

August 15, 2017

Via Electronic Mail and Federal Express

Todd Anthony Bianco, EFSB Coordinator
RI Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

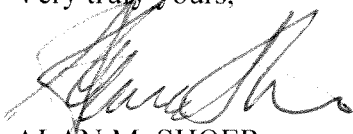
**Re: *Invenergy Thermal Development LLC's Application to Construct and Operate the
Clear River Energy Center in Burrillville, Rhode Island
Docket No.: SB-2015-16***

Dear Mr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Project ("Invenergy"), please find enclosed an original and three (3) copies of Invenergy's Objection to the Town of Burrillville's Data Request, No. 33-1.

Please let me know if you have any questions.

Very truly yours,



ALAN M. SHOER
ashoer@apslaw.com

Enclosures

cc: Service List

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD**

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

**OBJECTION OF INVENERGY THERMAL DEVELOPMENT LLC TO
THE TOWN OF BURRILLVILLE’S DATA REQUEST, NO. 33-1**

Invenergy Thermal Development LLC (“Invenergy”) respectfully objects to the Town of Burrillville’s (“Town’s”) Data Request, No. 33-1 on the ground that it seeks confidential, proprietary, and irrelevant information that is plainly outside the scope of discovery and likely is sought for an improper purpose. The Town’s Data Request, No. 33-1 requests the following:

In Response to the Town’s data request 32-9, Invenergy stated “Invenergy has not made any attempts to secure alternative water sources **as a result of the litigation.**” (Emphasis added.) Invenergy went on to state that it is continuing “the exploration of additional contingent water sources to supplement the contingency contained in our previously filed water supply plan.”

Regardless of whether Invenergy’s attempts have been made to secure additional contingent water sources “as a result of the litigation” or not, please set forth in detail all of Invenergy’s efforts to explore additional contingent water sources to supplement the contingency contained in your previously filed water supply plan. Please identify any and all additional possible sources of water that have been considered or explored including, but not limited to, the location of the water supply.

Invenergy objects to Data Request, No. 33-1 on the following grounds: (i) The Request seeks information related to potential negotiations or potential other contingent/redundant sources that have not resulted in any formal agreement, which is wholly irrelevant to the issues before the Rhode Island Energy Facility Siting Board (“EFSB” or “Board”) and is unlikely to lead to the

discovery of admissible evidence; (ii) The Request appears to seek information for the improper purpose of attempting to interfere with Invenergy's attempt to negotiate with and/or contract with an alternative contingent/redundant water supplier and preventing Invenergy from conducting business in Rhode Island; (iii) The Request seeks confidential and proprietary business information related to Invenergy's business strategy and negotiations; and (iv) The Request is unduly burdensome, in that if Invenergy is forced to provide the information requested, that production will adversely impact Invenergy's ability to fairly negotiate and secure other contingent water supply arrangements. The grounds for Invenergy's objections are articulated more fully below.

The information sought in Data Request, No. 33-1 is plainly irrelevant and beyond the scope of discovery permitted under the EFSB Rules of Practice and Procedure ("EFSB Rules"). EFSB Rule 1.27(b) only permits parties to request information that is "reasonable" and "relevant to the proceeding." EFSB Rule 1.6(b)(11) requires an Applicant to provide information on its support facilities, including water, and an analysis of their availability. Invenergy provided that information to the Board in its January 11, 2017 revised Water Supply Plan. If Invenergy actually enters into an agreement with an additional contingent/redundant supplier, it will supplement its Water Supply Plan and its response to the Town's Data Request, No. 32-9 to disclose the existence of that agreement and supplier.¹

Neither EFSB Rule 1.6(b)(11) nor any other EFSB Rule, however, requires an Applicant to provide information on its attempts to secure a contingent/redundant water source and/or the identities of possible prospective suppliers that the Applicant is talking to, "considering," or

¹ Invenergy previously identified a contingent/redundant source, Benn Water & Heavy Transport Corp. See Invenergy's revised Water Supply Plan, filed with the Board on January 11, 2017; Invenergy's Response to the Town's Data Request, Nos. 22-57 & 32-9 n.1.

