STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

In Re: INVENERGY THERMAL DEVELOPMENT LLC'S APPLICATION TO CONSTRUCT THE CLEAR RIVER ENERGY CENTER IN BURRILLVILLE, RHODE ISLAND	))))	**Docket No. SB-2015-06**

OBJECTION OF INVENERGY THERMAL DEVELOPMENT LLC TO THE CONSERVATION LAW FOUNDATION'S MOTION TO RELEASE THE REDACTED PORTIONS OF GLENN WALKER'S TESTIMONY

I. INTRODUCTION

Now comes Invenergy Thermal Development LLC ("Invenergy") and hereby objects to the Conservation Law Foundation's ("CLF's") motion (joined by the Town of Burrillville) requesting the Rhode Island Energy Facility Siting Board ("EFSB" or "Board") "allow the release to the public of the currently redacted portions of Mr. [Glenn] Walker's testimony." *See* CLF's Oct. 4, 2017 Motion ("CLF Mot."), at 1.

As discussed thoroughly below, CLF's motion to release the currently redacted portions of Mr. Walker's testimony should be denied for the following reasons: (1) because the redacted information is confidential and commercially sensitive, it should be protected; (2) the redacted information, if disclosed, would cause substantial harm to Invenergy; (3) there is no compelling public interest in disclosure of this redacted information; (4) any alleged public interest in disclosure of the redacted information does not outweigh Invenergy's privacy interests; and (5) CLF waived any objection it had to disputing the confidentiality of the redacted information when it failed to object to Invenergy's previously filed motion for protective treatment of the same information relied upon in the redacted portions of Mr. Walker's surrebuttal testimony.

Accordingly, Invenergy respectfully requests that the Board deny CLF's motion to release the redacted portions of Mr. Walker's surrebuttal testimony.

II. BACKGROUND

On September 27, 2017, the Town of Burrillville ("Town") submitted the surrebuttal testimony of Mr. Walker, and the Town redacted certain portions of Mr. Walker's testimony. The portions of the testimony that were redacted refer to information that had been previously designated as confidential by Invenergy. Invenergy provided that confidential information to only the Board, and parties that signed a Non-Disclosure Agreement, subject to Motions for Protective Orders.[1]

The majority of Mr. Walker's testimony identified in CLF's Motion concerns testimony that appears to be related to information provided by Invenergy in response to CLF's 9th Set of Data Requests.[2] Invenergy filed its confidential responses to CLF's 9th Set of Data Requests subject to a Motion for Protective Treatment, filed on July 11, 2017. *See* Invenergy's July 11, 2017 Motion for Protective Treatment ("Invenergy July 11, 2017 Mot."). None of the parties, including CLF, objected to Invenergy's Motion for Protective Treatment when it was filed or within the requisite objection period under the Board's Rules of Practice and Procedure ("Board's Rules" or "EFSB Rules").

Some redactions identified in CLF's Motion concern information that appears to derive from confidential Ryan Hardy testimony that was filed with the Rhode Island Public Utilities Commission ("PUC") during the PUC's advisory opinion process.[3] When Invenergy filed redacted versions of Mr. Hardy's PUC testimony, it also concurrently filed a Motion for Protective Treatment. *See* PUC Docket 4609, Invenergy Apr. 22, 2016 Motion for Protective Treatment ("Invenergy Apr. 22, 2016 Mot."). This Motion for Protective Treatment requested

[1] The Town, CLF and the Office of Energy Resources ("OER") signed Non-Disclosure Agreements.
[2] *See* G. Walker's Surrebuttal Testimony, at 3:10-11; 4:4-5; 5:19-22; 6:1-5; 21:13-14.
[3] *See* G. Walker's Surrebuttal Testimony, at 6:7-13.

protection of memoranda prepared by PA Consulting Group, Inc. ("PA") regarding PA's analysis and market assumptions that were utilized in the PUC testimony. *See* Invenergy's Apr. 22, 2016 Mot. Invenergy also cited to an EFSB order that had previously granted protection of the confidential information referenced in Mr. Hardy's PUC testimony in the EFSB docket. *See* Docket SB-2015-06, Order No. 82, dated Jan. 12, 2016. Although CLF participated in the PUC advisory opinion process, neither CLF nor any other party objected to Invenergy's motion for protective treatment filed with the PUC.

CLF appears to be attempting to circumvent the Board's prior decision, the EFSB objection deadline, and its own failure to object in a timely fashion by filing this motion to release the identified redacted portions of Mr. Walker's testimony. For the reasons articulated below, CLF's motion is meritless and should be denied.

