

November 6, 2017

Via Electronic Mail and Federal Express

Todd Anthony Bianco, PhD, EFSB Coordinator
RI Energy Facility Siting Board
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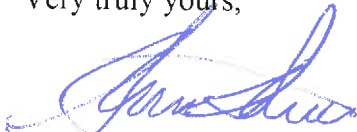
**Re: *Invenergy Thermal Development LLC's Application to Construct and Operate the
Clear River Energy Center in Burrillville, Rhode Island
Docket No.: SB-2015-16***

Dear Dr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Center Project ("Invenergy"), please find enclosed an original and three (3) copies of Invenergy's Objection to the Town of Burrillville's October 27, 2017 Motion.

Please let me know if you have any questions.

Very truly yours,



ALAN M. SHOER
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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) Docket No. SB-2015-06
CLEAR RIVER ENERGY CENTER IN)
BURRILLVILLE, RHODE ISLAND)**

**OBJECTION OF INVENERGY THERMAL DEVELOPMENT LLC TO
THE TOWN OF BURRILLVILLE’S OCTOBER 27, 2017 MOTION TO DISMISS**

Now comes Invenergy Thermal Development LLC (“Invenergy”) and hereby objects to the Town of Burrillville’s (“Town’s”) October 27, 2017 Motion, requesting the Rhode Island Energy Facility Siting Board (“EFSB” or “Board”) dismiss Invenergy’s EFSB Application (“Town’s Motion” or “Town’s Motion to Dismiss”). On October 31, 2017, the Conservation Law Foundation (“CLF”) filed a response to the Town’s Motion, supporting the Town’s Motion to Dismiss (“CLF Response”). For the reasons stated below, the Town’s Motion to Dismiss should be denied.

I. INTRODUCTION

The basis for the Town’s Motion is its assertion that Invenergy allegedly “[f]ail[ed] to [c]omply with an Order of the EFSB and EFSB Rules.” *See* Town’s Oct. 27, 2017 Motion (“Town Mot.”), 1. Specifically, the Town references the Board’s September 15, 2017 Order and claims that Invenergy allegedly “concealed the existence of [a] CREC-Fall River Water Agreement from the EFSB,” purportedly in violation of the Board’s Order, as well as in violation of the duty to supplement. *See id.* at 12 (citing Order No. 116, dated Oct. 18, 2017, effective Sept. 15, 2017, the Rhode Island Rules of Discovery and the EFSB’s Rules of Practice and Procedure). Similarly, CLF’s Response states that “while Burrillville is [purportedly] correct that Invenergy’s [alleged] 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” that Invenergy’s Application should allegedly be dismissed. *See* CLF’s Oct. 31, 2017 Motion (“CLF Resp.”), at 2.¹ The Town and CLF’s claims are false and mischaracterize and misrepresent the facts.

As discussed thoroughly below, the Town’s Motion to Dismiss should be denied for the following reasons. First, the Town’s Motion improperly characterizes the City of Fall River’s (“Fall River’s”) agreement with Benn Water & Heavy Transport Corp. (“Benn Water”) as the purported “CREC-Fall River Water Agreement[.]” The *only* entity that has an agreement with Fall River to supply water to the proposed Clear River Energy Center (“CREC”) as a possible contingent/redundant water source is Benn Water, not Invenergy or Clear River Energy LLC.

Next, Invenergy has *not* concealed any contingent/redundant water supply agreement from the Board or the parties. Invenergy’s Supplement to the revised Water Supply Plan, filed with the Board on September 28, 2017 (“Supplement”), provided the Board and the parties with all agreements Invenergy entered into with contingent/redundant water supply sources at the time