“exploring.” Indeed, such information has no bearing on Invenergy’s Water Supply Plan because Invenergy has not yet entered into an agreement, and it is purely speculative as to whether Invenergy will reach another agreement. *See, e.g., Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1328 (Fed. Cir. 1990) (“A litigant may not engage in merely speculative inquiries in the guise of relevant discovery.”). Thus, the information sought in Data Request, No. 33-1 is beyond the scope of discovery permitted by the EFSB Rules and is flatly irrelevant.

In addition, Data Request, No. 33-1 is not only irrelevant, but also is unduly burdensome and improper in that it seeks sensitive and confidential business information and strategy on what Invenergy might be “considering” or “exploring.” A party cannot obtain another party’s proprietary and confidential business information (including information regarding negotiations), unless the information is relevant and not unduly burdensome and adequate protections are in place. *See, e.g.,* EFSB R. 1.27(b)(3) (stating that the relevancy of data requests is determined under the standards established by Rule 26 of the Rhode Island Superior Court Rules of Civil Procedure); R.I. Super. R. Civ. P. 26(b)(1) (noting that the court “shall” limit unduly burdensome discovery, even if it is relevant); R.I. Super. R. Civ. P. 26(c)(7) (noting that the court can enter into a protective order to protect a party from undue burden, including an order “that a trade secret or other confidential research, development, or commercial information not be revealed.”); *Providence Journal Co. v. Convention Ctr. Auth.*, 774 A.2d 40, 47 (R.I. 2001) (determining that documents regarding negotiations that led to the booking of events “fall squarely within the [Access to Public Records Act (“APRA”)] exemption for confidential commercial or financial information”); *see also Barnes v. District of Columbia*, 289 F.R.D. 1, 10 (D.D.C. 2012) (“The Court understands that the parties may try to gain a competitive advantage through gaming the

discovery process.”); *McCook Metals L.L.C. v. Alcoa Inc.*, No. 00 C 6782, 2001 WL 293626, at *2 (N.D. Ill. Mar. 13, 2001) (expressing concern that “this plaintiff could delve into the status of the ongoing negotiations between Boeing and other subcontractors We fear that the pretrial discovery in this suit could permit the plaintiff to gain unfair competitive advantages with respect to the pending contract negotiations and with respect to the legitimately confidential plans of its competitors.”); *JILCO, Inc. v. MRG of S. Fla., Inc.*, 162 So. 3d 108, 110 (Fla. Dist. Ct. App. 2014) (“The disclosure of a party’s financial or confidential business information may cause irreparable harm where the information is irrelevant to any pending matter.”).

Here, there is no question that the information sought is highly confidential and irrelevant. Moreover, even if the requested information was marginally relevant—which it is not—that marginal relevance would not override the clear burden to Invenergy in ordering it to produce information regarding its thought process and potential suppliers. Indeed, it appears likely that the Town seeks the identities of the potential water suppliers whom Invenergy has contacted or is considering contacting, so that the Town can approach these prospective water suppliers and attempt to convince them not to contract with Invenergy. This is not only an improper purpose of discovery, but also may constitute a violation of Rhode Island law. *See L.A. Ray Realty v. Town Council of Cumberland*, 698 A.2d 202, 207 (R.I. 1997) (finding a defendant liable for tortious interference with prospective contractual relations). Moreover, if the Board forces Invenergy to release this highly sensitive commercial information, that release will adversely impact Invenergy’s bargaining position and its ability to negotiate and secure additional contingent/redundant water supply arrangements.

In sum, if the Town is provided with the irrelevant information sought in Data Request, No. 33-1, the Town will have the ability to interfere with and potentially impact Invenergy’s

negotiations via direct contact with a potential contingent/redundant supplier of water. The Town should not be allowed to abuse the discovery rules and obtain proprietary business strategy information that is irrelevant to this EFSB proceeding. If Invenergy reaches an agreement with an additional contingent/redundant supplier, Invenergy will provide that information to the Board (and the Town). Accordingly, Invenergy objects to the Town's Data Request, No. 33-1.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT LLC

By Its Attorneys:

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Dated: August 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 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

SB-2015-06 Invenergy CREC Service List as of 07/11/2017

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