III. ARGUMENT

A. CLF's Motion Should be Denied Because the Redacted Information is Confidential and Requires Protection as Disclosure Would Cause Invenergy Substantial Harm.

CLF's motion asserts that "there is no proprietary or confidential information contained" in Mr. Walker's redactions of which CLF entitles "the first category." CLF's Mot., at 2. CLF further contends that as to what it entitles "second category," "there may be confidential information, but that the public interests in the integrity of the EFSB process outweighs any privacy interests that Invenergy may have." *Id*. CLF does not offer any explanation of the basis for its assertions. Regardless of the manner in which CLF categorizes the redacted information, *all* of the redacted information in the testimony is confidential and requires protection.

Pursuant to R.I. Gen. Laws § 38-2-2(4)(B) and Rhode Island Supreme Court precedent, agencies may protect commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature from disclosure if the benefit of such

protection outweighs the public interest in disclosure of the information pending before a regulatory agency. *See* R.I. Gen. Laws § 38-2-2(4)(B); *Providence Journal v. Kane,* 577 A.2d 661 (R.I. 1990). Further, as noted in Invenergy's July 11, 2017 Motion for Protective Treatment, where the release of information or data to a competitor will "cause substantial harm to the competitive position of the person from whom the information was obtained[,]" the Board should grant a request to protect the information from public disclosure. *See Providence Journal Company v. Convention Center Authority*, 774 A.2d 40, 47 (R.I. 2001).

Most of the redacted information appears to relate and/or rely upon Invenergy's responses to CLF's 9th Set of Data Requests. CLF's 9th Set of Data Requests asked whether Invenergy participated in a so-called "Reconfiguration Auction," and if so, to describe the results. Accompanying Invenergy's redacted responses to CLF's 9th Set of Data Requests, Invenergy filed a Motion for Protective Treatment of this confidential information that was provided to the Board, and to CLF. *See* Invenergy July 11, 2017 Mot.

Invenergy stated that, pursuant to R.I. Gen. Laws § 38-2-2(4)(B), the redacted information regarding ISO-NE's Annual Reconfiguration Action and whether or not or in what manner Invenergy participated in that Auction constitutes "commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature" and that the public interest in disclosure of this information was outweighed by the need to protect this information because release will "cause substantial harm to the competitive position" of Invenergy. *See id*. at 2 (quoting R.I. Gen. Laws § 38-2-2(4)(B) and *Providence Journal Company*, 774 A.2d at 47).

Invenergy explained that the information requested in CLF's 9th Set of Data Requests is "commercially sensitive and not available to the general public." *Id*. at 3. Invenergy noted that

"[i]n order to fully respond . . ., [it] provided commercially sensitive information, but respectfully request[ed] protective treatment." *Id*. Invenergy demonstrated that providing the information requested to the public would substantially harm its competitive position because "[o]ther companies could use this information to the detriment of Invenergy in future auctions or business transactions." *Id*. Invenergy also noted that "[t]he ISO-NE does not disclose the details of company participation (or lack of participation) in reconfiguration auctions" and that "[t]he ISO-NE also treats this level of detail as confidential." *Id*. These points remain highly relevant to CLF's Motion.

As explained in Invenergy's July 11, 2017 Motion for Protective Treatment, this requested information is confidential, commercially sensitive and not available to the general public. The information is confidential because the ISO-NE does not disclose this information to the public and treats this information as confidential. Indeed, CLF fails to provide any support for its assertion that "there is no proprietary or confidential information contained in these redactions." CLF Mot., at 2. The information is also commercially sensitive as Invenergy's competitors could use this information to the detriment of Invenergy in future auctions or business transactions, causing Invenergy substantial harm.

The redacted information also relates and/or relies upon the Invenergy PUC testimony of Mr. Hardy. *See* G. Walker's Surrebuttal Testimony, at 6:9-11; *see also* PUC Docket 4609, R. Hardy's PUC Testimony. The confidential information in Mr. Hardy's PUC testimony is based upon memoranda prepared by PA regarding its analysis and market assumptions, modeling methodology and market projections as related to the proposed Clear River Energy Center ("CREC"). *See* Invenergy's Apr. 22, 2016 Mot. As discussed above, and in Invenergy's April 22, 2016 Motion for Protective Treatment, the information discussed in Mr. Hardy's PUC

testimony is highly sensitive and constitutes proprietary data and analysis completed by PA. If disclosed to the public and/or competitors, disclosure would harm Invenergy's competitive position in the wholesale electricity market. Disclosure would also harm PA, as this information regarding its modules and formulae is proprietary and treated as confidential by the energy industry in the regular course of business. Indeed, the information in Mr. Hardy's PUC testimony is similar to the information that the EFSB's has previously granted protection of in the EFSB docket. *See* Docket SB-2015-06, Order No. 82, dated Jan. 12, 2016.

