

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
REGARDING ADDITIONAL ADVISORY OPINIONS**

On March 6, 2017, the Energy Facility Siting Board (EFSB) will hold a hearing to consider what additional or supplementary Advisory Opinions to seek from state or municipal agencies in light of Invenergy's filing of January 11, 2017, which included: (a) a new plan for procuring water for the proposed facility that involves trucking water to the plant; (b) an entirely new design for the proposed facility, which design purportedly would produce the same amount of electricity while using vastly less water than the original design; and (c) a new proposal that would have Invenergy's proposed plant not be connected to the Burrillville sewer system, but to truck away waste (to an as-yet-unspecified location).

Conservation Law Foundation (CLF) respectfully submits its list of additional Advisory Opinions that it believes are required in this circumstance.

The Six Still-Missing Original Advisory Opinions

On February 6, 2017, the EFSB heard oral argument on CLF's Motion to Dismiss, which motion was predicated on the fact that fully six of the 12 municipal and state agencies that had been asked for Advisory Opinions had failed to provide those Advisory Opinions because the agencies had not received required information from Invenergy. Those six agencies are:

Burrillville Zoning Board, Burrillville Building Inspector, Burrillville Planning Board, R.I. Department of Transportation, R.I. Department of Environmental Management, R.I. Department of Health.¹

On February 16, 2017, the EFSB denied CLF's Motion to Dismiss. Chairperson Curran observed, on the record, that – in light of the missing Advisory Opinions – dismissal was permitted, but not required. February 16, 2017 EFSB Hearing Transcript, at 30, lines 13-18.

The current delay, necessitated by Invenergy's new filing, provides an opportunity for the EFSB to obtain the still-missing Advisory Opinions, and, where applicable, to obtain updated Advisory Opinions that account for the new water plan. This additional information would enable the EFSB to make its ultimate decision based on complete information.

Accordingly, CLF respectfully asks that the EFSB order that: (a) these six agencies be directed to submit to Invenergy no later than April 3, 2017, such Data Requests that, if answered fully and fairly by Invenergy, would permit the agency to provide their originally requested Advisory Opinion to the EFSB, updating those Advisory Opinions where applicable to account for the new water plan; (b) direct Invenergy to provide full and fair responses to these Data Requests no later than May 8, 2017; and (c) direct these Agencies to submit completed Advisory Opinions to the EFSB no later than September 1, 2017.

¹ Although the Department of Health (RIDOH) submitted an Advisory Opinion to the EFSB (which Advisory Opinion CLF refers to below, on page 5), RIDOH identified several concerns, including some based on inadequate information. For example, RIDOH noted that “[s]ince no process water source is currently under public consideration, RIDOH asks to assess the impact of any future water source proposal on drinking water quality” and that it did not have “sufficient information for evaluation of impacts of potential nighttime lighting of the facility.” RIDOH Advisory Opinion, at 35.

EFSB Expert Engineer

In Invenergy's original application, Invenergy stated that its plant's ability to operate "at a high capacity factor" was directly dependent on its ability to secure large quantities of water from the Pascoag Utility District. Invenergy October 28, 2015 Application, Section 6.2.3.1, at page 46.

On January 11, 2017, Invenergy claimed that an entirely new design for its proposed 1,000-MW power plant would enable the very same high-capacity output, using vastly less water, and a novel proposal for trucking water from Johnston to the Burrillville plant and trucking waste away.

CLF respectfully requests that the EFSB hire its own, independent expert engineer to evaluate Invenergy's new proposal, and advise the EFSB as to its feasibility and potential environmental effects and consequences. The EFSB Rules expressly contemplate the use of such a neutral expert. EFSB Rule 1.12(g).

CLF respectfully urges that the EFSB order Invenergy to pay the costs of the independent engineering expert. EFSB Rules 1.21(a).

