

**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 MOTION TO ADMIT  
BLACKSTONE HERITAGE CORRIDOR, INC.’S LETTER AS A FULL EXHIBIT**

Now comes Invenergy Thermal Development LLC (“Invenergy”) and hereby objects to the Town of Burrillville’s (“Town’s”) motion, requesting that the Rhode Island Energy Facility Siting Board (“EFSB” or “Board”) admit a letter (the “BHC Letter”) from the Blackstone Heritage Corridor, Inc. (“BHC”) as a full exhibit. *See* Town Mar. 19, 2019 Motion (“Town Motion”), at 1. As discussed further below, Invenergy respectfully requests that the Board deny the Town’s Motion as an improper and late attempt to introduce a letter that was and should only be considered by this Board as public comment. *See* R.I. Gen. Laws § 42-98-9.1(e).

**I. ARGUMENT**

**A. *The Board Should Deny this Motion Because it is Untimely.***

The Town’s Motion should be denied because it was filed out of time. Prior to the commencement of final hearings, the Board published a procedural schedule, which is attached hereto as **Exhibit A**.<sup>1</sup> Included in the procedural schedule was a directive regarding motions: “All motions must be filed ten days prior to the commencement of the hearing and be accompanied by supporting legal memoranda.” *Id.* The Town’s Motion should have been filed on or before October 20, 2017, which is ten days prior to the original final hearing

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<sup>1</sup> Invenergy acknowledges that the hearing dates outlined in the attached procedural schedule have changed. However, the motion provision in the procedural schedule has never changed and/or been amended.

commencement date. Alternatively, giving the Town every benefit of the doubt, when the final hearing dates were delayed and it was announced that final hearings were set to commence on April 11, 2018, the Town should have filed its Motion on or before March 30, 2018. The BHC Letter was filed over two years ago, on August 25, 2016. Instead of filing its Motion at least ten days prior to the commencement of final hearings, the Town inappropriately and untimely waited until months after the final hearings commenced.

The Town provides no excuse whatsoever for its failure to timely file this Motion, and does not even address the issue.<sup>2</sup> Instead, clearly recognizing that its Motion is untimely, the Town attempts to argue that the BHC Letter is needed for “impeachment.” *See* Town Motion, at 1 & 8. Impeachment is defined as “to discredit the testimony of a witness by proving that he/she has not told the truth or has been inconsistent, by introducing contrary evidence, including statements made outside of the courtroom in depositions or in statements of the witness heard by another.” *See* <http://dictionary.law.com/Default.aspx?selected=900> (last visited Mar. 21, 2019); *see also United States v. Hudson*, 970 F.2d 948, 956 (1st Cir. 1992) (stating “impeachment evidence . . . is admitted not for the truth of the matter asserted but solely for the fact that the witness’ trial testimony is less believable if he has made inconsistent statements about the matter on earlier occasions”). Contrary to the Town’s assertion, it did not use the BHC Letter to impeach any of Invenergy’s witnesses, nor could it have since it was not authored by an

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<sup>2</sup> On September 20, 2018, during final hearings, the Town objected when Invenergy introduced documents for cross examination purposes that the Town had not yet reviewed. CLF accused Invenergy of “trial by ambush.” *See* SB-2015-06 September 20, 2018 Transcript, at 110:1-8. Filing this Motion now, during the middle of final hearings, is an improper and unnecessary ambush. When arguing its objection, the Town specifically stated “We don’t do things this way. . . I mean, it could have been given to us a week ago. It could have been given to us yesterday. . . I believe it’s against the spirit of the rules . . . and I do think it’s inappropriate to a the [sic] last minute spring this stuff on people[.]” *See id.* at 108:4-109:3. Here, the Town’s Motion could have been filed two years ago, a year ago, and certainly ten days prior to the commencement of final hearings. Filing this Motion now is both inappropriate and untimely.

Invenergy witness.

Filing this Motion at this late date and arguing that the BHC Letter should be admitted as a full exhibit because it was allegedly used to impeach an Invenergy witness is an improper attempt to circumvent this Board's scheduling order and introduce evidence out of time.

***B. The Board Should Deny this Motion Because the BHC Letter Does Not Fall Within a Hearsay Exception.***

As a fall-back position, the Town asserts that the BHC Letter should be admitted as a full exhibit because it allegedly “falls within one or more exceptions to the hearsay rule” as either a “public report setting forth factual findings of an investigation of a federal statutory body” or as a business record. *See* Town Motion, at 7-9. The Town is plainly wrong. The BHC Letter is neither a public report, nor a business record.

BHC is not a governmental entity— it is a private, non-profit, 501(c)(3) corporation.<sup>3</sup> As such, the BHC Letter is not and cannot be a “public report setting forth factual findings of an investigation of a federal statutory body” as alleged by the Town. *See* Town Motion, at 8. Rather, the BHC Letter is, as confirmed in the Letter's express language, a “writing to express its *position* [(not findings)] that the project *may* have the potential for significant adverse impacts to the resources of the federally-designated John H. Chafee Blackstone River Valley National Heritage Corridor.” *See* Town Motion, Exhibit 1, at 1 (emphasis added).

