2016, Mr. Niland made false statements about the dollar amount of ratepayer savings from the Invenergy plant. March 31, 2016 Hearing Transcript, page 16, lines 8 to 17. When Mr. Niland was asked under oath at the PUC hearing whether he knew at the time he made the statement at the March 31 hearing that the figure was not correct, Mr. Niland

answered “Yes.” March 31, 2016 Hearing Transcript, page 63, line 13 to page 67, line 7; specific question and answer at page 66, line 20 to page 67, line 2.

After Invenergy belatedly realized that it would not be able to obtain the hoped-for water from PUD, Invenergy attempted to obtain water from the Harrisville Fire District. That effort failed.

Invenergy then sought water from the Nasonville Water District. That effort failed.

Invenergy then sought water from the City of Woonsocket, but was rebuffed.

By the autumn of 2016, the parties to this Docket had been spending time, energy, and financial resources litigating Invenergy’s permit application even though Invenergy had no source of water to cool its proposed fossil fuel power plant.

Invenergy has not offered to reimburse the other parties for their unnecessary litigation expenses during the first year of needless litigation.

By the autumn of 2016, it was clear that Invenergy’s application was incomplete because Invenergy had no source of cooling water for its proposed fossil fuel plant. This was clear to the parties in this Docket, to the public, and to the EFSB.

On October 13, 2016, “Invenergy was ordered to show cause why its application proceedings should not be suspended due to an incomplete application caused by the absence of a water supply plan.” EFSB Order 103, dated October 20, 2016, effective October 13, 2016. EFSB Order 103 concluded that “[t]he lack of information regarding Invenergy’s water source render[s] its application incomplete and therefore not in compliance with” EFSB Rules. Since then, Invenergy has come up with multiple proposed, possible, “contigent” water sources. Some

of these proposed water sources are the subject of on-going legal challenges; another one was kept secret from the EFSB and the public despite the EFSB's direct instructions to disclose.

On January 11, 2017, Invenergy filed an entirely new water plan with the EFSB. Under this new water plan, the Town of Johnston was to supply water to Invenergy and Invenergy was to truck that water from Johnston in far, far smaller quantities than initially contemplated.

Invenergy's January 11, 2017 EFSB Filing, Section 2.0, at p. 1. Invenergy's January 11, 2017 filing identified Benn Water & Heavy Transport Corp. (Benn), but merely as a contingent back-up supplier of water.

Invenergy's contract with the Town of Johnston is being challenged in the Superior Court. See Conservation Law Found., Inc. v. Clear River Energy, LLC, No. PC 2017-1037 (and in a parallel suit brought by the Town of Burrillville; the two cases have been consolidated). On June 20, 2017, the Superior Court denied motions by Invenergy and the Town of Johnston to dismiss the case. Conservation Law Found., Inc., v. Clear River Energy, LLC, 2017 WL 2782312 (R.I. Super. June 20, 2017), per Silverstein, J.

Unbeknownst to the EFSB, CLF, or the other parties in this lawsuit, on or about August 17, 2017, Benn entered into a 10-page written contract with the City of Fall River, Massachusetts, under which Fall River would supply potable water to Benn for Benn to supply to Invenergy. On August 17, 2017, when the contract was signed between Benn and Fall River, Benn had only been identified to the EFSB by Invenergy as a possible, contingent, back-up supplier of water to Invenergy.

The contract between Benn and Fall River states that the water at issue will be provided to “the Clear River Energy Center located in Burrillville, Rhode Island.”

A month after the contract was executed, on September 15, 2017, the EFSB heard oral argument on variety of motions. Once again, Invenergy’s water plan was central to issues under discussion.

On September 15, 2017, Invenergy’s counsel stated: “If there is another alternative water supply arrangement that agrees to provide water, you will see that agreement. We will provide that to you.” September 15, 2017 Hearing Transcript (September 15 Transcript), at page 83, lines 9 - 13. However, counsel did not acknowledge the existence of the Fall River water contract entered into the previous month.

