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 TOWN OF BURRILLVILLE'S MOTION TO DISMISS

I. INTRODUCTION

Now comes Invenergy Thermal Development LLC ("Invenergy") and hereby objects to the Town of Burrillville's ("Town's") Motion requesting the Rhode Island Energy Facility Siting Board ("EFSB" or "Board") dismiss Invenergy's EFSB Application ("Invenergy's Application" or "Application") and close this docket.

The Town contends that Invenergy's Application should be dismissed because it is allegedly incomplete as it does not presently have an alternative water supply source for CREC. *See* Town's September 13, 2016 Motion ("Town Motion"), 2. The Town further asserts that Invenergy's Application should be dismissed as incomplete because Invenergy purportedly failed to "timely provide the EFSB, the Town and its Entities with requested information regarding its proposed water supply." *Id*. at 3. The Town also contends that Invenergy not immediately filing an alternative water supply violates due process, stating that "[w]ithout the water information, the Town and its Entities have been denied a meaningful opportunity to fully evaluate and be heard on Invenergy's Application and its impact on the Town's residents and the Town's environment[.]" *Id*. at 3-4.[1]

[1] The Town states that it issued a data request to Invenergy on August 10, 2016 and that "Invenergy refused to provide any details related to its proposed water source." *Id*. at 3 n.4. However, Invenergy responded to the Town's data request stating:

As explained more thoroughly herein, the Town's assertions are incorrect and the Town's Motion to Dismiss should be denied for the following reasons: (1) Invenergy's Application contained the best available information on all support facilities, including water, when it was deemed complete, as Invenergy complied with all the requirements pursuant to the Energy Facility Siting Act ("Act") and the EFSB Rules of Practice and Procedure ("EFSB Rules"); (2) the Act allows Invenergy to introduce new evidence prior to and during the final hearing stage; (3) EFSB precedent establishes that amending and/or supplementing an application does not render the application incomplete under the Act; (4) the parties' due process rights have not been violated; and (5) dismissal is unwarranted and would result in drastically unfair and impractical consequences.

II. BACKGROUND

Pursuant to the Act, Chapter 42-98, *et seq.* of the General Laws of Rhode Island and the EFSB Rules, Invenergy filed its Application to seek the approval of the Board to site and construct the Clear River Energy Center, an approximately 850-1000 MW combined cycle electric generating facility on Wallum Lake Road in Burrillville, R.I. ("CREC" or "Project"). The application was reviewed by the Board for completeness in accordance with Rule 1.7 and deemed complete as it provided the required contents set forth in the EFSB Rules. The Application was properly docketed on November 16, 2015.

When Invenergy's Application was deemed complete, it contained the best available

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> Due to the confidential nature of the discussions we are involved with potential suppliers, we are not able to disclose the names of the counterparties. For each of the options we are examining, we are simultaneously performing the development work, permitting evaluation and engineering to determine viability. There are viable alternatives, and we anticipate making a selection in the very near term.

Invenergy has never "refused to provide any details." Invenergy has consistently reported that when a supplier is selected, it will provide the Town and all parties to the proceeding with the related details. *See* Invenergy's Notification Letter to the EFSB, dated August 22, 2016; Invenergy's Motion For Extension, filed with the EFSB on September 9, 2016.

information at the time on all support facilities, including water. At that time, Invenergy had a letter of intent with the Pascoag Utilities District ("PUD") for the use of Well 3A. During public comment, concerns were raised regarding Invenergy's use of Well 3A, including recommendations from many commenters, including the Town's expert before the Planning Board Advisory Opinion process, that Invenergy not use Well 3A and seek alternative supply options. Following public comments, the PUD terminated its letter of intent on August 19, 2016 and later issued an advisory opinion opposing the use of Well 3A.

Upon notification that the PUD had terminated the letter of intent, Invenergy timely notified the Board of the PUD's decision and that Invenergy was exploring alternatives. *See* Invenergy's Notification Letter to the EFSB, dated August 22, 2016. As one alternative water supply option, Invenergy explored the potential to utilize water from the Harrisville Fire District ("Harrisville"). The Harrisville Board recently voted against providing water to CREC. Invenergy has continued to explore other alternative water supply options and is confident that it will have another supply option ready for the Board's review within the coming weeks. In order to ensure that all parties have enough time to review Invenergy's alternative water supply, it filed a Motion for Extension on September 9, 2016, requesting the Board extend the dates listed in the current remaining Procedural Schedule thirty (30) days, subject of course to accommodating the Board's scheduling.

III. ARGUMENT

A. The Town's Motion To Dismiss Should Be Denied Because Invenergy's Application Was Properly Deemed Complete On November 16, 2015.

On October 28, 2015, Invenergy submitted its Application to the EFSB Coordinator for initial review, as required by Rule 1.7. The Coordinator properly coordinated his review with the Board and properly determined that Invenergy's Application is complete. In fact, on November

16, 2015, Invenergy's Application was deemed complete by the Coordinator and formally docketed with the Board. At the time Invenergy's Application was deemed complete, it contained the best available information on all support facilities, including water. As noted above, at the time the Application was docketed, Invenergy had a letter of intent with the PUD, although it did not at that time have a formal binding water supply agreement.