According to the Town, federal law and BHC's own mission is to “work with community partners to preserve and promote the [Corridor's] historic, cultural, natural and recreational resources . . . .” *See* Town Motion, at 3. Yet BHC never sought to intervene in this proceeding

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<sup>3</sup> *See* “About BHC,” available at <https://blackstoneheritagecorridor.org/about-bhc/> (last visited Mar. 22, 2019) (stating BHC “is a dynamic and successful nonprofit 501(c)(3) corporation”).

and is not a party in this proceeding.<sup>4</sup> BHC chose the form and context with which to submit its position, as public comment, and the Town's untimely effort to revisit that decision is wholly improper.<sup>5</sup>

Moreover, the Town's Supplement to its Motion attempts to improperly rely on prior cases where, "The EFSB has turned to the Blackstone Heritage Corridor Commission ("BHC") . . . in at least two previous dockets." *See* Town Supplement, dated Mar. 21, 2019 ("Town Supp."), at 1. The Town ignores a critical fact – the Blackstone Heritage Corridor Commission (the "BHC Commission") no longer exists, and it is not the same entity as the 501(c)(3) corporation that submitted the BHC Letter as public comment. Even if this Board's prior requests for advisory opinions from the BHC Commission were in any way relevant (which it is not since this Board made no such request in this proceeding), those requests and opinions were in connection with a completely different entity.

Furthermore, the BHC Letter is clearly not a record of regularly conducted activity. Rather, it is a letter specifically prepared in anticipation of litigation (this EFSB proceeding), and not subject to the business records exception to the hearsay rule. *See* R.I. R. Evid. 803(6); *Beacon Mut. Ins. Co. v. OneBeacon Ins. Corp.*, 376 F. Supp. 2d 251, 262 (D.R.I. 2005) (finding

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<sup>4</sup> This Board has rejected instances of intervention where other non-profit organizations have requested intervention, noting that "[t]he Rhode Island Supreme Court has held no matter how longstanding or qualified an organization in evaluating a problem, mere interest in the problem is not sufficient to render the organization adversely effected." *See* SB-2015-06, Order No. 85, effective Jan. 29, 2016, denying the intervention requests of Occupy Providence, Fossil Free RI, Sister Mary Pendergast, Rhode Island Progressive Democrats of America, Fighting Against Natural Gas (FANG), Burrillville Against Spectra Expansion (BASE), Sally Mandzela and the Burrillville Land Trust (citing *In Re Review of Proposed Town of New Shoreham Project*, 19 A.3d. 1226, 1227 (R.I. 2011)).

<sup>5</sup> This Board has similarly rejected the Town's request to treat any resolutions from municipalities opposing the Clear River Energy Center as full exhibits. *See* SB-2015-06, Order No. 119, effective Oct. 17, 2017.

that the business record exception was not available because a document at issue was prepared in anticipation of litigation).

**II. CONCLUSION**

For the foregoing reasons, Invenergy respectfully requests that the Board deny the Town's Motion.

Respectfully submitted,  
INVENERGY THERMAL DEVELOPMENT LLC  
By Its Attorneys:

/s/ Alan M. Shoer  
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Dated: March 25, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on March 25, 2019, 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

# EXHIBIT A

**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

**June 1, 2017**

**Testimony**

All testimony must include an executive summary of the testimony and be in question and answer form, double spaced, numbered lines.

July 3, 2017	Invenergy Direct Testimony
August 7, 2017	Other Parties Direct Testimony
September 1, 2017	Rebuttal Testimony
September 27, 2017	Surrebuttal Testimony

**Discovery**

October 1, 2017	Discovery Closes
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**Witnesses**

October 3, 2017	Witness List with CVs identifying the Witnesses’ areas of expertise
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**Exhibits**

Answers to data requests shall be offered as an exhibit by the party providing the answers.

October 3, 2017	Exhibit Lists and a clean copy of the Exhibit marked with the party name and number (e.g. Invenergy 1, Burrillville 5, etc.), three-hole punched and tabbed
October 9, 2017	Objections to Exhibits and/or Witnesses and Supporting Memoranda, or written confirmation that the Exhibits provided by the other parties can be marked as full and Witnesses and qualifications are acceptable

**Motions**

All motions must be filed ten days prior to the commencement of the hearing and be accompanied by supporting legal memoranda.

**Procedural Issues and Motions Hearing Dates**

October 2017: 17, 18, 19

**Final Hearing Dates**

October 2017: 31  
November 2017: 1; 2; 10; 20; 29; 30  
December 2017: 4; 7; 8; 12; 18  
January 2018: 9; 10; 11; 16; 17