¹As discussed thoroughly below, the claims made by both the Town and CLF that Invenergy failed to disclose the existence of a water agreement are false and misstate and distort the truth. CLF’s additional claims regarding what CLF improperly characterizes as “misstatements” are likewise untrue. CLF Resp., at 2. For example, CLF cites to statements Invenergy made when it had a Letter of Intent (“LOI”) with the Pascoag Utility District (“PUD”) and asserts that because Invenergy had a LOI, but not a contract, Invenergy’s statements that CREC will use water from PUD were allegedly “inaccurate” and/or “untrue.” *Id.* at 2-3. CLF further incorrectly quotes Mr. John Niland’s testimony before the Rhode Island Public Utilities Commission (“PUC”) to claim that he made purported “false statements” regarding ratepayer savings during the EFSB’s March 31, 2016 public comment meeting. As explained while under oath at the PUC, the figure referenced at the March 31, 2016 public comment meeting was “the only number” that Invenergy had because it “didn’t know the results of the revised analysis, what those results would show, whether the number would be higher or lower.” *See* July 25, 2016 PUC Transcript, at 67:2-7. Although CLF had moved to strike Mr. Niland’s explanation, the PUC denied CLF’s motion. Accordingly these additional claims are unfounded and do not support the Town’s Motion to Dismiss.

it filed the Supplement (Benn Water and the Narragansett Indian Tribe (“the NIT”)).

Additionally, and importantly, the Supplement explicitly informed the Board and the parties, confidentially, that Benn Water had entered into an agreement with Fall River. Therefore, any allegation that Invenergy “concealed” or “failed to disclose” any agreement involving CREC’s contingent/redundant water supply sources is patently false, and reveals the Town and CLF’s true motive in this proceeding – to pursue a disingenuous course of false accusations, innuendo and “alternative facts” in the vain hope that Invenergy will tire of the opponents’ charade and simply go away.

Further, Invenergy has complied with all Board Rules and Board Orders. Because the Supplement attached all agreements Invenergy entered into with contingent/redundant water supply sources (Benn Water and the NIT), because the Supplement explicitly informed the Board and the parties that one of Invenergy’s contingent/redundant water supply sources (Benn Water) had entered into an agreement with Fall River, and because the Supplement named the locations of Benn Water’s contingent/redundant water supply sources (including Fall River), Invenergy properly supplemented its response to the Town’s Data Request, No. 33-1 and complied with the Board’s Order noting that “if Invenergy had entered into another water supply agreement, that agreement would have to be presented to the Board.” *See* Order No. 116, dated Oct. 18, 2017, effective Sept. 15, 2017, at 3.

Invenergy filed with the Board all of the agreements reached between Invenergy and its primary water supplier, the Town of Johnston, and between Invenergy and its backup, or redundant/contingent water suppliers (Benn Water and the NIT). Neither the Town’s Data Requests nor the Board’s Order obligated Invenergy to supply the Board with the actual agreement between Benn Water and Fall River, to which Invenergy is not a party or signatory;

Invenergy, therefore, complied with all Board Rules and Orders.

Accordingly, this Motion to Dismiss should be denied.

I. ARGUMENT

A. The Only Agreement Involving Fall River as a Possible Contingent/Redundant Water Supply Source to CREC is with Benn Water, *Not* Invenergy, and Invenergy Has *Not* Concealed Any Agreement Involving CREC’s Contingent/Redundant Water Supply Sources from the Board or the Parties.

The Town’s Motion stems from the Town’s blatant misrepresentation that there is an agreement between Invenergy and Fall River to supply water to the proposed CREC as a possible contingent/redundant water supply source. The Town’s Motion erroneously claims that Invenergy allegedly wrongfully “concealed” the purported “CREC-Fall River Water Agreement” from the EFSB and the parties. Town Mot., at 8. Similarly, CLF’s Response falsely states that “Invenergy has not informed the EFSB of the existence of the contract between Fall River and Benn [Water] to this day.” CLF Resp., at 6. Nothing could be further from the truth.

First, the *only* agreement involving Fall River as a *possible* contingent/redundant supply source to CREC is with Benn Water, *not* Invenergy and *not* Clear River Energy LLC. The agreement that the Town erroneously refers to as the “CREC-Fall River Water Agreement” is between Benn Water and Fall River; it is not with Invenergy and/or Clear River Energy LLC. The Town’s repeated description of the agreement between Benn Water and Fall River as the “CREC-Fall River Water Agreement” is both intentionally misleading and factually false.²

² The Town takes the position that because the water is intended to be secured by Benn Water, for ultimate delivery to CREC, that this is tantamount to Invenergy being the actual party that signed the agreement, through a convoluted third party beneficiary theory of contract law. The problem with this strained legal argument is that it is contrary to the terms of the agreement, where Benn Water, not Invenergy, is the entity that has agreed to the responsibility for performance (including payment for the supply of water). Nowhere in the agreement has Invenergy taken on any contractual obligations vis-à-vis the City of Fall River.