Accordingly, the Board should deny the Town's motion solely on the grounds that the EFSB Coordinator has already deemed Invenergy's Application complete after thoroughly reviewing the Application in accordance with the Rules.

B. The Town's Motion To Dismiss Should Be Denied Because The Act Allows Applicants to Introduce New Evidence At The Final Hearing Stage.

Pursuant to the Act, "[t]he board at this [final] hearing may, at its discretion, allow the presentation of new evidence by any party as to the issues considered by the agencies designated under § 42-98-9." R.I. Gen. Laws § 42-98-11. The Act governing the EFSB process specifically contemplates that as the process moves through the public comment and advisory opinion stages, new evidence may come to light. R.I. Gen. Laws § 42-98-11 provides that new evidence may be introduced at the final hearing stage.

The issues raised by the PUD in its advisory opinion with regard to Invenergy using Well 3A, coupled with the PUD terminating its letter of intent, provide a circumstance where Invenergy can and should be allowed the opportunity to introduce new evidence concerning Invenergy's alternative water supply plans, as authorized by R.I. Gen. Laws § 42-98-11. And, Invenergy has specifically requested that the Board grant its Motion for Extension in order for the parties and certain agencies to have an opportunity to review the alternative water supply *prior* to final hearings.

Nevertheless, the Act specifically contemplates that a party, including the applicant, may

need to present new evidence at the final hearing stage, depending on the review and opinions of the agencies and provides a mechanism for a party to do so. *See* R.I. Gen. Laws § 42-98-11. Invenergy should therefore be allowed to introduce an alternative water supply, and the Town's Motion to Dismiss should be denied.

C. The Town's Motion To Dismiss Should Be Denied Because EFSB Precedent Establishes That Amending And/Or Supplementing An Application Does Not Render the Application Incomplete.

Additionally, it is not unusual for a new energy generating facility project to undergo changes associated with the design and plans for the project during the EFSB process.[2] For example, in *Manchester Street*, applicants made multiple revisions and supplementations to their original application during the EFSB process. Prior to final hearings, and in response to public comment concerns, the applicants supplemented their original application by revising, among other items, the net generating capacity of the facility, as well as the amount of water consumption needed for the project. *Manchester Street: Final Decision and Order*, Order 12, Docket No. SB-89-1, Dec. 17, 1990.[3] **Importantly, the applicants in *Manchester Street* actually changed their water supply plans during the EFSB process**. *Id*. (stating "[w]hereas the [a]pplicants originally proposed to obtain all water required in excess of the daily maximum output of the Olneyville well from the Providence water system . . ., the [a]pplicants (in response

[2] In *Rhode Island Hope Energy*, an applicant submitted a supplemental application to the Board with a revised height for two of the project's emission stacks. *Rhode Island Hope Energy: Final Order*, Order 35, Docket No. SB-98-1, May 24, 1999 (stating that "[i]n its supplemental application, Hope reduced the height of the two emission stacks from 210 feet above plant grade to 175 feet above plant grade").

[3] In *Manchester Street*, the EFSB specifically noted that "[a]t the time of the Preliminary Order, the [a]pplicants proposed to increase the net generating capacity of the Station . . .. The final [a]pplication, however, specifies [a lesser proposed net generating capacity]." *Id*. The EFSB also stated that "[t]he applicants now project substantially greater water consumption at the repowered Station than was indicated at the time of the Preliminary Order. Whereas the [a]pplicants in their original flings stated that the Alteration would increase the Station's freshwater demand from an average use of 307,000 gpd to 900,000 gdp, the Application as amended not indicates a project average use of 1,116,000 gpd. Similarly, whereas the [a]pplicants originally indicated an increase in the maximum water demand from 414,000 gpd to 1,300,000 gpd, the [a]pplicants now project a maximum water demand of 1,450,000 gpd"). *Id*.

to inquiries from the Board as to the adequacy of the single well) proposed a program to utilize water storage capacity at the Station to optimize use of the groundwater resources and reduce the use of City water").

Moreover, at the time the EFSB rendered its decision in *Manchester Street*, the applicants had not yet identified alternative technology to ensure a control strategy was in place for both CO2 and NOx emissions, in the event CO2 re-designation was denied. *Id*. In that case, the Board certainly did not dismiss the entire application merely because this data was not supplied in the application; instead the Board properly conditioned its license and gave the applicants sixty (60) days from the date the decision was rendered to submit an alternative plan for air emissions control. *Id*.

Accordingly, the Board is well within its authority to deny the Town's Motion to Dismiss and grant Invenergy's request for an extension to allow it an opportunity to supplement with an alternative water supply. *See also Ocean State Power: Final Decision and Order*, Order 7, Docket No. S.B. 87-1, Oct. 25, 1988 (The EFSB opted to suspend the hearings to allow the introduction of supplemental data in order to "balance timeliness with a comprehensive review of all issues.").