Also on September 15, 2017, EFSB Chairperson Margaret E. Curran told Invenergy’s counsel: “If there were an additional agreement reached with any other entity for another water supply plan, then that certainly would have to come before the Board.” September 15, 2017 Transcript, page 95, lines 5- 9. However, Invenergy’s counsel did not acknowledge the existence of the water contract entered into the previous month.

In fact, Invenergy has not informed the EFSB of the existence of the contract between Fall River and Benn to this day.

Apparently, the EFSB and the parties to this Docket are not the only ones that Invenergy failed to inform about the Fall River water contract. On October 24, 2017, the Fall River City Council passed a resolution expressing its amazement and chagrin upon learning of that contract – two months after it was signed. CLF attaches the Fall River City Council Resolution at Tab A.

The Fall River City Council said, in relevant part that “now, it is realized by this City Council and the general public that the City of Fall River has contracted to sell water to a Burrillville, RI energy company without prior knowledge of the City Council” despite the fact that “it is a regular practice for all Public Utilities Contracts for sale of Municipal Utilities to come before the Fall River City Council for review and consideration . . .” (Emphasis and capitalization as in original).

On September 28, 2017, Invenergy filed yet another new water plan with the EFSB (Invenergy’s September 28 Filing). Under Invenergy’s September 28 Filing, Benn was no longer the contingent back-up trucker of water for Invenergy; instead, Benn now became for the first time the principal trucker of water to Invenergy.²

Invenergy’s September 28 Filing also disclosed that Invenergy had signed some type of contingent, back-up water deal with the Narragansett Indian Nation (Narragansetts). Id. Invenergy’s supposed deal with the Narragansetts led the Town of Charlestown to move to intervene in this proceeding because the Town of Charlestown and the Narragansetts both draw water from the same sole source aquifer. On October 17, 2019, the EFSB granted limited intervention to the Town of Charlestown. In addition, a public hearing will be held in Charlestown, with 30 days’ advance public notice, pursuant to the Energy Facility Siting Act.

²



On October 20, 2017, there was a further challenge to Invenergy's contract with the Narragansetts. On that date, the Tribal Council of the Narragansett Indian Tribe filed a Motion to Intervene, claiming that the Narragansetts' contract with Invenergy was illegal and improper.

On October 25, 2017, Invenergy filed an Objection to the Tribal Council's intervention motion, claiming that the Tribal Council lacked authority to intervene to protect its water supply. Two days later, on October 27, 2017, the Tribal Council filed a rebuttal explaining that it did have authority to make its filing.

Even a cursory review of the EFSB filings makes clear that Invenergy unwittingly stumbled into a long-running dispute about tribal governance.

As of the date that this Motion is being filed, Invenergy has presented no evidence that it has access to any water source that is not the subject on-going controversy and dispute or to an active legal challenge.

Discussion

Burrillville's Motion to Dismiss addresses only Invenergy's failure to disclose the Fall River water contract to the Board. The core of Burrillville's argument is this:

Invenergy has repeatedly failed to disclose the CREC-Fall River Water Agreement to the EFSB and the parties for over two months, despite multiple opportunities to disclose it and a continuous obligation to do so. This conduct seriously undermines the public's faith in the siting process. The Town asks that the EFSB put a stop to Invenergy's continued pattern of evasive behavior.

Burrillville's Motion to Dismiss, at 5.

While CLF believes that Burrillville is correct that Invenergy's failure to disclose the Fall River water contract constitutes grounds for dismissal, CLF also believes that the broader context

here is crucial. Int'l Union, AFL-CIO v. NLRB, 520 F.3d 192,197 (2d Cir. 2008) (“Here, as elsewhere, context is everything.”); Jamsports and Entm’t, LLC v. Paradama Prod., Inc., 360 F. Supp.2d 905,906 (N.D. Ill. 2005) (“[C]ontext is everything”).

Invenergy’s failure to disclose the Fall River water contract comes in the context of Invenergy’s failure to be candid about the source of its cooling water since its original application was filed on October 29, 2015. At that time, Invenergy had a non-binding “letter of intent” with PUD, and Invenergy hoped in the future that it might be able to enter into a binding contract with PUD for water. But what Invenergy stated in its application, point-blank and several times, was that Invenergy will get water from PUD. And each time Invenergy stated that, Invenergy knew that it had no enforceable contract with PUD.