Second, Invenergy has not “concealed” the existence of *any* contingent/redundant water supply agreement. To the contrary, on January 6, 2017, Invenergy entered into a Memorandum of Agreement with Benn Water for Benn Water to be its contingent/redundant water supply source. On January 11, 2017, Invenergy identified Benn Water as its contingent/redundant supply source in Invenergy’s revised Water Supply Plan, and Invenergy filed that Memorandum of Agreement with the Board as an attachment to Invenergy’s revised Water Supply Plan. *See* Water Supply Plan, dated Jan. 11, 2017, at 1 and Appendix G. Subsequently, Invenergy and Benn Water entered into a long-term firm supply contract, which was executed on September 26, 2017. Invenergy filed this long-term firm supply contract with the Board on September 28, 2017, as a confidential attachment in Invenergy’s Supplement to the revised Water Supply Plan. *See* Supplement, dated Sept. 28, 2017, Appendix H.³

This confidential agreement between Invenergy and Benn Water was not only provided to the Board, but also to counsel for the Town, CLF, the Division of Statewide Planning and the Office of Energy Resources. Upon review of the confidential agreement, no party objected to Invenergy’s request to protect the confidentiality of Benn Water’s water supply source locations, as listed in Appendix H of the Supplement, including the specific reference to Fall River as a source of water to Benn Water. *See* Supplement, at Appendix H. On October 17, 2017, the Board orally granted Invenergy’s request to protect the confidentiality of Benn Water’s source locations, including Fall River, with the full knowledge, and consent, of the Town.⁴ It is

³ Invenergy also executed an agreement with the NIT whereby the Tribe agreed to be an additional contingent/redundant source for CREC. *See* Supplement, at 1 and Appendix I. Invenergy also confidentially filed that agreement with the Board and the parties as a confidential attachment to its Supplement.

⁴ Neither the Town, nor CLF, objected to Invenergy’s request that the agreements between Invenergy and Benn Water and the NIT, along with Benn Water’s supply source locations, which

enigmatic that the Town and CLF now seek to attack Invenergy's timely disclosure of the existence of Fall River as one of Benn Water's source locations. To assert that Invenergy was seeking to "hide" this information from the Board is, therefore, disingenuous.

Likewise, although the agreement that the Town improperly and repeatedly mischaracterizes as the "CREC-Fall River Water Agreement" is not with Invenergy or Clear River Energy LLC, the Supplement filed with the Board on September 28, 2017 specifically identified that Benn Water had reached an agreement with Fall River, stating in the redacted text that "Benn Water subsequently executed *a long-term firm reserve capacity water supply agreement* with the City of Fall River[.]" *Id.* at 1 (emphasis added). It is plainly evident from this reference in the text of the Supplement that Invenergy fully disclosed to the Board, and to the Town and CLF, that Benn Water entered into a separate "long-term firm reserve capacity water supply agreement with the City of Fall River[.]" *Id.*⁵

As Invenergy is neither a party nor a signatory to the agreement between Benn Water and Fall River, it did not file that actual agreement with the Board.⁶ However, as noted above,

included Fall River, be protected as confidential. When the Board heard oral argument on Invenergy's motion for protective treatment, neither party argued that Invenergy should provide the agreement between Benn Water and Fall River, identified in the Supplement. It is important to note that the Town thereafter (with Invenergy's consent) issued specific data requests on Invenergy about the information contained in Invenergy's Supplement. The Town's data requests did not request that Invenergy supply the agreement between Benn Water and Fall River.

⁵ Importantly, the Supplement also provided additional information about capacity, pricing, cost and volume terms regarding the Fall River water source. *See id.* at 1 and Exhibit C to Appendix H of the Supplement. The Town, for reasons unexplained in its Motion, simply ignores this relevant disclosure of information regarding the Benn Water and the Fall River water supply contingency.