The EFSB's Rules on independent experts tracks both Federal Rule of Evidence 706 and Rhode Island Rule of Evidence 706. The benefits of using a neutral, unbiased expert are adverted to in the first sentence of the Advisory Committee Notes to the Federal Rule – avoiding "[t]he practice of shopping for experts [and] the venality of some experts" Of course, where, as here, the matter under consideration is especially complex, the hiring of a neutral

expert is especially appropriate. Willis v. Palmer, 192 F.Supp.3d 973, 975 (N.D. Iowa 2016) (citing Grove v. Principal Mut. Life Ins. Co., 200 F.R.D. 434, 444-45 (S.D. Iowa 2001)).

Invenergy's latest scheme to truck water from Johnston was not its first choice (that was the Pascoag Water District); nor was it Invenergy's second choice (that was the Harrisville Water District); nor was it Invenergy's third choice (that was the City of Woonsocket). The multiple, complicated engineering challenges posed by Invenergy's novel last choice will require close scrutiny. This is the very situation that EFSB Rules 1.1(2)(g) and 1.2(1)(a) and (b) were designed to address.

CLF respectfully urges that the EFSB direct the independent expert to file her Advisory Opinion no later than September 1, 2017, and that all the parties be given 60 days to review the expert's Advisory Opinion before the Final Hearing commences.

Remand to the Public Utilities Commission

The Public Utilities Commission was previously asked to render an Advisory Opinion on whether the proposed plant is needed and whether it is cost-justified.

On the issue of need, CLF has written separately to the EFSB asking that this matter be addressed again because there is significant new evidence available on this question. CLF hereby incorporates by reference its February 21, 2017 letter on this subject, which letter it also attaches to this Motion as an Exhibit.

The PUC's Advisory Opinion on whether the proposed plant is cost-justified was based on Invenergy's original projection that the plant would cost \$700 million. However, Invenergy has recently acknowledged that the plant will instead cost \$1 billion, an increase of a whopping

42.8% in just 15 months since Invenergy's proposal was filed with the EFSB. And at a more fundamental level, the testimony on which the PUC relied in reaching its advisory opinion included other assumptions that have since been changed. For example, Invenergy's cost analysis "assumed four years of operation for CREC Unit 1 and three years of operation for CREC Unit 2." PUC Advisory Opinion at 14. With Invenergy's second unit having failed again to clear in the Forward Capacity Market and secure a capacity supply obligation, this assumption is unsound. Also, the three expert witnesses who addressed cost disagreed in their projections of February 2017's Forward Capacity Auction 11 results but agreed that those results would bear on the question of Invenergy's ultimate ratepayer impacts. *See* Testimony of Christopher Stix at 40 (Jun. 14, 2016); Rebuttal Testimony of Ryan Hardy at 12-13 (Jul. 11, 2016); Testimony of Seth Parker at 30-36 (Jul. 16, 2016). That Auction is now complete and its results can inform the PUC's and the EFSB's conclusions with respect to ratepayer impacts of the proposed plant. CLF respectfully requests that the PUC be asked to supplement its prior Advisory Opinion based on these changes.

Thus, CLF respectfully requests that the EFSB seek supplementary Advisory Opinions from the PUC on both the questions of need and cost.

New Advisory Opinions: Smithfield and Gloucester

Invenergy's new water plan calls for trucking water on roads passing through the Towns of Smithfield and Gloucester. CLF respectfully requests that the Planning Boards of both municipalities be asked for Advisory Opinions as to how this increased truck traffic would comport with the respective Guide Plans of the municipalities. CLF respectfully requests that

the Tax Assessors of both municipalities be asked for Advisory Opinions on the likely effect of property values in the receptive municipalities of the increased volume of truck traffic.

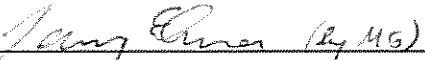
New Advisory Opinion: Providence Water Supply Board

Invenergy's newly filed water plan calls for Invenergy to use Providence water (to be resold by Johnston at a profit to Johnston). CLF respectfully requests that the Providence Water Supply Board be asked for an Advisory Opinion on the projected effect of this sale on the adequacy of the Providence water supply, including in light of anticipated impacts and effects of climate change over the 20- to 40-year life of the Invenergy plant.