Invenergy’s failure to disclose the Fall River water contract also comes in the context of Invenergy affirmatively misstating the ratepayer impacts of the plant. Invenergy spokesman John Niland cited huge purported ratepayer impacts at the March 31, 2016 EFSB public meeting held in Burrillville High School; Mr. Niland’s statement was made to the EFSB and the EFSB’s lawyers in front of 700 people. Later, Mr. Niland testified under oath that he knew at the time he was making the statement that the figures he was providing were false.

Invenergy’s failure to disclose the Fall River water contract to the EFSB also comes in the context of Invenergy’s failure to disclose the Fall River water contract to the Fall River City Council, a fact that has outraged the members of the Fall River City Council.

It is possible that Invenergy will argue that, technically, the Fall River water contract was between Benn and the City of Fall River and that therefore, technically, Invenergy had no duty to disclose it.³

However, Burrillville is correct when it explains that Invenergy was named in the Fall River water contract and was an intended beneficiary of the contract. Burrillville's Motion to Dismiss, at 5-8. But here again, context is crucial. The principal difference between Invenergy's January 11, 2017 water plan and its September 28, 2017 water plan is that under the former plan, Invenergy is the sole trucker of water regardless of the water source; and under the latter plan Benn is the sole trucker of water regardless of the source. If that fact actually excused Invenergy from disclosing the Fall River water contract to the EFSB, then Invenergy would be excused from disclosing any water source to the EFSB.

Such an argument would be too cute by half, and would be exalting form over substance. Assoc. Elec. & Gas Ins. Serv., Ltd. V. Clark, 676 A.2d 1357,1361 (R.I.1996) ("We no longer exalt form over substance[,]" per Weisberger, C.J.).

Conclusion

As a narrow, technical legal matter, Burrillville is correct that, in these circumstances, dismissal of this Docket is proper under R. I. Gen. Laws § 42-98-16 and under EFSB Rule 1.15(a)(8). Burrillville's Motion To Dismiss, at 12. But the broader context here may be even

³ Indeed, Invenergy comes close to making this very argument in its October 30, 2017 filing with the Board in footnote 2 on page 4. Note, however, that Invenergy's counsel's statement did not draw such a nice distinction: "If there is another alternative water supply arrangement that agrees to provide water, you will see that agreement. We will provide that to you." September 15 Transcript, at p. 83, lines 9 - 13.

more important. Invenenergy has misstated facts and withheld material information from the EFSB, from the parties, and from the public back to its initial application.

WHEREFORE, for the foregoing reasons, CLF urges the EFSB to grant Burrillville's Motion To Dismiss.

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CERTIFICATE OF SERVICE

I certify that the original and three copies of this Response were hand delivered to the Energy Facility Siting Board in two different formats: redacted and unredacted. In addition, redacted copies were served electronically on the entire service list, and unredacted copies were served electronically on Invenenergy and the Town of Burrillville pursuant to the Non-Disclosure Agreement in this case. I certify that all of the foregoing was done on October 31, 2017, 2017.



Tab A

(Councilor Steven A.
Camara)

WHEREAS, it is a regular practice for all Public Utilities Contracts for the sale of Municipal Utilities to come before the Fall River City Council for its review and consideration, and

WHEREAS, now, it is realized by this City Council and the general public that the City of Fall River has contracted to sell water to a Burrillville, RI energy company without prior knowledge of the City Council, and

WHEREAS, the Watuppa Water Board passed this contract of sale on a 2-1 vote on August 17, 2017, and

WHEREAS, this contractual agreement constitutes a potential for litigation by third parties, now therefore

BE IT RESOLVED, that the City Council Committee on Health and Environmental Affairs convene a meeting and invite members of the Watuppa Water Board, the Corporation Counsel, representatives of the Burrillville Board of Selectmen, representatives of Invenergy Corporation and Benn Water and Heavy Transport to discuss this contract and service to ensure that the City of Fall River will not be a co-defendant in any litigation and to assure this Council that through this contract the City of Fall River will not be environmentally and/or economically responsible in any way for providing water for what may be an environmentally damaging activity in the nearby State of Rhode Island.