⁶ Evidently recognizing that it has no legal or factual leg to stand on, the Town concocts an argument that, as Invenergy is a purported third-party beneficiary to the agreement between Benn Water and Fall River, Invenergy somehow has a duty to file the agreement between Benn Water and Fall River. Town Mot., at 3-8. The Town attempts to create a standard that a

Invenergy did explicitly reference the agreement between Benn Water and Fall River in Invenergy's Supplement, stating "Benn Water subsequently executed a long-term firm reserve capacity water supply *agreement* with the City of Fall River[.]" *Id.* (emphasis added).

In light of Invenergy's disclosures about Fall River as Benn Water's contingent source of water supply (in the Supplement and Appendix H of the Supplement) and Invenergy's statements to inform the Board about the existence of a separate agreement between Benn Water and Fall River (in the Supplement), it is difficult to take seriously the Town's and CLF's argument that "Invenergy has apparently attempted to conceal its Fall River water source" from the Board. *See* Town Mot., at 9; *see also* CLF Resp., at 6. This false statement directly contradicts the record and the information provided to the Board (and the Town) in Invenergy's water supply filings. *See* Town Mot., at 9; *see also* Water Supply Plan, filed with the Board on Jan. 11, 2017; Supplement, filed with the Board on Sept. 28, 2017.⁷

purported third-party beneficiary equates to being a party to an agreement and, therefore, a third-party beneficiary has an alleged duty to file an agreement of which it is a third-party beneficiary with the Board. Whether or not Invenergy is or is not a third-party beneficiary to the agreement between Benn Water and Fall River, Invenergy is not a signatory or a counter party to the agreement by the plain terms of the agreement.

⁷ Substituting rhetoric and hyperbole for facts and law, the Town's Motion and CLF's Response include uncharacteristically inflammatory and superfluous statements that are not supportive of the Motion and seek only to wrongfully and falsely attack the applicant and discredit this process. *See* Town Mot., at 5 (stating "Invenergy's continued pattern of evasive behavior"); Town Mot., at 10 (stating "Sadly, the reason may be that Invenergy has concealed and withheld essential information time and again in this docket, and thus far Invenergy has not been held responsible. Therefore, it appears that Invenergy no longer deems it necessary to be fully transparent with the EFSB, the parties, and the public"); CLF Resp., at 4 ("Invenergy has not offered to reimburse the other parties for their unnecessary litigation expenses during the first year of needless litigation"). Invenergy respectfully requests that the Board instruct the Town and CLF to refrain from including these types of inflammatory and false statements that fail to provide any proper legal analysis, in future filings with the Board – particularly since Invenergy, through its tax agreement with the Town, has in fact funded the Town's "unnecessary litigation" activities.

Because Invenergy has not concealed the existence of the contingent water supply agreement between Benn Water and Fall River, the Motion to Dismiss should be denied.

B. Invenergy Complied with all Board Orders and Board Rules.

The Town’s Motion further claims that “Invenergy had an obligation to produce the CREC-Fall River Water Agreement to the EFSB and the parties.” Town Mot., at 10. The Town contends that Invenergy was obligated to file the agreement between Benn Water and Fall River, which the Town repeatedly mischaracterizes as the “CREC-Fall River Water Agreement,” to “supplement its prior data response related to water *sources* for CREC” and to comply with the Board’s September 15, 2017 Order. *Id.* at 11 (emphasis added). The Town also claims that “Invenergy has withheld and/or refused to provide information with the apparent intent of getting CREC licensed by the EFSB at all costs.” *Id.* at 12.

The Town’s assertion that Invenergy was obligated to provide the Board and the parties with the agreement between Benn Water and Fall River in order to supplement Invenergy’s response to the Town’s Data Request, No. 33-1 completely ignores the fact that Data Request No. 33-1 did not ask Invenergy to provide an agreement between Fall River and Benn Water of which neither Invenergy nor Clear River Energy LLC were parties or signatories. The Town’s Data Requests No. 33-1 states:

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 possible *sources* of water that have been considered or explored including, but not limited to, *the location of the water*.

(Emphasis added.) The Town asks for all of “*Invenergy’s* efforts[.]” not Benn Water’s efforts. Similarly, the Town asks for “any and all possible *sources*[.]” The Town sought, through this Data Request, *physical locations* of water sources. The Town did not request the agreements

between Benn Water and any of Benn Water's source location in this Data Request, or in the follow-up 40th Set of Data Requests, despite the Town having actual knowledge of the existence of the agreement between Benn Water and Fall River.

Regardless of whether the Town wants to acknowledge this fact, Invenergy provided the Board (and the Town) with Benn Water's various and identified source locations, with related pricing data and water source information in its Supplement, which specifically and confidentially referenced and included Fall River. *See* Supplement, at 1 and Appendix H and Appendix I. Because the Data Request does not seek any and all agreements between Benn Water, Invenergy's contingent/redundant supply source, of which Invenergy is not a party or signatory, Invenergy does not have a duty to supplement its response to Data Request, No. 33-1 with the actual agreement between Benn Water and Fall River.⁸

Similarly, the Town's assertion that Invenergy was allegedly obligated to provide the agreement between Benn Water and Fall River in order to comply with the Board's September 15, 2017 Order is also unfounded. In the Board's Order, the Board states: "if *Invenergy* had entered into another water supply agreement, that agreement would have to be presented to the Board." *See* Order No. 116, dated Oct. 18, 2017, effective Sept. 15, 2017, at 3 (emphasis added). The identification of Invenergy as the required counter party to the agreement is important, and ignored by both the Town and CLF. The Board's Order asks Invenergy to provide the Board

⁸ As Invenergy stated in its objection to the Town's Data Request, No. 33-1, "[i]f *Invenergy* actually enters into an agreement with an additional contingent/redundant supplier, it will supplement its Water Supply Plan" *See* Invenergy Objection, dated Aug. 15, 2017, at 2 (emphasis added). Invenergy did exactly that when it supplemented its Water Supply Plan by attaching the Invenergy agreements with its contingent/redundant suppliers (Benn Water and the NIT). Invenergy did not state that it would provide the Town with any and all of Benn Water's (or the NIT's) other agreements or arrangements to secure access to adequate water supply resources.

with water supply agreements that Invenergy—not Benn Water—has entered into. Invenergy’s agreements with counter parties for the supply of water to CREC are with the Town of Johnston (primary water supplier) and with Benn Water and the NIT (back-up or contingent/redundant water suppliers). Invenergy has filed these three agreements with the Board. The Order does not ask for agreements in which any of Invenergy’s contingent/redundant water suppliers have entered into, of which neither Invenergy nor Clear River Energy LLC is a party or signatory. The Order simply noted that if Invenergy entered into another water supply agreement, it needs to present Invenergy’s agreement to the Board.

Invenergy complied with the Board’s Order. Invenergy and/or Clear River Energy LLC executed water supply agreements with both Benn Water and the NIT to be contingent/redundant water supply sources for CREC.⁹ Invenergy subsequently provided both of those agreements with the Board when Invenergy filed its Supplement on September 28, 2017. Invenergy also complied with its duty to supplement its response to Data Request No. 33-1 when it filed its Supplement, as the cover letter to the Supplement specifically stated that the information provided to the Board in the Supplement “also supplements Invenergy’s Responses to the Town of Burrillville’s Data Requests, Nos. 32-9 and 33-1.”

Because Invenergy’s Supplement identified Fall River as one of Benn Water’s supply sources, because Invenergy informed the Board and counsel to the Town (and other parties) that Benn Water entered into an agreement with Fall River, of which Fall River agreed to be a supply source for Benn Water, and because neither the Town’s Data Requests nor the Board’s Order obligated Invenergy to supply the Board with the actual agreement between Benn Water and Fall

⁹ The agreement between Invenergy and the NIT was executed on September 19, 2017. The agreement between Invenergy and Benn Water was executed on September 26, 2017.

River, to which it is not a party, Invenergy complied with all Board Rules and Orders.

II. CONCLUSION

For the foregoing reasons, Invenergy respectfully requests that the Board deny this latest Motion of the Town.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT LLC

By Its Attorneys:

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Dated: November 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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