Supplemental Advisory Opinion: Department of Health

In its prior incomplete Advisory Opinion (see footnote 1, on page 2), the R.I. Department of Health addressed noise (Section 6.0), air pollution and asthma (Section 8.0). CLF respectfully requests that the Department of Health be asked for a supplementary opinion addressing these matters in the context of the new proposal for increased truck traffic. This new analysis should be in addition to RIDOH completing its prior Advisory Opinion which was incomplete due to the failure of Invenergy to provide necessary information required by RIDOH.

CONSERVATION LAW FOUNDATION,
by its Attorneys,



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CERTIFICATE OF SERVICE

I certify that an original and 10 copies of this Motion were filed by hand with the Energy Facility Siting Board, 99 Jefferson Blvd., Warwick, RI 02888. I certify that electronic copies of this letter were served on the entire service list of this Docket. I certify that both of these things were done on February 24, 2017.

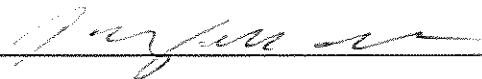


EXHIBIT A



For a thriving New England

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February 21, 2017

Energy Facility Siting Board
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To the EFSB:

Re: Invenergy Proposal, SB 2015-06

Conservation Law Foundation (CLF) respectfully requests that the Energy Facility Siting Board (EFSB) permit CLF to bring back its expert witness Robert Fagan, who testified before the Public Utilities Commission (PUC) in Docket # 4609, as to whether or not the proposed Invenergy power plant is needed for system reliability of the New England electricity grid. CLF bases this request on the existence of major new evidence pertaining to the issue of need, which evidence was not available at the time of the PUC hearing in July 2016.

At the PUC hearing Mr. Fagan testified that the Invenergy plant is not needed. See, e.g., PUC Advisory Opinion, page 12, line 15 to page 13, line 11. Witness Seth Parker, called for the Division of Public Utilities and Carriers, testified that the Invenergy plant is needed. See, e.g., PUC Advisory Opinion, page 13, lines 14 to 18. The PUC, after hearing the evidence, sided with Parker, and rendered an Advisory Opinion stating that the Invenergy plant “is needed in order to meet the electric generation reliability needs of Southeastern New England” PUC Advisory Opinion Conclusion, at 22.

New evidence, not available at the time of the PUC hearing, demonstrates that on multiple salient points on which witnesses Fagan and Parker disagreed, Fagan was correct and Parker was incorrect. New evidence includes, but is not limited to: the results of an ISO-run Reconfiguration Auction, the results of ISO-run Forward Capacity Auction-11 (FCA-11, conducted February 6, 2017), and Invenergy’s failure to clear its second turbine in FCA-11.

While CLF is certainly willing to present Mr. Fagan’s testimony here in the EFSB, CLF respectfully suggests that the matter be remanded to the PUC for further consideration, as the PUC was the agency that first addressed the issue of need.

In the event that Mr. Fagan returns as an expert witness, CLF would, of course, not object to other parties being permitted to have experts address the same issue; CLF is quite confident of what the new evidence shows.

However, Invenergy should not be heard to object to this new evidence being presented. The EFSB has already determined that the issue of need is an important one in this case; in its March 10, 2016 Preliminary Decision and Order, the EFSB listed the question of whether the proposed plant is needed as the very first issue to be considered at final hearing. EFSB Preliminary Decision and Order, at 9. Indeed, if Invenergy were to interpose an objection to CLF presenting this new evidence, CLF would argue that the EFSB should draw an adverse inference from Invenergy's objection. See, e.g., Belanger v. Cross, 488 And 410, 412-413 (R.I. 1985) (collecting cases for the adverse inference rule).

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