D. The Town's Motion To Dismiss Should Be Denied Because The Parties' Due Process Rights Have Not Been Violated.

In the Town's Motion to Dismiss, it asserts due process concerns because Invenergy has not immediately filed an alternative water supply, upon demand by the Town, stating that "[w]ithout the water information, the Town and its Entities have been denied a meaningful opportunity to fully evaluate and be heard on Invenergy's Application and its impact on the Town's residents and the Town's environment[.]" Town's Motion, 3-4. Invenergy appreciates that "the fundamental requisite of due process is the opportunity to be heard at a meaningful time

and in a meaningful manner; this certainly requires one to be forewarned about the subject matter of the hearing with sufficient detail so an intelligent explanation or rebuttal can be formulated." *Boyer v. Bedrosian*, 57 A.3d 259, 273 (R.I. 2012) (citing *Avanzo v. Rhode Island Department of Human Services*, 625 A.2d 208, 210-11 (R.I. 1993)). That is why Invenergy requested an extension of the remaining procedural schedule, with the intent to allow all parties, including the Town, the requisite notice of an alternative water supply plan, with a sufficient opportunity to present witnesses and evidence at the hearing. *See* Invenergy's Notification Letter to the EFSB, dated August 22, 2016; Invenergy's Motion For Extension, filed with the EFSB on September 9, 2016. This process will afford the Town and all parties with the required due process. *Larue v. Registrar of Motor Vehicles, Dep't of Transp., Office of Operator Control* 568 A.2d 755, 758 (R.I. 1990).

The EFSB process has sufficient flexibility to allow the procedural schedule to adjust in order to provide the parties and certain agencies adequate time to "be forewarned about the subject matter" before final hearings so that the parties (including the Town) and certain agencies can form an "intelligent explanation or rebuttal." *See Boyer*, 57 A.3d at 273. After the parties and agencies are given an opportunity to review the alternative water supply, final hearings to evaluate the water supply alternative can proceed, and the Town will be "given an opportunity to present witnesses and evidence at the hearing," which the Rhode Island Supreme Court has established protects due process rights. *See Larue*, 568 A.2d at 758.

Accordingly, because neither the Town nor any of the other parties or agencies due process rights will be violated by allowing Invenergy an opportunity to amend its application to present an alternative water supply, the Town's Motion to Dismiss should be denied.

E. The Town's Motion To Dismiss Should Be Denied Because Dismissal Is Unwarranted And Would Result In Drastically Unfair and Impractical

Consequences.

When Invenergy found out that the PUD had rescinded its letter of intent, Invenergy timely notified the Board that the water supply analysis detailed in its Application would be supplemented, putting all parties on notice. *See* Invenergy's Notification Letter to the EFSB, dated August 22, 2016; Invenergy's Motion For Extension, filed with the EFSB on September 9, 2016. An extension will allow the relevant state agencies sufficient time to review and opine upon Invenergy's alternative water source when the details are filed with the Board.

In any event, the fact that Invenergy plans to supplement its Application is not a reason to dismiss the Application and start over, especially where many other aspects of the Application that were reviewed by the agencies are not related to water supply. Dismissing Invenergy's Application at this time, without providing Invenergy with an opportunity to supplement, would be unduly prejudicial to Invenergy and the other participants in this process. Throughout the past year, the EFSB has held numerous hearings and public meetings. The EFSB has tasked twelve (12) local and state agencies to render advisory opinions about the Project with many issues concerning other matters beyond water supply.

If the Board were to grant the Town's Motion to Dismiss and close the docket, all of that time, effort and energy utilized by all those involved in this process would need to be replicated, as Invenergy would surely file another application. The second application would include all the same information in the original Application that was deemed complete on November 16, 2015, as well as the additional alternative water supply information Invenergy plans to supplement to the Board. It would not be fair to Invenergy and the other agencies (for example, the Public Utilities Commission) to "re-do" all areas of the process that are not relevant to water (need, cost effectiveness, jobs, taxes, etc.).

Accordingly, as dismissal is unwarranted and would result in wasteful, inefficient and impractical results, the Town's Motion to Dismiss should be denied.

IV. CONCLUSION

For the foregoing reasons, closing this docket and forcing Invenergy to re-file is not only unnecessary, but it also does not make practical sense. The Board can provide Invenergy with time to supplement its Application, extend the deadline for certain state agencies to review the supplemented material and possibly supplement their advisory opinions and then proceed to Final Hearings sometime in December or January.

Therefore, Invenergy respectfully requests that the Board deny the Town's Motion to Dismiss and grant Invenergy's Motion For Extension to allow Invenergy the opportunity to supplement its Application with an alternative water supply plan and continue on with the EFSB proceedings.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT LLC

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Dated: September 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I delivered a true copy of the foregoing responses 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 08/26/2016

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