Because the redacted information is not public and constitutes "commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature" under R.I. Gen. Laws § 38-2-2(4)(B) and because disclosure of the redacted information will cause substantial harm to Invenergy if disclosed, the information should be protected and CLF's motion should be denied.

B. CLF's Motion Should be Denied Because There is no Public Interest in Disclosure of this Redacted Information and Any Alleged Public Interest in Disclosure of the Redacted Information Does Not Outweigh Invenergy's Privacy Interests.

As to the public interest balancing test, the Board may protect information from public disclosure if the benefit of such protection outweighs the public interest inherent in disclosure of information pending before regulatory agencies.

CLF contends that the public interest in the integrity of the EFSB process outweighs any privacy interest Invenergy has in the redacted information. CLF Mot., at 2. Invenergy does not dispute that public confidence in the integrity of the EFSB process is important. However, Invenergy disputes that releasing the redacted information will harm the public confidence in the integrity of the EFSB process. CLF has neither explained nor provided any support for its unfounded belief that the release of confidential and commercially sensitive information regarding

whether Invenergy participated in the ISO-NE's Annual Reconfiguration Auction will somehow bolster public confidence in this EFSB proceeding.

It appears that CLF's contention is that unless all information is provided to the public—regardless of the confidential nature of the information and the harm such release could cause—the public will not have confidence in the process. Following CLF's argument to its illogical conclusion, it appears that CLF believes that, in order to achieve transparency, public interest requires disclosure of all information, regardless of the confidential nature of that information. Not only is that the wrong standard to apply when determining whether there is a public interest in publishing confidential information, but the consequence of CLF's contention is absurd and contrary to Rhode Island law and well established Rhode Island Supreme Court precedent.

Accordingly, because CLF has failed to provide any support for its belief that the public interest will be served by disclosure of this confidential and commercially sensitive information and because CLF has failed to establish that the alleged public interest outweighs protection of this confidential and commercially sensitive information, its Motion should be denied.

C. CLF's Motion Should be Denied Because it Failed to Object to Invenergy's Previously Filed Motions for Protective Treatment of This Confidential and Protected Information.

CLF's Motion should also be denied because it is a "back-door" effort to file an untimely objection to Invenergy's July 11, 2017 Motion for Protective Treatment.[4]

Pursuant to Rule 1.17(C) of the EFSB Rules, "[a]ny party objecting to a written motion filed pursuant to this rule shall within five (5) days of the service of the motion, file an objection thereto in writing setting forth in detail the grounds for the objection." EFSB Rule 1.17(C).

[4] It is also a "back-door" attempt to file a late objection to Invenergy's motion for protective treatment filed with the PUC and circumvent the EFSB's previous ruling regarding the information referenced in Mr. Hardy's PUC testimony. *See* Docket SB-2015-06, Order No. 82, dated Jan. 12, 2016. The information referenced in Mr. Hardy's PUC testimony is the same information that the EFSB deemed protected in its Order No. 82.

As discussed above, on July 11, 2017, when Invenergy filed its responses to CLF's 9th Set of Data Requests, Invenergy concurrently filed a Motion for Protective Treatment. Neither CLF, nor any other party, filed an objection to Invenergy's Motion for Protective Treatment. Because the redacted information in Mr. Walker's surrebuttal testimony directly relates and/or relies on Invenergy's confidential and redacted responses to CLF's 9th Set of Data Requests, CLF should not be allowed a "second-bite" at the "objection apple." If CLF thought the information redacted and marked as confidential in Invenergy's responses to CLF's 9th Set of Data Requests was not confidential and/or if it thought that the public interest outweighed the confidential nature of this information, it should have and could have objected to Invenergy's motion for protective treatment within five (5) days of Invenergy filing it.

Failing to object within the five (5) day time period articulated in EFSB Rule 1.17(C) should deem CLF's objection waived, and CLF should not be allowed to raise a late objection simply because the confidential information provided in Invenergy's responses to CLF's 9th Set of Data Requests was restated and/or relied upon in Mr. Walker's surrebuttal testimony.

IV. CONCLUSION

For the foregoing reasons, Invenergy respectfully requests that the Board deny CLF's motion to release the redacted portions of Mr. Walker's surrebuttal testimony.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT LLC

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Dated: October 10, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, I delivered a true copy of the foregoing document to the Energy Facilities Siting Board via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer